Modern Slavery

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Modern Slavery

A Comparative Study of the Definition of Trafficking in Persons

By

Dominika Borg Jansson

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Abbreviations

CATW	Coalition against Trafficking in Persons
CBSS	Council of the Baltic Sea States
CEDAW	Committee on the Elimination of Discrimination against Women
CIS	Commonwealth of Independent States
CoE	Council of Europe
Ds	Departementsserien
ECtHR	European Court of Human Rights
ECHR	European Convention for Human Rights and Freedoms
EU	European Union
EWL	European Women's Lobby
GAATW	Global Alliance against Trafficking in Women
IAF	International Abolitionist Federation
IHRLG	International Human Rights Law Group
ILO	International Labour Organization
IOM	International Organization for Migration
KCIK	Krajowe Centrum Interwencyjno-Konsultacyjne dla Ofiar Handlu Ludźmi
KKPK	Komisja Kodyfikacyjna Prawa Karnego
MSWiA	Ministerstwo Spraw Wewnętrznych i Administracji
NCK	Nationellt Kunskapscentrum för kvinnor
NJA	Nytt juridiskt arkiv
NMT	Nationellt Metodstödsteam mot Prostitution och Människohandel
OSCE	Organization for Security and Cooperation in Europe
Prop	Proposition
RH	Rättsfall från hovrätterna
Roks	Riksorganisationen för kvinnojourer och tjejjourer i Sverige
SKR	Sveriges Kvinno- och Tjejjourers Riksförbund
SOU	Statens offentliga utredningar
TFEU	Treaty on the Functioning of the European Union
TIP	US State Department Trafficking in Persons Report
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Education, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
VCLT	Vienna Convention on the Law of Treaties

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CHAPTER 1

Introduction

Introduction

Trafficking in human beings is one of the most serious offences of our time. It has been described as one of the main forms of organized crime.[1] The international community even defines the phenomenon as a modern form of slavery.[2] The European Court of Human Rights (ECtHR) has also confirmed that trafficking in human beings cannot be considered consistent with international human rights law or with a democratic society.[3] The International Labour Organization (ILO) estimates the overall number of people in forced labour to be 21 million.[4] Yet, worldwide there are only a few thousand convictions of traffickers every year.

It is not surprising, then, that states and the international community alike view trafficking as one of the most serious and acute problems of our time. Although the practice has been addressed in international law and numerous states have criminalized it,[5] the problem not only persists but also seems to be growing.[6] This book argues that an important part of the reason for this development is inherent in the wording of the relevant trafficking legislation.

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1 "Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten Priorities for the Next Five Years. The Partnership for European Renewal in the Field of Freedom, Security and Justice", [Com (2005)184 final – Official Journal C 236 of 24.9.2005] and "Trafficking in Human Beings", Interpol Fact Sheet, http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Trafficking-in-human-beings, (accessed 2014-05-12). See also "Human Trafficking: Organized Crime and the Multibillion Dollar Sale of People", UNODC, 19 July 2012, http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking_-organized-crime-and-the-multibillion-dollar-sale-of-people.html, (accessed 19 May 2014).

2 "Global Report on Trafficking in Persons", UNODC and Global Initiative to Fight Human Trafficking (UN.GIFT), February 2009, http://www.unodc.org/documents/Global_Report_on_TIP.pdf, (accessed 19 May 2014).

3 Case of *Siliadin v. France*, (Application no. 73316/01), Judgment Strasbourg, 26 July 2005, and Case of *Rantsev v. Cyprus and Russia*, (Application no. 25965/04), Judgment Strasbourg, 7 January 2010, final 10 May 2010.

4 "ILO Global Estimate of Forced Labor. Results and Methodology", ILO, 2012, p. 13, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf, (accessed 19 May 2014).

5 It should, however, be noted that criminal law alone will not solve the trafficking problem.

6 "Global Report on Trafficking in Persons", 2009.

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According to international expert organizations such as the United Nations Office on Drugs and Crime (UNODOC), traffickers profit from inadequate national criminal legislation as well as from a lack of international cooperation.[7] In this context, harmonization of national laws has been presented as a first step toward solving or dealing with the trafficking problem. Consequently, the aim of the most important international document on trafficking in human beings, the Palermo Protocol,[8] is to create an internationally binding definition of trafficking by harmonizing the relevant laws of the state signatories to the protocol.[9] Comments from the United Nations (UN), as well as from many other international organizations, indicate that the Palermo Protocol is perceived as a powerful instrument and one which will serve as a model for national legislations. In consequence, subsequent international law has largely drawn on the protocol's definition of human trafficking.[10]

The international definition of trafficking contained in Article 3 of the Palermo Protocol constitutes the core of this research,[11] which consists of two main parts. The first deals with the original source, i.e., the international definition of trafficking itself. The second part addresses the process of implementation of this definition in three different state parties to the Palermo Protocol. These analyses generate findings that can be divided into two categories. Both categories concern challenges to the implementation of the original source and the interpretation of the transplant. Firstly, there are certain problems that are experienced by all three countries. As I will illustrate, these are attributable to the wording of the international definition of trafficking. Secondly, there are challenges that are country-specific. These concern primarily how trafficking is conceptualized on the national level. Building on the findings mentioned above, recommendations are made on how the international

7 Ibid.

8 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the 2000 United Nations Convention against Transnational Organized Crime.

9 Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the 2000 United Nations Convention on Transnational Organized Crime, Part 2, p. 267, hereafter the Legislative Guide.

10 See the definition of human trafficking in the EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. See also the Council of Europe Convention on Action against Trafficking in Human Beings that entered into force in 2008.

11 For the wording of Article 3 and an analysis thereof, see Chapter 4.

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definition of trafficking might be improved. The suggestions range from simple to more far-reaching reforms, concluding with a proposal on how a trafficking provision might be framed.

When states struggle with anti-trafficking efforts, international advice often comes in the form of encouragement to adjust national laws to the international definition of trafficking and to increase the penalties for the crime. However, as will be shown, national laws that have implemented the international definition of trafficking in human beings do not always work as intended. Also, the fact that penalties for trafficking often already are quite high, although the crime persists, is often overlooked. Such advice tends to neglect the fact that laws on the books do not always equal law in practice. By contrast, this study acknowledges the law in practice by attaching importance to the specific context in which the international definition of trafficking is implemented. It takes into account variables such as perception, legal tradition, and language as well as the practical consequences that the implementation of the international definition of trafficking has had on individual countries.

This book argues that there is arguably no adequate international definition of trafficking. The present definition is reproduced in both international law and national legislation, making an already troublesome situation even worse. Despite the importance of the topic, it has not been extensively researched. The present book conducts a critical legal analysis of the wording of the international definition of trafficking and puts those findings in context by discussing the implications that this definition has had on national laws, a novel approach in the study of trafficking.

Purpose and Research Questions

Although trafficking does not always involve an element of border-crossing and many countries also suffer from so-called internal trafficking, the crime often involves at least two and sometimes several states. The fact that the Palermo Protocol requires states to criminalize all forms of trafficking in human beings while international cooperation and victim support are optional objectives indicates that *prevention by harmonizing laws* is considered one of the main tools in the fight against human trafficking. The question of countering trafficking by means of the harmonization of national criminal laws is therefore essential. However, although trafficking laws are harmonized, there are very few trafficking convictions.

The main research question is why, despite international anti-trafficking efforts, there are so few trafficking convictions worldwide. The purpose is

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to evaluate the international definition of trafficking by means of which national laws in this area are harmonized. A secondary purpose is to discuss what actually happens when states agree to create and implement a common definition of a crime. The distinction between first and secondary purpose is artificial as both purposes are linked to one another. However, this division is useful for the overall structure of the study. The underlying argument is that although a country's definition of a crime may be a verbatim transcript of the original legal source, a successful legal harmonization has not necessarily taken place.

This study examines two main areas, both covered by the umbrella concept of legal harmonization. Firstly, it concerns itself with the international definition of trafficking as set out in Article 3 of the Palermo Protocol. The definition is scrutinized from both legal and social perspectives. First, a critical legal analysis of the wording is conducted. Then, the wording is evaluated against the social practice of human trafficking and its realties. The question is whether the current international definition of human trafficking is satisfactory in terms of legal effectiveness and its sensitivity to the phenomenon itself.

Secondly, this work addresses the development that takes place on the national level after an international treaty has been implemented. It addresses the following question: Can we talk about the trafficking definition of the Palermo Protocol in terms of universality if we are not familiar with the results of its implementation in individual countries? I will attempt to answer this question by conducting country-specific analyses of the relevant laws of three state parties (Sweden, Poland, and Russia) to the Palermo Protocol.

In addition, the study contributes to the debate on international harmonization of law and legal transplants by discussing the shortcomings of national implementation and the problems that might arise when attempting to mend international dilemmas with unified criminal legislation. It indicates that the difficulties are not only internal in nature but also that certain problems can be attributed to the original source, i.e., there exist both country-specific and general problems with regard to international legal harmonization. The findings are also cause for reflection concerning what might be considered achievable or realistic where possible results of international harmonization are concerned.

To a certain extent, the findings of this work can be applied to other areas of criminal law where international harmonization takes place. However, the crime of trafficking in human beings is especially illustrative when discussing the importance of the roles that perception and language play in the field of legal harmonization. The potential success of legal harmonization is highly dependent upon attitudes and perceptions such as certain presuppositions or prejudices concerning the crime and its victims.

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National laws are harmonized on different levels and through various mechanisms. The next section will position this work in its relevant field by describing the process of international legal harmonization.

Harmonization of Criminal Law within the Context of Human Trafficking

Contemporary criminal law does not fall under the exclusive competence of states.[12] Some experts argue that individual states no longer can handle recent developments such as globalization and organized crime on their own.[13] As a result of this development, national criminal laws have been subjected to several harmonizing measures. The EU member states, e.g., have been affected by this development on an EU level and on an international level. The world order no longer consists of states with uniformly sovereign legislation. Scholars increasingly speak of constitutional pluralism.[14] In some cases, international legislation prevails over national norms, while in others it is still unclear how rules, decisions, and outcomes stemming from international legal acts are to be interpreted in relation to each other and to national legislation, especially if they are mutually contradictory.[15]

Under the premise that criminals might take advantage of differences between states' criminal laws or favour countries that have lower penalties for organized crime, harmonization of criminal laws and increased penalties for organized crime have been advocated by the international community. Along with prevention and victim protection, prosecution is considered to be one of the main tools in the fight against human trafficking. It is achieved by ensuring

12 F.M. Tadic, "How Harmonious Can Harmonization Be? A Theoretical Approach Towards Harmonization of (Criminal) Law" in A. Klip, H. van der Wilt (eds.), *Harmonization and Harmonizing Measures in Criminal Law*, Proceedings of the Colloquium, Amsterdam, Royal Netherlands Academy of Arts and Sciences, December 2001, pp. 1–2.

13 J. Vogel, "Why is the Harmonization of Penal Law Necessary? A Comment" in *Harmonization and Harmonizing Measures in Criminal Law*, pp. 55–56.

14 See, e.g., N. Walker, "The Idea of Constitutional Pluralism", *Modern Law Review,* vol. 65, no. 3, 2002, p. 317.

15 Within the field of criminal law, this has become especially evident with regard to international sanctions related to terrorism. These are ordered on the UN level, reinforced at the EU level, and then 'executed' on the national level. See T. Andersson, I. Cameron, K. Nordback, "EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale", *European Business Law Review,* vol. 14, no. 2, 2003 and I. Cameron, "European Union Anti-Terrorist Blacklisting", *Human Rights Law Review,* vol. 3, no. 2, 2003.

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that states have adequate legal frameworks and appropriate criminal definitions of trafficking in human beings.[16] The Palermo Protocol is seen as a step in this direction as it is built around the concept of the three P's: prosecution, prevention, and protection.

In addition to extended victim assistance, the EU Directive on trafficking replacing the Council Framework Decision 2002/629/JHA introduces tougher penalties for trafficking.[17] Compared to the Palermo Protocol, the directive has a more extensive area of application. It not only deals with criminalization but also with victim protection. It also refers to another directive[18] concerning residence permits for those victims of trafficking and irregular migration who choose to cooperate with authorities.[19] The trafficking directive also refers to the Palermo Protocol as an important step "in the process of enhancing international cooperation against trafficking in human beings".[20] Moreover, the directive's definition of trafficking is a verbatim transposition of the Palermo Protocol's definition, perhaps the only exception being that forcing someone to commit criminal activities is explicitly set out in the directive as a form of exploitation.

Furthermore, the EU is required to build on the practice in this field stemming from relevant international acts, notably the United Nations Convention against Transnational Organized Crime (Palermo Convention) to which the European Community is bound by virtue of Council Decision 204/579/EC [3].[21] Also, the EU and its member states are required to follow the principles of human rights of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 4 of the ECHR explicitly and without

16 See Opinion No. 7/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission, "Proposal for a European Strategy and Priority Actions on Combating and Preventing Trafficking in Human Beings (THB) and Protecting the Rights of Trafficked and Exploited Persons", p. 3.

17 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

18 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration and who cooperate with the competent authorities.

19 Paragraph 7 of Directive 2011/36/EU.

20 Ibid, Paragraph 9.

21 See Paragraph 6 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime and also paragraph 9 of Directive 2011/36/EU that makes direct reference to the Palermo Protocol.

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exception prohibits slavery. The Council of Europe (CoE) defines trafficking in human beings in its own 2005 Convention on Action against Trafficking in Human Beings. Nevertheless, Article 4 of the document is almost a literal translation of Article 3 of the Palermo Protocol. As the legislations of the majority of the EU member states build on the aforementioned experience because they are signatories to those international acts and must follow them by virtue of their membership in the EU,[22] Article 3 of the Palermo Protocol is the essential provision in discussing the international definition of trafficking.

The three countries studied in this work are bound by international law on trafficking on different levels and to varying degrees. Poland and Sweden have both ratified the Palermo Protocol and the ECHR (the international level). They are members of the EU which in turn has its own directive on trafficking in addition to being bound by the ECHR (the EU level). Russia is only bound by international law by having ratified the Palermo Protocol and the ECHR. This distinction adds another factor to the analyses of the three countries.

Trafficking in human beings is a crime that affects several areas of state responsibility including security, migration, health, social security, development, education, labour, gender equality, and human rights. In consequence, international documents usually advocate a holistic approach when anti-trafficking measures are concerned. The question is whether the definition of trafficking in the Palermo Protocol corresponds to this approach. Even more importantly, the question is if the definition is consistent with the developments that the trafficking phenomenon has undergone.

Two important developments within this area are that traffickers allegedly have become less violent in their contacts with potential victims and that women traffickers have become more common.[23] Traffickers abuse people's vulnerability, e.g., political instability and/or economic distress. In such circumstances, violence as an additional means of coercing someone into exploitation is often not necessary. The question is, however, if this constitutes a real change or a change in perceptions brought on by our increasing knowledge of the crime.

22 See, e.g., Paragraph 2 of the Opinion No. 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission "On the Decision of the European Court of Human Rights in the case of *Rantsev v. Cyprus and Russia*", 22 June 2010.

23 "Knowledge Product. Trafficking in Human Beings in the European Union", 08 OC Networks in South-East European Sphere O2 Analysis and Knowledge, Europol Public Information, the Hague, 1 September 2011, p. 11. See also "Människohandel för sexuella ändamål", Lägesrapport 13, RPS Rapport 2012, pp. 14–15.

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While the trafficking of women and children for sexual exploitation is still one of the more predominant forms of trafficking,[24] the phenomenon is constantly expanding and adapting to new circumstances. The traffickers of today tend to operate on a lesser scale than they did a decade ago. Largely gone are the big cells in which a broad and in principle dispensable base was ruled hierarchically by a small number of key actors.[25]

Nowadays, flexibility seems to be the modus operandi. A person can be brought to a country as a migrant worker. Indebted to the trafficker, the person is then forced to work off his debt for little or no compensation, often under poor working conditions. The same person can then be used in order to commit welfare benefit fraud, a new form of trafficking that seems to be on the increase.[26] Others might be forced to beg and to commit petty theft.

To get the current international definition of trafficking in line with the development referred to above would be a step in the right direction. However, it is important to note that a legal amendment alone will not solve the trafficking problem. Simply put, there are arguably certain disadvantages to a view on international cooperation that focuses *exclusively* on criminal law measures. By paying too much attention to unified criminal legislation, actual international cooperation might become an issue of secondary importance. This is already evident in the Palermo Protocol, according to which the implementation of criminal provisions is obligatory while international cooperation is only an optional measure. This implies that anti-trafficking efforts are mostly focused on the law on the books as opposed to law in practice. If efforts are predominantly focused on the harmonization of criminal laws, the evaluation of these laws might be neglected by the international community, especially as there are few mechanisms of control.

The former Polish trafficking law will serve as an example. The law in question was drafted in order to meet international requirements. However, the Ministry of Interior noted that in many cases the courts had decided to impose

24 "Global Report on Trafficking in Persons", 2009.

25 Presentation by Gert Bogers, Seconded National Expert in the European Commission in DG Home Affairs in the Unit Fight against Organized Crime, specifically working in the area of trafficking in human beings since July 2010 during the Third Annual International Symposium on Preventing Human Trafficking, held on 24 November 2011 in Brussels.

26 According to a report from Europol, welfare benefit fraud is likely to expand even further. This is primarily due to the relatively large profits that it generates where a single trafficking group can get 125,000 Euro per month and the low levels of perceived risk of detection. See "Knowledge Product. Trafficking in Human beings in the European Union", 2011, p. 14.

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conditional suspension of sentences.[27] Such circumstances are rarely visible in international statistics. Countries usually report on whether or not a certain law is in place and sometimes also on the number of convictions carried out in accordance with that law but rarely on the details of the penalties imposed. If trafficking is to be practically treated and not just described as a grave offence and the ratification of the Palermo Protocol as a first step in a particular country's fight against the crime, then the subsequent evaluation must go beyond analysing the law on the books. We must therefore inquire if and how the country has ratified the original source both in terms of the end result, i.e., the legal transplant, and the practical application thereof.

On the surface, a country might meet the requirements set forth in the relevant international treaty. Under the surface, however, problems may abound. For example, if sentences for trafficking are suspended it might be called into question whether the grave nature of the crime is fully mirrored in case law. The question is what the implications are for the application of provisions concerning other serious crimes as well as the overall credibility of criminal law. Such a development also stands in contrast to international obligations as the Palermo Protocol requires states to not only criminalize trafficking but also to incorporate into their relevant provisions and the application thereof the spirit of the protocol. The latter requires states to, among other things, make an effort to effectively and adequately prevent human trafficking and to impose proper and proportional penalties. In addition, "states shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-state actors".[28]

The fact that a country has consented to become a party to the Palermo Protocol and perhaps even set up a national agency in charge of trafficking issues is too often seen rather uncritically as a sign of positive development. In an official United Nations Development Programme (UNDP) note, Moldova, Romania, and Albania are applauded for establishing national counter-trafficking policies and programs.[29] Although such efforts deserve to be recognized, there is also a danger in interpreting them as a concrete ambition

27 U. Kozłowska, "Analiza statystyk dotyczących zjawiska handlu ludźmi" in *Handel ludźmi w Polsce. Materiały do raportu 2009*, Warszawa, Ministerstwo Spraw Wewnętrznych i Administracji, 2009, p. 44.

28 "Recommended Principles and Guidelines on Human Rights and Human Trafficking", Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, E/2002/68/Add.1, Paragraph 13, p. 42.

29 "Trafficking in Human Beings. A Guidance Note", UNDP, Europe and the CIS, Bratislava Centre, September 2004, p. 6.

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to act. Again, there is a step between making a law and acting in accordance with that law.

According to one of the internationally more authoritative sources on trafficking in persons, the US State Department Trafficking in Persons Report (TIP),[30] Poland, e.g., was – and still is – placed on Tier 1 of three, which is the best.[31] Such a placement suggests that the Polish trafficking legislation at that time corresponded to international standards and that the country had taken decisive steps in order to combat trafficking. Although Poland had signed the Palermo Protocol and established a national counter-trafficking plan, some Polish legal scholars considered their former trafficking laws to be flawed. The provision dealing with trafficking specifically was said to be vague, as a result infringing on principles of legality, equality before the law, and legal certainty.[32] The case law from Polish courts where this law was applied seems to validate the critics' concerns as the trafficking legislation was sometimes applied arbitrarily, yielding varying results in different courts and regions of the country. Despite all of this, the country was still considered good enough to be placed on Tier 1.

Russia provides another illustrative example where the potential danger of having too much faith in the implementation of the Palermo Protocol's definition of trafficking is concerned. In 2003, probably due to the country's consenting to become a party to the Palermo Protocol in 2000 and ratifying it in 2004,[33] Russia was elevated from the worst placement of Tier 3 to Tier 2 in the TIP Report. It was then said that "[t]he Government of Russia does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so".[34] The same passage could then be read every year, from the first time it appeared in 2003 to the version of the report dated 2008. It was not until 2009 that Russia was taken off its Tier 2 placement and moved to the Tier 2 Watch List. The latter placement applies to countries

30 The TIP Report is a general overview of trafficking worldwide. It also evaluates states' efforts in this area. It is published yearly by the US State Department and constitutes an influential tool where international lobbying in the area of trafficking is concerned.

31 "Poland", TIP Report, 2013, pp. 303–305. Countries are rated according to their national anti-trafficking efforts and placed on different tiers ranging from 1 to 3, where tier 1 is the best.

32 E. Zielińska, "Zakaz handlu ludźmi w polskim prawie karnym" in Z. Lasocik (edt.), *Handel ludźmi. Zapobieganie i ściganie*, Warszawa, Katedra Kryminologii i Polityki Kryminalnej IPSiR UW, 2006, pp. 226, 228.

33 E.V. Tiurukova and the Institute for Urban Economics for the UN/IOM Working Group on Trafficking in Human Beings, "Human Trafficking in the Russian Federation. Inventory and Analysis of the Current Situation and Responses", Moscow, 2006, p. 7.

34 "Russia", TIP Report, 2003.

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that do not fully comply with the minimum standards for the elimination of trafficking but are making significant efforts to do so. Although they are making some efforts, either the number of trafficking cases in these countries is very high or significantly increasing or the government is failing to combat trafficking or further steps are needed in order for the country to improve its placement.

The picture sketched above suggests that although it might be easy to make assumptions based on supposed efforts such as consenting to international documents or the establishing of certain polices, this does not necessarily mean that these assumptions are true. In some cases, efforts are simply about paying lip service. Sometimes, the value of such international evaluations can also be questioned.

As will be illustrated in the subsequent sections, attempts to create an international definition of trafficking are further complicated by the fact that we are not dealing with a physical object such as a table but instead with an entirely social and linguistic construction, i.e., a crime or rather the constituent parts of a crime. The definition affects national criminal laws which traditionally have been considered to fall under the exclusive competence of states.

Although this book studies the criminal provisions on trafficking, it is important to note that criminal law alone will not stop trafficking. The questions raised in this section will be revisited in following chapters, most notably Chapter 4, where the international definition of trafficking is scrutinized. In the following section, various ways in which trafficking is conceptualized and different approaches to studying the phenomenon are addressed.

Approaches to the Study and Conceptualization of Human Trafficking

Since trafficking affects so many issues ranging from migration to human rights, there are different approaches to how to study the crime. Some of the central approaches are addressed here. The author also comments on how these relate to her work.

Research on trafficking in human beings usually focuses on some aspect(s) of trafficking as a social phenomenon. It is viewed either as a matter for the social sciences or as the subject of a legal inquiry pertaining to the more narrowly defined *crime* of trafficking.[35] Only rarely is it perceived as being both.

35 See, e.g., A. Gallagher, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A preliminary Analysis", *Human Rights Quarterly,* vol. 23, 2001 and

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Legal commentaries on criminal law usually include concise legal analyses of the relevant provisions while most writings on trafficking as a social practice focus on the social characteristics of the phenomenon.[36] In the latter case, a reference is sometimes made to relevant legal provisions. At times, a definition of trafficking might be included in the text. This definition is, however, rarely elaborated upon further. However, the legal and social aspects of trafficking in human beings should not be viewed in isolation from each other. This work will therefore include both.

Trafficking is capable of quick adaptation to new environments. Naturally, and rightly so, criminal laws do not work that way. Before a law is drafted or amended, much needs to be taken into consideration. Proper agencies must be consulted, and the consequences of the suggested amendment must be carefully evaluated. Nevertheless, in this process it is of great importance to use the latest intelligence and research at hand. This statement might seem obvious. However, as will be shown, in this specific area it is anything but obvious as many modern trafficking laws do not always match the current characteristics of the crime.

In the past, focus within research on human trafficking has mostly been on sexual exploitation.[37] Even though this scholarly domain is presently more nuanced than it has been in the past, there are still new facts to be discussed.[38] For one, trafficking has been acknowledged as more than a crime. In some regions of the world, it is said to have become something of a social practice much like the past trade in slave labour. This approach toward the study of trafficking is slowly gaining more recognition among the academic community dealing with various forms of human exploitation.[39]

M.Y. Mattar, "Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention", *Tulane Journal of International and Comparative Law*, vol. 14, no. 2, 2006.

36 L.D. Erokhina, "The Problem of Trafficking in Women in Social Risk Groups", *Sociological Research*, vol. 46, no. 1, 2007 and C. Zimmerman, "The Health of Trafficked Women: A Survey of Women Entering Post-trafficking Services in Europe", *American Journal of Public Health*, vol. 98, no. 1, 2008.

37 See, e.g., B. Hernandez-Truyol, J. Larson, "Sexual Labor and Human Rights", *Columbia Human Rights Law Review,* vol. 37, 2006.

38 See J. Chuang, "Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts", *Harvard Human Rights Journal,* Vol. 11, 1998 and K. Kempandoo et al., *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights*, Boulder CO, Paradigm Publishers, 2005.

39 See, e.g., B. Herzfeld, "Slavery and Gender: Women's Double Exploitation", *Gender and Development,* vol. 10, no. 1, 2002, W.P. Nagan, A. de Medeiros, "Old Poison in New

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Similarly, scholars interested in the issue of contemporary slavery are becoming increasingly aware of and interested in the trafficking phenomenon.[40] This is also the path advocated by the author, i.e., that trafficking in human beings should be recognized – and not just on paper – as the slavery of our times. This is a recurring view throughout this work. It finds its logical conclusion in the last chapter where the question of how to possibly frame future legislation on trafficking in human beings is discussed.

Another quite prevalent approach to the study of trafficking in human beings involves a gender dimension. It focuses on the experience of the victim and questions such as how a stereotypical victim of trafficking in human beings is construed in legal texts and case law and if this image corresponds to reality. Some of the more interesting findings within this field indicate that in laws concerning sexual crimes, as well as other crimes where the victims are typically female, women are often divided into two categories, namely the 'coerced innocents' and the 'others'.[41] There seems to be a rather simplistic view according to which the victim must be 'blameless'. Thus, victims of trafficking, who at a certain point have displayed some level of agency, are often blamed for doing so.[42] As will be shown, current international anti-trafficking instruments seem to contain many of these weaknesses including the idea of the stereotypical victim of trafficking as a coerced innocent, arguably a rather narrow label fit by few women.[43] The 'gender approach' is very useful when trying to understand the trafficking definition of the Palermo Protocol and the events that influenced it. It is also relevant when examining how trafficking is being dealt with on the national level. It can, e.g., be used to critically appraise

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Bottles: Trafficking and the Extinction of Respect", *Tulane Journal of International and Comparative Law*, vol. 14, no. 2, 2006 and S.P. Torgoley, "Trafficking and Forced Prostitution: A Manifestation of Modern Slavery", *Tulane Journal of International and Comparative Law*, vol. 14, no. 2, 2006.

40 See, e.g., K. Bales, P.T. Robbins, "'No One Shall Be Held in Slavery or Servitude': A Critical Analysis of International Slavery Agreements and Concepts of Slavery", *Human Rights Review,* January-March 2001. See also J. Allain, "The Definition of Slavery in International Law", *Howard Law Journal*, vol. 52, 2008–2009.

41 C. Feinman, *Women in the Criminal Justice System*, third edition, Westport, CT, Praeger, 1994, p. 3. See more on this distinction in the following.

42 K. Touzenis, "Trafficking in Human Beings. Human Rights and Transnational Criminal Law, Developments in Law and Practices", *UNESCO Migration Studies 3*, 2010, p. 35.

43 See, e.g., E.M. Bruch, "Models Wanted: The Search for an Effective Response to Human Trafficking", *Stanford Journal of International Law,* vol. *40,* no. 1*,* 2004 and N. Demleitner, "Forced Prostitution: Naming an International Offense", *Fordham International Law Journal,* vol. 18, no. 1, 1994, p. 167.

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how trafficking is conceptualized in case law, the help that victims receive, return policies of the countries of destination, etc.

Traditionally, trafficking in human beings has been regarded as a criminal law issue. However, there has been a trend toward adopting a more holistic approach when studying and conceptualizing the crime. Trafficking has been framed as a human rights abuse,[44] and even as an issue falling under the concept of human security.[45] The following chapters will indicate that the crime spans over various fields and why a holistic approach is indeed necessary.

The aim of legal rules is to address specific situations. The question is if we know enough about trafficking in human beings or rather if our current legal responses to the crime are adequate. Do we know enough about the complexity of the crime, its push and pull factors,[46] i.e., the supply and demand side of the trafficking chain? How will states handle the fact that violence is no longer the primary means used by traffickers to force people into exploitation,[47] or the increase in trafficking for labour exploitation? While most people would probably not solicit the services of a victim of trafficking for sexual exploitation, there is a tendency to be less scrupulous when it comes to buying products and other services. How often do we actually ask ourselves whether a product that we buy, e.g., chocolate,[48] comes from non-exploited labour? Arguably, people seldom contemplate where the boundary between exploited and non-exploited labour lies. Some important characteristics of the crime of trafficking have changed or we have learned more about them, and the changes

44 A. Gallagher, 2001. See also A.D. Jordan, "Human Rights or Wrongs? The Struggle for a Rights-Based Approach to Trafficking in Human Beings", *Gender and Development,* vol. 10, no. 1, March 2002.

45 M.A. Clark, "Trafficking in Persons: An Issue of Human Security", *Journal of Human Development*, vol. 4, no. 2, 2003.

46 These form central concepts within the research on human trafficking and migration and are described in Chapter 3.

47 In Sweden, this should be seen in relation to the relatively low number of convictions for trafficking. In cases where the perpetrator has 'only' taken advantage of a person's vulnerable position, the action is usually not seen as trafficking but instead as procuring.

48 The exploitation of labour, particularly child workers, in the production of chocolate is a wide-spread phenomenon. However, it has not been afforded as much attention as other forms of trafficking. See, e.g., www.antislavery.org, aborrights.org and "Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labor in the Cacao Sector in Cote d'Ivoire and Ghana", 4th Report, Payson Center for International Development and Technology Transfer, Tulane University, 30 September 2010, http://www.fairtrade.net/fileadmin/user_upload/content/2009/resources/2010-09-30_tulane-fourthann-cocoa-rprt.pdf, (accessed 19 May 2014).

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will, as I shall argue, eventually force a re-thinking of our current provisions on this crime.

National legislators cannot draft proper trafficking provisions without first educating themselves on the practice. In addition to what has already been said in the introduction about the unique features of this work, another characteristic that sets it apart from previous research on trafficking is that it evaluates the national trafficking provisions including the source provision in light of current research and intelligence on trafficking. It thus combines different perspectives, e.g., legal-technical, gender, human rights, legal tradition, language, and poverty.

When national trafficking provisions are studied from an international perspective, e.g., when the purpose is to evaluate whether or not they meet the standards of international law, the net is usually cast either too wide or too narrow. A wide approach, although encompassing a study of several countries, tends to be shallow. It usually stops at examining whether or not this or that country has ratified the Palermo Protocol or other relevant instruments and if certain national laws are in place, but it lacks the potential to discuss national legislations in-depth. The TIP Report is an illustrative example of research with a wide approach. Although the report offers an excellent general overview of trafficking worldwide, its country analyses are rather formalistic, focusing on the existence of national trafficking laws as opposed to their quality and application.

If the net is cast too narrow, i.e., if we look at just one country, we will not be able to perform a comparative analysis. Likewise, if we look at a specific provision in isolation from the context where it operates, we risk losing track of the legal rule as part of the whole. If we look at the trafficking provisions in isolation from the social practice of trafficking, we will not see the entire picture. The net therefore must not be cast too wide or too narrow.

The approach taken here hopefully accommodates these concerns. Due to the international emphasis on the first purpose of the Palermo Protocol, i.e., to prevent and combat trafficking in human beings through criminalization of the phenomenon,[49] and the implications that this has for both global and national anti-trafficking efforts, focus will be placed on that part of the protocol. The analyses are therefore limited to Article 3 of the Palermo Protocol and corresponding national trafficking provisions of state parties to the protocol.[50]

49 See Article 2 of the Palermo Protocol on the statement of purpose.

50 The term *trafficking provisions* here also applies to provisions that deal with trafficking or offences similar to trafficking but that are not referred to as *trafficking* in national legislation.

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Although what has been said above about one country not being enough to conduct a comparative analysis is true, the number of countries cannot be too large either, at least not if the ambition is to conduct a more detailed analysis. Therefore, focus will be placed on the trafficking laws of three state parties to the Palermo Protocol. An outline of the study is presented in the following section.

Outline

This work begins with an introduction where the main purposes and research questions are summarized. Chapter 1 also offers a brief introduction to the field of international criminal law and the harmonizing efforts undertaken within the area of human trafficking. As the research includes comparative legal analysis, the concept of legal transplants was chosen as the theoretical framework. The analytical tool presented and developed in Chapter 2 uses this concept to extrapolate four different factors or steps that are used to conduct the analysis of both the original source and the national transplants. These steps allow for a comprehensive analysis of three mutually very different countries.

In order to be able to reason about the criminal provisions on human trafficking, e.g., when attempting to answer whether the provisions correspond to the actual nature of the crime, and their practical application, a background and initial understanding of trafficking as a social phenomenon is necessary. Chapter 3 is consequently intended to function as a backdrop for the following analyses, presenting an overview of trafficking in human beings as a social practice.

As has been mentioned above, the research has two main parts, i.e., the international definition of trafficking and the relevant national laws resulting from that source. The international definition of trafficking is studied in Chapter 4 and includes both a traditional legal analysis of the original source, i.e., Article 3 of the Palermo Protocol, and a discussion of the source in its specific historical, cultural, and linguistic context. This is to explain the actual legal meaning of the original source as well as to point to certain presuppositions that it contains. The next logical step is to examine the national criminal provisions on trafficking that the international definition has spawned. These are described and analysed through legal analysis as well as through the prism of the concept of legal transplants. The three cases including Sweden (Chapter 5), Poland (Chapter 6), and Russia (Chapter 7) are structured to show the difficulties concerning the implementation of the international definition

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of trafficking as well as which of these difficulties that are internal in nature and which are common among the countries.

Chapter 8 contains conclusions based on the findings and arguments made in the previous chapters. In light of these arguments, the chapter also suggests possible reforms of the international definitions of trafficking and slavery. It also points to potential avenues for future research.

Throughout this work, the pronouns *she* and *he* are used interchangeably. When writing the country analyses, my ambition was to use mostly primary sources. All of the translations from Swedish, Polish, and Russian into English are my own.

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CHAPTER 2

Theory and Methodology

Introduction

In this chapter, the methodological tools chosen for conducting the analyses are presented. Also, the empirical cases are addressed by discussing the importance of and reason for choosing Sweden, Poland, and Russia as case studies. The methodological difficulties associated with the particular empirical choices are also touched upon. In addition, the importance of language in the area of legal harmonization is addressed.

Reasons for Choosing the Case Studies

Three different countries have been chosen as the empirical base of this study. These countries differ among themselves in many respects. The main differences are to be found on three different levels. These concern (1) experiences, (2) cultural baggage, and (3) norms. Firstly, Poland and Russia are countries of origin, destination, and transit. They also suffer from internal trafficking. Sweden is a country of destination and, to a lesser extent, transit. Hence, the *experiences* with regard to trafficking differ among the countries.

In comparison to Poland and Russia, Sweden has been firmly involved in the fight against human trafficking. Poland has recognized trafficking as a serious issue. This is partly the result of the country's ratification of the Palermo Protocol and its accession to the EU and partly the result of internal processes. The Russian state, however, has not prioritized trafficking to the extent that it needs to. On the contrary, comparatively few efforts are made on the national level to counter the occurrence of the crime.

These differences in experiences between the countries are reflected on the empirical level. There is much more information available on trafficking in Sweden and Poland than in Russia. Also, case law and policy documents in this area are more readily accessible in the first two countries. In addition, the countries' trafficking provisions vary among themselves and so do other criminal provisions, legal methodology, and sources as well as the manner in which laws are applied. In Russia, e.g., laws can be biased against certain social groups, e.g., people with a homosexual orientation.

Secondly, there are cultural disparities among the countries that affect, e.g., how the public views various state authorities including courts. This *cultural baggage*

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also affects national attitudes toward trafficking including questions such as if and how victims of trafficking should be assisted by the state, if victims should bring their cases before courts or if they should opt for settlement, etc. It also affects the judicial system such as the way in which a judge reasons about a specific law.

Thirdly, the countries have internalized different *norms*. These norms concern corruption, the meaning and standing of international law in the national legal system, the idea of the stereotypical trafficking victim, etc. These norms, presuppositions, or prejudices (depending upon one's point of view) influence the implementation of the international definition of trafficking.

The differences described above create certain problems on the methodological level, giving rise to questions such as what legal method one should choose (as the countries have disparate legal traditions) or how the legal comparative analyses are to be structured. However, the advantages of choosing these three countries outweigh the problems mentioned here.

Trafficking is a multi-layered offence facilitated by the supply of and *demand* for victims. It is therefore vital to include a country of destination in the analysis. Sweden, primarily a country of destination and, to a lesser extent, transit, is also interesting when the perception of trafficking is concerned. The country has long been acknowledged as the forerunner in combating trafficking yet the crime occurs in Sweden on a much lesser scale than it does in, e.g., Poland or Russia. While the actual occurrence of trafficking has been comparatively low in Sweden, the perceived need for anti-trafficking efforts has been substantial. This does not, however, imply that there are no problems with the Swedish trafficking legislation or the application thereof.

The reasons for focusing on Russia and Poland are several. Firstly, according to current estimates the majority of victims of trafficking for sexual exploitation in Europe is made up of women from Eastern Europe.[1] The end of the Cold War is believed to have been instrumental in precipitating trafficking for sexual exploitation of Eastern European women into West European sex markets.[2]

1 "Trafficking in Persons to Europe for Sexual Exploitation", UNODC, chapter extracted from *The Globalization of Crime – A Transnational Organized Crime Threat Assessment Report*, (not formally edited), http://www.unodc.org/documents/publications/TiP_Europe_EN_LORES.pdf, (accessed 19 May 2014).

2 "Trafficking in Persons", UNODC, p. 40, http://www.unodc.org/documents/data-and-analysis/tocta/2.Trafficking_in_persons.pdf, (accessed 19 May 2014).

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Also, according to intelligence from Europol, trafficking for forced labour of EU nationals for the EU market is on the increase.[3] Although some cases of British and Portuguese nationals trafficking their own countrymen for forced labour have been reported, most cases involve nationals of the new member states of the union, i.e., Poles, Lithuanians, Bulgarians, etc.

Secondly, a study of trafficking in Eastern Europe clearly illustrates the links between the instability of economic and political transition in 'developing'[4] states such as the rise in unemployment and transnational human trafficking.[5] The development in Eastern Europe, together with the opening up of borders and restrictive immigration policies in the countries of the European Union, has allegedly led to a growth in human trafficking. It has also affected these countries' views on human trafficking.

Thirdly, in the Russian case, and to a certain extent also in the Polish one, when considering possible effects of anti-trafficking efforts, we need to take into account the high level of corruption pervading the state machinery as well as its status as an accepted social practice among the population. In a survey from 2013, Poland ranks as number 38 of 177 countries on Transparency International's Corruption Perceptions Index where countries are ranked by their *perceived* levels of corruption as determined by expert assessments and opinion surveys.[6] While Sweden is ranked number three, Russia is ranked number 127 with a score of 28 which indicates that the country is seen as being thoroughly corrupt.[7] The situation in Russia is further aggravated by the fact that not only are the trafficking provisions and the implementation thereof lacking but also people's trust in the criminal legal system is reportedly low.

3 "Knowledge Product. Trafficking in Human Beings in the European Union", 08 OC Networks in South-East European Sphere O2 Analysis and Knowledge, Europol Public Information, the Hague, 1 September 2011, p. 7.

4 The term *developing states* is here used to refer to third world countries as well as to the post-socialist states, i.e., countries in a state of transition.

5 E. Morawska, "Trafficking into and from Eastern Europe", in M. Lee (edt.), *Human Trafficking*, Devon, Willan Publishing, 2007, p. 95.

6 The Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0–100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean. A country's rank indicates its position relative to the other countries and territories included in the index. The index for 2013 includes 177 countries and territories.

7 "Corruption Perceptions Index 2013", Transparency International, http://cpi.transparency.org/cpi2013/results/, (accessed 19 May 2014).

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Both Poland and Russia are countries of the old 'Eastern Bloc' that in the past have been perceived as rather homogenous. The varying results that the economic and political transformation brought about in that region, however, clearly illustrate that homogeneity was never the case. Poland's transition from communism to liberal democracy has been comparatively successful. The country is now a member of the EU and so bound by EU law including the EU human rights framework. This is clearly reflected in the country's attempts to improve its anti-trafficking efforts and to honour its international obligations.

In Russia, by contrast, development has gone from efforts to democratize the country to increased authoritarian tendencies. Also, among the three countries, Russia has the by far most serious trafficking problem both in terms of its nature and its scope. In addition to being a country of origin, transit, and destination for victims of trafficking, Russia also suffers from so-called internal trafficking, notably for forced prostitution. Children and young adults working as prostitutes on the streets of cities such as St. Petersburg and Moscow are usually recruited from poor rural areas.[8] Moreover, Russian cities feature so-called marriage agencies that sometimes serve as fronts for trafficking.[9] The women who have been unfortunate enough to employ the services of such agencies are usually lured with promises of marriage to wealthy foreign men but end up in forced prostitution or in marriages much resembling slavery. This is particularly interesting in light of the fact that many victims of trafficking for sexual exploitation are not physically forced into exploitation but instead are enticed by promises, be they of work, study abroad programs, or marriage.

Being a country of vast territory and large citizenry, Russia is also a country of great contrasts: between the cities and the countryside, between the extremely rich and the devastatingly poor, and between women and men, all of which has an impact on trafficking in human beings. As has been mentioned above, Russia and Poland are countries of origin, transit, *and* destination. How these countries perceive and address trafficking therefore affects the

8 E.V. Tiurukanova and the Institute for Urban Economics for the UN/IOM Working Group on Trafficking in Human Beings, "Human Trafficking in the Russian Federation. Inventory and Analysis of the Current Situation and Responses", Moscow, 2006, p.17. See also "Russia", TIP Report, 2011.

9 M.Y. Mattar, "Dr Mohamed Mattar Remarks on the Anti-trafficking Law of the Russian Federation Presented to the State Duma of the Russian Federation", Embassy of the United States in Moscow, 29 November 2004, http://moscow.usembassy.gov/tip-transcript25.html, (accessed 19 May 2014).

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phenomenon and thereby the anti-trafficking efforts both on a regional and on an international level. The experience in the area of organized crime indicates that the application of legal instruments on a regional level reinforces the action taken globally. Regional action, especially by countries that are greatly affected by trafficking, therefore has the potential of either improving or aggravating the global situation.

The three countries conceptualize trafficking in differing ways. These differences might partly be explained by disparate perceptions of prostitution, forced labour, etc., which in turn are articulated through and reinforced by language. This brings us to the additional reason for choosing these specific case studies. In order to be able to capture perceptions and presuppositions as articulated in language, there needs to be a command of the relevant language(s). As the analyses also include looking at informal norms, there should also be at least a rudimentary knowledge of the relevant country's history and culture, both legal and general. Apart from the previously stated reasons, the author's fluency in the Swedish and Polish languages and good reading abilities in Russian as well as knowledge of the relevant countries' legal systems, histories, and cultures constitute other reasons for choosing these three states as case studies. Moreover, there are also reasons of a more linguistic nature.

Today, several books in comparative law lament the lacuna in comparative research on non-English countries. Also, analyses in comparative law are said to be lacking a culture-sensitive approach. It is expressed that a comprehensive and *meaningful* study of foreign law(s) needs to address the law as part of a larger whole, preferably according to the legal system's original sources, tradition, etc.[10]

Ideally, such an analysis will include original sources, for even the most brilliant translations might miss certain cultural and lingual subtleties hidden in the original text. If one is to rely solely on secondary sources, these hidden implications might be lost in translation or the translation might become tainted by the interpretation of the writer. However, scholars argue that the will and ability of the comparative community to deal with other languages than English seem to be in decline.[11] In effect, the focus of comparative studies on Anglo-speaking countries has tipped the scales in favour of common law countries. Civil law states, especially those where less 'popular' languages like Polish and Swedish are spoken, remain, to a certain extent, under-researched.

10 O. Brand, "Language as a Barrier to Comparative Law" in F. Olsen, A. Lorz, D. Stein (eds.), *Translation Issues in Language and Law*, Great Britain, Palgrave Macmillan, 2009, p. 20.

11 Ibid.

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To summarize, the selection of cases is such as to primarily demonstrate two things. Firstly, the different countries clearly illustrate the nature of trafficking and the fact that it can take various forms depending on context. This impacts on how trafficking is conceptualized on the national level and how it is construed in criminal provisions and case law.

Secondly, the countries also illustrate problems with the implementation of the international definition of trafficking. Although there are specific internal problems in Russia and to a certain extent also in Poland and Sweden that affect the implementation and application of the trafficking definition, some of the most serious problems are common among the countries. From a country placed on the TIP report's Tier 3 to a country considered one of the main forerunners in the fight against human trafficking to a country placed somewhere between these two 'poles', they all face common problems which are attributable to the Palermo Protocol.

Methodological Difficulties

Comparative law is used to compare different legal systems or rules within specific legal systems. It can also be used to interpret international law. Some of the main concepts and institutions of international law are said to have their roots in institutions of municipal private law. It is believed that these institutions can yield their full potential only through comparative law.[12] With regard to the three case studies, there are certain differences between the countries that might make a comparison difficult.

The differences concerning trafficking in human beings between the three countries chosen as objects of study not only relate to the actual situation such as the scope and characteristics of the phenomenon but also to the existence and availability of sources, both legal and other, on this specific issue. This particularly concerns Russia where trafficking is not a prioritized issue on the state's agenda. This situation is in turn reflected in the lacuna in policy documents on human trafficking. In contrast, information on this topic in Sweden abounds. However, it is important to note that specific lacunas within this particular area also exist in Sweden. These will be discussed in more detail in the chapter addressing the Swedish context.

A comparative analysis where both the quality and quantity of sources differ between the objects of study seems, at least structurally, problematic, yet

12 K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, third edition, Oxford, Clarendon Press, 1998, p. 8.

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the reasons that were spelled out above for choosing these three countries outweigh the difficulties. Also, the differences tell us something about legal harmonization as the results concerning the implementation of the same original source may differ vastly between countries.

In order to be able to carry out a comparative analysis of these mutually very different objects of study, a suitable analytical framework was developed. By employing the concept of legal transplants, four main factors to be used in the subsequent analyses were identified. These include (1) transmissibility, (2) accessibility, (3) reception, and (4) perception and are more thoroughly developed in the following. Furthermore, as I shall argue, the aforementioned factors are articulated in and detectible through the study of language. Also, they are influenced by language. To mention one example: The accessibility of a transplant might be more favourable in cases where the transplant originates from the same language or language family as the original source than in instances where two different language families are involved. Language thus forms an important dimension in this study. It should be noted that this dimension is often largely forgotten in comparative studies of law. However, the following country analyses will illustrate the immense importance that language plays as many linguistically similar or even exact concepts sometimes mean different things in different countries.

The varying results pertaining to the process of legal transformation in post-communist countries have illustrated that it is not enough to draft laws (even technically flawless laws), transplant them into completely different settings than the original, and then literally hope for the best. Scientists have become increasingly aware of another dimension that is sometimes referred to as culture and sometimes as norms or informal institutions. The author is aware of the problem of cultural specificities and will acknowledge it within the context of language and its influence on laws and the application thereof. Culture, as will be set out in more detail below, is here understood as a series of habitual practices and not as biological determinants. These concepts are also included in the factors of perception and reception.

What concepts like culture and social norms have in common is that they are uniformly difficult to grasp, describe, and measure. Also, they often tend to become politicized. Language or perceptions of things that are articulated through language,[13] by contrast, might present a more tangible explanatory variable with regard to how things can be framed and understood depending

13 According to a psychological study, the language that a person speaks may actually influence their thoughts. See S. Danziger, R. Ward, "Language Changes Implicit Associations between Ethnic Groups and Evaluation in Bilinguals", *Psychological Science,* 2010 21: 799,

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on context. Language can therefore be used as a factor that can help to explain the process of legal transplantation or harmonization more adequately.

By studying case law and policy documents in this area, we might get a better picture of the situation in a specific country and possible explanations as to why the trafficking problem sometimes persists even if the criminal provisions are being amended. Through language as expressed in court verdicts, doctrine, and public documents, we are able to gain more insights into how trafficking is understood and conceptualized in practice.

When discussing international legal harmonization such as the implementation of an international treaty in national legislation, we must therefore be aware of language and the perceptions of things that are created, articulated, and reproduced through language. Consequently, the implementation of the definition of trafficking of the Palermo Protocol on the national level will be considered with respect to the laws created by harmonization, i.e., the transplant (first dimension or the *legal analysis*), the transposition and interpretation of the provision by relevant institutions, i.e., legislator, courts and legal practitioners (second dimension or *accessibility*), or even informal norms that arguably influence the *perception* and *reception* of the transplant, i.e., the harmonization process (third dimension).

The implementation will also be considered in the context of language by taking into consideration perceptions which in turn are to be found in legal texts, court decisions, and policy documents on this subject. This forms the fourth dimension of the inquiry as well as the unifying factor in which the other three dimensions are reflected. The role that language plays in this study will be set out in more detail below, but first the analytical tool used for conducting the comparative analyses of the case studies is described in some detail.

Legal Transplants

Introduction

The concept of legal transplants is common in comparative legal studies. I use it in order to take into consideration the variables mentioned in the following. Just like its name suggests, the concept of legal transplants has been borrowed from the medical field. The original source can be a provision, a law, or even an institution, such as the Swedish institution of *ombudsman*.[14] This source is to

originally published online on 5 May 2010, http://pss.sagepub.com/content/21/6/799.full.pdf+html, (accessed 19 May 2014).

14 U. Kischel, "Language and Different Law Cultures" in F. Olsen, A. Lorz, D. Stein (eds.), *Translation Issues in Language and Law*, Great Britain, Palgrave Macmillan, 2009, p. 12.

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be transplanted into a new setting by means of implementation. The procedure can vary. Sometimes laws are transposed verbatim, and sometimes a concept is borrowed to inspire national legislation.

While some treaties are self-executing and can stand as individual sources of law, others might require formal transposition. The end result, both the wording and the way that the item functions in the new setting, constitutes the transplant. A successful transplantation hinges on different variables which may differ depending on context. By the same token, it is difficult to supply a general recipe for a successful transplantation. There are, however, certain factors that should be taken into consideration when reasoning about legal transplants and harmonization, and these will be addressed in detail below.

Reform through legal transplants has been used in the past,[15] and so the concept of legal change through the borrowing of foreign laws and institutions has long captured the interest of academics. Very simply put, there are two schools of thought within the concept of legal transplants. The first looks at a specific transplant, i.e., adopts a law-as-rules approach. The second school does the opposite and concerns itself mostly with the setting where the rule originates or whereto it is transplanted, i.e., the mirror theory of law.

The first of the two predominant theories on legal transplants mentioned above is associated with Alan Watson. Simply put, he argues that all legal development is the result of legal borrowing.[16] This theory is mainly based on the reception of Roman law throughout continental Europe during the early Middle Ages.[17]

One of the main thrusts of his argument is directed at dysfunctional laws. According to Watson, laws are often dysfunctional or at least inadequate and do not meet the needs of society or the ruling elite, hence law is not a perfect mirror image of society.[18] Notwithstanding the fact that Watson acknowledges legal culture as an inherent part of any legal system, he holds that this does not imply that there must be a strong connection between the two.[19] Watson has

15 J.M. Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain The Transplant Process", *American Journal of Comparative Law,* vol. 51, no. 4, 2003, p. 839.

16 It is important to note that Watson refers mainly to the domain of private law.

17 W. Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants", *American Journal of Comparative Law,* vol. 43, 1995, p. 490.

18 A. Watson, "Legal Change: Sources of Law and Legal Culture", *University of Pennsylvania Law Review,* vol. 131, 1983, pp. 1151–1154.

19 A. Watson, "From Legal Transplants to Legal Formants", *American Journal of Comparative Law,* vol. 43, 1995, p. 470.

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also argued that legal culture might indeed vary between countries and even between regions within a single country. However, this is considered as supportive of the argument that law is affected more by legal history as opposed to the society where the law operates.

Legal practitioners are said to be partly responsible for this development in that law is believed to be affected more by this law-making elite than by societal or economic factors. Moreover, insofar as the latter factors are of importance for legal development, they are said to first be filtered by impartial practitioners.[20]

Some parts of the theory advanced by Watson might be questioned. Firstly, it is problematic to draw far-reaching conclusions concerning legal borrowing based on a development that took place a millennium ago and under conditions very different from our own. The rediscovery of the Corpus Iuris Civilis could not have come at a better time as the need for codified legislation was dire throughout the European continent.[21] Secondly, a dysfunctional law might be the very symptom of a dysfunctional society thus proving that there is in fact a connection between law and society. Many Soviet laws, e.g., were, just like the society in which they operated, unjust as well as technically flawed and did not meet the needs of the population. Thirdly, although lawyers draft, interpret, and reinterpret laws, societal and economic factors do have an impact on the law-making elite. Politicians might, e.g., demand laws, the content of which is not necessarily supported by individual lawyers or even the legal community as a whole.

At the other end of the spectrum is the so-called mirror theory of law, which varies in rigidity depending on the writer. While Otto Khan-Freund argued that a true knowledge of a specific legal order requires more than being accustomed with its written laws, i.e., knowledge of its social and political context,[22] in Pierre Legrand's opinion the cultural differences between countries are so great as to render legal transplants basically impossible.

According to Legrand, rules carry a cultural baggage and, because of how they operate as opposed to what their wording is, they cannot travel.[23] According

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20 E. Wise, "The Transplant of Legal Patterns", *American Journal of Comparative Law,* Vol. 38, 1990, p. 4.

21 P. Legrand, "The Impossibility of Legal Transplants", *Maastricht Journal of European and Comparative Law*, 111, 1997.

22 O. Khan-Freund, "On Uses and Misuses of Comparative Law", *Modern Law Review,* vol. 37, no. 1, 1974, p. 27.

23 P. Legrand, "What Legal Transplants" in D. Nelken, J. Feest (eds.), *Adapting Legal Cultures*, Portland, Oregon, Hart Publishing, 2003, p. 57.

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to this view, those who perceive rules as being able to travel tend to have a formalistic view of law as a law-as-rules model that is unmoved by the society in which it operates. However, this judgment may seem somewhat deterministic. It all comes down to what you read into the term *legal transplant* or, indeed, a successful legal transplant. In reality, legal rules do travel, just like organs are transplanted from one person to another. Naturally, the transplant will be affected by the new host and vice versa. As legal rules are essentially words and words have meaning, the new host might give the rule a slightly different interpretation than the one it had in its original context. The interpretative act will no doubt be affected by the context in which it is undertaken, i.e., the society where the rule is now meant to operate.[24]

The new context notwithstanding, the transplant might still prove to function, albeit not in the same manner as it did in its original setting. Just like an organ transplant will not turn the receiver into the donor, the legal transplant will not have the same meaning in the new context. So, if an exact transposition concerning not just the wording of a legal rule but also the way it operates is our idea of a legal transplant, then we must, much like Legrand does, conclude that legal transplants are in many cases impossible in principle. If, however, we assume the stance that just like with a transplant patient the transplant might still function even if it does not function in the same way it did in its original context, then legal transplants appear to be possible.

The dictionary meaning of the verb *transplant* is "to lift and reset (a plant) in another soil or place" or "to remove from one place and settle and introduce elsewhere" or "transfer (an organ or tissue) from one part or individual to another",[25] Nowhere does it mention an exact transposition or functioning as a prerequisite for transplantation. Having taken the actual meaning of the word *transplant* into consideration, it seems as if Legrand is more concerned with the realities or rather impossibilities of legal cloning than legal transplants.

These two views of legal transplants painted above constitute to a certain degree opposite ideal types on a black and white spectrum.[26] In my opinion, the spectrum consists of a lot of greyish areas, and the end product, which differs depending on setting, is probably located somewhere in the middle.

24 U. Kischel, p. 12.

25 The Penguin English Dictionary, Penguin Books, 1985, p. 888.

26 It should be borne in mind that, for the purpose of this study, these views have been shortened and simplified. By no means is the ambition of the author to criticize these views per se. The purpose is to draw a picture of how the legal transplants theory might be adjusted to suit the questions addressed in this book.

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An analysis according to the legal transplants theory may very well start with what Legrand would call a law-as-rules model by examining the wording of the original source, in this case Article 3 of the Palermo Protocol. However, this does not preclude the possibility of viewing the transplant from a broader perspective, as a metaphor for the connection between the part and the whole, of both the giver and the receiver.[27] Moreover, such a perspective allows us to examine not only culture, as stressed by Legrand, but also the matter of reception of and the receiving country's perceived need for the transplant.

The concept of legal transplants, which, as has been mentioned above, forms an integral part of modern comparative legal methodology,[28] allows for an analysis that goes deeper than a superficial examination of the wordings of written laws. Moreover, through the prism of legal transplants, it is also possible to study the end result in its new setting, the soil in which it is meant to operate. The soil in its turn is not only made up of a specific rule or even a specific legal system but also relates to the deeper structures within which the system operates.[29] The legal past has importance for the legal present, for like all traditional practices law preserves certain values, rituals, and myths. Moreover, it tends to institutionalize these values in laws, case-law, and doctrine.[30] Values in turn are part of a legal culture, a concept, the meaning of which is rather vague, incorporated into the legal transplant theory.

In an attempt to explain legal culture, some scholars have divided it into three sub-dimensions where the first dimension concerns the valuation of individual liberty, i.e., the value that people attach to individual liberties, freedom, and integrity. Individuals' support for the rule of law forms the second dimension, and their perceptions of the neutrality of law form the third.[31]

These three dimensions are connected in that those who view law as a neutral force also tend to show support for the rule of law. The same is true for individual liberty, as those who attach great value to personal liberties are also more likely to consider law as autonomous rather than instrumental, and,

27 D. Nelken, "Towards a Sociology of Legal Adaptation" in D. Nelken, J. Feest (eds.), *Adapting Legal Cultures*, Portland, Oregon, Hart Publishing, 2003, p. 19.

28 L.A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations", *International Lawyer,* vol. 34, no. 3, 2000, p. 1065.

29 P. Legrand, "European Systems are not Converging", *International and Comparative Law Quarterly,* vol. 45, 1996, p. 56.

30 M. Krygier, "Law as Tradition", *Law and Philosophy 5,* 1986, p. 241.

31 J.L. Gibson, G.A. Caldeira, "The Legal Cultures of Europe", *Law and Society Review,* vol. 30, no. 1, 1996, p. 56.

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conversely, those who value the upholding of a certain social order higher than personal freedom are inclined to make exceptions from the principles of a rule of law society. They view law as an instrument in place to promote certain values through social engineering or as a means of subordinating a certain group or groups of people with differing opinions.[32]

Legal transplants have been broadly used to facilitate political, legal, and economic change in former communist states. The concept is presented in this specific context in the following section.

Legal Transplants in Context

Introduction

The events of the last decades, notably the fall of communist rule in Central and Eastern Europe and the subsequent law development movement,[33] clearly illustrate that research in comparative law should not be reduced to studies of law on books. In light of the fact that in some cases the high expectations for the Eastern European countries did not materialize, there is now a rather widespread consensus that certain issues such as legal culture vital to the legal development process were largely neglected.[34]

The international assistance offered to post-socialist states focused primarily on written laws in hope of securing legality and economic progress through legal transplants.[35] In lieu of the expected success, the results were mixed, at times even disappointing. Russia, e.g., experienced an uncontrolled privatization at the end of which national resources were located in the hands of a few well-to-do individuals. Today, the Russian legal system and judiciary are struggling with many problems ranging from corruption and a lack of transparency to an instrumental view of law and a lack of independence from the political branch as well as of proper training of judges.[36]

32 Ibid, p. 60.

33 The law development movement aimed at democratizing the post-socialist countries and was parallel to the so-called Washington Consensus in economic policy.

34 See, e.g., S. Pejovich, "Law, Tradition, and the Transition in Eastern Europe", *The Independent Review*, vol. 2, no. 2, 1997, pp. 243–254 on how the process of privatization was influenced by informal rules.

35 D. Berkowitz, K. Pistor, F.R. Richard, "Economic Development, Legality and the Transplant Effect", CID Working Paper No. 39, March 2000, *Law and Development Paper No. 1,* Centre for International Development at Harvard University, p. 1.

36 This has been expressed in, *inter alia*, an internal report initiated by the Russian state and conducted by the Center for Political Technologies. "Sudebnaja sistema Rossii. Sostojanije problemy", Tsentr Politicheskikh Tekhnologij. Po zakazu Instituta Sovremennogo Razvitija, Moskva, 2009.

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Although it is impossible to predict with absolute certainty whether a legal transplant will prove successful or not, there are, as has been mentioned above, certain conditions which are said to increase the possibility of a successful transplantation.[37] These factors include transmissibility, accessibility, reception, and perception.

Transmissibility

The first condition, transmissibility, deals with how easily the object to be transplanted can be detached from its original setting. In this case, the transplant stems from international law, the very aim of which is to be transplanted into national legal systems. This circumstance might, but does not necessarily have to, suggest a high level of transmissibility. This factor will be used when discussing the original source, i.e., the trafficking definition of the Palermo Protocol. For instance, issues such as what type of international agreement we are dealing with are relevant. Is it a bilateral agreement, a directive, or a treaty, etc.? What kind of perceptions, e.g., history, discourse, influenced the wording of the agreement?

When, by whom, and based on what prior documents was the protocol drafted are all important questions, as are the debates that took place during the drafting process. What was agreed upon during these debates and was there in fact a compromise? Intentions of the drafters are important as are compromises reached between the parties for they do in fact indicate that there were alternative views on the matter.

Language stands at the center of some of these questions and of the comparative method. It forms an integral part of the concept of transmissibility. In order to compare something, e.g., provisions on trafficking in different countries, a translation of certain central concepts needs to be undertaken. At this point problems might be encountered as a verbatim translation of a specific legal concept into another language may not exactly express the concept in question. Although legal borrowing or harmonization is a common phenomenon and has been throughout history, transplants often change upon reception. Although a new legal institution might be imported together with a certain word, it has been shown that such imports usually change once they come into contact with a different legal system. In effect, the same word no longer signifies identical objects.[38]

Since linguistically similar words may have different meanings in various countries (and even contexts), we must first turn to the original source.

37 E.M. Wise, 1990, p. 17.

38 U. Kischel, p. 12.

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The original language of the Palermo Protocol is English, and the subsequent translations are to be interpreted in the light of the English version and its spirit. Consequently, we shall take our departure in the English version of the Palermo Protocol. The central concepts in the protocol will be interpreted in the light of the general rules of interpretation of international treaties as expressed in the Vienna Convention on the Law of Treaties (VCLT) from 1969. Article 31 of the VCLT contains the general rule of interpretation and reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

In situations where the general rule of interpretation does not suffice, preparatory works to the treaty may be consulted and the context in which the treaty was drafted might also be taken into consideration. This is spelled out in Article 32 of the VCLT:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

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(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Therefore, the text of the Palermo Protocol as well as that of the Palermo Convention will be considered in Chapter 4. In order to accurately describe the spirit of the Palermo Protocol and the central concepts in Article 3, prior UN documents in this area as well as the Legislative Guide and the Interpretative Notes[39] to the protocol will be consulted. The drafting process will also be analysed. This will indicate the overall level of transmissibility in relation to the three state parties.

Accessibility

The second condition, accessibility, concerns the relation between two systems as well as possible linguistic barriers or similarities and might also influence the process of transplantation. Some Polish scholars, e.g., note that it is difficult to incorporate the trafficking definition of the Palermo Protocol into Polish criminal law due to the substantial differences with regard to, among other things, the legal traditions of the donor and the recipient. The protocol is written in English and therefore said to be influenced by a common law tradition which is not entirely appropriate when considering how Polish criminal law has traditionally been construed.[40]

The notion of accessibility covers different questions such as the legal and practical standing of international law in a specific country. It also concerns a country's (criminal) legal tradition. In a country where the legal provisions do not significantly differ from their practical application, it is enough to primarily consult the written law in order to be able to take into account the factor of accessibility. In Sweden, e.g., there are the preparatory works. These are official writings that include comments on the drafting process of the law such as opinions issued by authorities, researchers, and other interested parties as well as concrete guidelines on how a specific rule should be interpreted and applied.

In a rule of law country, where judgments are not only precedents but also published and easily accessible, it is fruitful to take these into consideration. In Russia and to a certain extent also in Poland, there are sometimes excessive gaps between the legal provisions and their practical application. It is therefore of importance to include materials that illustrate this discrepancy or

39 The Interpretative Notes and the Legislative Guide are preparatory works to the Palermo documents. Their status will be more closely described in Chapter 4 of this work.

40 O. Górniok, J. Bojarski, "Objaśnienie wyrażeń ustawowych" in M. Filar (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2010, p. 615.

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rather give an accurate description of the situation. In the Russian context, it is therefore not sufficient to only consider the trafficking provisions. A more profound knowledge of the Russian Criminal Code is necessary if, e.g., we are to discuss the rules on relief from criminal responsibility, which in turn do not always directly mention the Russian concept of social dangerousness but where the concept is central to both their actual wording and practical application. The Russian concept of social dangerousness in turn cannot be properly understood in isolation from the specific context in which it operates, i.e., the Russian legal culture, which cannot be understood set alone from the general culture and history of the country.

In some cases, the implementation of an original source is more successful than in others. Yet, all three provisions stem from the same source. To assume that any two countries due to linguistically similar terminology, i.e., trafficking provisions that are based on a common international definition, will experience the same problems in this particular area is to assume a rather reductionist stance as underlying differences in political and social values imply otherwise. They not only affect how laws are written but also their application as well as the minds of persons who apply the law and vice versa.

Although Russia attempted to distance itself from communist ideology after the collapse of the Soviet Union,[41] it seems logical that some traits of the latter would remain both in the Russian legal system and in its political life. It is therefore not unreasonable to ask whether the attitude towards international law in Russia, especially within the field of criminal law (an area which traditionally has been viewed as falling predominantly under national influence), has undergone a profound change so as to be able to accommodate a proper transplantation of the trafficking definition of the Palermo Protocol into Russian criminal law.

Reception

The study of the national situations with regard to trafficking will not limit itself to analyses of criminal provisions and court rulings applying these provisions. It will also include research, state policy (including the practical application of anti-trafficking measures and policies), and NGO reports as well as national polls and media coverage on the topic. The factor that is visible in these sources concerns *receptivity*. This is a concept that among other things relates to possible similarities such as common values between the donor and the recipient.

41 G. Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe", *American Journal of Comparative Law,* vol. 43, no. 1, 1995, p. 95.

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Research indicates that the manner in which a country receives a legal transplant is more influential on the potential success of the transplant than possible similarities between the systems such as belonging to the same legal family. According to Pistor et al., a successful reception must fulfil two central criteria. Firstly, in order to be effective the transplant must be perceived as *meaningful* by the recipient. The transplant should fit the *soil* of the recipient as well as fill a specific gap where national legislation is either non-existent or considered inferior to the transplant. This also means that people must have a strong incentive to utilize the transplant and consequently to demand adequate institutions, the aim of which is to enforce the law. Secondly, the legislative, executive, and judiciary branches must be able to address and fulfil these demands while at the same time not infringing on legality.[42]

The process of reception is closely linked to that of perception as perception affects how transplants are received. The importance of perception for successful harmonization is defined in the following section.

Perception

The factor of reception is closely related to the concept of perception. Perception deals with questions such as whether the reception was forced (e.g., a result of international lobbying) or voluntary. It also considers the identity of the donor, whether the donor is viewed as a friend or as a competitor, if there are geographical or cultural ties to the donor, or if a high level of prestige is involved, e.g., when the donor is viewed as politically superior. Perception also relates to the need, real or perceived, of the recipient for the transplant as well as to how the phenomenon of trafficking is being conceptualized.

It should be added that the division between these four factors, i.e., transmissibility, accessibility, reception, and perception is somewhat artificial. This means that perceptions of trafficking and of the victims of the crime influence how laws are written and, above all, applied, and vice versa, meaning that laws have the potential to influence how trafficking is conceptualized.

In summary, the analyses of the national trafficking provisions, i.e., the new entities fostered by the adoption of the original source, consist of two parts. While the first part contains the strictly legal discussions, the second part looks at the transplant according to factors of *accessibility*, *receptivity*, and *perception* and compares the findings from each country to each other as well as in relation to the original source. All these factors are, furthermore, expressed in and

42 D. Berkowitz, K. Pistor, J.F. Richard, "The Transplant Effect", *American Journal of Comparative Law,* vol. 51, 2003, p. 167.

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reinforced by language. Below, the role that language plays in this study is explained in more detail.

Importance of Language

> To share a language is to share a form of life
> LUDWIG WITTGENSTEIN

This study attempts to adopt a language-sensitive approach. Although there will be no specific chapters on the importance of language save for this section, the ambition is to apply a language-sensitive approach to the whole body of the analysis. The role of language is of such significance for the underlying hypothesis and theoretical framework of this work that all parts of it will be permeated with this approach.

During the last couple of decades, linguists have become more interested in legal systems as potentially interesting objects of study. Lawyers have also, especially in light of the prevalent trend of internationalization and harmonization of law, realized the importance of acknowledging the role of language in law. Language is viewed as not only a reflection of reality but is also believed to partly constitute that reality.[43] However, the typical research in comparative law is said to be ignorant of this ambition as scholars attempt to perform legal rather than literal translations, thus disregarding certain linguistic aspects.[44]

Looking back, written texts became one of our main sources of historical knowledge, but legal texts, much like history, do not write themselves. We can only interpret events that someone believed to be important enough to describe. Consequently, we miss out on the events that for some reason have been left out. We experience the Grand Narratives, the story about the story, but does this necessarily imply knowledge of all the other little stories that actually brought about the grand one? We thus become dependent on a specific author, whose context and presuppositions have an impact on what is written and thus preserved for us to read.[45]

We must therefore consider, e.g., the Palermo Protocol in its specific context, asking questions such as what happened during the drafting process

43 C. Hutton, *Language, Meaning and the Law*, Edinburgh, Edinburgh University Press, 2009, p. 57.

44 O. Brand, p. 31.

45 J.M. Conley, W. O'Barr, *Just Words. Law, Language and Power*, second edition, Chicago and London, University of Chicago Press, 2005, p. 116.

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and who influenced the document. The key is to be aware of the nature and limits of available records. Also, the relevant records should be analysed not only in relation to their legal content but also linguistically, socially and historically, for it is the linguistic details that have the potential to reveal things about dominant concepts or rather interpretations or definitions of certain concepts such as prostitution, trafficking, and victim which are not always detectable at a first reading of a relevant legal provision or court ruling.[46]

However, when studying legal texts, or any other text for that matter, it is not enough to consider the text in context. The reader must also be aware of his own pre-understanding. As Martin Heidegger maintains, there is no understanding without pre-understanding.[47] The reader, including a lawyer in the process of interpreting a legal text, is no tabula rasa. The wording of the law, or rather the law in context, is not absolute. The very activity of interpretation makes the latter statement apparent. Moreover, the legislator, although an abstract notion, is often said to have certain intentions. In order to be able to understand or rather reason about a particular law, we need to address the role of presupposition and how it affects both our own and other persons' understandings of things. Acknowledging the importance of presuppositions might help us understand specific court decisions, e.g., how courts conceptualize trafficking, how they construe a stereotypical victim of the crime, how they reason about circumstances that happen in other countries, etc.

How big of a role does pre-understanding then play in the interpretation of legal texts? We can attempt to answer this question by examining the influence of personal beliefs on law. If preconceived notions were irrelevant in the process of legal interpretation, there would be fewer conflicts over how laws should be applied and, by the same token, less legal debate. Of course, discussion would still take place due to the uncertainness of language, but it would arguably be less prominent if all people had the same pre-understanding of things. Further, in a way, it could be argued that it is our very pre-understanding or presupposition that makes language or words at times ambiguous.

We can clearly see the importance of pre-understanding in court rulings where judges with the same background (language, education, and legal system) voice different opinions on how a certain law should be applied.

46 Ibid, p. 117.

47 Very simply put, Heidegger claims that interpretation is grounded in preconception. Therefore, there cannot be any understanding without pre-understanding. M. Heidegger, *The Essence of Reason*, translated by T. Malick, Evanston, Northwestern University Press, 1962, pp. 191–192.

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Legal language, just like ordinary language and perhaps even more so,[48] is created by humans and is thus open to a certain degree of interpretation. A lawyer does not look at a text with a blank mind expecting it to write across her understanding one absolute truth. Just like an ordinary reader of an ordinary text, a lawyer looks at the relevant law based on a specific culture and from a particular set of beliefs, and from these beliefs, a certain understanding of what is reasonable, what is reprehensible, not acceptable, etc., arises. It is from this foundation that she reads the text and draws conclusions about the law. The ambition is not to address the particular law with a blank mind, which indeed is impossible, but to be aware of and to try to understand the beliefs that we bring to the text.

A judge, e.g., reads the trafficking law with certain pre-understanding of reality. That is not wrong, only natural. However, it affects the application of the transplant. The key is to be aware of pre-understanding and its role in interpreting the text so that some changes in the interpreter's world-view can be introduced where the text *in context* demands it. In short, pre-understanding is inevitable but should not be rigid. The key is to know and embrace the fact that I as a reader, whether in the capacity of judge, legal scholar, or layman, looking at a law, am not passive, having words of absolute truth enter my mind as I study the text.

In this particular case, there are several facets that might influence the author's pre-understanding such as being fluent in Swedish and Polish with a good reading knowledge of Russian; being a Swedish lawyer and thus part of the Swedish legal tradition but also being familiar with the Polish and Russian legal systems and cultures; being a woman, etc. I am sure that the list is not exhaustive. Further, none of this actually means something constant, for neither women nor lawyers are members of homogenous groups but instead are individuals.

Let us revisit the idea that the legal text should be considered in its specific context. Here, the hermeneutical circle makes for a useful illustration. It is said that a person's knowledge of the whole will improve if she acquaints herself with a particular part and vice versa. Put into perspective, it is not enough to study the Russian law on trafficking as this small part of the Russian Criminal Code and Russian legal tradition and history should not be analysed in isolation from the context in which it operates. To be sure, I can begin my analysis

48 Legal language usually strives to describe abstract notions such as *crime*, *intent*, etc., as opposed to dealing with nominal definitions like *tree* or *sun*. This makes legal language even more artificial than language in general and so arguably more prone to falling under the influence of human beliefs.

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by looking at this particular text but only to try to place it in a larger context to seek to understand its meaning as part of a larger whole.

When studying the Russian trafficking provision, the trafficking definition of the Palermo Protocol can serve as a reference point or example of how things might be understood and framed depending upon context. However, it should not blindfold me so as to prevent me from seeing definitional differences or make me dismiss other interpretations on their face as false, inadequate, or wrong just by means of comparison. By creating a certain conceptual system and establishing it as universal and most appropriate in all settings and under all conditions,[49] my world-view or pre-understanding might become so rigid that particular laws, texts, or theories cannot be challenged or even questioned but instead must be assimilated into the aforementioned system in order for it to be able to survive. In practice, this might imply that countries are required to change their legislation to get it in line with the protocol's definition of trafficking,[50] even though their own legislation suffices or perhaps even works more efficiently in their specific context than that of the protocol.

If I adopt a specific and rigid view of trafficking, my own understanding of trafficking might force itself on my reading of the Russian, Polish, or even the Swedish trafficking provisions, and so any other interpretation (when one specific interpretation is said to be set in stone) will be regarded as being problematic. If there really is only one possible universal definition of trafficking, then laws that are said to have incorporated this definition but de facto differ from it become problematic (for the definition's very survival or its ability to uphold its claim of universality).

In order to uphold the merits of the definition and make matters simpler, I can do one of two things.[51] I can either view the mere existence of a law that has resulted from a certain country's accession to the Palermo Protocol as enough for ascribing universality to the aforementioned definition or I can deem the legal situation concerning trafficking in the relevant country problematic based only on the study of this single provision. A logical conclusion in the second case would then be to alter the law in question. This would mean a

49 I am here referring to the international definition of trafficking as stated in the Palermo Protocol.

50 In this context it should be noted that the Palermo Protocol does not require for states to adopt linguistically identical definitions of trafficking, only that the spirit of the protocol be incorporated into national provisions. However, in practice, experts often equate proper implementation with identical or similar terminology.

51 Of course, there might be other actions that one can take, but the two described above are the most common ones.

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priori accepting the superiority of the protocol over national legislation in terms of being the best solution for the specific context. Accordingly, if national laws differ from the universal definition of trafficking that they are supposed to implement, some might (and do) argue that all or at least the majority of the problems associated with trafficking can be ascribed to this failure.[52]

The choice usually falls on one of the two abovementioned alternatives. International reports routinely encourage states to get their laws in line with the Palermo Protocol's definition of trafficking and to increase the penalties for trafficking. The relevant laws are not even evaluated, and the fact that the penalties often are quite tough to begin with is often overlooked, as are alternative explanations to the trafficking problem. Acknowledging these circumstances, however, would necessitate a new approach or at least some serious reconceptualizing and rethinking of central concepts set in stone. This in turn would complicate things and, above all, put the definition of trafficking of the Palermo Protocol or rather the definition's supposed universality under scrutiny.

That being said, it is not my intention to argue that laws on books do not matter. However, the process of drafting legislation, especially in the case of legal transplants and legal harmonization, should be sensitive to specific contexts. It is, e.g., not true that some nationalities are inherently immune to the concept of human rights and predestined to stay so, but the existence of differing internal norms stemming from historical experience, like a certain 'culture'[53] of corruption or other forms of social conduct, is of importance for the creation and application of laws. It should therefore not be overlooked due to reasons of political correctness or a misconceived notion of a prejudice-free approach.

Again, this does not imply that a situation cannot be improved by formulating new laws. It does, however, mean that laws are not always the main problem or, for that matter, the solution. Quite the contrary, new laws drafted in order to adopt international definitions might further complicate an already troublesome situation. When transplanting legal rules, there usually are some

52 International organizations, at least prior to the Palermo Protocol, depicted the lack of an international definition of trafficking as one of the main obstacles to a successful fight against the practice. The Palermo Protocol similarly acknowledges criminal measures (in the form of a universal definition of trafficking) as the main tool for countering trafficking.

53 *Culture* is here understood in regard to its dictionary meaning and not something that is an inherent part of a person or of a specific nationality. The Penguin English Dictionary defines culture as "the *socially* transmitted pattern of human behavior that includes thought, speech, action, institutions, and man-made objects".

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fundaments upon which new laws can be built. Perhaps there is no need to bring out the proverbial carbon paper in order to incorporate the *spirit* of the transplant into the new law. Naturally, anti-trafficking measures are necessary as is the ambition to help victims of trafficking and to bring the offenders to justice, but this can arguably be done in more and perhaps better ways than by striving to create linguistically universal legislation.

Also, if we always work from the assumption that the definition is universal, we risk giving the definition a life of its own. In such cases, a theory might become the only legal solution to the trafficking problem and therefore, in a sense, beyond reproach. If focus is always on this or that law's compatibility with the trafficking definition of the Palermo Protocol, the question of whether the definition itself is adequate becomes secondary if not peripheral. Reports from international organizations usually do not question the merits of the Palermo Protocol's definition of trafficking. Quite the contrary, the definition is routinely referred to as a benchmark against which all trafficking laws should be evaluated. What is more, the merits of the definition and its said universality are sometimes taken by researchers as a priori knowledge.

The country analyses strike at the very heart of the problem of or discussion on legal borrowing; the harmonizing of national laws through international measures; and the importance of language and 'culture' when evaluating the success of legal transplants as well as potentially creating new and more appropriate ones. Language forms an integral part of the analytical tool that has been developed for this study. Through language (in laws, court practice, legal doctrine, policy documents, national polls, the media, etc.) we can study the soil where the original source is to be transplanted as well as the end product. Through language, we can also examine the processes of perception and reception which influence how the transplant functions, and above all we can see how language influences law in action, i.e., how a law is applied in specific cases, how evidence is evaluated, etc. Before proceeding to the analyses of the original source and the transplants spawned by it, the social practice of trafficking will be described in more detail.

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CHAPTER 3

Human Trafficking as a Social Practice

Introduction

In order to be able to discuss the legal definition of trafficking, we need to acquaint ourselves with the characteristics of the phenomenon. Consequently, before proceeding to an analysis of the legal definition of trafficking, the nature of the crime is discussed in more detail. First, factors that are thought to drive trafficking, i.e., so-called push and pull factors, are touched upon. Then, different perspectives of looking at trafficking, e.g., migration and gender, are addressed. This chapter is intended to function as a backdrop for the following analyses of the international definition of trafficking and the national provisions that this definition has inspired.

Trafficking: An Overview

Human trafficking constitutes a highly lucrative business. People all over the globe are being sold, bought, and maltreated against their will. Various organizations give different estimates as to the scope of trafficking. The lack of exact statistics has prompted some states to act in accordance with the saying out of sight out of mind, i.e., to deny that they have a trafficking problem. It has been said that it is only by understanding the depth and scope of human trafficking that we can adequately address the issue of how to counter it. At the same time not much knowledge on the crime has been attained, which in effect has made anti-trafficking efforts inadequate and disjointed.[1] Although trafficking statistics will never be entirely precise due to the phenomenon's clandestine nature, other factors can be used as indicators. The statistics of countries of origin concerning emigration can, e.g., be used as an indicator of trafficking. According to Ukrainian emigration statistics, during a ten-year period beginning with the demise of communism some 400,000 women had migrated from Ukraine.[2] Another indicator might be found in national polls. In such polls conducted in Poland in 2001 and 2005, every fifth woman responded that she would not hesitate to accept

1 "Global Report on Trafficking in Persons", UNODC, 2009, p. 2.

2 O. Malynovska, "International Migration in Contemporary Ukraine: Trends and Policy", *Global Migration Perspectives,* no. 14, Global Commission on Migration (GCIM), 2004, p. 31.

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a dubious job offer abroad, while every fourth woman claimed that she would accept a 'normal' job offer without examining its legitimacy.[3]

Though states view trafficking as a crime that affects the victim and, especially when an organized crime group is involved, the state's security and immigration restrictions,[4] there are other areas that need to be recognized. The trade can assume various forms such as forced labour, illegal adoptions, and even human organ and tissue removal. In this context, it is also important to mention that trafficking is not only a transnational crime but that so-called internal trafficking is also common in many countries. Typically, people living in poorer rural areas or minority Diasporas are sent to richer regions of the country. However, on both the international and national levels focus has mostly been on transnational trafficking.

Trafficking in human beings is not 'just' a crime. It is a practice that affects entire societies or rather the very fabric of democratic societies. It undermines the very foundations of liberal democracies by violating principles of integrity and human dignity.[5] If not a direct purpose, the consequence of trafficking is that human rights are violated. In truth, the human dignity of the victims is being infringed upon. Human trafficking also leads to loss of human capital, drives organized crime, fuels political corruption, and causes the spread of HIV and other venereal diseases.

Trafficking in Human Beings after the Demise of Communism

After the end of the Cold War, the post-communist states have emerged as one of the main regions of origin for victims of trafficking. There are so many Russian-speaking victims of trafficking in the global sex industry that they have collectively been dubbed 'Natashas'.[6]

Although the demise of communism in Central and Eastern Europe opened a door to or at least a Pushkinian window on Western Europe, the long-term

3 "Wiedza i opinie o handlu kobietami. Komunikat z badań", Centrum badania opinii społecznej, Warszawa, 2001, http://www.cbos.pl/SPISKOM.POL/2001/K_124_01.PDF, (accessed 19 May 2014) and "Polacy o zjawisku handlu kobietami. Komunikat z badań", Centrum badania opinii społecznej, Warszawa, 2005, http://www.cbos.pl/SPISKOM.POL/2005/K_008_05.PDF, (accessed 19 May 2014).

4 A. Gallagher, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis", *Human Rights Quarterly*, vol. 23, 2001, p. 976.

5 T. Obokota, *Trafficking in Human Beings from a Human Rights Perspective. Towards a Holistic Approach*, Leiden, Martinus Nijhoff Publishers, 2006, p. 9

6 See, e.g., V. Malarek, *The Trade in Natashas. Inside the New Global Sex Trade*, New York, Arcade Publishing, 2004.

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processes of economic, political, and legal transformation are not yet at their end. In some cases, we might have to accept the idea that some states are just not heading for democracy and market economy.

Economically, many of the countries in this region continue to fall behind their Western neighbours while political instability and corruption hinder further reforms. Poverty and unemployment rates, especially among women, are still exceedingly high. This development is termed the *feminization of poverty*.

Political instability, deficient law enforcement, and lacking border control mechanisms in the Eastern European states (this concerns primarily the countries of the old Soviet Union including the CIS states) created the perfect environment for criminal activities.[7] These factors, together with the opening up of borders to Western Europe and the process of globalization, particularly advancement in communication and transportation, have led to an increase in trafficking in human beings. Restrictive immigration policies in the destination countries combined with the fact that there are few legitimate job offers in Western Europe for foreign nationals with elementary education and no language skills have created optimal conditions for traffickers and human smugglers to capitalize on the dreams and false hopes of the less fortunate ones.

Where trafficking is concerned, there is also the matter of political and financial corruption. Corruption makes organized crime very difficult to counter as criminals may bribe or even threaten judges and law enforcement officials. Sometimes, high ranking officials are involved in illicit activities.[8] In Ukraine, e.g., convicted traffickers seldom serve time in jail.[9]

Trafficking in human beings as a social phenomenon is usually explained in terms of specific push factors in the countries of origin and pull factors in the countries of destination. In the following, these factors will be described in more detail.

Push and Pull Factors

Trafficking as a social practice is often explained in terms of factors of push and pull. The push factors, on the one hand, are connected to the concept of

7 L.I. Shelley, "Russia's Efforts to Combat Human Trafficking: Efficient Crime Groups versus Irresolute Societies and Uncoordinated States" in W.A. Pridemore (edt.), *Ruling Russia. Law, Crime and Justice in a Changing Society*, Lanham, Rowman & Littlefield Publishers, 2005, p. 181.

8 During 2010, several high ranking officials in Russia including a police colonel and a senior military officer were exposed for their involvement in trafficking. See "Russia", TIP Report, 2011.

9 See, e.g., "Ukraine", TIP Reports from 2009, 2010 and 2011.

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supply, i.e., the supply of victims depends on the existence of specific push factors. These are found in the countries of origin. Pull factors, on the other hand, are to be found in the countries of destination. They include demand but also other factors that influence the decisions of migrants and traffickers. The *push factors* can be divided into s*ocioeconomic, sociocultural, political,* and *legal factors* (and sometimes also environmental factors).[10]

During the 1990s, privatization, the aim of which was to transform the centralized planned economies of Eastern and Central Europe into market economies, commenced. The first thing on the agenda was to introduce and institutionalize the concept of private ownership, i.e., to adopt laws and create institutions, the purpose of which would be to establish and protect property rights of both individuals and legal entities. In the communist countries, politics and economy were intertwined. The resources were therefore not utilized effectively. Unsuccessful enterprises, e.g., were rarely liquidated.[11] As a result of privatization, many people, mostly women,[12] lost their jobs.

Transition also led to a collapse of the old social safety nets, leaving many people impoverished. In that context, many were forced to consider more unconventional methods of earning a living including prostitution. An interesting fact is that Russian women victims of trafficking frequently differ from trafficking victims from other countries in that they often have secondary and even post-secondary education.[13]

Sociocultural factors are closely intertwined with socioeconomic factors. As has been mentioned above, the privatization process in the former communist states led to high unemployment rates, especially among women and people living in rural areas. Even in richer countries like Poland, unemployment rates are significantly higher among women.[14] This is also true for certain minorities and is a result of discrimination based on ethnic

10 See, e.g., "Push Factors", Globalization 101, http://www.globalization101.org/push-factors/, (accessed 19 May 2014).

11 K. Hobér, *Transforming East European Law*, Uppsala, Iustus Förlag, 1997, p. 171.

12 D Hughes, "Trafficking for Sexual Exploitation: The Case of the Russian Federation", IOM, 2002, p. 12.

13 See, e.g., "Victims of Trafficking: Who are they? A Statistical Profile for the Period of March 2006 – 15 November 2009", IOM, US State Department et al., p. 13, http://www.no2slavery.ru/files/Statistic_FINAL_424_eng_fin.pdf, (accessed 19 May 2014). Among Russian women with secondary education some 22% had completed secondary education and 62% had unfinished secondary education while only 16% had less than nine years of education. Among those with post-secondary education, 24% had a college education.

14 "Krajowy Program Działań na Rzecz Kobiet – drugi etap wdrąźeniowy na lata 2003–2005", Warszawa, p. 19.

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background.[15] One example is the Roma population that is usually economically worse off than the majority population. Most of the children abducted from Albania for the purpose of organized begging in Italy come from Roma communities.[16] A study on the recruiting process of children trafficking victims from Romania indicates that children of Roma origin run a higher risk of being trafficked than ethnic Romanians,[17] and similar results have been shown for other countries of origin.

Another group that has suffered especially greatly from exploitation in trafficking is the Russian-speaking minority of the Baltic countries, especially in Latvia. Apparently there are different possibilities or rather different circles in the Dantonian hell for trafficked women depending on their ethnicity. While women of Latvian ethnicity usually end up in brothels in Germany, Russian-speaking women residing in Latvia might find themselves in the most hellish of situations along the highways between major European cities or in the Balkans.[18]

With the advancement of technology, people living in the poorer regions of the world have been made even more aware of their own difficulties as well as exposed to the lifestyle of the 'rich'.[19] Many people whose dreams have been inspired by the vivid pictures of relative wealth portrayed on soap operas and the like have left the region in hope of a better life which has led to a substantial loss of human capital in the countries of origin.

There also seems to be a connection between hard economic conditions and increased violence against women and children. A couple of years ago, domestic violence in Poland reached such proportions that a nationwide televised campaign with the telling slogan *Dom to nie ring* meaning *A home is not a boxing ring*, was launched. According to some scholars, this development can

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15 T. Obokota, 2006, p. 44.

16 "Trafficking in Children in South Eastern Europe: Situation Overview", Stability Pact for South Eastern Europe – Task Force on Trafficking in Human Beings, UNICEF, 2002, p. 1.

17 "Trafficking in Children in Romania – Study on the Recruiting Process", General Inspectorate of Romanian Police National Agency against Trafficking in Persons, Twinning Project PHARE RO2006/IB/JH 08, 24 November 2009, p. 50 and G. Fusu-Plaiasu, I. Ionescu, and R. Iordache (eds.), *Fra Thematic Study on Child Trafficking. Romania*, European Union Agency for Fundamental Rights, p. 20.

18 Interview conducted by the author with A. Vaisla, Head of Unit 2, Drug Enforcement Bureau for Fight against Trafficking in Human Beings of the Organised Crime Combating Board of Main Criminal Police Board of State Police, Ministry of Interior, Latvia, on 11 May 2005 at 11:30 in Riga, Latvia.

19 D. Hughes, "Trafficking for Sexual Exploitation: The Case of the Russian Federation", IOM, 2002, p. 11.

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partly be explained by the reintroduction of certain values that portray women either as wives or mothers or as sex objects,[20] and partly by growing poverty and alcohol abuse.

According to some, trafficking is culturally constructed. Cultural values are, e.g., said to be a factor where the expectance of children to contribute to the family's economy is concerned. Children are sent to neighbouring cities and sometimes abroad to provide for the family and are expected to send home remittances. Thailand is mentioned as an example of a country where women and children are sometimes sold into prostitution as a means of contributing to the family's economy.[21] Moreover, this also occurs in poor European countries such as Albania.[22] There have also been incidents in both Poland and Russia of parents trying to sell their children.[23] In many of these instances it is, however, important not to demonize the parents. These often see no other choice than to send their children abroad or to neighbouring cities in hope of them securing an income or simply surviving. Usually, whole families share the same fate. Even though there might have been instances of parents selling their children for selfish motives, a vast majority simply do it to survive.

In some places men, due to their responsibility as the breadwinners (also a cultural construction), are expected to go abroad in search of work if none is to be found at home. This is especially true in post-socialist states such as Moldova, Belarus, or Ukraine.[24] In these countries the number of victims of forced labour is reported to be higher than the number of people trafficked for sexual exploitation.

Political and legal push factors can also influence the patterns of trafficking. Regional conflicts like those in the Balkans or Caucasus aggravate the situation

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20 J.E. Johnson, "Violence against Women in Russia" in W.A. Pridemore (edt.), *Ruling Russia. Law, Crime and Justice in a Changing Society*, Lanham, Rowman & Littlefield Publishers, 2005, p. 163.

21 T. Obokata, 2006, p.44.

22 B. Scharlowski, S. Prata, "How Children are Exploited in Europe", International Foundation terre des homes, EU Forum on Prevention of Organized Crime, Brussels, 2004, p. 5.

23 In February 2012, a woman tried to sell her five-year old son for 300,000 Russian rubles to a policeman who was working undercover and posing as a potential buyer. Reportedly, she did not ask any questions and was only interested in receiving the money in order to be able to start her own company. See information posted by the Russian Ministry of Interior, "V Khabarovskom kraije zaderzhana zhenshchina, pytavshajasja prodat' svojego maloletnego rebenka", 28 February 2012, http://pda.mvd.ru/news/item/157635/, (accessed 19 May).

24 "Trafficking of Men – A Trend Less Considered", *IOM Migration Research Series*, no. 36, 2008.

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by fuelling political instability and thus economic regression. In the 1990s alone, nearly 3.6 million people died as a result of internal conflicts while 'only' 220,000 deaths were attributed to conflicts among states. Research indicates that civil conflicts tend to erupt as grave horizontal inequalities between groups (be they ethnic, religious, or social) become apparent.

The collapse of the Soviet Union has produced an identity crisis among the native Russians,[25] which is one of the reasons behind the conflicts taking place in the Caucasus today. This identity crisis is illustrated by the preamble of the Russian constitution which speaks of *Rossija* (motherland) and *Rossijskaja Federatsija* (the power, the federation of states) and refers to some of its subjects as *Russkij* (ethnic Russians) and to others as *Rossijskij* (citizens of the Russian Federation).

Trafficking laws of many countries of origin are either non-existent or flawed or the implementation is poor. Corruption plays an important role as some officials are either directly or indirectly involved in the illegal trade.[26] The combination of the element of organized crime, flawed laws, and poor law enforcement creates prospects for illegal migration to thrive. As an example, so-called employment agencies can be mentioned. Some of these enterprises organize trafficking behind seemingly legal facades. They advertise in the local press, arrange meetings between 'employers' and potential victims, and provide detailed information about the possibilities of employment abroad. At times, these organizations operate without proper licences. In 2003, Moldovan authorities estimated that more than two hundred employment firms were operating without legal permits, whereas only thirty-five agencies were authorized.[27] At the same time, the interest to find work abroad was huge among the Moldovan population, with more than twenty thousand young women leaving Moldova every year.[28]

In addition to factors present in the countries of origin that influence the supply of victims, organized crime, etc., there are also factors in the countries of destinations that influence trafficking patterns. These so-called *pull factors* are usually described as antonyms to the push factors. Obviously, one of the main incentives to move abroad is to improve one's financial situation, so

25 A. Agadjanin, "Revising Pandora's Gifts: Religious and National Identity in the Post-Soviet Societal Fabric", *Europe-Asia Studies,* vol. 53, no. 3, 2001, p. 473.

26 D. Hughes, "The 'Natasha' Trade: The Transnational Shadow Market of Trafficking in Women", *Journal of International Affairs,* 2000, p. 9.

27 T. El-Cherkeh et al., "EU-Enlargement, Migration and Trafficking in Women: The Case of South Eastern Europe", HWWA-Report 247, Hamburgisches Welt-Wirtschafts-Archiv (HWWA), Hamburg Institute of International Economics, 2004, p. 82.

28 Ibid, p. 79.

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countries with healthy economies and generous welfare systems might be prioritized, but there are also other factors that might entice people to migrate. Persons living in regions plagued by conflicts yearn for political stability. Some may be contemplating migration in order to escape discrimination, be it racial or based on gender. However, there are also additional factors which can affect a potential migrant's decision.

Just like language or cultural barriers between the country of origin and destination might make a person question the decision to migrate, the opposite might tip the scales in favour of a move. Geographic proximity as well as relatives or large diaspora communities living in the potential country of destination are also factors that are said to influence the migrants' decisions.

It should be borne in mind, however, that the demand for cheap illegal labour, sexual services, or organs for transplantation in the destination countries indirectly influences the trafficking process since traffickers will send the victims to where the demand for their services is the most substantial. Can we then argue that trafficking is both supply and *demand* driven? Some people may say that they would not buy a product if they knew that it was produced by exploited labour or that they would not solicit the services of a trafficked sex worker and that they by that logic do not demand trafficking. This might be true if we adopt a more narrow interpretation of the concept of demand. If, however, demand is seen in a broader context and arguably from a more logical point of view, it seems that our actions as consumers of both goods and services do have an impact on trafficking. For example, demand might encompass an employer's need for cheap labour, or a consumer's request for cheap goods and services.[29] Having discussed the push and pull factors, it is now time to look at the ways in which trafficking can be addressed and at the various areas that the crime affects.

Trafficking can take many different forms and thus be seen from various perspectives. From the point of view of the victim, it is all about finding better living opportunities by means of migration. A state might see the very same action as a violation of its laws on migration, labour, etc. It might also see the people responsible for it, i.e., the criminal organization, as a security threat. International human rights organizations see trafficking not only as a crime but also as a violation of basic human rights. There are thus several stakeholders and perspectives in this area. In the following, the different ways of looking at trafficking will be addressed in more detail. We will start with the umbrella concept of migration.

29 "Is Trafficking in Human Beings Demand Driven?", *A Multi-Country Pilot Study*, no. 15, IOM Migration Research Series, IOM, 2003, pp. 9–10.

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Trafficking from Various Perspectives

Trafficking from a Migration Perspective

Migration is a common and essential characteristic of life. Throughout time, entire societies have been developed and destroyed as a result of movements of people. Nevertheless, the people migrating irregularly today are in vulnerable situations. Being under the radar of their host countries makes them especially susceptible to various forms of exploitation such as being trafficked.

People have been migrating in search for better life, work, or even refuge from wars or natural disasters for ages. In that sense, migration is not a new phenomenon. However, its flows have even during the last decades undergone some important changes. Although most people migrate within their own countries as a result of urbanization, some 200 million people are believed to have migrated internationally.[30]

There are several reasons why the migration of today differs from past movements. The first reason is its international nature, which is said to be the result of globalization. Globalization affects the way that people become aware of conditions existent in other countries as well as the way that people travel. It is also said to increase the number of possible countries of origin and destination. The circumstance that the number of migrants seems to be on the increase constitutes the second reason. The third reason is the differentiation of migration as in people of various ethnicities forming the migration flows. Migration has increasingly become a political issue as states see it as a potential risk to, e.g., their welfare systems or even, when irregular migration is considered, as a security issue. The securitization of migration thus forms the fourth reason while the fact that contemporary migration as a result of its alleged feminization is often addressed in terms of gender is the fifth reason. This last characteristic of modern migration will be addressed in more detail in the section below.

Global migration is usually divided into regular and irregular migration. The latter can be divided into smuggling and trafficking, though in reality the line between these two is often blurred. Irregular migration violates the migration laws of states. The practice takes on several forms, one being a family-organized form of illegal entry. A person may try to enter the relevant country on the basis of a valid document issued to a family member of similar appearance. Another way of gaining illegal entry to a country of destination is via smuggling. This is usually facilitated on a larger scale by organized crime groups. The smuggling of persons is perceived as a crime directed against the state, notably

30 “Human Development Report”, 2009, UNDP, p. 1.

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the state's right to control its own borders. The smuggled persons' consent to the offence often prevents the authorities from seeing and thus treating these persons as victims.

Although a person might consent to being smuggled and perhaps even initiate the transaction, the conditions under which the subsequent smuggling is carried out might differ greatly from the initial agreement. It is a well-known fact that people have been seriously injured or even killed during illegal and dangerous transports. Some persons, particularly those who have not been able to pay the smugglers upon departure but have promised to pay them back as soon as they start earning money in the new country, may fall victim to forced labour, sexual exploitation, or both. In such cases, it is difficult if not impossible to draw a clear line between trafficking and smuggling.[31]

The fact that smuggling circumvents national laws and governance systems and is often organized by international crime syndicates, poses a serious threat not only to individuals but also to states. This concerns both countries of origin where so-called brain drain and the general drain of workers might occur and countries of destination where illegal entities will attempt to circumvent, among other things, migration and labour laws of the relevant country.

One of the main forms of both regular and irregular migration is labour-driven. The possibility of finding jobs with better wages, combined with employers who are willing to hire irregular workers and consumers who are interested in cheaper products and services, constitutes a significant pull factor.

Trafficking from a Gender Perspective

Over the last three decades, the overall number of female migrants has been on the increase. Also, between the years 1965 and 1990, the number of women migrants in the most important, industrialized as well as developing, receiving countries actually grew faster than the number of their male counterparts. Today, female migrants constitute some 50% of all migrants.[32] The real change of the last decades, however, relates to *how* women move. The majority of women now migrate independently, not as wives or daughters but as individuals in search of work opportunities. Moreover, some women migrate as primary breadwinners for their immediate or extended families. As a result of the increasing flows of women migrants, the concept of the feminization of migration has been coined.

31 J. Fitzpatrick, "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking", *Michigan Journal of International Law,* vol. 24, 2002–2003, p. 1150.

32 "Human Development Report", 2009, UNDP, p. 25.

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This concept breaks with the traditional migration theories where women migrants were mostly viewed as dependents following their husbands or male family members. As a result of (independent) migration being viewed as a distinctly male practice, the notion of women as individual migrants remains somewhat under-researched. Arguably, this has made an imprint on modern acts concerning irregular migration such as the Palermo Protocol on smuggling,[33] which is said to have been created with an idea of a stereotypical male migrant in mind. While the stereotypical picture of an independent migrant is a male in search of work abroad, the stereotypical victim of trafficking is often portrayed as a docile, coerced young female.

However, the stereotypical ideal of the 'coerced innocent' is arguably "too simplistic to reflect the reality of the majority of known trafficking situations"[34] as most victims of both trafficking and smuggling make conscious decisions to migrate although their decisions may be based on fraudulent information. The aforementioned stereotypes may hinder some traditionally atypical victims from receiving the state assistance to which they are actually, at least morally, entitled.

What, if any, differences are there then between male and female migrants? Generally speaking, some uniting factors exist, but there are also considerable discrepancies. Both men and women may be tempted to migrate as a result of political instability or as a way of escaping from natural disaster. In the majority of cases, however, poor economic and social opportunities in the country of origin and, presumably, better opportunities in the relevant state of destination influence the migrants' decisions. Both sexes move in search of better work opportunities, to support family members, to find better living conditions, education opportunities for their children, etc.

The setting in which a person lives is also said to affect her potential to migrate.[35] In some regions of the world, unmarried, single, or divorced women are stigmatized by their own communities. In the case of some women who are stuck in abusive relationships or are victims of domestic violence, migration becomes a way out of abuse. Arranged marriages are still a common practice in some places of the world, making a considerable number of women migrate for this purpose.

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33 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

34 "Violence against and Trafficking in Women as Symptoms of Discrimination: The Potential of CEDAW as an Antidote", *Gender and Development Discussion Paper Series*, no. 17, Economic and Social Commission for Asia and the Pacific, December 2005, p. 7

35 See, e.g., "Human Development Report", 2009, UNDP, p. 13.

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Although poor and yearning for a better life, some women may traditionally be forbidden to take the step to leave their communities, something that in effect restricts their freedom of movement. Also, in some instances women are not considered as valuable as their male family members. If a family has limited financial resources to invest, the lot to stay put will usually fall on women.

The abovementioned circumstance constitutes one of the differences between male and female migrants. In certain cases, however, it may work in the opposite direction, as some women might see the traditional constraints on their mobility as a reason to move to a less discriminatory society.

Men and women also show different vulnerability to human rights abuses in the countries of destination, e.g., varying forms of exploitation or specific health risks. While men as a group may be more exposed to labour-related injuries such as falling when working without a safety line on a construction site, as a result of the exploitation in the sex industry, female migrants are more likely to contract sexually transmitted diseases like HIV.

Consequently, migration is not a gender-neutral practice. From the very moment that a woman decides to leave her country of origin to the time when she first arrives in her country of choice, and usually even thereafter, her decisions, experiences, and vulnerabilities to a large extent differ from those of her male counterpart. We can see that poverty and poor development drives both regular and irregular migration, as it works as a push factor that forces people to migrate. Below, trafficking will be discussed in that particular context.

Trafficking as a Result of Poverty, Development, and Education

The roots of trafficking in human beings are to a large extent to be found in poverty. Human trafficking in turn perpetuates poverty, which creates a vicious circle. Victims of trafficking usually come from the lowest strata of society. The subsequent exploitation perpetuates that state by denying them basic rights, e.g., the right to health care, education, security, etc.[36]

By studying court judgments, we can see that tough economic conditions indeed constitute one of the main factors that influence people's decisions to try their luck abroad. Research from different countries indicates that a vast majority of victims of trafficking were unemployed in their countries of origin. This especially relates to women, whose chance of finding a job is less than

36 T. Truong, "Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management", UNESCO, 2006.

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that of men.[37] As a result of the transition process, women were the first to lose their jobs. Moreover, as a result of the failure of social services, the main responsibility to care for the children and elderly and, in many instances, to provide for whole families, was put on women.[38] This development made women migrate in a hitherto unprecedented way.

Domestic violence as well as gender and ethnic discrimination perpetuate poverty, thus contributing to trafficking in human beings. Many victims are members of various minorities such as the Roma minority in South-eastern Europe or come from rural areas or cities with high unemployment rates. The majority of victims also have a very poor education, little or no language skills, and little experience of traveling abroad.

Trafficking perpetuates poor development by means of brain drain as well as the discrimination of women and ethnic minorities. In addition to being a development issue, trafficking is also seen as a serious security threat. This perspective will be addressed in the following section.

Trafficking as a Security Issue

The international community considers some illegal acts to be of a rather serious nature, constituting threats against society and men alike. In the context of the EU, these are the serious offences referred to in Article 83(1) TFEU.[39] According to the EU, organized crime takes a variety of forms: trafficking in human beings, drugs and firearms trafficking, money laundering, and the illegal shipment and dumping of waste inside and outside of Europe.[40]

Human trafficking is viewed not only as a serious crime against individuals but also as a form of organized crime that is often linked to other illegal

37 "Fattigdom och människohandel – En strategi för bekämpning av människohandel genom Sveriges internationella utvecklingssamarbete", Enheten för Global Utveckling, Stockholm, 2003, p. 13.

38 "Trafficking in Human Beings in South-Eastern Europe", UNICEF, UNOHCHR, OSCE, 2004, p. 68.

39 Article 83(1) TFEU pertains to the regulation of substantive criminal law and states that the European Parliament and the Council may establish minimum rules with regard to the definition of criminal law offences and sanctions in the area of particularly serious transnational crime. The provision stipulates a list of crimes in which the EU shall have legislative competence including terrorism, trafficking in human beings, organized crime, and money laundering.

40 "The EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe", Communication from the Commission to the European Parliament and the Council, p. 4, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0673:FIN:EN:PDF, (accessed 19 May 2014).

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practices. Apart from various types of smuggling that can be carried out in tandem with trafficking, there is also money laundering, where the profits stemming from various crimes like trafficking in human beings may end up. The latter practice can potentially enable criminals to invest in legitimate businesses, to influence politics, and even to run for political office.

Victims of trafficking may be forced to commit crimes such as theft and benefit fraud. This too impacts negatively on the economies and laws of the states of destination. The low-risk and high-reward nature of human trafficking contributes to making the practice an important security issue for states. Whereas the profits from the crime are significant, on par with profits from the illegal trade in narcotics and firearms, the risk of detection is comparatively low.[41]

One way of countering the abovementioned development has been to enforce proper legislation. Another way is to focus on vulnerable groups in the countries of origin and destination by trying to integrate them into their local societies. While these groups are particularly vulnerable to discrimination and abuse, they are also as a result of that isolation more likely to get involved in illicit activities. The same applies to aliens without residence permits and asylum seekers.[42] In addition to the fact that trafficking violates the migration and labour laws of the countries of destination, it is also a health threat to society. This threat is described in more detail below.

Trafficking as a Health Issue

Studies point to an increasing link between prostitution and HIV infection.[43] Furthermore, the same factors that increase a person's risk of being trafficked are the same that increase her vulnerability to HIV. Human trafficking and HIV/AIDS are caused by various root problems ranging from poor education and development possibilities, various forms of socioeconomic inequalities and lacking respect for human rights, to poor health protection.

Where data exist, the prevalence of HIV infection has been shown to be disproportionately high among people trafficked for the purpose of sexual

41 "Fighting Trafficking in Human Beings – An Integrated Approach and Proposals for An Action Plan", p. 4, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0514:FIN:EN:PDF, (accessed 19 May 2014).

42 "The Stockholm Programme – An Open and Secure Europe Serving the Citizen", European Council, p. 8, (2010/C 115/01), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF, (accessed 19 May 2014).

43 See, e.g., "Drugs and HIV/AIDS in Southeast Asia", UNODC, Regional Project for Reducing HIV Vulnerability from Drug Abuse (AD/RAS/02/G22), 2004, p. 42, http://www.aspacngo.org/Acrobat/drugReport/HIV_AIDS.pdf, (accessed 19 May 2014).

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exploitation. In this context, women are seen as especially vulnerable although young boys are also at risk. However, all victims of trafficking run a higher risk of being infected with HIV than other people.[44]

The very conditions in which forced prostitution takes place inevitably increase the risk of contracting sexually transmitted diseases like HIV. These are often marked by high numbers of clients, some of whom prefer unprotected sex, and poor hygiene, voluntary or forced use of narcotics, as well as inadequate health care for those already infected with sexually transmitted diseases.

Victims of other types of exploitation such as forced labour may also become exposed to unsafe practices which can increase the risk of contracting an HIV infection.

> HIV/AIDS has received little attention in efforts to address trafficking in persons, and specific HIV/AIDS prevention and care services hardly exist for these people. General responses addressing HIV/AIDS have little impact on trafficked persons due to the clandestine nature of human trafficking, and because people who have been trafficked are not usually reached by services.[45]

In addition to all the factors mentioned above, trafficking in human beings is also a grave violation of basic human rights. Actually, all of the factors mentioned in the previous sections can be summed up as breaches of positive human rights such as the right to health care and education. However, trafficking also violates the most basic, so-called negative, human rights by treating people as slaves. Below, trafficking as a human rights issue is discussed in more detail.

Trafficking as a Human Rights Issue

The by far most reprehensible element of trafficking is its severe violation of the victims' human rights and basic democratic principles. Traffickers not only violate the human rights of individuals but also certain values essential to the fabric of liberal democracies such as the prohibition of slavery. It is also important to keep in mind that the violation is not committed by a state against an individual but by individuals toward their fellow citizens.

44 "ILO Action against Trafficking in Human Beings", ILO, 2008, p. 31, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090356.pdf, (accessed 19 May 2014).

45 "People Vulnerable to Human Trafficking", UNODC, http://www.unodc.org/unodc/en/hiv-aids/more-about-people-vulnerable-to-human-trafficking.html, (accessed 19 May 2014).

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Trafficking is both a cause and a consequence of the violation of human rights and is explicitly recognized as such by the international community.[46] This was first officially acknowledged in the ECtHR judgment *Siliadin vs. France.*[47] In this case, the court looked into the situation of a girl from Africa held in servitude as a housemaid in France. That judgment focused on the failing of the criminal law framework of the country of destination in place at the time. The Court stated the obligation of the state signatories to the ECHR to penalize and prosecute acts of slavery, servitude, and forced labour. It thus highlighted the requirement for states to enact proper legislation that prohibits trafficking and to honour their obligations as set out in Article 4 of the ECHR.

In a judgment from 2010 the Court extended its reasoning. The case concerned the death of Oxana Rantseva and was brought before the court by the victim's father.[48] The woman was trafficked to Cyprus for the purpose of sexual exploitation. Within a few weeks she left her workplace but was traced by her employer who brought her to the police with the aim of having her detained and extradited as he wished to employ someone else. The police noted that the woman's stay in Cyprus was not illegal but nevertheless forced her to go back to her workplace with the trafficker. On that same night, the victim fell from a balcony to her death after trying to escape from her captor. Despite the peculiar circumstances of her death, the local police never investigated it as a possible case of human trafficking.

Whereas in *Siliadin vs. France* the Court focused on the state's obligation to penalise and prosecute trafficking, in *Rantsev vs. Cyprus and Russia* it also held that states have a positive obligation to prevent trafficking and to assist the victims of the crime. This means that not only are proper criminal provisions necessary, i.e., that individuals, so to speak, have a negative right not to get trafficked, but also that states must carry out preventive measures as well as offer victim protection. The latter implies that individuals also have positive enforceable rights in relation to states which in turn have a corresponding duty to protect these rights.

46 C. Rijken, E. de Volder, "The European Union's Struggle to Realize a Human Rights Based-Approach to Trafficking in Human Beings", *Connecticut Journal of International Law,* vol. 25, no. 49, 2009, p. 52. Report of the UN High Commissioner for Human Rights (UNHCHR), "Recommended Principles and Guidelines on Human Rights and Human Trafficking", 5, U.N. Doc. E/2002/68/add.1, May 2002.

47 Case of *Siliadin vs. France*, Application no 73316/01, Judgment 27 July 2005.

48 Case of *Rantsev vs. Cyprus and Russia*, Application no. 25965/04, 2010, Judgment Strasbourg, 7 January 2010, final 10 May 2010.

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Negative rights or obligations have always been viewed as inherent in the ECHR. This does not, however, apply to the positive obligations. Although some of these are explicitly set out in the ECHR, the concept as such, and the enforcements mechanisms for these types of obligations, did not appear until the late 1960s and the *Belgian linguistic case*.[49] From that point on, the ECtHR has continued to broaden this category of obligations. By the same token, the Court has strengthened the substantive requirements of the convention and connected them to procedural obligations which are independent of Articles 6 and 13 of the document.

While substantive obligations are drawn from specific provisions, procedural obligations are said to be drawn from these provisions in conjunction with Article 1 of the convention.[50] Article 1 has thus become a keystone of the convention system. It is said to form an independent source of general positive obligations with regard to states.[51] The motives of the Court have been to safeguard the rights of the individuals by guaranteeing them the effective enjoyment of positive rights. The nature of positive rights is such that states must take the necessary measures to safeguard these rights. These measures might be judicial, procedural, etc.

In *Rantsev v. Cyprus and Russia*, the Court also managed to incorporate other international instruments into its judgment, notably the Palermo Protocol. In this unanimous milestone judgment, the Court confirmed that trafficking cannot be considered consistent with the values of the ECHR, most notably Article 4 of the convention or with a democratic society.[52] Although not explicitly mentioned in the convention, trafficking in human beings falls

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49 *Belgian Linguistics Case* of 23 July 1968, 1 EHRR 252 as referred to in J.F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights. A Guide to the Implementation of the European Convention on Human Rights*, Human rights handbooks no. 7, p. 5.

50 See, e.g., Case of *Assenov and others v. Bulgaria*, Application no. 90/1997/874/1086, 28 October 1998, where Article 3 of the ECHR was applied in conjunction with Article 1.

51 See, e.g., Case of *Assanidze v. Georgia*, Application no. 71503/01, 8 April 2004, where the court held that Article 1 requires states to implement a system that would guarantee the application of the ECHR over all its territory and in relation to every individual.

52 The court held: "[b]y its very nature and aim of exploitation [human trafficking] is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere…It implies close surveillance of the activities of victims, whose movements are often circumscribed… It involves the use of violence and threats against victims, who live and work under poor conditions…"

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within the ambit of Article 4 which absolutely prohibits slavery, servitude, and forced labour.

The Court also clarified the obligation of states, as it argued that national authorities that are aware of a situation of human trafficking or of the real risk that an individual might end up in such a situation are required to take appropriate measures. This includes a procedural obligation to investigate situations of potential human trafficking and to cooperate with other state parties. This applies to states of origin, transit, and destination.

In the abovementioned case, Cyprus was found to have violated Article 4 in multiple respects including the obligation to create an effective administrative framework to prevent trafficking in general and the obligation to take protective measures in the case of the victim in particular. Russia had failed to investigate the alleged violation's start in Russia, after the Russian authorities had become aware of the victim's case.

The Court also found that Cyprus had violated the victim's right to her liberty, first by illegally detaining her at the police station and later by forcing her to go back with her employer. The latter action was said to be a clear violation of Article 5 of the ECHR as a result of the authorities having failed to observe their positive obligation to protect the victim from arbitrary detention by a third party. In this particular case, they had actually contributed to her loss of liberty and subsequent death.

This passage is interesting in light of the fact that many countries still lack appropriate procedures when dealing with trafficking victims. Even if traffickers get convicted, the victims may still be detained or even deported without notice. It is not unusual that they are re-trafficked upon return. This not only poses a risk to the victims but also makes them less inclined to cooperate with the authorities.

Trafficking is a very serious crime where the victims are often treated in a violent manner. They are threatened, beaten, and drugged. It is also not uncommon for victims of trafficking to get infected with HIV or to become pregnant and then be forced to undergo abortions. There have even been anecdotal reports of executions of women who had tried to escape from the traffickers. The alleged executions were public in order to deter other women who might have been contemplating escape. Traffickers often threaten family members and friends of the victim who are still living in the home country. This is precisely what makes the crime so dangerous, its links to several states. While the exploitation takes place in a foreign country or a different region within a specific country, the recruiter remains in the country of origin or the local community where he can threaten remaining family members. The discussions on

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trafficking as a social practice presented in this chapter will form a backdrop against which the crime of trafficking will be discussed in the following. I will start with an analysis of the international definition of trafficking in its specific cultural and historical setting, namely previous and current international legislation in this area.

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CHAPTER 4

The Role of the Palermo Documents

UN Trafficking Documents: Overview

In late 1990s, efforts against transnational organized crime were undertaken at the international level. States agreed that organized crime was becoming increasingly internationalized, which required international responses. To this end, the Palermo documents were drafted.[1] This chapter contains an analysis of the Palermo documents, i.e., the Palermo Convention and the Palermo Protocol on trafficking.[2] It describes the documents' importance and their mutual relation as well as by whom, why, and when they were drafted. Firstly, the Palermo Protocol is considered in its specific setting, taking into account the drafting process as well as the document's historical context. This is carried out according to the concept of legal transplants, more specifically the factor of transmissibility.

Secondly, the legal content of the documents is analysed. Emphasis is on the definition of trafficking as stated in Article 3 of the Palermo Protocol. Specific issues of interest, i.e., issues that might affect the national implementation process, are identified.

As has been mentioned above, trafficking in human beings affects highly politicized areas such as migration, labour, prostitution, etc. It therefore necessarily involves various perspectives and stakeholders with often disparate priorities. This disparity makes the crime difficult to tackle not only on the national but also on the international level. Also, the crime is a multinational problem. It therefore requires a holistic and international response. This response in turn must be supported and reinforced on the regional and national level. As has been mentioned above, the international community (e.g., the UN, EU, etc.) has agreed that a common definition of the crime is a first step toward progress in this specific area. If we are to address and compare something, one of the first steps is agreeing on what it is, and here is where the Palermo Protocol's definition of trafficking enters into play.

1 These documents include the UN (Palermo) Convention on Transnational Organized Crime and the Protocols thereto. The protocols address trafficking in human beings, smuggling in human beings, and the illicit manufacturing of and trafficking in firearms.

2 The other protocols that adjoin the Palermo Convention are not of importance in this context.

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Notwithstanding the fact that individual countries struggle with certain problems that might hamper anti-trafficking efforts on the national level, the international definition arguably has some potential to improve the overall situation in this area. Conversely, a troublesome situation cannot improve if we are working with an inadequate international definition of trafficking. This does not mean that the situation is not complicated, because it is. There are many problems, both national and international. However, we must start somewhere.

The international community has attempted to tackle the problem of human trafficking for over a century.[3] In that sense, the Palermo Protocol is not a novelty. However, the document does differ from its predecessors. The most important difference from previous international documents in this area is that the protocol sets out specific obligations vis-à-vis the state signatories. The parties to the protocol are *obligated* to criminalize the offences established therein. Although a verbatim transposition of the international definition of human trafficking into national laws is not officially required, state signatories are nevertheless required to get their laws in line with that definition.

In order to be able to understand some of the difficulties concerning the implementation of the international definition of trafficking into national legislation, we first need to acquaint ourselves with the Palermo Convention on organized crime. This is the result of the fact that the protocol is to be interpreted in light of the Palermo Convention. Moreover, it is important to note that states cannot become party to the protocol if they do not first sign and ratify the convention. There are two or, if the Interpretative Notes[4] are included, three relevant documents in this specific area, i.e., the Palermo Convention, Protocol, and Interpretative Notes.[5] Certain questions emerge with regard to issues that have been addressed by these documents. These questions have had consequences for the implementation of the international trafficking definition into national legal systems. They concern:

3 A. Jonsson, D. Borg, "International Efforts to Combat Human Trafficking" in F. Shanty (edt.), *Organized Crime: An International Encyclopedia*, Oxford, ABC-CLIO, 2007, pp. 391–394.

4 These constitute the preparatory works to the Palermo documents. A/55/383/Add.1 Addendum, https://www.unodc.org/unodc/en/treaties/CTOC/background/General-Assembly-documents.html, (accessed 19 May 2014).

5 A. Jordan, "The Annotated Guide to the Complete UN Trafficking Protocol", Global Rights. Partners for Justice, Washington, 2002, preface.

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a) Border crossing and involvement of an organized crime group when committing trafficking;
b) Intent of the perpetrator vis-à-vis the exploitation;
c) The multitude and mutual relation of various improper means;
d) Consent of the victim.

These questions will be addressed in the following, but first the original source itself will be analysed in relation to the factor of transmissibility. We will start by placing the document in its specific cultural and historical setting.

Anti-Trafficking Efforts of the UN – A Historical Background

Even though the doctrine on trafficking in human beings has been developed in international law for some time now, it was not until the beginning of the twenty-first century that a consensus on the definition of the crime emerged. The attempts that were made by the drafters of the Palermo Protocol to create an internationally binding definition notwithstanding, I shall argue that there is as of yet no common understanding of the trafficking phenomenon. The denominators that most definitions of trafficking are said to have in common concern the elements of coercion and border crossing,[6] but even these concepts are subjects of frequent debates. Although discussions in this area often relate to the way in which trafficking is conceptualized, e.g., as a migration issue or as a human rights violation, the discussions preceding the adaptation of the Palermo Protocol to a large extent focused on the consent of the victim. These discussions in turn influenced the drafting process of the protocol as well as the definition of trafficking that eventually emerged.[7]

The first international instruments on trafficking in human beings were exclusively concerned with trafficking in women and girls for the purpose of prostitution. As a result of the international efforts to eradicate human trafficking, a document called the International Agreement for the Suppression of the White Slave Traffic was signed on 18 May 1904. The signatories, consisting of twelve European powers, among them Russia, declared that the purpose of the document was to guarantee women and girls who had been subjected to the abuse or compulsion associated with trafficking protection against the

6 K. Abramson, “Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol”, *Harvard International Law Journal*, vol. 44, no. 2, 2003, p. 473.

7 Ibid, p. 474. See more about the drafting process of the Palermo Protocol in the following.

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criminal practice of the ‘white slave trade’. The preamble of the agreement read:

> [....] being desirous of securing to women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as the ‘White Slave Traffic’, have decided to conclude an Agreement with a view to concerting measures calculated to attain this object.

This suggests that women and girls in general as well as women who were already victims of trafficking were to be guaranteed protection. It has been questioned, however, whether cases involving women who were already engaged in prostitution and then forced into trafficking would fall under the scope of this provision.[8] Women who might have initially consented to prostitute themselves abroad were arguably not considered as worthy of state protection as the ‘coerced innocents’. The agreement is said to implicitly differentiate between ‘pure and innocent’ women and those with prior experience of prostitution, in effect preserving the ambivalent attitude toward women engaged in forced prostitution.[9] This development had practical consequences for women victims of trafficking as it reinforced the myth of female sexuality, in effect dividing women into unwilling victims and the others.

The agreement depicts prostitution as an immoral way of life, and the question is whether the women who had worked as prostitutes prior to their exploitation were also seen as immoral. In the document the state parties agreed to:

> [....] have a watch kept, especially in railway stations, ports of embarkation, and en route, for persons in charge of women and girls destined for an immoral life.[10]

Perhaps this was just an unfortunate choice of words, the true purpose of which was to state that the exploitation was indeed immoral. However, seen in its specific context,[11] the wording of the abovementioned passage suggests that one of the main purposes of the agreement was to rid societies of the immoral

8 N. Demleitner, “Forced Prostitution: Naming an International Offense”, *Fordham International Law Journal*, vol. 18, no. 1, 1994, p. 167.

9 Ibid, p. 167.

10 International Agreement for the Suppression of the White Slave Traffic, Art. 2.

11 This refers to both the nature of the document, which offered no provisions on victim assistance, and to the general attitudes toward women prevalent at that time.

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practice of prostitution as opposed to actually helping victims that had been sexually exploited.

At the beginning of the twentieth century, stereotypical ideas of women were common in politics, law, church, academia, and even psychology. Sigmund Freud, whose research was very much en vogue at that time, argued that women due to their inferiority essentially had two life choices where they could find fulfilment. One was marriage and motherhood and the other was aggressive behaviour and neurosis. This popular view reinforced the ancient idea of women as having one of two natures. According to the Madonna-whore duality, women were considered essential to the process of procreation and thus to the preservation of family life, but there was also a fear of their destructive carnal nature perhaps best portrayed as the biblical seductress Eve who led Adam to the path of damnation. In order to preserve the family unit and keep communities safe, it was commonly agreed that women had to be kept within the boundaries of the private domain.[12]

Although prostitution was considered an immoral way of life, the state signatories offered no real assistance to the victims but made it optional for charitable organizations or private persons to provide such help if the latter were inclined to do so. Moreover, the document did not address criminal measures against traffickers. There were thus no practical provisions in the agreement above that secured for trafficking victims the protection mentioned in the preamble of the document.

> [....] within legal limits, and as far as can be done, to entrust temporarily, and with a view to their eventual repatriation, the victims of a criminal traffic when destitute to public or private charitable institutions, or to private individuals offering the necessary security.[13]

Today, charitable organizations and the occasional philanthropist have been replaced by NGOs as states continue to attach most attention to legislative efforts and are either reluctant or unable to offer proper protection and assistance to victims of trafficking.

Voluntary return of victims of trafficking to their country of origin seems to have been preferred by the signatories to the agreement as the parties undertook to send back women who either desired to return to their home countries or who were claimed by someone who exercised authority over them. The very

12 C. Feinman, *Women in the Criminal Justice System*, third edition, US, Greenwood Publishing Group, 1994, p. 4.

13 International Agreement for the Suppression of the White Slave Traffic, Art. 3.

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words *authority* and *claim* imply that these women were not seen as individuals but rather as possessions, their fates resting in the hands of others. They could fall victim to trafficking and then possibly become re-victimized if *forced* to return to someone who had the right to claim them.

> [….] within legal limits, and as far as possible, to send back to their country of origin those women and girls who desire it, or who may be claimed by persons exercising authority over them.[14]

This reinforces the argument that the main ambition of states was, and perhaps to a certain extent still is, to rid their societies of an unwanted practice and illegal migrants.[15] Again, this view prevails in many modern trafficking cases as authorities in different countries are said to deport victims of trafficking without first taking the proper precautions, sometimes without even taking the victims' statements. In some countries, victims of trafficking might be arrested or deported for selling sex without any consideration of the fact that they are first and foremost victims.

The ideas expressed in the 1904 agreement were partly replicated in subsequent documents including the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Although this document stated that prostitution was inconsistent with the dignity and worth of the human person, it also considered it to be a threat against the family unit and, by the same token, the community. The preamble of the convention reads:

> Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community [….].

14 Ibid.

15 In a Swedish case from 2013, a woman was deported after having testified in a trial concerning one of the most serious cases of trafficking in Sweden. Although the perpetrators were convicted of trafficking and the woman was one of their victims, she was still deported due to the fact that she was making money in an immoral way, i.e., not only was she a victim of trafficking, that very circumstance made the state refer to her as a criminal. See "JO skuldbelägger offer för människohandel", Stiftelsen Tryggare Sverige, 8 March 2013, http://www.mynewsdesk.com/se/pressroom/stiftelsen-tryggare-sverige/blog_post/view/jo-skuldbelaegger-offer-foer-maenniskohandel-17633, (accessed 19 May 2014). See more on this case under the section on Sweden.

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The fact that there was no specific obligation for states to offer victim support might perhaps indicate that the wellbeing of the victims was not the primary concern of the drafters of and the state parties to the convention. Moreover, if the welfare of the community was considered to be at stake, we might ask why a prohibition on the purchase of sexual services in order to curb the demand side of the practice was never considered an option. Arguably, women in prostitution were, yet again, stigmatized. In effect, the invisible distinction between the coerced innocents and the undeserving women was not called into question.

Some women may be physically forced into prostitution, others may see no other choice than to prostitute themselves to earn a living. If the latter are then at a later stage forced or lured into trafficking, they should not be treated differently from the 'coerced innocents', i.e., the victims who have not prostituted themselves before or contemplated doing so. In summary, women who have at a first stage chosen to prostitute themselves and then subsequently fall victim to trafficking should not be stigmatized or discriminated against by states. If they are treated differently from other victims of trafficking, they are automatically being re-victimized. The question is if women are still being divided into these two categories.

Previous international anti-trafficking documents, e.g., the International Agreement for the Suppression of the White Slave Traffic, are, due to the reasons mentioned above,[16] outdated. However, if put under close scrutiny, the contemporary discourse on trafficking, including the Palermo Protocol, reveals some similarities with those documents, notably when the idea of a stereotypical victim of trafficking is concerned.[17] Current anti-trafficking instruments seem to reproduce many of the weaknesses of the earlier approaches such as a never-ending debate on the role of prostitution and consent.[18]

Although knowledge concerning trafficking has increased significantly since the days of the agreement and even those of the 1949 convention, the question is whether the first priorities of states, and so the motives behind relevant international legislation, have changed in any significant way. Has the concern for the wellbeing of the victim truly become more important than issues of security, criminal justice, and border control? Or does the main

16 The main reasons include the idea of women having one of two distinct natures that was arguably expressed in the document, the instance of women being referred to as commodities, and, finally, the unfortunate title of *white* slave traffic.

17 E.M. Bruch, "Models Wanted: The Search for an Effective Response to Human Trafficking", *Stanford Journal of International Law*, vol. 40, no. 1, 2004, p. 3.

18 Ibid.

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motive behind international legislation remain to be that of upholding state sovereignty and a moral way of life? Also, do victims of trafficking get the assistance that they are entitled to or are they treated as criminals and simply returned to their home countries, i.e., deported? The following sections of this work will shed some light on these very important questions, but first the Palermo Convention on Organized Crime, with which the Palermo Protocol is to be interpreted *mutatis mutandis*, will be described in some detail.

Palermo Convention on Organized Crime

The United Nations Convention against Transnational Organized Crime (Palermo Convention) was the culmination of efforts undertaken by the UN in the field of organized crime since the mid-1990s. In 1994, the World Ministerial Conference on Organized Transnational Crime (Naples Conference) presented a political declaration and a plan of action concerning the subject of transnational organized crime. These documents in turn inspired discussions concerning the possible creation of a uniform and legally binding convention, the primary aim of which would be to harmonies counter-strategies in the area of transnational organized crime.

This ambition was put into practice in a number of meetings held by the so-called Lyon Group, a group of senior experts established by the seven major industrialized countries of the world and the Russian Federation, i.e., the G 8. In addition, several regional meetings were held. Although certain differences in opinion arose between the participating states, they did not hinder further international cooperation. Eventually, the General Assembly appointed an Ad Hoc Committee, the task of which it was to create a proposal for a global convention against transnational organized crime.

The committee held several sessions and managed to agree on a number of provisions. The final text was presented to the General Assembly in 2000 and was at that point adopted by the assembly and opened for signature at a high-level conference that was held in Palermo in December 2000. Below, the main characteristics of the convention, which are of relevance to the interpretation and application of the Palermo Protocol, will be touched upon.

The Palermo Convention, much like the Palermo Protocols, requires states to understand the raison d'être behind the document, especially in cases where the convention relies on the states' discretionary powers.[19] This means that

19 S. Betti, "New Prospects for Inter-state Cooperation in Criminal Matters: The Palermo Convention", *International Criminal Law Review*, vol. 3, 2003, p. 154.

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although states do not have to implement the text of the convention into their national legislations word by word they are obligated to consider the motives or purposes of the convention.

According to Article 37, Paragraph 2 of the Palermo Convention, a party who wishes to sign the Palermo Protocol must first become party to the convention. The protocols to the Palermo Convention were not intended to be independent treaties but to supplement the convention. The signing of the Palermo Convention therefore ensures that the general provisions of the convention will be applicable in any cases that might arise under the protocols. The rationale behind the Palermo documents is that the Palermo Convention supplies general provisions while the protocols are more specific. Article 37, Paragraph 4 of the Palermo Convention states that the protocols to the convention are to be interpreted together with the convention, taking into account the purposes of the protocols. An interpretation of the Palermo Protocol therefore requires that the convention is also considered and that provisions in the protocol and in the convention that use similar or identical language are generally given similar meaning. However, an interpretation of the Palermo Protocol should also consider the purpose of the protocol. This may in some cases modify the meaning applied to the Palermo Convention.

A similar reference is also made in the Palermo Protocol. According to Article 1, Paragraph 2 of the protocol, the provisions of the convention apply *mutatis mutandis* to the protocol. The meaning of the phrase *mutatis mutandis* is clarified in the Interpretative Notes to the Palermo Protocol as meaning "with such modifications as circumstances require" or "with the necessary modifications".[20] This basically means that when the provisions of the Palermo Convention are applied to the protocol, minor modifications of interpretation or application, the purpose of which is to take into account circumstances that arise under the protocol, are allowed. However, such modifications are only permitted if absolutely necessary and then only to the extent that is necessary. In certain cases, modifications have been explicitly ruled out by the drafters.[21]

Another important connection between the Palermo Convention and its protocol is a principle contained in Article 1, Paragraph 3 of the protocol. This article states that offenses established in accordance with the protocol are also to be considered offenses established in accordance with the convention. This principle ensures that the general provisions on mutual assistance and other

20 Paragraph 62 of the Interpretative Notes, A/55/383/Add.1, and Paragraph 17 (c) of the Legislative Guide, Part Two, p. 254.

21 Paragraph 17 (c) of the Legislative Guide, Part Two, p. 254.

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forms of international cooperation of the convention will also apply to the offenses established under the Palermo Protocol.

The purpose of the Palermo Convention, as spelled out in Article 1 of the document, is to promote international cooperation in order to be able to prevent and combat transnational organized crime more effectively. Article 2 of the convention sets out the definitions of various terms used in the document, such as an organized criminal group, while Article 3 stipulates the scope of application of the convention. Article 3, Paragraph 1 reads as follows:

1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:
   a. The offences established in accordance with Articles 5, 6, 8 and 23 of this Convention; and
   b. Serious crime as defined in Article 2 of this Convention; where the offence is transnational in nature and involves an organized criminal group.

Article 3, Paragraph 2 then goes on to describe what is meant by a transnational offence. The Paragraph reads as follows:

2. For the purpose of Paragraph 1 of this article, an offence is transnational in nature if:
   a. It is committed in more than one State;
   b. It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
   c. It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
   d. It is committed in one State but has substantial effects in another State.

The wording of Article 3, Paragraph 1 of the Palermo Convention might suggest that the document applies only to crimes that are transnational in nature and involving an organized criminal group. At the same time, however, the convention requires certain offences to be established at national levels independently of their transnational nature or the involvement of an organized criminal group. This is stated in Article 34, Paragraph 2 of the convention and concerns offences established in accordance with Articles 5, 6, 8, and 23.[22] The

22 Article 34(2) reads as follows: "The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in Article 3, Paragraph 1, of this Convention, except to the extent that Article 5 of this Convention would require the involvement of an organized criminal group".

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offences in Article 34, Paragraph 2 of the Palermo Convention include participation in an organized criminal group (Article 5), money laundering (Article 6), corruption (Article 8), and obstruction of justice (Article 23).

The question is how to interpret the provision of trafficking as contained in the protocol. Are states required to criminalize trafficking only when there is a transnational element, or do the convention and the protocol require criminalization also in non-transnational cases? There is *no clear answer* to this question in any of the Palermo documents. In order to find an answer, both documents as well as the preparatory works thereto must be consulted.

According to an Interpretative Note to Article 34 of the Palermo Convention, the convention requires the elements of transnationality and the involvement of an organized criminal group in relation to the provisions pertaining to international cooperation but not to the extent that the elaboration of national criminal offences is concerned.[23] Although the note in question only mentions offences established in accordance with Articles 5, 6, 8, and 23 of the convention, it also states:

> [...] This provision is furthermore intended to ensure clarity for States Parties in connection with their compliance with the criminalization articles of the Convention and is not intended to have any impact on the interpretation of the cooperation articles of the Convention.

This suggests that in cases of *international cooperation*, an element of *transnationality is* required. One way of reading the note might be that the elements of transnationality and organized crime group are not required in cases of national criminalization of *all* offences established in accordance with the convention and its protocols. It is argued that Article 34, Paragraph 2 of the Palermo Convention should be directly applicable also with regard to trafficking offences. The argument is that the same provision ought to apply to the crime of trafficking to ensure that all traffickers can be prosecuted under national laws.[24] Again, there are no clear indications in the Palermo Convention or the protocol that the statement above is true. The question is instead

23 D. McClean, *Transnational Organized Crime. A Commentary on the UN Convention and its Protoco*ls, Oxford, Oxford University Press, 2007, p. 15.

24 A. Jordan, p. 9. Although this is an annotated guide to the Palermo Protocol, the purpose of which is to be used as a tool to assist advocates in the development of a human rights framework for national anti-trafficking laws and policies, it is far from obvious that all interested parties have read it or even know of its existence.

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answered in the official Legislative Guide to the convention and its protocols (in Paragraph 18 of Part 1 and Paragraph 25 of Part 2 of the Legislative Guide[25]). Paragraph 18 of Part 1 of the Legislative Guide reads as follows:

> [....] In other words, in domestic law, the offences established in accordance with the Convention of participation in an organized criminal group, corruption, money-laundering and obstruction of justice and the Protocol offences of trafficking in persons, smuggling of migrants and trafficking in firearms must apply equally, regardless of whether the case involves transnational elements or is purely domestic.[26]

The question is why this issue has not been properly resolved in the Palermo documents. Arguably, one should be able to understand the role of the elements of transnationality and the involvement of a criminal group without being forced to consult the preparatory works, annotated guides, and the like. It should also be noted that there might be a risk that not all interested parties are aware of the preparatory works' existence.

It seems as if the Swedish legislator has been aware of the Legislative Guide to the Palermo Convention and its protocols. In the preparatory works to the first provision on trafficking (2002), it is acknowledged that trafficking might take place within a single country.[27] This is later restated in the preparatory works to the provision from 2004.[28] This awareness on behalf of the Swedish legislator might, however, be connected to the facts that preparatory works are a common concept (and a source of law) in the Swedish legal system and that Swedish lawyers consult these in instances of interpretation of both national and, where available, international law.

In Poland, by contrast, preparatory works[29] are not considered a source of law. It is therefore not difficult to imagine that Polish lawyers are not as accustomed to consulting (international) preparatory works as their Swedish counterparts. In this context it should be noted that of the four authoritative

25 See more on Paragraph 25 of Part 2 of the Legislative Guide under the section on the Palermo Protocol.

26 Legislative Guide, Part 1, Paragraph 18, p. 11.

27 Prop. 2001/02:124, p. 8.

28 Prop. 2003/04: 111, p. 48.

29 In Poland, preparatory works in the Swedish sense of the word do not exist. There are occasional comments made by legal scholars during the drafting process, but these are not seen as a source of law or even as a means of interpreting the law. They are rarely used in doctrine and are not routinely referred to in case law.

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commentaries to the Polish Criminal Code consulted by the author only one actually mentions the Palermo Protocol.

In this context, Article 34, Paragraph 3 of the Palermo Convention, which stipulates that domestic measures may be broader in scope and more severe than those stated in the protocols, should be noted. The Palermo documents thus only impose a minimum standard. However, it should be borne in mind that this does not solve the problem per se. It simply allows countries to take tougher measures against trafficking. Below, the Palermo Protocol and the international definition of trafficking are discussed.

Palermo Protocol – The Negotiation Process

Introduction

It should be noted that the Palermo Protocol is, first and foremost, a law enforcement instrument. From an individual-centered perspective, a more rights-oriented instrument might have been a better option. However, the need for creating an anti-trafficking instrument developed from the desire of governments to counter transnational organized crime. Not surprisingly, a law enforcement tool with rather weak language on human rights protections was drafted.[30] As has been mentioned before, in 1992 the UN established a Commission on Crime Prevention and Criminal Justice which soon decided to tackle the issue of transnational organized crime. On the recommendation of the Commission, a World Ministerial Conference on this subject was held in Naples in 1994. At this point, the characteristics of the new threat were discussed, addressing issues such as failed states, globalization, and the increasing element of internationality in organized crime which manifested itself in the form of various trafficking crimes.[31]

This sparked the discussions on a new instrument. Eventually Poland proposed an elaboration of a new convention on organized crime and submitted a draft. At first, the idea was to include various offences in one document, but as time went by other proposals were made. Eventually a decision was taken in a General Assembly resolution to establish an open-ended intergovernmental Ad Hoc Committee. The first task of the committee was to submit a draft of a convention against transnational organized crime. The second task was to discuss the elaboration of international

30 A. Jordan, preface.

31 D. McClean, 2007, p. 3.

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instruments addressing, among other things, trafficking in women and children.[32]

In effect, little preliminary work was actually carried out by the Ad Hoc Committee on the draft protocols. Suggestions were instead submitted by individual countries, among them the United States and Argentina.

Over one hundred states were represented at the sessions of the committee. In addition, the committee also held parallel informal meetings. NGO representatives were invited to participate, even though the topic of the negotiations was not seen as pertaining directly to human rights law. Simply put, three different perspectives or approaches that affected the final draft can be distinguished. These include a migration perspective, a criminal law perspective that focuses on the prosecution of traffickers, and a human rights perspective.[33] The last perspective can, in the main, be divided into two sub-perspectives or groups. There was a lack of consensus between the two groups representing the human rights perspective, which basically concerned two vastly opposed views on prostitution.

The first group, the Human Rights Caucus, led by the Global Alliance Against Trafficking in Women (GAATW) and the International Human Rights Law Group (IHRLG) advocated for a broad definition of trafficking that covered all its forms such as forced labour and servitude irrespective of the nature of the work or services provided or the gender of the trafficked person. The definition was, however, to exclude voluntary prostitution. Trafficking would be defined by the presence of, *inter alia*, coercion or any other form of abuse with regard to recruitment or the conditions of work in the country of destination.

Additionally, the group strived for the inclusion of human rights protections for trafficked persons regardless of their willingness to act as witnesses for the prosecution. These rights would include the right to a safe shelter; social, medical and legal assistance; the ability to sue for back wages and damages; and residency and working permits during judicial proceedings. It was also noted that victims of trafficking are often treated as criminals for selling sex, begging on the streets, violating labour laws, etc. One of the aims of the GAATW-led coalition was therefore to include an anti-discrimination clause to ensure that trafficked persons are not subjected to discriminatory treatment in law or in practice.

The second group represented by the Coalition against Trafficking in Persons (CATW) and its partners, *inter alia*, the European Women's Lobby (EWL) and

32 Resolution 53/111 of December 1998 as referred to in D. McClean, 2007, p. 9.

33 J. Westerstrand, "Mellan mäns händer. Kvinnors rättssubjektivitet, internationell rätt och diskurser om prostitution och trafficking", Uppsala universitet, 2008, p. 190 f.

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the International Abolitionist Federation (IAF) regarded prostitution as a violation of human rights that should be abolished. According to this group not even an adult is believed to be able to genuinely consent to engage in prostitution. Improper means are irrelevant since there is no distinction between forced and free prostitution. Consequently, the group sought to include all prostitution as well as other sex work in the definition of trafficking in the Palermo Protocol irrespective of conditions (improper means) or consent of the victim.[34] The Coalition Against Trafficking in Women organized 140 NGOs into the International Human Rights Network. It advocated for a definition of trafficking that would protect all victims of trafficking, not just those who could prove they had been forced. An additional goal was to create protection mechanisms for trafficked women and children and strict and consistent measures of prosecution for traffickers. Focus was on the demand aspect of trafficking, which was described as having previously been perceived as an invisible link in the trafficking chain.[35] As has been mentioned above, what the group actually wanted was to criminalize all trade measures undertaken with the purpose of exploitation irrespective of whether or not improper means had been used. The argument raised by some states that supported this view was that the element of coercion would be difficult to prove in court.

By contrast, the GAATW presented their own definition of trafficking, which they claimed was based on their collective experience in this area. According to the organization, trafficking involves the criminal manipulation of persons who want or need to migrate in hopes of a better future. Trafficking is said to be the result of a combination of the victims' desires to migrate, organized crime, and restrictive immigration laws in the countries of destination. According to the GAATW trafficking includes all acts (including attempts) aimed at recruitment, transportation within and across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage for the purposes of placing or holding such person, whether for pay or not, in servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage.[36]

34 "History", CATW, http://www.catwinternational.org/WhoWeAre/History, (accessed 19 May 2014).

35 "Guide to the New UN Trafficking Protocol", CAATW, European Women's Lobby, AFEM, p. 3, t http://www.catwinternational.org/Content/Images/Article/83/attachment.pdf, (accessed 19 May 2014).

36 "Human Rights and Trafficking in Persons: A Handbook", GAATW, 2000, pp. 26–27.

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This group ultimately held that if prostitution was forced it would be categorized as trafficking and consent of the victim would never arise as a separate matter. The presence of improper means would thus preclude possible consent. GAATW also highlighted that the victims should not be blamed for their choices, stating that GAATW defends the safety and rights, including the right to self-representation and organization, of all migrants and their families against the threats of an increasingly globalized and informal labour market.[37]

The GAATW also argued that the abolitionist approach to prostitution views not only prostitution as morally deviant but also some of the women involved in this trade as both deviant, fallen, and helpless.[38] Other opponents of the abolitionist approach argued that the approach fails to see trafficked women as individuals capable of making autonomous decisions. Since it is impossible to find a clear-cut victory for any of the parties to this dispute, the trafficking definition of the Palermo Protocol is said to be a compromise.[39]

The dispute between the two groups referred to above is still a heated and very complicated debate. Some argue that in this context it is useful to distinguish between *choice* and *agency*. While a person in a vulnerable position might not have a choice but to agree to being trafficked, she still possesses the agency to act.[40] While some research indicates that legalized prostitution de facto increases trafficking,[41] the question still remains whether it was the best choice to explicitly state in the trafficking provision that consent is irrelevant (only) when any of the improper means have been used. This will be more thoroughly discussed in the section on consent.

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37 "Basic Principles of GAATW", http://www.gaatw.org/index.php?option=com_content&view=article&id=94&Itemid=47, (accessed 19 May 2014).

38 "Human Rights and Trafficking in Persons: A Handbook", p. 61 f.

39 D. McClean, p. 322

40 K. Touzenis, "Trafficking in Human Beings. Human Rights and Trans-national Criminal Law, Developments in Law and Practices", *Unesco Migration Studies 3*, 2010, p. 35, http://unesdoc.unesco.org/images/0018/001883/188397e.pdf, (accessed 19 May 2014).

41 See E. Neumayer, A. Dreher, S.Y. Cho, "Does Legalized Prostitution Increase Human Trafficking?", *World Development*, vol. 41, 2013, pp. 67–82, http://www.sciencedirect.com/science/article/pii/S0305750X12001453#, (accessed 19 May 2014), where the authors argue that although legalization of prostitution has led to a preference among sex buyers for non-trafficked prostitutes, this effect has been smaller than the demand for foreign sex workers. When prostitution is legalized, the demand for sex workers increases. This demand, however, is not met by voluntary (domestic) sex workers, which, in effect, increases trafficking flows for sexual exploitation.

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Another important question is how the dispute described above affected the definition of trafficking that finally emerged. Some scholars argue that as a result of the conflict described above, the NGOs were not able to counter the government representatives' focus on repressive measures against illegal migration and organized crime, thus failing to strengthen the victims' human rights.[42] However, we cannot know for sure if the situation would have been different, i.e., if we would have a better definition of trafficking and a more human rights oriented document if the NGOs mentioned above instead of carrying on this dispute would have cooperated. We must still keep in mind that the Palermo documents were a state effort aimed at countering organized crime. In effect, the state representatives agreed on a common denominator, namely criminal measures.

Below, the general articles of the Palermo Protocol will be discussed.

The Palermo Protocol – General Rules

> The starting point in the fight against human trafficking is the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime.[43]

The statement above was made by the UNODC and reflects the understanding of the UN on the importance and potential of the Palermo Protocol in the fight against trafficking in human beings.

As has been mentioned in the introduction, the main purposes of the Palermo Protocol are three. Firstly, state signatories to the document are to criminalize trafficking in human beings in their national legislations and to establish proper penalties for this offence. Secondly, states should promote international cooperation. Thirdly, the signatories are to consider offering protection and assistance to victims of trafficking. The first purpose is expressed in mandatory terms. The other two, however, are facultative.

Article 4 of the Palermo Protocol stipulates the scope of the protocol's application. The provision reads as follows:

> This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in

42 M. Ditmore, M. Wijers, "The Negotiations on the UN protocol on Trafficking in Persons", NEMESIS, no. 4, 2003, pp. 79–80.

43 "Trafficking in Persons. Global Patterns", UNODC, April 2006, p. 12.

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accordance with Article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5 of the protocol requires states to criminalize trafficking in human beings as well as and when applicable[44] attempt, preparation, and organizing of this crime. Trafficking can be criminalized by means of creating a single offence or a combination of offences. What matters is that the provision[s] address, at a minimum, the full range of conduct covered by the trafficking definition of the protocol. Article 5 reads as follows:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
   (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with Paragraph 1 of this Article;
   (b) Participating as an accomplice in an offence established in accordance with Paragraph 1 of this Article; and
   (c) Organizing or directing other persons to commit an offence established in accordance with Paragraph 1 of this Article.

The wording of Article 4, notably the part on the transnational nature of the crime and the involvement of an organized criminal group in its commission, reinforces the view that the protocol is only applicable in cases where these circumstances are present. However, according to Article 1, Paragraph 2 of the protocol, the provisions of the Palermo Convention shall apply *mutatis mutandis* to the protocol. In principle this means that if the spirit of the convention is to forego the requirement of transnationality when drafting national criminal legislation in this area, the meaning of the protocol should be the same.

44 States are required to criminalize attempts only if it is compatible with the basic principles of the relevant legal system. Generally, the drafters of the protocol agreed that attempts to commit trafficking should be criminalized. Nevertheless, the concept of attempt does not apply in the criminal justice systems of some of the state signatories to the Palermo documents. Consequently, the disclaimer *subject to the basic concepts of its legal system* was incorporated into Article 5 of the protocol. See the Legislative Guide, Part 2, Paragraph 41.

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As we have already seen, Article 34, Paragraph 2 of the Palermo Convention is to be interpreted in such a way that the element of transnationality is not necessary in cases of criminalization and that also so-called internal trafficking *is to be* (the convention uses the words state parties *shall*...) criminalized by state parties.

> In other words, in domestic law, the offences established in accordance with the Convention of participation in an organized criminal group, corruption, money-laundering and obstruction of justice and the Protocol offences of trafficking in persons, smuggling of migrants and trafficking in firearms must apply equally, regardless of whether the case involves transnational elements or is purely domestic.[45]

In line with this argument, Part 2, Paragraph 25 of the Legislative Guide to the Palermo Protocol reads as follows:

> It is important for drafters of legislation to note that the provisions relating to the involvement of transnationality and organized crime do not always apply...[I]t is important to emphasize that, for example, Article 34, Paragraph 2, of the Convention provides that legislators must not incorporate elements concerning transnationality or an organized criminal group into domestic offence provisions... In the case of trafficking in persons, domestic offences should apply even where transnationality and the involvement of organized criminal groups do not exist.[46]

The element of transnationality constitutes one of the criteria for applying the Palermo Convention and its protocols to the extent that it concerns international cooperation. Transnationality should, however, not form a prerequisite of national trafficking offences and is, by the same token, not required as proof in national prosecution of trafficking cases. The same applies to the criterion of involvement of an organized criminal group. Consequently, offences established in accordance with the protocol should apply equally irrespective of whether they were committed by individuals associated with an organized criminal group or by individuals working independently. This is clearly expressed in the official interpretative notes (made by drafters of the Palermo documents during the drafting process),

45 Legislative Guide, Part 1, Chapter 2, Paragraph 18, p. 11.

46 Legislative Guide, Part 2, Chapter 1, Paragraph 25, p. 258.

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as summarized in the Legislative Guides to the Palermo Convention and its protocols.[47]

As has been mentioned above, the Swedish state seems familiar with the preparatory works to the Palermo Protocol. The Swedish preparatory works to the trafficking provision from 2004, e.g., clearly state that there is no requirement in the Palermo Protocol to incorporate into national criminal legislation an element of transnationality.[48] The question is whether the same can be said about other states. In the author's opinion, there is a risk that some states not having the same tradition of preparatory works or experience with interpreting and applying international law might find this problematic. Below, the international definition of trafficking will be analysed.

Article 3 of the Palermo Protocol – The Definition of Trafficking

Introduction

According to some experts, the trafficking definition of the Palermo Protocol has been widely embraced by states and the international community alike.[49] However, important questions remain about certain prerequisites of the definition, as well as its application in domestic criminal law. Reportedly, there is a conflict between those who support a restrictive interpretation of the crime of trafficking, and those who advocate for its expansion. The complex wording of the Palermo Protocol's definition of trafficking is partially blamed for this development.[50] Article 3 of the Palermo Protocol reads as follows:

For the purposes of this Protocol:

(a) "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;

47 See Article 34, Paragraph 2 of the Palermo Convention and Paragraph 59 of the Interpretative Notes, A/55/383/Add.1.

48 Prop. 2003/04: 111, p. 32.

49 "Abuse of a Position of Vulnerability and Other 'Means' within the Definition of Trafficking in Persons", Issue Paper, UNODC, 2013, p. 1.

50 Ibid.

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(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
(d) "Child" shall mean any person under eighteen years of age.

There is no obligation on state signatories to also criminalize the individual elements of trafficking such as abduction or forced prostitution.[51] However, it is up to the states to adopt such provisions if they wish to do so. Consequently, the abovementioned requirement to criminalize trafficking concerns the crime as a combination of constituent parts and not the individual elements. If one of the listed measures is combined with any of the listed means and carried out for any of the listed purposes, the conduct must be qualified as trafficking. It is important to note that trafficking is completed at an early stage, even before an actual exploitation has taken place.[52]

Thus, trafficking is considered to be a multi-layered offence, one that can be divided into three constituent parts. These include measures, means, and purposes. Starting with the part on measures, they will be discussed in more detail below.

Measures

The first part of the definition of trafficking deals with various trade measures. Each person that facilitates a trade measure against another person might be guilty of trafficking. In a similar vein, the trafficked person can become victim of several crimes committed by several perpetrators.

The trade measures include recruitment, transportation, transfer, harbouring, and receipt.[53] There is a wide range of possible methods that the trafficker can use. They often vary depending upon the cultural context and the geographical setting as well as on the individual circumstances of the potential victim and the financial possibilities of the trafficker. In most cases, however,

51 This especially pertains to the issue of prostitution which is considered to fall outside of the scope of the Palermo documents. See the Interpretative Notes, Paragraph 64, A/55/383/Add. 1.

52 Legislative Guide, Part 2, Paragraph 33, pp. 268–269.

53 These measures are not further elaborated upon, neither in the Interpretative Notes nor in the Legislative Guide.

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the conduct starts with some sort of recruitment. Sometimes traffickers operate alone, and sometimes they are involved in larger networks where different persons specialize in different links of the trafficking chain. Statistics also indicate that the number of female traffickers is on the increase. Sometimes, former victims of trafficking in human beings, in particular for the purpose of sexual exploitation, eventually become traffickers.[54] Women often rank low in the trafficking rings and are usually responsible for tasks that make them more exposed to the risk of detection and prosecution than those of male traffickers. This development is especially prevalent in Eastern Europe and Central Asia, where more than three fourths of those convicted of trafficking in persons offences are women.[55]

Apart from the obvious form of the giving and receiving of payments, it is possible to commit a trafficking offence by harbouring or in one way or another transporting the trafficked person. Sometimes people are smuggled across borders, and sometimes they travel with legitimate or forged documents. Along the way, there can be several steps involving multiple perpetrators. The journey ends in the country of destination, at which point the victim is delivered to the person who will be responsible for organizing the subsequent exploitation.

A conduct can only be described as trafficking if combined with certain means and carried out for a specific purpose. Below, the means listed in Article 3 of the Palermo Protocol will be touched upon.

Means

In order for the conduct to be considered trafficking in human beings, one of the means set forth in Article 3 of the Palermo Protocol must by employed by the trafficker unless the victim is a minor. These include the use of force or the threat thereof, 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. Only some of these means have been clarified in the Interpretative Notes. This is probably due to the fact that most state signatories already had provisions and case law concerning the majority of the improper means. The preparatory works to the Palermo Protocol, however, shed some light on the notion of vulnerability.

54 "Trafficking in Human Beings", Eurostat Methodologies and Workingpapers, European Commission, 2013, p. 67.

55 "Global Report on Trafficking in Persons", 2012, UNODC, p. 11.

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On the one hand, the preparatory works refer to existent legislations of different state signatories. In many countries pregnant women and drug addicts, e.g., are considered to be in vulnerable positions. The preparatory works also point to country-specific solutions, e.g., the case of Bulgaria, where abuse of power in relation to the victim is also considered a form of a vulnerable position.

On the other hand, the Interpretative Notes express their own understanding of the concept of vulnerability which is said to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.[56] The definition acknowledges that many trafficked people are simply following orders of those close to them, such as a parent, a spouse or a community leader. These people might, due to legal or cultural reasons, lack the possibility of refusing.[57] However, the intentions of the drafters of the Protocol with respect to a vulnerable position of the victim are said to be unclear, as there seems to be no explanation for why the concept was included, apparently at the last minute. A possible reason for including a wide range of overlapping means in the definition is said to have been motivated by an ambition to ensure that all the different ways by which an individual can be placed in a state of exploitation were covered.[58] However, none of the means stated in the protocol's definition of trafficking are defined. According to the preparatory works, the prerequisite of 'abuse of a position of vulnerability' is to be interpreted as referring to 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved'. However, no further guidance is provided on how this concept is to be applied in practice.[59]

There is also a Note on illegal adoptions, which might pertain to the means of the giving and receiving of payments in order to obtain consent from a person having control over another person. If the purpose of the illegal adoption amounts to a practice similar to slavery as defined in Article 1, Paragraph (d) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the conduct will be considered trafficking.[60] It is worth noting that transactions for non-commercial purposes are not viewed as trafficking. Naturally, most countries have other

56 Interpretative Notes, A/55/383/Add.1, Paragraph 63.

57 A. Jordan, 2002, p. 4.

58 "Abuse of a Position of Vulnerability and Other 'Means' within the Definition of Trafficking in Persons", p. 3.

59 Ibid, p. 3.

60 Interpretative Notes, A/55/383/Add.1, Paragraph 66.

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provisions that criminalize adoptions for commercial purposes. However, from a strictly symbolic point of view, the giving or receiving of excessive payments for the purpose of adoption might be considered a form of slavery in cases where the child is traded as a mere commodity.

Purpose

The third requirement for the conduct to be considered trafficking in human beings is the purpose of the act which should be exploitative in nature, including, 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. The wording of Article 3 (a), i.e., the phrase *for the purpose of*, implies that direct intent to exploit is necessary at all stages of the trafficking chain. This forms an ulterior intent requirement, which means that there must be direct intent to fulfil a certain purpose, which is exploitation. This is true if the trafficker is to be convicted of trafficking as a principal perpetrator. In other cases, the rules on complicity might become applicable.

In this context, it seems fruitful to consider the purpose of the Palermo Protocol which is to criminalize all links of the trafficking chain including recruitment and transportation. Intuitively, one might believe that the party responsible for the subsequent exploitation must have intent to exploit the victim and that this is enough for the conduct to be considered trafficking. It seems sufficient that the other parties have intent in relation to their own conduct, such as recruitment of the victim and a specific improper means, and intent (but not necessarily direct intent) in relation to the intent of the person responsible for the subsequent exploitation.

However, it is questionable if this is the case. The wording of Article 3 suggests that every person must have the specific purpose of exploitation. As we shall see, this constitutes a weakness in the international definition. It is important to note that there are no clear answers to this question of the purpose of the perpetrator in the Palermo documents or the preparatory works thereto. In effect, this has created certain problems on the national level. These will be addressed in the chapters containing the country analyses.

Forms of sexual exploitation other than in the context of trafficking in persons are not covered by the Palermo Protocol. The Interpretative Notes state that:

> The travaux préparatoires should indicate that 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

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> exploitation' are not defined in the Protocol, which is therefore without prejudice to how State Parties address prostitution in their respective domestic laws.[61]

The abovementioned statement is a way of reconciling various national views on prostitution, notably the discussion on forced versus voluntary prostitution. In that context, some states have legalized the practice and some, like Sweden, have criminalized, or are currently discussing the criminalization of, the purchasing of sexual services.

The concepts of forced labour, servitude, etc., are not defined in the Palermo Protocol. Instead, reference is made in the Legislative Guide to existent international documents in relevant areas such as the ILO Convention concerning Forced or Compulsory Labour. With regard to the practice of trafficking in human organs, there is a Note concerning the removal of a child's organs for *legitimate medical or therapeutic reasons*. This cannot form an element of trafficking if valid consent has been obtained before the procedure from the child's parent or legal guardian.[62]

Intent of the Perpetrator

In order for an offence to be viewed as trafficking under the Palermo Protocol, general intent in relation to the act must be established. This means intent in relation to a trade measure and specific means. In the cases of underage victims, intent with regard to the victim's age must also be established. In these cases, intent based on indifference or probability should arguably be enough. This is the result of the fact that in many instances traffickers are not interested in the age of the victim and do not undertake the necessary measures to gain this information. In other cases, underage victims are what the traffickers are looking for. Also, when arranging travel, either by having access to the victim's ID or in the act of falsifying documents, knowledge of the victim's age seems apparent.

According to the Palermo documents, only intentional conduct is to be criminalized.

> All of the criminalization requirements of the Convention and Protocols require that the conduct of each offense must be criminalized only if committed intentionally. Thus, conduct that involves lower standards, such as negligence, need not be criminalized.[63]

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61 Interpretative Notes, A/55/383/Add.1, Paragraph 64.

62 Interpretative Notes, A/55/383/Add.1, Paragraph 65.

63 Legislative Guide, Part 2, Paragraph 45(d), p. 267.

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The question of what is meant by *intentional conduct* arises. Does the term only exclude negligent acts or does it also require direct intent, in effect excluding other forms of intent such as indirect intent (intent based on knowledge) and *dolus eventualis* (intent based on indifference or probability)? Arguably, other forms of intent than direct intent should be possible. Naturally, there is a certain margin of appreciation concerning national concepts of intent.

Also, the Interpretative Note reads that state parties need not criminalize negligence, which means that they are *not prohibited* from criminalizing negligent conduct should they wish to do so. In addition, Article 34, Paragraph 3 of the Palermo Convention explicitly allows for measures that are more strict or severe than those suggested by the convention and its protocols. Again, this does not solve the problem as we do, e.g., not know if national provisions requiring direct intent with respect to all elements of the act of trafficking would meet the requirements of the protocol.

As has been mentioned above, in addition to general intent with regard to the unlawful act (to at least one trade measure and improper means), specific purpose to exploit the victim is also necessary. This is one of the integral prerequisites of the definition of trafficking.

Consent

Once it is established that deception, coercion, force, or other of the means listed in Article 3, subparagraph (a) have been employed, possible consent is precluded or irrelevant, and by the same token, genuine consent can never be combined with any of the prohibited means.[64]

Yet, the issue of consent was, as has been mentioned above, fiercely debated during the negotiation process of the Palermo Protocol. To summarize this debate, one group (the Human Rights Caucus led by the GAATW) argued that improper means would preclude consent and that there therefore was no need to explicitly state that consent was irrelevant. The other group (the CATW-led network of NGOs) held that it should be highlighted that even if the victim consents at some stage, trafficking might still take place. It also held that possible consent should not be used as a defence by defendants in trafficking cases. Again, what the debate actually boiled down to was the issue of forced versus voluntary prostitution.

According to some scholars, consent is basically an issue in the protocol because the document is thought to protect the stereotypical coerced innocent. By contrast, a male economic migrant is perceived to have voluntarily and consciously chosen smuggling as a means of facilitating entry into the

64 Legislative Guide, Part 2, Chapter 2, Paragraph 37, p. 254.

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destination country of his choice, which in practice is not always the case. In the Palermo Protocol on smuggling the issue of consent is irrelevant. This is the result of the rather widespread belief that the stereotypical smuggled person is a rational male economic migrant, who has acted on his own and who is not under the control of others.[65]

The argument above seems to suggest that women should not be blamed for their choices or rather for displaying agency. The main thrust of this argument is that trafficking is possible even if the woman consented at some stage of the recruitment, i.e., if she agreed to prostitute herself. The wording that *consent is irrelevant* when any of the improper means has been used by the trafficker in conjunction with a specific trade measure might indicate that focus is on the initial stage of the trafficking chain. As we shall see, this has had implications on the national level. These implications can be summed up as an undue focus on the situation in the country of origin, a lack of understanding on when a legally valid consent can be obtained and withdrawn, and confusion with regard to the concepts of free choice and agency.

Even though it is important to distinguish trafficking from smuggling[66] as the first is a crime against the person and the other against the state, women who have displayed some level of agency should not be treated differently than 'the coerced innocents'.

We should also keep in mind that smuggling is arguably not just a crime against the state but often *also* against individuals. Smugglers usually target people in vulnerable situations. This suggests that the choices of the smuggled persons are not always voluntary. At times, people agree to being transported under dangerous conditions (like containers on water), all in hope of securing a better future for themselves and possibly their families. Often the smuggled person cannot afford the trip and becomes indebted to the smuggler. Upon arrival in the country of destination, he might be forced to repay the debt, sometimes under circumstances resembling slavery or practices similar to it.

Even though the definition of smuggling does not require an element of abuse, most smuggled persons are, in one way or another, abused by the smugglers. Arguably, few would consider enlisting the help of smugglers if not truly desperate. There is not one country in the world that is not affected by the

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65 K. Abramson, p. 479.

66 The crime of smuggling of human beings is defined in Article 3 (a) of the Palermo Protocol on smuggling. The Article reads as follows: Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

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smuggling of migrants, whether as a country of origin, transit or destination for migrants smuggled by criminal networks. Smuggled migrants might be just as vulnerable to life-threatening risks and exploitation as victims of trafficking. Throughout the world, thousands of people have died during perilous transports.[67]

Although trafficking and smuggling constitute two different crimes, they are interesting to compare with respect to how the concepts of free choice and agency might be construed depending upon context. While the definition of smuggling reflects a rational (male) migrant who has the agency to act, the words *by means of* in the definition of trafficking suggest that the victim is not only to be deprived of the freedom of choice but also of her agency to act. It should be recognized that victims of both trafficking and smuggling might lack a free choice. When trafficking is concerned, victims might possess the agency to act or they might not, while in cases of smuggling they always possess this agency. Consent, however, arguably contains both concepts. The fact that a woman consents to recruitment might thus illustrate the agency to act. However, for consent to become relevant she must also have a free choice, i.e., viable options.

Victims of trafficking are often deceived about the nature of the work promised to them. Nevertheless, this does not mean that they fit the image of the 'coerced innocent'. The question is whether, as a result of this idea of a stereotypical victim, the other category of women who do decide to prostitute themselves abroad might be considered fallen and therefore less worthy of state protection. At the same time, research indicates that this particular type of victim of trafficking, i.e., older women with children (obviously sexually experienced) is growing. I will explore this question in the chapters containing the case studies.

Some might ask whether the words *consent is irrelevant* in the international definition of trafficking do indeed safeguard the rights of all victims because they ultimately suggest that it does not matter whether or not the victim had consented to prostitution. However, as improper means and, above all, exploitation are prerequisites of the definition, this is already evident. What seems to be the main issue here is how the concept of improper means has been construed. It is the words *by means of* that imply that the perpetrator must assume a very active role. Again, here certain requirements concerning agency and

67 "Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants", UN, 2012, p. 1, http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/UNODC_2012_Assessment_Guide_to_the_Criminal_Justice_Response_to_the_Smuggling_of_Migrants-EN.pdf, (accessed 19 May 2014).

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consent must be fulfilled by the woman if she is to be regarded as a victim of trafficking. A woman in an extremely vulnerable situation might not possess a free choice, which negates consent. Yet, she might still retain the agency to act and, e.g., initiate recruitment. In other words, it seems as if it does not matter whether we explicitly state that consent is irrelevant or not if we keep the wording or construction *by means of*. The latter suggests that some women might get blamed for displaying agency in order to change their situation and that these actions might be mistaken for free choice and consent despite the fact that the women and their situations are exploited by the perpetrator.

By focusing on the behaviour of the victim (such as possible consent, i.e., if she was influenced by any of the improper means or not) in the country of origin or during transport, transfer, etc., we risk losing track of the situation in the country of destination. This is what has happened in national court proceedings where prosecutors are required to present detailed information on the situation of the victim in the country of origin and how she behaved when the perpetrator first approached her. This creates certain difficulties as the information is located in another country. In most cases it is also impossible to tell what happened between the perpetrator and the victim.

In this context, it seems more fruitful to consider the nature of the actual exploitation. Was the victim involved in some form of procuring? Was there some form of an informal contract between the parties, allowing her to keep part of her earnings or to go home if she would decide to do so? Or was she kept under explicit or implicit surveillance? Did she have money, a passport, and knowledge of the country of destination? Was she able to communicate with other people? Was she afraid of the trafficker? Was she in a vulnerable position (both in her home country and in the country of destination)?

The focal point should be the exploitation in the country of destination, to which one cannot legally consent, or the intentions of the perpetrator to exploit a person like a commodity. Although this is arguably covered by Article 3, as trafficking needs not to be transnational, in practice it is often neglected.

Some scholars argue that the drafters of the Palermo Protocol instead of focusing on the elements of force or deception or even the actual exploitation, the existence of which de facto precludes the possibility of consent, placed emphasis on the pros and cons of legalizing or criminalizing prostitution. It has been argued that instead of seeing the offence of trafficking as a human rights violation, the sexuality of women yet again took centre stage and that such a development not only distracts the attention from the abuse associated with the exploitation that takes place in the country of destination but also unduly limits the understanding of trafficking to offences against *physically* coerced women. Further, as physical coercion, threat, etc., *in the country of*

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origin is immensely difficult to prove in court proceedings in the destination country, a situation that can best be described as a catch-22 arises. Simply put, we have here part of the explanation for the low numbers of trafficking convictions throughout the world.

The question is if the words *consent is irrelevant* appearing in the international definition of trafficking might suggest that consent is possible in instances where all the relevant facts are known to the trafficked person. This is not a hypothetical question, as many people throughout the world are living under such desperate circumstances that they would prefer taking their chances as slaves abroad than remain in their current situations. Some scholars claim that in situations where the prospective migrant worker did not need convincing prior to departure, doubts might arise as to whether we are dealing with trafficking or not. This is said to be true even if the person's human rights are subsequently violated in the country of destination. In such cases, consent is said to form an important factor.[68] The passage above indicates that under certain circumstances consent is indeed relevant. Of course, this is already evident from the prerequisite of improper means and its connection to the trade measures. If someone is *not* drawn into exploitation *by* means of deceit, threat, etc., then obviously there is consent, and reversely it is not possible to, e.g., consent to a lie.[69] However, what we should be asking is this: Is it really necessary for an act to be qualified as trafficking to influence someone *by means of* deceit, threat, or any of the other improper means? In essence, the question is why the following cases would be treated differently.

In case (1) the victim is in a vulnerable situation. The perpetrator is aware of this condition and takes advantage of it by initiating recruitment (e.g., offering employment). This case might be seen as trafficking. In case (2) a woman is in a vulnerable situation, but she initiates the recruitment and the perpetrator takes advantage of the situation. The case will most probably *not* be seen as trafficking since it will be difficult to prove that the perpetrator influenced the woman *by means of* abusing her vulnerability. Arguably, both cases should be qualified as trafficking as it should not matter who initiates the procedure that aims at exploiting a person who is in a vulnerable situation.

The question of improper means and the construction *by means of* will be more thoroughly discussed in the chapters containing the case studies as well as in the final chapter of this work.

68 K. Touzenis, p. 35.

69 A. Jordan, p. 7.

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Situation of Child Victims

Article 3, subparagraphs (c) and (d) of the Palermo Protocol stipulate that no improper means need be established when persons under eighteen years of age are involved. Due to their age and immaturity, children are considered to be more easily persuaded or lured into trafficking than adults and therefore the use of force or other improper means is not necessary for the offence to be considered trafficking.

Article 3 (d) clearly states that the term *child* shall mean any person less than eighteen years of age. The wording of the provision, which highlights the objective circumstance that someone is of a certain age, taken together with the purpose of the Palermo Protocol, which is to protect victims of trafficking, especially women and *children*, suggests a strict interpretation.

The preparatory works to the protocol state that in instances where the victim of trafficking is a minor, the prosecution must, in order to be able to have an act qualified as trafficking, prove action such as recruitment or transportation of the underage victim for the purpose of exploitation, but no improper means.[70]

In addition, intent of the perpetrator vis-à-vis the age of the victim must be established. However, in that respect intent based on indifference or *dolus eventualis* should arguably be enough. After all, it is not uncommon that the trafficker actually looks for an underage person. Older women are often considered liabilities since they might have contracted venereal diseases, become addicted to drugs, or had several unwanted pregnancies and sometimes illegal abortions, which all take their toll on the emotional and physical health of the women.

Article 3 of Palermo Protocol states that it is forbidden to give or receive payments or benefits to achieve the consent of a person having *control* over another person for the purpose of exploitation. This part of Article 3 primarily applies to parents or legal guardians and children, other cases could involve people with disabilities or drug addicts who, through their addiction, are controlled by other people. Article 3 does not mention absolute control or that control must be transferred to the trafficker from the person having control over the victim. It is enough that the trafficker acquires consent of the person in control to take the victim. In the case of minors, this control seems even more implied as the age difference between the perpetrator and the victim automatically places the latter in an inferior position. The concept of control usually has a well-established meaning in national legal terminology, which is problematic for the consistent implementation of the Palermo Protocol.

70 Legislative Guide, Part 2, Chapter 2, Paragraph 38, p. 270.

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Internal Trafficking

According to international estimates, most of the trafficking victims detected around the world were foreign nationals in their country of exploitation. However, about one in every four victims detected between 2007 and 2010 was a national of the country where the exploitation took place. The crime of *trafficking* in human beings may suggest that the victim is moved across borders. However, this is not always the case.[71] Domestic or internal trafficking not only exists but seems to be increasing. The phenomenon usually mirrors countries' varying social and criminal contexts. In some countries it might reflect socio-economic differences, e.g., between cities and rural areas. The patterns of domestic trafficking might also indicate certain sociocultural conditions, e.g., when it comes to the occurrence of victims exploited in child labour.[72]

In this context it is important to note two things: Firstly, that the Palermo Protocol is to be applied also with regard to domestic trafficking, and secondly, that the current focus on the initial stage of the trafficking chain, and thus the transnational element of the crime, is uncalled for and should be nuanced by means of acknowledging trafficking as a complex phenomenon. The core of the crime is not constituted by border crossing or even movement, although the very word *trafficking* might imply so, but instead by the abuse and violation of a person's human rights.

Summary

> The term *trafficking in persons* can be misleading: it places emphasis on the transaction aspects of a crime that is more accurately described as enslavement. Exploitation of people, day after day. For years on end.[73]

Turning now to summarize, the findings can be categorized according to the following.

Firstly, there is a lack of consistency between the Palermo documents and the preparatory works thereto. This regards the issues of border crossing and the involvement of an organized criminal group as possible prerequisites of the trafficking crime. If just the Palermo Convention and the adjoining protocols are studied, it seems as if the elements above are required as prerequisites of a trafficking provision. However, if the documents are read together

71 "Global Report on Trafficking in Persons", UNODC, 2012, p. 49 f.
72 Ibid, p. 51.
73 "Global Report on Trafficking in Persons", UNODC, 2009, p. 6.

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with the preparatory works thereto it becomes clear that these requirements do not, or rather should not, apply when criminalizing trafficking on the national level. Since not all interested parties are aware of the preparatory works to the Palermo documents, this might create certain problems concerning the practical implementation of the international definition of trafficking on the national level.

Secondly, there is the issue of the Palermo Protocol's historical and cultural context. The definition of trafficking of the Palermo Protocol has arguably been influenced by previous documents in this area as well as by the overall discourse on trafficking. The latter is in turn affected by past experiences and ideas in this field. One of these ideas is the concept of the stereotypical trafficking victim. Arguably, this idea is present in the international trafficking definition of today. This is illustrated by the fact that improper means are connected to the trade measures and that the perpetrator must influence the victim *by means of* violence, deceit, etc. In other words, the perpetrator must arguably assume a very active role.

If the perpetrator is to act in a certain way, this also places specific requirements on the behaviour of the victim. If he is to be active, she must be passive. This relationship is normalized in the definition of trafficking. Anything outside of this supposed axiom is seen as an anomaly and is often held against the victim. This suggests that the behaviour of the victim in the country of origin impacts on how the act is qualified. Undue focus is put on whether the perpetrator initiated a trade measure or not, and, in a similar vein, women are blamed for displaying agency. This in its turn suggests that undue attention is given to the situation in the country of origin as opposed to the abuse in the country of destination.

To summarize, the perpetrator must be aware of the victim's vulnerable situation and actively abuse it. This means that it is usually not enough to abuse an opportunity, i.e., that a person is in a vulnerable position, but the perpetrator must also make a person agree to a certain measure *by means of* abusing her vulnerable position. He must also understand that it is this position that forces the victim to accept his offer. In reality, traffickers intentionally target the weakest members of society. It might thus be questioned whether the trafficking definition of the Palermo Protocol is sensitive to the mechanisms of the practice of human trafficking. The definition is sometimes said to contain too many elements that must be proven by national prosecutors.[74] This does in fact make the definition quite opaque and in-effectual. This line of argument corresponds to the comment above made by the UNODC, according to which

74 A. Jordan, p. 3.

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the term *trafficking in persons* can be misleading as it places emphasis on the transaction aspects of a crime that is more accurately described as enslavement.

Ultimately, it all boils down to the following question. Is it necessary to include the wording *by means of* in the definition of trafficking? In other words, should it not be enough for the perpetrator to abuse another person's vulnerability for an act to be qualified as trafficking? If abuse of another person's vulnerability, irrespective of whether the woman had displayed agency or not (e.g., by initiating recruitment or contemplating prostitution as a means of escaping a difficult situation), was made the focus of the international definition of trafficking, we might avoid having a situation where women are divided into different categories and where some victims enjoy less protection than others based on how they behaved prior to the exploitation. It might also solve the problem of evidence in trafficking cases if courts were to consider the nature of the exploitation and not the means or measures by which a victim was essentially enslaved.

The current international definition of trafficking instead focuses more on the various trade measures and means used by traffickers at the initial stage of the trafficking chain than on the actual abuse associated with the crime.

Thirdly, the wording of Article 3 suggests that the perpetrator must act with a *specific purpose* to exploit the victim. The question is what happens in instances where the trafficker does not desire the exploitation per se but rather to receive remuneration. Although most traffickers act for financial gain, national laws might fail to recognize this as trafficking. In much legislation, including that of Sweden, Poland, and Russia, the words *for the purpose of* imply that the perpetrator must act with *direct intent* to exploit the victim. If such purpose cannot be established, the behaviour will not be qualified as trafficking. It might, however, be qualified as complicity.[75]

Fourthly, both the issue of intent of the perpetrator and consent of the victim might be resolved if focus was placed on the actual or planned exploitation. Arguably, it should not matter why you are exploiting someone or why you have contributed to such exploitation, i.e., whether it is in order to earn money or to derive some sort of sick pleasure from it. The outcome is the same. Another human being is being robbed of her dignity and basic human rights.

In this context, possible *consent* of the victim as well as the means and measures by which the exploitation is facilitated are arguably given too prominent of a role. The inclusion of the words *consent is irrelevant* in Article 3 of the

75 In some cases, a person with intent to earn money but not to exploit the victim might be seen as an accomplice to the crime. See more on this in the relevant country chapters.

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Palermo Protocol is not clearly discussed by any of the Palermo documents, nor is the prerequisite *by means of*, i.e., the process by which the perpetrator undertakes a measure, combined with one or several of the improper means, which is aimed to affect the disposition of the victim. This has led to a situation where some victims might be seen as less worthy of protection, e.g., if they have initiated the recruitment, contemplated prostitution as a way of escaping a difficult situation, etc.

In many instances, people choose exploitation before starvation, which has prompted some to argue that such cases might not be seen as exploitation. However, the fact that a person would starve to death had he not decided to enter into forced labour does not mean that exploitation has not taken place. The person in question is still treated as a slave, no matter what the circumstances were that influenced his choice.

The following chapters will indicate how the international definition of trafficking has affected national trafficking laws. The process of implementation will also be discussed. This will indicate country-specific challenges *and* answer the question whether certain difficulties on the national level are attributable to the original source, i.e., the trafficking definition of the Palermo Protocol.

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CHAPTER 5

Sweden

Introduction

> Prostitution and human trafficking for sexual purposes represent a serious obstacle to social equality, to gender equality and to the enjoyment of human rights. Trafficking profoundly violates human dignity and the right of individuals to decide over their own lives and their own bodies. The victims are primarily women and girls, but men and boys are also being exposed to prostitution and human trafficking for sexual purposes.[1]

Sweden has long been involved in the struggle against human trafficking, focusing primarily on trafficking for sexual exploitation. The official opinion of the Swedish government is that trafficking is intrinsically linked to prostitution. Also, it maintains that both prostitution and trafficking are sustained by demand.[2] As Sweden is a country of transit and destination, the government has taken it upon itself to try to reduce the occurrence of both crimes. To this end, an action plan to combat trafficking and prostitution was established in 2008. The plan, which remained in place in 2008–2010, addresses five main areas of concern. These include preventive work, especially protection of at-risk groups, awareness raising, appropriate reforms of the justice system, and improved international cooperation.[3]

There is a comparatively large amount of public writings in the area of human trafficking for sexual exploitation. There are preparatory works to the trafficking provisions, investigative reports, official statements, as well as policy documents. Policy measures addressing trafficking for other exploitation purposes such as forced labour and begging have, however, not been developed yet.[4] These forms of trafficking also remain under-prioritized and under-researched.

1 "Against Prostitution and Trafficking for Sexual Purposes", Government Offices of Sweden, 2009, p. 4.

2 Ibid.

3 "Action Plan to Combat Prostitution and Human Trafficking for Sexual Purposes", Info Sheet, Ministry of Integration and Gender Equality, Sweden, 2008, http://www.regeringen.se/content/1/c6/11/06/28/c77ec2bb.pdf, (accessed 19 May 2014).

4 N. Mörner, "Sweden", Report on the Implementation of Anti-Trafficking Policies and Interventions in the 27 EU Member States from a Human Rights Perspective (2008 and 2009), European NGOs Observatory on Trafficking, Exploitation and Slavery (E-notes), p. 209.

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Efforts to counter trafficking by means of specific trafficking provisions started in early 2000 after Sweden's ratification of the Palermo Protocol. In this chapter, relevant laws and case law as well as government policy and public attitudes in this area will be analysed. The first part of this chapter contains the legal analysis while the second part studies trafficking in Sweden through the prism of legal transplants, i.e., it concerns itself with attitudes and policies on trafficking.

Since it in the year 2002 first entered into force, the Swedish criminal provision on trafficking in human beings has undergone several amendments. Before 2002, other criminal provisions were applicable in trafficking cases. These primarily concerned crimes against the personal liberty and sexual integrity of the individual and will be addressed in more detail later in this chapter. The first trafficking provision criminalized transnational trafficking for sexual purposes. It was the result of Sweden's obligations according to the Palermo Protocol and the EU framework decision on trafficking. It bore some resemblance to the trafficking definition of the Palermo Protocol. The provision was amended in 2004, at which point the requirement of border crossing as a prerequisite of trafficking was removed. The area of application was furthermore extended to cover all forms of trafficking and not just trafficking for sexual purposes.

In late 2005, the Swedish government decided to call for a special investigation on the crime of trafficking in human beings, including a review of the relevant criminal provision as stated in Chapter 4, Section 1 (a) of the Criminal Code. The purpose of this review was twofold, namely to answer how anti-trafficking efforts could be improved and to evaluate whether a new wording of the criminal provision or increased penalties were necessary in order to improve these efforts.[5]

In the spring of 2008, the results of the review were published. The main argument put forward by the expert inquiry was that the wording of the 2004 provision on trafficking in human beings hindered an effective application of the provision. More specifically, the way in which the intent of the perpetrator was construed was being questioned. This difficulty was reportedly illustrated by the propensity in case law to view actions that could very well be considered trafficking in human beings as other crimes, notably as procuring and gross procuring according to Chapter 6, Section 12 of the Penal Code.[6]

In accordance with these findings, an amendment of the wording of the relevant provision was suggested. The intention was to make the provision on

5 SOU 2008:41, p. 15.
6 Ibid, p. 16.

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trafficking in human beings more pronounced in terms of describing the essence of the crime and what behaviours should fall within the scope of the new provision. At the same time, there was an explicit ambition to honour Sweden's international obligations in this particular field.

While most of the ideas put forward by the expert inquiry were endorsed by the Swedish government, one of the most important suggestions concerning the question of intent of the perpetrator was not followed.[7] In terms of making the Swedish trafficking provision more like the trafficking definition of the Palermo Protocol, the recent amendment might be considered a success. However, it can be questioned whether the attempts to make the provision more effective were as successful. This question of intent of the various links of the trafficking chain in relation to exploitation will be addressed in more detail in the section on intent. In the following, the criminal provisions on trafficking in human beings will be analysed. We will start with the current provision.

Present Provision on Trafficking

Introduction

The provision on trafficking is located in Chapter 4 of the Swedish Criminal Code, titled On Crimes against Liberty and Peace. The placement of the offence within this specific chapter suggests that trafficking is perceived as a violation of personal autonomy. Victims of trafficking are treated as mere commodities, recruited and sold to the highest bidder to meet the demand of the 'market'. In that sense trafficking is more than – if we consider trafficking for sexual exploitation – a sexual crime. It is also a violation of personal autonomy such as the freedom of movement and the right to make decisions with regard to one's own person. Of course, an individual's integrity is also violated during a sexual crime, but in the case of trafficking the violation is usually more pronounced and long term. By the same token, *all* forms of trafficking can be perceived as violations of one of the main human rights principles, namely the *inherent* dignity of the human being. From this principle, other rights such as liberty and equality before the law flow, as expressed in, among other documents, the preamble of the Universal Declaration of Human Rights.[8]

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7 See more on this important issue in the section on the purpose of the perpetrator and in the summary.

8 "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

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The provision on trafficking is based on the same source as its predecessors, namely the Palermo Protocol and the EU framework decision[9] on trafficking. The disposition of the provision, resembling the one of the Palermo Protocol, is roughly divided into three sections. These include a general description of the crime, the crime pertaining to children, and, finally, trafficking crimes of lesser severity.

As has been mentioned above, the purpose of the latest amendment of the trafficking provision was to make it more effective and thus to strengthen the protection against trafficking in criminal law.[10] One main change was made to the provision. The prerequisite of control was removed.[11] In addition, the dual criminality requirement was removed as a precondition for jurisdiction over trafficking crimes committed abroad.[12] Chapter 4, Section 1 (a) reads as follows:

> A person who, in cases other than those stated in Section 1, by unlawful coercion, deceit, taking advantage of someone's vulnerable situation or by any other such improper means recruits, transports, transfers, harbours or receives a person for the purpose that he or she is to be exploited for sexual purposes, organ removal, military service, forced labour or other service that places the person in a distressed situation, shall be sentenced for trafficking in human beings for at least two and at most ten years.
>
> A person who commits a criminal act as defined in Paragraph 1 against a person less than eighteen years of age shall be sentenced for trafficking in human beings even if no such improper means as defined there has been used.
>
> If the crime as defined in Paragraph 1 or 2 is of a less serious nature, imprisonment for at most four years shall be imposed.

The criminal act of trafficking in human beings is, like Article 3 of the Palermo Protocol, divided into three constituent parts: measures, means, and purposes.

9 In 2011, the framework decision was replaced by a directive.

10 Prop. 2009/10:152, p. 1.

11 See more on this subject in the section on the trafficking provision from 2004.

12 Chapter 2, Section 2 of the Criminal Code sets out instances in which crimes committed outside the realm shall be adjudged according to Swedish law and by a Swedish court. The main rule is that crimes committed abroad by Swedish nationals and certain other groups are to be adjudged by Swedish courts save for certain circumstances, e.g., when double criminality is required. Since the amendment, the crime of trafficking in human beings cannot be the subject of such an exception.

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In the following, the analysis of the provision will be conducted according to this scheme. Trafficking is often referred to as a multifaceted crime consisting of a chain of events.[13] Moreover, the various events usually take place in different countries.[14] The aim of the trafficking definition of the Palermo Protocol is to criminalize all links of the trafficking chain and to punish all persons, from the recruiter and transporter to the person responsible for the final exploitation,[15] who are involved in the trade as main perpetrators.

This is also true for the Swedish trafficking provision that penalizes behaviours such as recruitment and transportation if carried out for the purpose of exploitation while employing improper means. If recruitment or transportation are considered equal to the subsequent exploitation, i.e., if both are actually labelled trafficking in human beings as opposed to, e.g., acting as an accomplice to the crime,[16] remains to be seen. As we shall see, the question hinges to a large extent on the ulterior intent requirement contained in the trafficking provision. Before addressing this requirement, the various prerequisites in Section 1 (a) of the trafficking provision will be described in more detail.

Improper Means

Introduction

The trafficking provision starts by stating that trafficking is secondary to another offence, namely kidnapping.[17] If the prerequisites for kidnapping are at hand, a person will not be convicted of trafficking.

The offence of trafficking in human beings contains prerequisites that shed light on the fact that the crime involves a violation of personal integrity. This is currently indicated through a requirement being imposed on the perpetrator

13 Prop. 2001/02:124, p. 18.

14 "Människohandel för sexuella och andra ändamål 2009", RPS rapport 2010:5, Lägesrapport 11, 2010, p. 9.

15 Other 'links' include the persons responsible for transferring and harbouring the victim along the way as well as for offering housing upon arrival. All of these actions are said to constitute trafficking in human beings or rather are at least in the majority of cases said to be necessary and *equally* important for the commission of the crime.

16 The question is whether, e.g., transporting a person without a specific intent to exploit that person but instead to receive payment, yet while being indifferent in relation to the subsequent exploitation, constitutes trafficking (as a principal perpetrator) or criminal complicity (as an accomplice to the crime). See the section on the purpose of the perpetrator for a more detailed discussion on intent in relation to the exploitation.

17 Kidnapping is a qualified form of trafficking in human beings, as people can be kidnapped and then forced into exploitation. See more on the provision on kidnapping in this chapter.

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having made use of improper means.[18] The provision then lists various improper means that might be utilized by a trafficker in order to force a person into exploitation. These means include (1) unlawful coercion, (2) deceit, (3) taking advantage of someone's vulnerable situation, and (4) the umbrella concept of 'any other such improper means'. These means, starting with the prerequisite of unlawful coercion, are addressed in more detail below.

Unlawful Coercion

The prerequisite of unlawful coercion in the provision on trafficking in human beings corresponds to the offence of unlawful coercion as defined in Chapter 4, Section 4, of the Swedish Criminal Code. The provision reads as follows:

> A person who, by assault or otherwise by force or by threat of a criminal act, compels another to do, submit to or omit to do something, shall be sentenced for unlawful coercion to a fine or imprisonment for at most two years.
>
> Anyone who to such effect exercises coercion by threatening to prosecute or report another for a crime or give detrimental information about another, shall also be sentenced for unlawful coercion, provided that the coercion is wrongful.
>
> If the crime referred to in the first Paragraph is gross, imprisonment for at least six months and at most six years shall be imposed. In assessing whether the crime is gross special consideration shall be given to whether the act included the infliction of pain to force a confession, or other torture.

According to this provision, a person who compels another to do or omit to do something or makes someone tolerate a certain act by means of assault, violence, or threat of a criminal act is guilty of unlawful coercion. In trafficking cases, the desired outcome is, e.g., to compel a person to perform a certain service such as prostitution or begging or to agree to recruitment, transport, harbouring, etc. There are different ways of compelling a person to provide, e.g., prostitution services.

One way of committing unlawful coercion is by means of *assault*. A person is guilty of assault if he inflicts physical injuries, illness, or pain upon another person or places the person in a state of powerlessness.[19] The notion of physical injuries concerns such injuries as cuts, broken limbs, sight and hearing

18 SOU 2008:41, p. 22.

19 See Chapter 3, Section 5 of the Criminal Code for the definition of assault.

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injuries, and paralyses. The concept is to be interpreted rather extensively, e.g., by covering cases where someone shaves another person's (especially a woman's) head. Illness means afflictions of both physical and psychological nature, including trauma. If inflicting pain is used as a means of committing assault, the pain must be of substantial enough nature as well as of certain duration.[20]

Another way of committing unlawful coercion is by means of applying *physical force* other than *assault*. While assault includes violence that inflicts pain or injury, or places a person in a powerless, or to powerlessness similar, state,[21] the concept of force within the context of the provision on unlawful coercion does not require that. However, in instances where the force is not carried out by means of physical assault, it must be of such a nature so as to override some form of resistance.[22]

In instances where the forced person is under total control of the perpetrator, the coercion is called *absolute*. This means that the victim is forced to do or omit to do something without being able to act autonomously.[23] In this scenario, a person is physically forced to do something or to tolerate something being done to him. A person can, e.g., be handcuffed and raped or robbed. In cases of relative coercion, the forced person is presented with two or more options, as in either you do A and you will walk free or you do not do A and I will execute my threat, and thus with, at least on a theoretical level, a choice. Assault and other forms of violence (physical force) belong to the category of absolute coercion while threats of unlawful acts, e.g., assault, death, etc., belong to the category of relative coercion. Both are covered by the provision on unlawful coercion.

The difference between absolute and relative coercion is that in cases of relative coercion the perpetrator is not *physically* forcing a person to do something but instead seeks to motivate them by emotional force or manipulation. The perpetrator might indeed be lying and might in the case of facing resistance from the forced person not follow through with the threat. In most cases, absolute coercion is considered as more intrusive than relative coercion. The forced person is not even given a choice but is physically forced into obedience. However, on a more pragmatic level, the threat of having your child

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20 L. Holmqvist et al., *Brottsbalken. En kommentar*, Göteborg, Norstedts Juridik, 2000, p. 161 ff.

21 See Chapter 3, Section 5 of the Criminal Code.

22 L. Holmqvist et al., p. 213.

23 N. Jareborg, S. Friberg, *Brotten mot person och förmögenhetsbrotten*, Uppsala, Iustus Förlag, 2010, p. 47.

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beaten to death may be as influential on your behaviour, if not more so, as being beaten in order to, e.g., perform a sexual service.

As has been mentioned above, relative coercion is a form of threat. This type of unlawful coercion can by committed by means of *threatening* someone *with a criminal act* such as physical assault.[24] Threats of all forms of criminal acts are enough to qualify an act as unlawful coercion. Not all criminal acts, however, can be considered serious enough so as to force a person to act in a certain way. What is crucial when it comes to the prerequisite of threat within the context of unlawful coercion is how the forced person perceives the threat, i.e., whether he perceives it as seriously meant and its consequences as undesirable enough so as to force him to act in accordance with the wishes of the perpetrator. There must be causality between the threat and the disposition of the forced person, meaning that the person has acted according to the desires of the perpetrator and as a result of the latter's threat.[25]

In most cases, the threat will be clear, as in either you agree to A or I will do B, but it can also under certain circumstances be implied.[26] The latter can be illustrated by a situation where an entrepreneur is threatened by the mob to submit part of his earnings to the illicit organization. The entrepreneur knows that others in his situation were beaten if the money was not paid. However, the threat against the entrepreneur does not need to be pronounced. It is enough that it is implied and that the threatened person directs his actions in accordance with the threat. In cases of trafficking, a trafficker might make an example by punishing one of his victims for acting against his will. The message is clear, i.e., to scare the others into obedience, but it does not need to be pronounced individually to each victim in order to fall within the scope of the provision on unlawful coercion.

The threat needs not to be directed at the victim personally but can be made against a member of the victim's family or concerning property of the victim.[27] This is especially relevant in trafficking cases, where recruiters and other 'links'

24 See, e.g., case *RH 1999:4*, where a man gave the perpetrator his car as a result of unlawful coercion which was delivered in the form of a threat of physical assault. The perpetrator threatened to kick the car owner in the head. This seems to indicate that the bar is not set too high. The man was after all not threatened at gun point, not by several but only one perpetrator. It goes to show that what is relevant is that the intention behind the threat is to bring about a certain outcome and that the victim acknowledges the threat and acts accordingly.

25 N. Jareborg, S. Friberg, p. 203.

26 Ibid, p. 91.

27 SOU 2000:88, p. 247.

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of the trafficking chain based in the country of origin can threaten remaining family members of the victim thus forcing the victim into compliance.

Unlawful coercion also covers acts involving less serious threats than the threat of committing a criminal act against the threatened person. The two forms of threat covered by the provision include blackmailing someone with either treats of getting *reported to the authorities* or with *disclosure of detrimental information*.[28] In these cases, however, the coercion must be wrongful. Threatening to report someone to the authorities due to their status as an illegal migrant or a prostitute – at times victims are not aware of the fact that selling sex is not criminalized under Swedish law – is an example of how this type of threat might be exercised.

In some countries, victims of trafficking are routinely treated as criminals, which would explain their rampant fear of authorities. They are arrested, sometimes fined or even jailed, and then eventually deported.[29] This suggests that the threat is very potent.

The other way of inducing someone to act in a certain way, i.e., by means of threat of disclosing detrimental information, includes instances where the perpetrator threatens to scandalize the victim for refusing to act according to his wishes.[30] One way of scandalizing a person might be to disclose her past as a prostitute or victim of trafficking to her local community or family. In many countries, victims of the international sex trade are stigmatized by their own societies. The threat of disclosing a less than perfect past is therefore very effective.

As has been mentioned above, according to the provision on unlawful coercion, in cases of threats of reporting someone to the authorities for a crime or of disclosing detrimental information, unlawful coercion is at hand only *if* the coercion is *wrongful*. This is basically decided by the motives of the perpetrator. If a person, e.g., knows that someone has committed a crime and tells the perpetrator to turn himself in and threatens to report him if he does not comply, this will not be qualified as unlawful coercion. Likewise, if a person who is indebted to another person is required to pay the debt and refuses to do so, threatening that person with involving the relevant authorities will not be seen as unlawful coercion. This is, however, not true if the creditor tries to acquire unauthorized profits, e.g., by means of threatening with disclosure of detrimental information.

28 Prop. 2009/10:147, p. 19.

29 V. Malarek, *The Natashas. Inside the New Global Sex Trade*, New York, Arcade Publishing, 2004, p. 119.

30 Prop. 2009/10:147, p. 19.

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If a person uses blackmail as a means of compelling someone to prostitute herself, the coercion (or rather the motive behind it) is wrongful.[31] It should be noted that with regard to, e.g., sexual crimes, this requirement is usually considered met. Due to the very nature of the crime, there is a rather strong presumption that the perpetrator has acted wrongfully.[32] The outcome desired by the perpetrator is to force a person to perform a sexual act against his will and the means to bring about this outcome, e.g., threats through the form of blackmail, are therefore, and by the same token, improper. The picture sketched above suggests a similar interpretation in trafficking cases.

Furthermore, in cases of trafficking, the person is not only a victim in relation to the specific outcome of the crime but is also a means for committing the crime. In an attempt to explain this, we can compare a case of trafficking in human beings to a case of extortion. A person can, e.g., try to compel a prostitute or an illegal migrant to give him money by threatening to report them to the authorities or to disclose detrimental information about them to their families, or the person can threaten the prostitute in order to compel her to prostitute herself and the illegal migrant to, e.g., beg on the streets for money. In the first scenario, the aim of the actions of the perpetrator is to simply take the money. In the second scenario, however, the perpetrator is not threatening the persons in order to gain a material benefit from them but rather to use them as tools in an attempt to gain money by making them provide various services. This in turn implies that the coercion in trafficking cases must always be considered as being wrongful due to the improper motive behind it. It is therefore reasonable to argue that in all forms of trafficking in human beings there should be a strong presumption to consider coercion exercised through the means of blackmail as wrongful.

It is important to note that assault and violence or the threat thereof are very difficult if not impossible to prove in court proceedings. It is partly to this end that prosecutors usually do not base their cases on these prerequisites. Instead, they argue that the victim was in a vulnerable situation or that the perpetrator made use of *some other improper means*. As we shall see, these prerequisites are also difficult to prove and are rarely seen as serious enough, in effect leading to few convictions for trafficking. As a result of this development, some people fear that trafficking will only be connected to the use of violence. However, the implications are even more serious. This is what one would call a typical catch-22. We will revisit this important question in the

31 L. Holmqvist, p. 214.

32 P. Asp, *Sex och samtycke*, Uppsala, Iustus Förlag, 2010, p. 63.

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summary of this chapter. Below, the prerequisite of deceit will be discussed in some detail.

Deceit

The second type of improper means set out in the trafficking provision is deceit, i.e., to cause someone to form a false belief. The concept of deception forms part of the provision on fraud, as stated in Chapter 9, Section 1, Paragraph 1, of the Swedish Criminal Code. It has been extensively discussed and analysed in that context. This provision reads as follows:

> If a person by deception induces someone to commit or omit to commit some act which involves gain for the accused and loss for the deceived or someone represented by the latter imprisonment for at most two years shall be imposed for fraud.

In cases of fraud, the action of the victim (which must be to the advantage of the perpetrator and to the disadvantage of the victim) is influenced by means of deception. The victim is, e.g., induced to buy a car after having a look at its odometer which has been set back or changed. The perpetrator needs not override possible resistance of the victim. Also, there might be other circumstances, apart from deceit, that influence the disposition of the victim. However, there has to be causality between the creation of the false belief and the disposition of the victim. This means that the disposition would not have been undertaken had it not been for the created, reinforced, or upheld false belief.[33]

Deceit thus amounts to giving out false information about something to someone and in that way creating false belief. It can also be about reinforcing or strengthening an already erroneous view on behalf of the victim. In a similar vein, it is considered possible to be deceived by someone's actions even if that person per se does not tell a lie but only implies something.[34] In order to induce someone to do something *by means of deceit*, the disposition of the victim must be influenced by the lie. In cases of trafficking, the disposition of the victim is to be influenced *by* means of deceit. The disposition is to allow transportation, agree to provide prostitution services, etc.

The situation described above (deceit by means of) can be illustrated according to the following:

33 L. Holmqvist, p. 421.
34 N. Jareborg, S. Friberg, p. 174.

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1. Act→false belief. 2. False belief→disposition.

Deceit is especially interesting in cases of trafficking for sexual exploitation and domestic servitude, where women are sometimes lured by friends or even boyfriends. One may therefore be deceived by false pretences not so much in the form of words but rather appearances. An old neighbour or an acquaintance living abroad might hint to a potential victim that there are possible job opportunities abroad by inventing her own story of success and then by offering to provide contact information. There is no false information in relation to the potential victim, i.e., the person is not per se told that if she does A they will gain B, but the overall impression engrained on the mind of the person is that if she only does A she will have what the other person has.

It is also not uncommon that female recruiters are used in order to instil trust in the victim, as women tend to be less suspicious toward other women.[35] Here the woman recruiter can paint a vivid picture of her own situation in the foreign country without making any specific promises to the deceived person. At this point, the deceived person might inquire into whom she can contact to discuss potential job openings abroad. If the 'recruiter' has given a misleading description of the future situation, and the victim believed her and directed her own actions accordingly, the prerequisite of deceit is probably met. If one can further illustrate that the disposition of the victim was affected *by means of* deceit, and provided that other relevant prerequisites are at hand, trafficking in human beings by means of deceit has taken place.

Deceit is evaluated in trafficking cases according to the two following steps. The perpetrator is to create false belief (1) and thereby influence the victim's disposition (2). The word *by* indicates that the wrongful belief is the means by which trafficking is facilitated. There must therefore be a causal relation between the action of the perpetrator and the actual disposition of the victim, i.e., trafficking in human beings by means of deceit might be at hand if the disposition of the victim is influenced by the false belief. Thus, the false belief must be relevant to the disposition.

The weight is to a certain extent placed on the experience or perspective of the victim. If he truly was deceived, then the action will in principle be characterized as deception even if the victim can be described as extremely gullible if seen from an objective perspective. This is especially relevant in trafficking cases, where victims are usually young and inexperienced. It is a well-documented fact that victims of trafficking, perhaps with the exception of Russian

35 D. Hughes, "Trafficking for Sexual Exploitation: The Case of the Russian Federation", *IOM Migration Research Series,* no. 7, Geneva, 2002.

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women, are usually poorly educated as well as from the poorest segments of society. Their naivety combined with deep despair makes them ideal targets for those who profit from the hopes of others.[36]

The employment of improper means by the perpetrator must, as indicated, directly influence the actions of the victim. If a person accepts a job offer while being aware of the fact that she will have to work as a prostitute in the country of destination, there is no deceit and the crime will not be considered trafficking in human beings unless the person is also deceived with regard to some other *important* issues such as the nature of the promised work or remuneration.[37] In case law, it has sometimes proven difficult to establish the second part of the chain of events, namely the causality between the false belief and the disposition of the victim. I will try to illustrate this with four different scenarios.

1) A woman is offered work abroad as a prostitute. She accepts the offer. According to law, we are not dealing with trafficking as there is no false belief, i.e., trafficking by means of deceit has not taken place.
2) A woman is offered work abroad as a prostitute. She is told that she will live and work from a two-room apartment but is housed in a three-room apartment instead. Again, according to law, trafficking by means of deceit has not taken place. Although the woman was misled about her future housing situation, she was not manifestly tricked concerning any of the important aspects of her work, e.g., working conditions, remuneration, freedom of movement, etc. In other words, the wrongful belief arguably did not affect her decision, i.e., trafficking by means of deceit has not taken place.
3) A woman is recruited to work as a nanny but ends up in forced prostitution. In her home country she never even considered prostitution. She was a good student hoping to visit a foreign country and earn some money working as a nanny. She would never have agreed to recruitment had she known that the work would involve prostitution. Thus, the false belief influenced her decision to go and trafficking by means of deceit

36 This is also true for Sweden, as confirmed by an official report of the National Police Board, RPS Rapport 2010:5, p. 11.

37 Prop. 2001/02:124, p. 35. A person can still end up in trafficking even though she did agree to prostitute herself. It is the manner of the subsequent arrangement that decides whether it should be seen as procurement or trafficking in human beings. Some circumstances that might imply the latter include the person being forced to work for free, being placed under strict supervision, or being threatened by the perpetrator.

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has taken place. The woman is deceived with regard to the nature of the work that is promised to her in the foreign country. The court establishes that the perpetrator first created false belief and then influenced the actions of the woman by means of that false belief. The court points to the fact that the woman was a top student in her home country and that this makes it unlikely that she would have agreed to working as a prostitute.[38]

As has been stated above, it often proves difficult to establish causality between the false belief and the disposition of the victim. This will be illustrated by the next scenario.

4) A woman is deceived concerning the nature of the work offered to her abroad. She is told that she will have to provide certain services like posing, massage, striptease, etc. She ends up in prostitution. In her statement to the court, the woman argues that she was deceived about the nature of the work, which the court establishes to be true. However, the court cannot conclude that the woman's actions were influenced by the false belief created by the perpetrator.[39] The court thus finds the woman to have been deceived. However, if the provision on trafficking is to become applicable the victim has to be induced to go abroad *by means of* deceit.

In the case referred to as scenario 4 above, the court could not establish that it was actually the false information that induced the woman to go abroad or that she would not have taken the offer if she knew that it included prostitution. The prosecutor was therefore forced to prove that the woman did not herself consider prostitution before being approached by the recruiter, which seems something of a Sisyphean task as well as unfair to the victim. The court stated: "If [the woman] was to travel to Sweden irrespective of whether she knew that she was to have sexual intercourse with men or not, then there is no causal relation between the deceit and the trip".[40]

The question is whether it should not be enough that the woman was actually misled by the perpetrator to argue that the lies did influence her disposition. After all, if women were willing to go abroad and prostitute themselves

38 See case from 2006-04-12 from the District Court of Katrineholm, *case no. B 133–05*, where these circumstances made the court qualify the offence as trafficking in human beings.

39 See, e.g., case from 2003-04-17 from the District Court of Solna, *case no. B 2636–02* and from 2003-06-26 from the Svea Court of Appeal, *case no. B 3065–03,* where these exact circumstances led to the labeling of the case as procurement.

40 Case from 2003-04-17 from the District Court of Solna, *case no. B 2636–02*. The translation is my own.

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just because they had at some point considered prostitution as a means of escaping a vulnerable situation, there would be no need to place false advertisements in the press or to otherwise deceive them. Moreover, it seems difficult, if not impossible, to speculate whether the woman would have accepted the offer if she had known that it included prostitution or whether she de facto considered prostitution at the moment of recruitment. In comparison, it seems logical to focus on the facts, i.e., the false recruitment advertisements and the repeated lies of the perpetrator. The fact is that the woman did decide to go to Sweden under false pretences. She responded to a fake ad in an Estonian newspaper and was subsequently lied to by the perpetrator about the nature of the services that she was to perform in Sweden.

In this context it should also be noted that women are often instructed by the perpetrators in regard to what to say in their testimonies. Perpetrators threaten remaining family members or the victims know that if they tell the truth they will be threatened or hurt by remaining gang members upon return to the country of origin.[41] The case referred to above was decided by the Court of Appeal. This court went even further and held that it could not even be proven that the woman was deceived since she chose to prostitute herself at a later stage.

The fact that the woman chose to return to Sweden to prostitute herself should not have influenced the court's evaluation of the recruitment situation and the prerequisite of deceit. It is not the author's intention to argue that the case above was not complicated, only that when word stands against word, courts should be looking at facts. There were two solid facts in this particular case. Firstly, over thirty women (mostly impoverished Estonians) were being exploited by the perpetrator over a considerable amount of time. Secondly, the perpetrator targeted this specific group of vulnerable women by placing false advertisements in the Estonian press.

41 See, e.g., the story of a Romanian woman trafficked to Sweden. She was first deceived about the nature of the job in Sweden and was then gang raped when she refused to prostitute herself. After that she sold sex several times a day without being able to keep any of the profits. When discovered by the police, the perpetrators threatened the woman's family members who remained in Romania, including her two children. She was instructed to testify that she had provided prostitution services voluntarily. As a result of that, the Swedish authorities almost immediately deported her to Romania where she was recaptured by the traffickers at the airport and promptly sent back into continued exploitation in Sweden. See M. Carlsson, "Alexandra utvisades – till människohandlarna", Dagens Nyheter, 27 February 2013, http://www.dn.se/nyheter/sverige/alexandra-utvisades--till-människohandlarna, (accessed 19 May 2014). See more about this case in the section about reception of the transplant in Sweden.

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However, above all, the case illustrates the prejudices toward women involved in sex work and trafficking as well as the problems connected to the prerequisite of improper means (in this case, deceit) and the words *by means of*. It seems much harder to establish causality between deceit and the disposition of the victim in instances where the victim had at some point considered prostitution, i.e., displayed agency. The question is if it is fair and reasonable to keep this distinction. If two women are in equally vulnerable situations and another person cynically exploits them, should the women be judged differently because of their previous thoughts and actions?

We should ask ourselves what would happen if the victim initiated the contact and asked for a position (even if that position included some form of prostitution) and then ended up being exploited (for example, with no possibility of deciding the number of clients and working hours, with no pay, confiscated documents, etc.)? Judging from the case above, the act would probably be qualified as procuring and not trafficking.[42]

The question is thus if we should not focus on the exploitation taking place in the country of destination to judge if the case is one of procuring or trafficking. Some might oppose this suggestion by arguing that the aim of the trafficking provision is not only to criminalize consummated crimes but also planned exploitation. However, in reality all cases that are brought before courts concern consummated crimes (usually crimes that have been going on for some time, which enables the police to secure evidence). The main question is if one should keep this lofty ambition or promote effective trafficking legislation, or rather which of these objectives is more important. In the case of the first alternative, i.e., if the ambition is to criminalize and *prosecute* planned exploitation, then Swedish police and prosecutors should, e.g., start reacting to false advertisements of Swedish job offers appearing in the foreign press as well as to any other trade measures taking place abroad where the aim is to exploit a person in Sweden. In this context it should also be noted that attempt to commit trafficking is also criminalized under Swedish law.

Taking Advantage of Someone's Vulnerable Situation

The third type of improper means is taking the measure in question by means of taking advantage of someone's vulnerable situation. A vulnerable situation

42 It should be noted that it does matter whether an act is qualified as trafficking or as procuring. For one, generally only victims of trafficking can claim damages as a party to a crime. Secondly, the range of penalties differs between the two crimes. Thirdly, there is symbolic value in properly labelling an offence. For the victim, a trafficking conviction signalises that she did not partake in the practice voluntarily.

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can be of a physical or of a psychological nature. A common denominator is that the person seems to be in a hopeless state with no real possibilities of solving his problem.

Examples of vulnerability include instances where the victim is indebted to or employed by the perpetrator or is a drug addict and the perpetrator supplies her with drugs. The preparatory works to the trafficking provision specifically mention a woman with a sick child that is in need of medical treatment. Such treatment can be promised in return for the woman agreeing to engage in prostitution.[43] Refugees and mentally or physically disabled persons are also depicted as particularly vulnerable to various forms of abuse including trafficking in human beings. Although poverty is distinguished as a common denominator in cases of vulnerability, it is important to stress that poverty alone is not enough to establish a vulnerable situation.[44]

If vulnerability is to be regarded as improper means, the person must be left with no other options than agreeing to trafficking, i.e., that there are no viable alternatives to submitting to the will of the perpetrator.[45] In order for the behaviour to fall under the scope of this prerequisite, the perpetrator must have violated the person's 'true and independent free will'.[46]

A person in a state of helplessness as defined in Chapter 3, Section 5 of the Criminal Code is clearly to be considered in a position of vulnerability. Helplessness in this sense is defined as a near total lack of control over one's own body, e.g., being unconscious, asleep, hypnotized or dizzy, or severely under the influence of alcohol or drugs. Other circumstances comparable to a helpless state include total or partial paralysis of the body or a reaction to tear gas, pepper spray, and the like.[47]

A vulnerable situation might also take its form in a state of dependence. Some victims are in such a situation upon departure while others become dependent at a later stage. If the victims lack language skills and are unfamiliar with their new surroundings, e.g., this might be enough to establish an element

43 Prop. 2001/02:124, p. 21 and pp. 24–25.

44 Ibid, p. 35. See also case 2003-04-17 from the District Court of Solna, *case no. B 2636–02* where the court acknowledged the victim's tough financial situation. However, it also pointed to the fact that the victim was making ends meet by borrowing money from her parents and boyfriend. The court was, therefore, not clear on whether she actually was in such a vulnerable situation that the accused could be said to have made use of improper means.

45 Prop. 2001/02:124, pp. 24–25.

46 Ibid., pp. 24–25.

47 N. Jareborg, S. Friberg, p. 25.

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of dependence vis-à-vis the perpetrator. If their documents are confiscated by the trafficker, they cannot end the abuse and simply travel back home. This is also true if they do not receive the promised earnings but are instead forced to work for free. They might be reluctant to contact the police out of fear of prosecution.[48]

Some insights into how to further interpret the concept of a state of dependence might be found in Chapter 6, Section 3 of the Criminal Code on the exploitation of a person in a state of dependence. With regard to this provision, the prerequisites on what constitutes taking advantage of someone's dependent state are the same as before its latest amendment.[49] The focal point is that a person in a position of power has seriously abused it by taking advantage of the victim's subordinated state. There needs to be a direct link between the power imbalance, the actions of the perpetrator, and the reactions of the victim. The victim must be in such a state of dependence that he sees no other option than consenting to the demands of the perpetrator.[50]

By taking what has been said above into consideration, a pattern or rather a test can be distinguished. First, the court must establish whether or not the victim was in a vulnerable situation. Usually, the prosecutor points to the victim's financial situation. In such cases the prosecutor must first prove that the victim was living under tough (material) conditions that were severe enough so as to push her into prostitution or rather make her accept the offer of the perpetrator.

The second step, which in turn could be seen as consisting of two parts, is to prove that the victim did not see any other alternative to getting out of her situation than consenting to prostitution.[51] A situation resembling an extortion of sorts must arise, and this necessitates the second part of the second step, namely the circumstance that the perpetrator must have made use of improper means. The perpetrator must induce the victim to undertake a certain disposition *by* means of taking advantage of her vulnerable situation.

48 All of the abovementioned circumstances were at hand in case from 2006-06-13 from the Göta Court of Appeal, *case no. B 626–06,* where the accused were sentenced for trafficking in human beings.

49 SOU 2010:71, p. 64. The only changes are, firstly, that this provision is now only applicable to adult victims since the situation of underage victims is now specified in a special provision, and secondly, that the penalty has been lowered from six to four years in prison. The latter is due to the fact that the more serious forms of taking advantage of someone's vulnerability have been moved into the current provisions on rape and sexual coercion.

50 L. Holmqvist et al., p. 292.

51 Prop. 2001/02:124, p. 35.

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Normally, these two steps are considered to be enough. A severely tough economic situation, state of dependence, or other form of a vulnerable situation must not necessarily be created by the perpetrator or exist between the perpetrator and the victim.[52] It is enough that it is established by the court that such a situation existed at the point of recruitment, e.g., that the victim was indebted to a loan shark and the perpetrator was aware of that situation. In addition to the victim's lack of alternative means of solving the situation, i.e., settling the debt, and the fact that the perpetrator is aware of that situation, it is also required that the latter uses this situation to induce the person to go abroad.

However, the question is how this step or part should be evaluated by courts. It has been argued that in one case,[53] the court adopted too strict an interpretation.[54] While the court had established that the victim was living under very tough economic conditions, so much so that she was considered to be in a vulnerable situation, and that the perpetrator was aware of that situation, it did not qualify the action as trafficking in human beings. This was due to the fact that in her statements the victim had said that she did not know for sure whether it was the fact that she was in a vulnerable position that made the perpetrators approach her.

The court held that since it was not clear whether the woman's vulnerable situation was used as means of coercing her into prostitution, trafficking in human beings was not at hand. This view was based on the reported beliefs of the victim, i.e., what the victim thought about the possible motives of the perpetrators. Arguably, the prerequisite of a vulnerable situation of the victim should be regarded from a more objective point of view. It should be enough that the victim was in such a situation and that the traffickers usually specifically target vulnerable people. Moreover, it is one thing to argue that the perpetrators did not act by abusing the victim's vulnerable situation and another to use the victim's testimony to draw conclusions with regard to possible motives and knowledge of the perpetrators. In other words, it seems somewhat strange to make statements about the motives of the perpetrator based on the reports or rather speculations of the victim.

52 See, e.g., case from 2005-02-28 from the District Court of Stockholm, *case no. B 2698–04* and cases from 2005-06-09 from the Svea Court of Appeal, *case no. B 2204–05, B 2343–05* and *B 3344–05,* where the perpetrators knew that the victim was indebted to another person.

53 Case from 2004-04-29 from the District Court of Huddinge, *case no. B 3848–03*.

54 "Människohandel (för sexuella ändamål) – möjligheter och svårigheter vid rättstillämpningen", Rapport 2, RättsPM 2007:2, Utvecklingscentrum, Stockholm, 2007.

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Again, this should be seen in a broader context where former victims of trafficking are either forced or otherwise persuaded to testify to the benefit of the traffickers. This might be the result of Stockholm syndrome, fear of the traffickers, fear of being faced with the reality of being a victim of trafficking and repeated rapes and the accompanying fear of being exposed as such in their native communities, as well as an overall distrust in public authorities.

> A large proportion of the human trafficking victims in Sweden have never been outside their countries of origin before they were trafficked. They do not know how Swedish society works or how to get help from the police, the social services or NGOs. They also may have had bad experiences with the police and the social authorities in their countries of origin. Experience has shown that persons subjected to human trafficking for sexual purposes often have a low level of confidence in authorities and are reluctant to talk to the police. From tapped phone calls it has been verified that traffickers also tell their victims to say that they are involved in prostitution on their own account if questioned by the police. Feelings of shame and guilt may also make the victims unwilling to talk about the sexual abuse to which they have been subjected. A further possible source of stress for the victims is the knowledge that they are in the country illegally and in certain cases, they believe that it is illegal to sell sexual services. On top of all this, they may be worried that their family and neighbours in their home country might find out that they have been involved in prostitution.[55]

Thus, we clearly see that there is a risk in attaching too much significance to *how* the abuse of the vulnerable situation was facilitated, e.g., if it was the perpetrator or the victim that initiated recruitment or if the perpetrator was truly aware that the victim's vulnerable situation was what made her accept the offer. As has been mentioned above, it is a well-known fact that perpetrators intentionally approach persons who are in vulnerable situations. Besides, we should still be able to take the prerequisite of improper means into consideration by looking at the exploitation in the country of origin, i.e., the prerequisite must not necessarily be connected to a trade measure in a country of origin or transit. These questions will be further discussed in this chapter's summary. We now turn to consider the prerequisite of 'other such improper means'.

55 "Human Trafficking and Prostitution from a Swedish Perspective", County Administrative Board of Stockholm and National Task Force against Prostitution and Human Trafficking (NMT), 2011, p. 21.

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Other Such Improper Means

The last form of improper means is the umbrella-concept of 'other such improper means'. It is impossible to list all methods that might be applied by potential traffickers as means of coercing others into various forms of exploitation. It is neither possible nor warranted to create such detailed legislation. Also, even if all possible scenarios were listed in the trafficking provision, a case may still arise with just as reprehensible but as of yet unknown circumstances. The aim of the prerequisite is to take care of such possibilities. It applies to situations where the independent and free will of the victim is being violated by the trafficker, i.e., where the perpetrator has considerable influence over the disposition of the victim.[56]

The wording *or other such improper means* signifies that this prerequisite is to be considered equal to such improper means as unlawful coercion and deceit.[57] Yet, at least in theory, it is easier to interpret the latter two concepts. Compared to the other improper means, the practical application of the prerequisite of other such improper means is therefore considered somewhat problematic.[58] The other prerequisites concern the actions of the perpetrator, a person actively doing something to induce, force, etc., another person to do something. The prerequisite of other such improper means, by contrast, focuses on a specific and already existent situation that the alleged trafficker takes advantage of in order to induce the person to, e.g., prostitute herself.[59] Although the prerequisite of a vulnerable position and similar situations has been discussed in preparatory works, little has been said about the actual action of taking advantage of such a situation.[60]

As the other prerequisites such as force or deceit, are usually difficult to prove in court, prosecutors often base their case on the claim that the alleged perpetrator made use of other such improper means. This in turn usually means that the victim was living under very difficult circumstances where she did not see other viable options than to submit to the will of the offender, a situation of which the alleged perpetrator took advantage.[61] As we have already indicated in previous sections of this work, the circumstances above are often not considered serious enough to qualify an act as trafficking or they are impossible to prove. This leads to cases of trafficking being qualified as procuring.

56 Prop. 2001/02:124, p. 35.
57 Ibid., p. 34.
58 SOU 2002:69, pp. 141–142.
59 RättsPM 2007:2, p. 11.
60 SOU 2008:41, p. 96.
61 SOU 2008:42, p. 71, Prop. 2001/02:124, p. 25.

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Consent of the Victim

The Swedish trafficking provision does not explicitly state that consent is irrelevant if any of the improper means have been used. This can be compared to the trafficking definition of the Palermo Protocol that includes the concept by stating that consent of the victim is irrelevant in cases where the victim is a minor or where any of the improper means has been used. However, including consent in the Swedish provision in the same way as in Article 3 of the Palermo Protocol has been discussed.[62]

Although the trafficking provision does not explicitly state that consent is irrelevant, one may argue that this is still an implicit part of the provision. This is the result of the fact that consent is technically precluded if any of the improper means have been utilized by the perpetrator for the purpose of exploitation. In instances of trafficking in human beings, just like with rape cases, the employment of improper means would suggest non-consent.[63] In other words, the use of improper means, e.g., if a person has been forced or deceived, renders possible consent legally irrelevant.[64]

This suggests that adding the words *consent is irrelevant* would probably not alter the trafficking provision in any significant way, only clarify or emphasize the meaning of improper means. However, outside of the trafficking context it might be interpreted as a specific statement concerning prostitution.

In the case of child victims, improper means are not necessary even though some sort of influence by the perpetrator on the will of the victim must be established if the provision on trafficking is to become applicable.

Trafficking in human beings is a crime where the only evidence often consists of the usually conflicting testimonies of the victim and the perpetrator. When word stands against word, questions such as intent of the perpetrator and alleged consent of the victim become especially relevant. The notion of consent in this specific context also has symbolic value. Not including the passage stating that consent is irrelevant when any of the improper means has been used might signify an understanding that a person can never agree to such a serious crime as trafficking. It might arguably point to the fact that trafficking is not only a violation of specific rights such as the right to one's bodily integrity or freedom of movement but that it is also a crime against humanity.

62 See, e.g., 2008-09-26 Brottsoffermyndigheten: Yttrande över betänkandet SOU 2008:41 Människohandel och barnäktenskap– ett förstärkt straffrättsligt skydd. Dnr: Ju2008/3706/L5, p. 1.

63 P. Asp, 2010, p. 205.

64 See Prop. 2003/04:111, p. 61 and Prop. 2009/10:152, pp. 15 and 20.

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However, it has been argued that the preparatory works should clearly state how the concept of consent in the trafficking provision is to be interpreted. It is argued that although this might seem superfluous, it would still highlight the fact that consent should never preclude responsibility for trafficking. The lack of guidelines on how consent is to be interpreted may lead to a situation where courts, as a result of the fact that the victim had supposedly given her consent, come to view potential cases of trafficking as procuring.[65]

The crucial thing here seems to concern the process of legal valuation or interpretation and not necessarily the question of explicitly stating in the trafficking provision that consent is irrelevant. The main question is how we view exploitation. If a person treats another person as a commodity (including in terms of planning the exploitation of the victim), the question of possible consent seems highly irrelevant if not inappropriate. The question is whether by stating (like the Palermo Protocol does) that consent is (only) irrelevant when improper means have been used, it might be suggested that consent is relevant when these means have not been used (in the sense of the perpetrator not having induced the victim to agree to an act *by means of* improper means) even if the perpetrator has exploited the victim or planned to do so. This would not constitute trafficking since improper means are necessary unless the victim is a minor for an act to qualify as trafficking.

Age of the Victim

In instances where the victims of trafficking are less than eighteen years of age, no requirement is made on the perpetrator having made use of improper means. It is enough that the perpetrator undertakes one of the listed trade measures and that she has ulterior intent to exploit the victim.

In the preparatory works to the trafficking provision, it is stated that a person under the age of eighteen is by the very token of her youth in such a vulnerable state that all measures attempted at exploiting her are to be considered human trafficking.[66]

The Palermo Protocol, which applies especially to women and *children,* is clear on the fact that no improper means are necessary in cases concerning children. According to the Swedish Ombudsman for Children, there should be a separate section and not just a paragraph on trafficking in children, which is to expressly state that in order to establish criminal responsibility

65 2008-09-26 Brottsoffermyndigheten, p. 1.

66 Prop. 2001/02: 124, p. 28.

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in cases involving underage victims the use of improper means is not necessary.[67]

However, specific problems in this area will not necessarily be solved by dividing the relevant provision into two different sections. After all, the Palermo Protocol does not have a separate article on underage victims, yet is clear on the fact that improper means are not necessary in the case of minors if there is (direct) intent to exploit. The Swedish trafficking provision clearly states the same, even though Paragraph 3 is not a separate rule but part of the trafficking provision.

The preparatory works also state that in order for criminal responsibility for trafficking to be established, the actions of the underage victim must be influenced by the perpetrator. This influence, however, must not necessarily be connected to the use of any of the improper means or be of a significant degree. The concept of influence is, unfortunately, not further elaborated upon in the preparatory works and it is up to the courts to fill in the blanks.

In case law, the interpretation of the concept of influence with regard to underage victims has at times been rather unfavourable to the latter. It is especially interesting to see how the courts have interpreted the concept in cases of recruitment. Questions such as if, in order for the crime to be considered trafficking, the perpetrator is to actively recruit the underage victim arise. What happens in cases where the victim takes the initiative? Seen in the light of the motives of the Palermo Protocol, it should be enough that the perpetrator influences the disposition of the victim even if the victim initiates first contact.

It might be argued, however, that the courts have sometimes interpreted the concept in such a way so as to yield results that are not in accordance with the motives of the Palermo Protocol to especially protect children against the crime of trafficking. The courts have interpreted the concept by attaching importance to the personal history of the victims. In cases from 2005 that involved the same perpetrators,[68] the court dealt with the quite similar stories of two different girls, their common denominator being their subsequent exploitation for sexual purposes. The first girl was in dire need of medicines that she could not afford and was told that she could make the money she needed by prostituting herself in Sweden.

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67 2008-09-29 Remissvar: Betänkandet (SOU 2008:41) Människohandel och barnäktenskap – ett förstärkt straffrättsligt skydd. Diarienummer: 9.1: 0553/08, p. 2, www.barnombudsmannen.se7Adfinity.aspx?pageid=7017, (accessed 19 May).

68 Case from 2005-02-28 from the District Court of Stockholm, *case no. B 2698–04* and cases from 2005-06-09 from the Svea Court of Appeal, *case no. B 2204–05, B 2343–05* and *B 3344–05*.

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Although the court did establish that there was intent in relation to the victim's age, it argued that the decision of the victim was not influenced by the perpetrator but instead by her own circumstances. Thus, some sort of a 'by means of requirement' has also been applied concerning child victims. The accused had taken advantage of the girl's tough economic position as well as her medical situation. The court, however, held that as the accused were not personally responsible for the victim's difficult situation, they could not be found guilty of recruiting her into trafficking. It also held that someone else could very well have abused the victim's circumstances.

Again, we should focus on the actual or planned exploitation in the country of destination. We should also be aware of what desperate circumstances might force a person to do, such as consider prostitution, and not judge her (especially when she is a minor) for that decision. Instead, the adult who cynically exploits that condition (even if she has not herself initiated the recruitment or has not created the victim's difficult situation) should be held responsible for the crime.

If we compare trafficking to other crimes such as sexual acts with persons under the age of fifteen, case law indicates that it does not matter if the child initiates the act. Adults are considered to be in such a dominant position so as to assume primary responsibility for such acts. Logically, this should also be the case in instances of trafficking. Although the acts criminalized are different (in regard to sexual acts with persons under the age of fifteen, we are dealing with consummated acts; here, we may deal with acts which are at a distance to the actual exploitation), it should not reasonably matter if it is the minor or the perpetrator that initiates the recruitment. It should be enough that the perpetrator takes advantage of the situation of the victim by responding to his initiative.

The judgments referred to above are puzzling for the following reasons. In the case of adult victims, the preparatory works clearly state that the perpetrator is to have made use of improper means by taking advantage of the victim's difficult situation (for example, tough economic situation, need for medicine for herself or for family members, etc.). The abuse is to take place by, e.g., inducing the victim to accept an offer of work as a prostitute. It is expressly stated that the perpetrator does not need to create this situation. In instances of dependence, e.g., the victim could very well be dependent on someone other than the actual perpetrator.

It is thus enough that the perpetrator is aware of and takes advantage of an existent situation and that it is due to this situation that the victim 'consents' to prostitute herself abroad. Also, the fact that others could have taken advantage of the victim's difficult situation by inducing her to prostitute herself abroad should not preclude responsibility for trafficking. After all, it would be

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an ideal defence to argue that you may have committed a criminal act but are not culpable for someone else could also very well have committed the act in question.

So, why does the court (in this case) set the bar higher for a minor than for an adult victim when there already is a presumption that the age of the victim in itself creates a state of dependence in relation to the perpetrator? There must, at the very least, be some serious circumstances that negate the abovementioned presumption. By delving deeper into the relevant case, we learn that the girl had considered prostitution as a means of escaping her difficult situation. Moreover, we can compare the reasoning of the court to the statements made concerning the second girl.

While the first girl admittedly considered prostitution as a way of paying for her medicines, the second girl was said to have never even considered that option, nor had she ever prostituted herself in her home country. She was indebted to a person in her country of origin and was forced to repay the debt. This was a circumstance that the perpetrators were aware of and of which they took advantage. The fact that the girl unlike her compatriot had not provided prostitution services before or even considered prostitution as a means of escaping her troubles seemed to have had some impact on the court's decision making. Simply put, she was considered to be a good girl.

However, what is also the case here is that the court actually established criminal responsibility for trafficking in human beings based on the existence of improper means. The perpetrators had made use of improper means by taking advantage of the victim's state of dependence. Criminal responsibility for trafficking was de facto established by applying the main rule, i.e., Paragraph 1 of the provision on trafficking in human beings rather than Paragraph 3 concerning underage victims.

Based on the findings from the abovementioned cases, it seems that the history of the victims does have some impact on the decision making of the courts. This seems to somewhat contradict the Swedish government's policy on underage victims of trafficking and prostitution. This policy clearly states that children are especially vulnerable to various forms of exploitation and are also in a dependent position in relation to adults and should therefore be afforded special protection.[69]

Perhaps the most important thing is to clarify in an explicit manner the issue in preparatory works, i.e., to clarify what it means to recruit, transport, etc., children without using improper means. Today, the valuation seems to be

69 "Handlingsplan mot prostitution och människohandel för sexuella ändamål", Regeringens skrivelse 2007/08: 167, p. 9.

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more about recruitment *by means of* measures resembling improper means or even by improper means than about abusing the victim's youth and thus vulnerability. According to, among others, the Ombudsman for Children, a clear statement in the preparatory works on what is meant by no requirement of improper means with regard to children might prevent or at least diminish the likeliness of future discussions on the personal histories of victims and their actions in the countries of origin. This would hopefully put an end to the millennium-old stereotype of the good girl (Madonna) and the one who had considered prostitution (the whore), at least where underage victims are concerned.

In the majority of cases concerning underage victims, the courts have based intent of the perpetrator concerning the age of the victim on indifference. It has been expressed that in most trafficking cases, the perpetrator tends to be aware of the risk that some of the victims may be underage.[70] In fact, age is rarely a factor for the organizers of trafficking, where the 'merchandise' is being depersonalized as the enterprise is usually carried out on a large scale. As more and more people pass through the machinery, personal questions are seldom being asked.[71] Sometimes traffickers intentionally recruit younger victims. These are considered to be better investments as they tend to be more easily handled and less damaged in terms of, e.g., not having contracted venereal diseases.

What is crucial, both in relation to the issue of influence and of intent, is how the provision is applied and not necessary the legal technicalities of making Paragraph 3 of the current provision on trafficking into a separate rule. Even if we would create a special provision for children, the problems concerning interpretation would probably still remain. The age of the victim, both with regard to intent of the perpetrator and the fact that the perpetrator must in some way influence the actions of the child, would remain questions open to interpretation.

Trade Measures

Introduction

From the very first attempt to criminalize trafficking in human beings as a specific crime, the legislator acknowledged the crime as a multifaceted act

70 See, e.g., case from 2003-10-15 from the District Court of Gothenburg, *case no. B 7477–03* and case from 2003-12-18 from the Court of Appeal for Western Sweden, *case no. B 4388–03*.

71 See, e.g., case from 2005-02-28 from the district court of Stockholm, *case nr B 2698–04* and cases from 2005-06-09 from the Svea Court of Appeal, *case no. B 2204–05, B 2343–05,* and *B 3344–05*.

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consisting of a chain of events with several perpetrators. To this end, various measures that may be employed by the traffickers were set out in the trafficking provisions.[72] These measures are prerequisites that together with the employment of improper means and the purpose to exploit the victim constitute the crime of trafficking. The measures include recruitment, transport, transfer, harbouring, and receiving of persons and will be described in more detail below.

Although trafficking is typically a crime consisting of a chain of events such as recruitment and transportation, it does not mean that all links of the chain are necessary or that they need to be undertaken in a specific order for the crime to be considered trafficking in human beings. The measures might be undertaken by several persons or by just one perpetrator. They can be carried out across borders or within a single country. As has been mentioned above, the first provision on trafficking criminalized only cross-border trafficking. As a result, the trade measures were divided into initial measures such as recruitment and transportation, and measures undertaken in the country of destination such as harbouring.[73]

In 2004, the area of application was extended to include internal trafficking. Instead, the requirement of control was imposed. This meant that the trade measures were divided into those that aimed at establishing control and those where established control was being transferred.[74] The trade measure 'or takes any other such action with a person' was added to cover different types of transfers not necessarily pertaining to cross-border transports. In the recent amendment, this prerequisite was removed and replaced with transfer.[75]

The measures listed in the trafficking provision are alternative. This means that any of the measures combined with improper means for the purpose of exploitation qualifies as trafficking in human beings. Provided that other necessary prerequisites are at hand, each measure can be criminalized as the consummated crime of trafficking. In other words, actual exploitation is not necessary in order to be able to qualify an act as trafficking.

The delimitation between the different trade measures decides when a crime can be considered consummated. Recruitment is consummated when the point of consummation is arrived at, i.e., when all the elements necessary for its execution and accomplishment are present. In that sense the different trade measures also indicate the point at which acts can be qualified as

72 Lagrådsremiss "Straffansvaret för människohandel", Stockholm, 2002, p. 6.

73 Prop. 2001/02:124, pp. 22–26.

74 Prop. 2003/04:111, pp. 49–54.

75 Prop. 2009/10:152, p. 14.

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attempts to commit recruitment, transport, etc., i.e., they provide a reference point for when an act becomes punishable.

Recruitment

The Swedish legislation draws on the definitions of the Palermo Protocol with regard to the meaning of the different trade measures.[76] Recruitment means that a person is to be found guilty of trafficking if she recruits someone by enlisting improper means with direct intent in relation to a subsequent exploitation of the recruited person. Recruitment measures pertain to all initial measures undertaken prior to the exploitation.

Nevertheless, there are no specific guidelines on how the concept of recruitment should be interpreted, and it seems somewhat unclear as to when acts of recruitment are actually consummated, especially with regard to underage victims. It is, e.g., dubious whether a recruitment might be considered consummated already at the point when someone approaches a possible victim and gives false information or if it is also required that the approached person accepts the offer. This uncertainty is not a good thing, especially in light of the fact that this question decides the point in time where the act is punishable as a consummated act of trafficking. Attempted human trafficking can be at hand at an earlier stage, but in order to know what constitutes an attempt we need to know what constitutes a consummated crime.

In the first trafficking provision from 2002, where only transnational trafficking was criminalized, the crime was consummated upon the victim having entered Sweden. Recruitment meant to induce another person to travel or to be transported to another country where the planned exploitation was to take place.[77]

After the amendment of the trafficking provision in 2004, if initial measures which could form part of a victim's transfer between other persons were undertaken together with the employment of improper means and for the purpose of exploitation, a situation where control over the victim was established arose. At that point, the crime of trafficking in human beings was considered consummated.[78]

The preparatory works to the present trafficking provision define recruitment as different procedures aimed at recruiting or procuring a person where some form of informal agreement is aimed at. As trafficking is an informal practice, formal employment contracts are rarely signed. The majority of the

76 Lagrådsremiss "Straffansvaret för människohandel", p. 7.

77 Prop. 2001/02:124, p. 23.

78 Prop. 2003/04:111, p. 65.

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jobs offered include moonlighting as nannies, dancers, etc. According to an analysis of the situation of victims trafficked to Sweden, Finland, and Estonia in their countries of origin between the years 2007 and 2008,[79] the victims are usually recruited informally by acquaintances or friends and sometimes even by lovers or family members.

Women already working as prostitutes may be recruited by professional recruiters at brothels, strip bars, etc. A significant part of the informal recruitment takes place on the Internet. There are also Swedish cases where a fee has been paid to a foreign brothel in order to purchase a woman. Naturally, in these instances there are no employment contracts.

What is certain is that there needs to be causality between the recruitment and the disposition of the victim. The disposition of the victim should suggest that the recruitment actions have influenced her decision-making and corresponding actions. If she, e.g., books a ticket or tells her friends that she is going abroad, it might suggest that her disposition has been affected by the recruitment. If the perpetrator has acted for the purpose of exploitation, trafficking might be consummated already at that stage.

Transportation

Transporting a person typically means moving someone from one location to another. It does not only pertain to providing the actual transports, but a person responsible for organizing the trip might also, if other necessary prerequisites are at hand, be found guilty of trafficking. As with the other trade measures, if the perpetrator has direct intent in relation to the exploitation of the victim or direct intent with regard to another person's intent to exploit and the victim has been induced to travel by using improper means, trafficking is at hand.

One important question is whether the transporter must actively use any of the improper means or if it is enough that the victim has, e.g., been deceived about the nature of the work at an earlier stage and that the transporter is simply aware of that but does not, however, make any promises himself. If the transporter actively threatens, deceives, or employs any of the other improper means against the victim in order to influence his disposition, i.e., to make him agree to transport, trafficking is, of course, at hand. It is more doubtful, however, if trafficking is also at hand in situations where the transporter does not use any improper means. If the person knows of the improper means used by

79 "The Organization of Human Trafficking. A study of Criminal Involvement in Sex Exploitation in Sweden, Finland and Estonia", Swedish National Council for Crime Prevention, Report 2008:21, p. 8.

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the recruiter who has hired him, the transporter may, however, at least be guilty as an accomplice.[80] In fact, this is true also with regard to the other trade measures, such as harbouring, transfer, etc.

Transfer

As a result of the recent amendment of the trafficking provision, the prerequisite of 'or takes any other such measure with a person' was substituted with the prerequisite 'transfer'.[81] The former prerequisite concerned measures that can be part of a transport or transfer of a victim between different persons involved in the trafficking chain. It covered instances where a person was induced to travel to the country of destination or to another location but where the measures could not reasonably be described as recruitment or transport. The prerequisite also pertained to situations where a person was offered for a relevant exploitation purpose when this was intended as part of the transfer of that person.[82]

The meaning of the new prerequisite of transfer is similar to the former prerequisite of 'or takes any other such measure with a person'. It covers different actions that are part of a situation where a person is being moved or where someone sends away and receives her, in other words, different procedures that form part of a transfer or the giving away of a person but that do not correspond to actual transports. Examples include instances where the victim is induced to undertake the transfer, e.g., between customers, on her own as well as instances where the perpetrator gives away the victim to another person.[83] The latter includes situations where the victim is sold from one person or brothel to another within one country, so the transfer need not be transnational.[84]

Harbouring and Receiving of the Victim

Harbouring the victim means offering either temporary or permanent residence. A person who offers up her apartment as a brothel, e.g., might if other prerequisites are at hand be guilty of harbouring. Harbouring is also possible during transports. A person who receives the victim acts either as the last stop on the victim's journey or as one of several stops along the way. The prerequisite 'receives' includes instances where the perpetrator receives the victim,

80 N. Jareborg, S. Friberg, pp. 42–43.
81 Prop. 2009/10: 152, p. 18.
82 Prop. 2003/04:111, pp. 65–66.
83 Prop. 2009/10:152, p. 60.
84 N. Jareborg, S. Friberg, p. 4

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i.e., acts as the first and last stop in the country of destination, and instances where the responsibility for the victim switches hands.[85] The latter situation is at hand in instances where someone receives the person for further transportation or other measures.

Purpose

Ulterior Intent Requirement

In order for the action to fall within the scope of the provision on trafficking in human beings, the purpose of the perpetrator must be to exploit the victim. The perpetrator must therefore have *direct intent* to exploit the victim or have direct intent in relation to someone else's direct intent to exploit. This ulterior intent requirement forms an integral prerequisite of the trafficking provision. This also implies that, provided all relevant prerequisites are at hand, the crime of trafficking is consummated even before the actual exploitation has taken place.

Direct intent here means that the perpetrator must either desire for the woman to get exploited because he derives some pleasure from it or he must see it as a necessary end towards achieving his goal. In most cases the party responsible for the subsequent exploitation of the trafficking victim does not desire the exploitation of the victim per se. Most likely, the person does not see it as an end in itself but as a means of securing the material benefits associated with it. Yet, the person knows that she will only achieve these benefits *if* she exploits the victim, and with that purpose she acts her part. Direct intent might thus be at hand in two different scenarios. You can either specifically desire the result of your actions or you may consider the result a necessary step in achieving a further purpose.

We can compare this to an example of a patient in a coma. I would like the patient to die and therefore turn off the life support, as I *hope* that this will kill him. I can either argue that death was the desired outcome and thus the purpose of my actions. Alternatively, I might argue the contrary, namely that death per se was not the purpose of my actions but that the desire to inherit the patient's vast estate was my motivation. Even though death per se is not my primary purpose, it is necessary to achieve the desired outcome, and I would probably venture to do it again so as to reach the desired end.

Ulterior Intent and Links in the Trafficking Chain

Many links in the trafficking chain might act with intent to exploit but not necessarily with direct intent. At the same time, all links of the trafficking

85 Prop. 2009/10:152, p. 60.

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chain, with the exception of some individuals who take pleasure in tormenting others, constitute money-driven actions. For the sake of justice and consistency, they should all be labelled accordingly, but the ulterior intent requirement with its requirement of direct intent can be an impediment in this respect. In response to this, it has been argued that in cases of, e.g., transports, the perpetrator transports a person in order to receive remuneration, meaning that his receiving payment is not necessarily conditional upon the fact of whether an exploitation subsequently takes place or not. In the case of the party responsible for the subsequent exploitation, however, it is believed that the latter must take place if the party is to earn money.

However, it should be noted that the earnings from trafficking hinge on the successful participation of all of the links. Trafficking is usually facilitated not by single individuals but by organized crime rings. All of the links of the trafficking chain, from the recruiter to the person responsible for organizing the exploitation, usually answer to one authority. In other cases, the members are all on equal footing with each other, rationally dividing the tasks among themselves to maximize the profits, and so, it can be argued, all links are equally interested in the exploitation of the victim coming to pass, as this is undoubtedly what generates the profits and eventually pays them for their 'trouble'. In that sense, they all want or, in legal terms, have intent for the victim to become exploited. It therefore seems logical that they all should be judged accordingly and not according to the specific trade measures with which they have been tasked. However, their intent is not always direct, which creates the problem.

Partially due to the development above, many potential cases of trafficking are instead qualified as procuring. In some cases, the court can also find the perpetrator guilty of trafficking as an accomplice. This possibility will be discussed in the following, but first various forms of abuse will be touched upon.

Types of Abuse to Which the Ulterior Intent Can Relate

The current provision on trafficking refers to exploitation, which is a change in wording as compared to the previous provisions that used the term *abuse*. The motive behind this change was to underline the serious nature of the crime of trafficking in human beings, where people are treated as property and traded as such, and thus the impropriety of the abuse. In this specific context, it was mentioned that exploitation might not be the best solution in terms of proper terminology. This is due to the fact that the verb *exploit* in Swedish also means to *work on*, e.g., to exploit a property by erecting buildings on it, or *take advantage of* something. However, the meaning of exploitation in this context is identical to that contained in the 2004 provision on trafficking in human beings, i.e., to abuse.

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The ulterior intent must refer to one of the types of exploitation as set out in the trafficking provision. The prerequisite of exploitation for sexual purposes refers to sexual crimes contained in Chapter 6, Sections 1–6, as well as in Sections 8–11, and concerns abuses of a long-term nature as well as abuses of shorter duration. The most important crimes include rape and gross rape, purchasing of sexual services, sexual coercion and gross sexual coercion, sexual abuse, and the rape of a minor and the gross rape of a minor. They also include inducing children to tolerate sexual acts and participate in pornographic movies and pictures.

Other forms of exploitation include organ removal, military service, forced labour, and other services that place a person in a distressful situation. Sweden has signed the international documents on the prohibition of forced labour including forced military service. The 2004 provision on trafficking in human beings mentioned, in addition to forced labour, practices similar to it. To be in such a state, as in being coerced, required a situation where the free will of the victim was seriously or at least partially circumscribed, leaving the victim unable to make decisions concerning his own situation.

The perpetrator may also fulfil the ulterior intent requirement by having direct intent to exploit the victim for the purpose of organ removal or for the purpose of placing the person in any other services that would put her in a distressful situation. Placing someone in a distressful situation implies a, for the victim, really difficult situation that is not temporary or that does not pass quickly.[86] Other instances that are covered by this prerequisite include using children in armed conflicts in cases where forced military service or forced labour is not at hand, abusing young people sexually, and forced labour within so-called forced marriages. In addition, it is meant to be used in instances where people are induced to work under appalling conditions and for a very little pay but where forced labour per se is not at hand.

General Intent

Introduction

Before proceeding to a discussion on intent, we must establish the meaning of a forbidden act and, by extension, a crime. Firstly, there needs to be a clear connection between intent or, in cases where this is possible, negligence of

86 See section on the text and analyses of the provision on placing someone in a distressful situation.

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the perpetrator and the relevant forbidden act. The perpetrator's view of her actions must correspond to the actual chain of events. Simply put, intent or negligence of the perpetrator must cover the relevant criminal act. This concerns both intent in relation to the actual description of the crime and lack of possible justifications. There must also be intent (or negligence) with respect to the outcome of the unlawful act.

With regard to the act in question, one can have intent based on knowledge or on indifference. In relation to the outcome of the act, one can have direct intent (specific purpose), intent based on knowledge, or intent based on indifference.

In addition to ulterior intent that forms a prerequisite of the trafficking provision, intent in relation to the forbidden act (to a specific trade measure and to at least one of the improper means) is required, i.e., intent is necessary with regard to all other elements of the unlawful act. The objective prerequisites, essentially the description of the unlawful act (and lack of possible justifications), must be covered by the perpetrator's intent. If a crime is to be qualified as trafficking, the perpetrator must have intent with regard to every part or element of the unlawful act, i.e., a specific trade measure, improper means, (and, where relevant, the age of the victim).

Let us say that you are recruiting a woman who will be forced to work as a prostitute abroad. You induce the woman to go by telling her that she will be working as a dancer. You have intent in relation to the lie (1) and to the recruitment (2). If a person is in a vulnerable position, you must have intent with regard to this circumstance (1) and concerning a specific trade measure such as transfer (2). If the victim is a minor, you must also have intent with regard to this fact (1) as well as concerning a trade measure such as transportation (2). As has been mentioned above, with regard to the specific purpose of the act, i.e., exploitation, direct intent is necessary.

When the general intent requirement is concerned, other forms of intent in addition to direct intent are possible. In instances where the perpetrator desires the specific outcome of his action, he acts with direct intent, but the perpetrator can also have intent based on knowledge and indifference. It is, e.g., enough that the perpetrator knows that the victim is in vulnerable position, that she is being transported etc. It is also enough in relation to the general intent requirement that he could have reasonably suspected a certain result to his action but nevertheless went through with it, being indifferent to the realization of the result. To summarize: When checking whether the general intent requirement is fulfilled all forms of intent existent under Swedish law can be applied. The different forms of intent are set out in more detail below.

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Different Forms of Intent

Direct intent is a form of intent which is used only in relation to consequences. Intent based on knowledge means that the perpetrator acts with the knowledge of his actions and of their possible results.

Intent based on knowledge is at hand when the perpetrator is practically certain that an effect will occur as a result of her acts or that a certain circumstance is at hand when acting. One example might be that intent based on knowledge (in relation to the death of another person) is at hand when someone sinks a ferry for insurance purposes but foresees that the persons working on the ferry will die as a consequence of the act. Another example might be that intent based on knowledge (in relation to the fact that a certain object was appropriated by means of an offence) might be at hand when someone buys an expensive object extremely cheaply from a friend who is known to make his living as a thief.

In trafficking cases, this means that the perpetrator acts with knowledge in relation to deceit when she knows that she is not telling the truth, in relation to the age of the victim when she knows that the person is below eighteen years of age, etc.

In other words, the person must understand that he tells another person a lie, abuses her vulnerable situation, etc., in order to influence her disposition. If, however, the act is to be qualified as trafficking, the perpetrator must also fulfil the purpose requirement dealt with above. If there is only intent based on knowledge in relation to the exploitation (the specific purpose or ulterior intent requirement), the perpetrator will, as explained above, as a main rule not be convicted of trafficking as a principal perpetrator.

If it is reasonable for the perpetrator to suspect specific results of his action and if it is established that he carried out the action indifferent to the fact that a certain outcome would come to pass, he has acted with indifferent intent.

This means that instead of making a hypothetical test (whether or not the person would have acted as she did had she been sure about the outcome), one should make a test of indifference, i.e., ask whether the actual realization of the risk was not seen as a reason not to perform the act in question. However, even if the former concept of *dolus eventualis*, which actually entailed a hypothetical test,[87] is no longer part of the definition of intent, it can still be used as an additional test when examining if there is enough evidence to establish intent based on indifference.[88]

87 Simply put, the purpose of the hypothetical test was to establish whether the perpetrator would still carry on with his actions if he knew of their possible results.

88 P. Asp, "Uppsåtets nedre gräns – en efterlängtad sequel", *Juridisk Tidskrift,* Nr 2, 2004/05, p. 387.

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A valuation of a possible presence of indifference contains two steps. The first step concerns the issue of whether the perpetrator actually suspected that a specific circumstance that is a prerequisite of a crime was at hand, e.g., that the recruited person was under the age of eighteen. The second step addresses the hypothetical question of whether it can be established that the perpetrator was indifferent in relation to the age, i.e., whether the actual existence of the circumstance (in this case that the person was underage) would not provide a reason to abstain from committing the act.

If the indifference test mentioned above is answered in the negative, a person cannot be said to have acted indifferently, and the act can therefore not have been committed intentionally. In order to establish intent, i.e., if indifference is to be construed as intent, the person must be indifferent in relation to both the risks and the outcome of her actions.[89] This does not have to mean that the person desires the negative effects of her actions, only that she values the desired end more than the potential risks and effects of the unlawful act.

Participation

Introduction

While it might be quite easy to prove that a transporter had intent to transport a victim or, put more generally, that the perpetrator had general intent in relation to the trade measure and in relation to the means adopted, it is often much more difficult to prove that he also had direct intent in relation to the final exploitation, i.e., to establish that the ulterior intent requirement is fulfilled. Scholars have proposed that in order to be able to establish criminal responsibility for trafficking, the ulterior intent requirement should be changed so that it would be enough to act with intent based on indifference concerning the subsequent exploitation.[90]

This has been one of the main suggestions on how to improve the provision criminalizing trafficking. To that end it has been suggested that the part of the trafficking provision which reads 'for the purpose of' should be replaced with the words *with intent to* in order to signify that direct intent in relation to the exploitation should no longer be necessary, but that intent based on knowledge or intent based on indifference ought to be enough to qualify an act as trafficking. However, the legislator has turned down this proposal, stating that

89 M. Borgeke, "Från Franks första formel till likgiltighetsuppsåt – Vad hände med tanken att uppsåtsläran borde reformeras?", *Juridisk Tidskrift,* Nr 2, 2008/09, p. 288.

90 Prop. 2009/10: 152, p. 19.

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such an amendment would unduly extend the area of principal perpetration in trafficking cases.[91]

As has been mentioned above, in cases where you cannot prove direct intent concerning the exploitation, recruiters, transporters, etc., can still be found guilty, though not as principal perpetrators but instead as accomplices to the crime. Thus, what is left is to use the rules on criminal complicity. Below, the various forms of criminal participation will be set out.

Chapter 23, Section 4, Paragraph 1 of the Criminal Code contains the rule on complicity. The provision reads as follows:

> Punishment as provided for an act in this Code shall be imposed not only on the person who committed the act but also on anyone who furthered it by advice or deed. The same shall also apply to any other act punishable with imprisonment under another law or statutory instrument.
>
> A person who is not regarded as the perpetrator shall, if he induced another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime.
>
> Each accomplice shall be judged according to the intent or the negligence attributable to him. Punishments defined in law for the act of a manager, debtor or other person in a special position shall also be imposed on anyone who was an accomplice to the act of such person.
>
> The provisions of this Paragraph do not apply if the law provides otherwise in special cases.

The abovementioned provision distinguishes between the person who has committed the crime (principal perpetrator) and a person who has not directly committed but nevertheless aided the crime (an accomplice).[92] An accomplice is either an instigator or an accessory to a crime. An instigator induces a person to do something by means of psychological influence. The instigator needs not persuade or deceive the other person.

In cases where instigation is not at hand, a person might instead be seen as an accessory. Being an accessory means providing either physical or psychological aid. You can aid a crime or participate in its commission in different ways and to a varying degree. Each and every person that aids a crime or takes part in its commission is independently responsible for her actions. Each accomplice shall therefore be judged according to the intent or negligence attributable to him.

91 SOU 2008:41, p. 16 and Prop. 2009/10: 152, p. 20. See also N. Jareborg, S. Friberg, pp. 42–43.

92 P. Asp, M. Ulväng, N. Jareborg, *Kriminalrättens grunder*, Uppsala, Iustus Förlag, 2010, p. 462.

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Object of Participation

In order for criminal complicity to become relevant, there must be an object of participation, i.e., something in or to which one can participate or contribute. This means that one or several persons must commit an unlawful act as perpetrators.[93] An unlawful act is at hand if someone has committed a prohibited act and this act is not justified. The act of participation can sometimes be complemented by means of the 'picking' of prerequisites from the act of the accomplice(s). However, some scholars argue that this violates the principle of legality, arguing that the unlawful act must be based on the act(s) of the principal perpetrator.[94]

In the case of trafficking, someone must fulfil the prerequisites, i.e., there must be means, measure, and ulterior intent. This can be illustrated with the figure below:

Unlawful act (object of participation):

1. Act of a perpetrator that fulfils the requirement of the offence including ulterior intent requirements that follow from the offence description. For example: A perpetrator who recruits a person by means of violence for the purpose of sexual exploitation, i.e., who has intent (direct/knowledge/indifference) with regard to violence (1) and recruitment (2) as well as direct intent concerning exploitation.
2. The act must not be justified. For example: The perpetrator is forced (by means of violence or threats) by a third person to commit the act in question.

After having established an unlawful act, we first check if the accomplice has furthered the act as an instigator or as an accessory. In order to decide which act an accomplice is guilty of furthering or participating in, his intent or negligence should be connected to the most severe act that can be covered by the object of participation and the person's intent or negligence.

Act of Participation

Chapter 23, Section 4 of the Criminal Code defines the act of participation in or furthering of a crime as promotion of an unlawful act by advice or deed. This means that the furtherance must be carried out either by psychological means, e.g., advice, or by physical means, e.g., deed. The common meaning of promoting an act is to do something that makes its facilitation easier or at least is

93 N. Jareborg, *Straffrättens ansvarslära*, Uppsala, Iustus Förlag, 1994, p. 100.

94 SOU 1996:185, p. 339 f. See also Prop. 2000/01:85, p. 56.

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attempted to make it easier.[95] Advice not only pertains to typical advice but also to persuasion.[96] Moreover, it is agreed that furtherance/participation that is unnecessary for the commission of the crime can be seen as furthering of the act. For example, if several persons wait in the escape car but only one driver is needed or several persons keep watch when one would suffice, all of them are guilty of furthering the act.[97]

What is important here seems to be that the act of furtherance has somehow influenced the chain of events by at least strengthening the resolve of the persons responsible for committing the act.[98] It is, moreover, not primarily the quality of advice or deed that decides whether furtherance has taken place but rather the fact that the accomplice has engaged in the act. He can, e.g., give bad advice or by his deed make the commission of the crime more difficult than what it would have been without his involvement. Still, if he desires the act to come to pass, he is guilty of furthering it. In case law, the degree of activity for an action to be considered as the furthering of an unlawful act has been set quite low. It has been considered enough that a person strengthens the perpetrator's resolve by, e.g., offering instructions while the perpetrator is assaulting someone without himself having to physically assault the victim.[99]

Intent of the Accomplice(s)

Intent of the accomplice must cover both the object of participation and the accomplice's own actions. We must therefore distinguish between the act of participation and the main unlawful act. If the act requires intent, the accomplice's intent must cover the fact that he has promoted an unlawful act.[100] In the case of trafficking, intent based on knowledge or indifference is enough in this respect. However, the accomplice must also have intent with regard to all elements of the main unlawful act and to its outcome.[101] In instances of trafficking, this means that the accomplice must have intent in relation to the unlawful act of the perpetrator including intent in relation to the ulterior intent of the perpetrator, i.e., the accomplice must not herself have the ulterior

95 SOU 1996:185, p. 187.

96 Ibid.

97 SOU 1944:69 p. 90 f., SOU 1996:185, p. 187 f.

98 SOU 1944:69, p. 91.

99 See, e.g., *NJA 1986, s. 802*. In this case, the accomplice pointed out the location of the victim's carotid artery.

100 See, e.g., *NJA 2006, s. 577*.

101 Prop. 2000/01:85, p. 10.

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intent but he or she must have intent in relation to the ulterior intent of the perpetrator (since this forms part of the unlawful act).

Most of the links of the trafficking chain include people who have intent to receive remuneration but not necessarily direct intent to exploit the victim. Exploitation is not necessarily a required step in order to achieve their goal, which is remuneration. The money is believed to be paid regardless of whether exploitation takes place or not. These people are said to be lacking direct intent in relation to the exploitation and are therefore considered not guilty of trafficking as principal perpetrators. If they have furthered the object of participation and have intent in relation to the furthering and to the object of participation including the ulterior intent of the perpetrator, they are, however, to be viewed as accomplices to the crime.

It should be noted, however, that the sentence is determined according to the guilt of each individual participant in a crime. The range of penalties is the same irrespective of whether the participants in the crime are regarded as perpetrators, instigators, or accomplices. Proper labelling might, however, have a symbolic value. A possibility therefore exists of relabeling an accomplice as a principal perpetrator. This possibility will be addressed in more detail below.

Possibility of Relabeling an Accomplice as a Principal Perpetrator

The rules on criminal complicity make it possible to convict a person as a principal perpetrator even if he has not committed the main unlawful act. This is possible if the accomplice is believed to have assumed such an active and prominent part in the commission of the crime that it seems natural for the court to regard him as the principal perpetrator.[102] This also applies in the other direction, i.e., if the person who was actually responsible for organizing the exploitation is a mere accessory in the hands of a main instigator he can be relabelled as an accomplice or both persons can be regarded to be in such a position so as to be viewed as co-perpetrators.

Certain conditions must be met in order to make a relabeling possible. Firstly, the accomplice must physically or emotionally promote the unlawful act in a way which makes it *natural* to regard him as a principal perpetrator. 'Normal' guidance or assistance is therefore not enough to redefine an accomplice as a principal perpetrator, but the other party or parties to the crime must be dependent on the former's instructions.[103] Secondly, the accomplice must act in consultation or at least in consensus with the other participant(s). Thirdly, the instigator must have intent with regard to the fact that he has

102 SOU 1944: 69, p. 93.
103 P. Asp, M. Ulväng, N. Jareborg, p. 487.

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promoted/furthered the unlawful act as well as in relation to all elements of the main unlawful act.[104]

Translated to our specific context, this might entail that under certain conditions a person responsible for the subsequent exploitation who has acted as an accessory in the hands of the instigator might be relabelled as an accomplice, while the latter can be relabelled as a principal perpetrator. This has the potential of making the situation that only persons with ulterior intent can be considered as perpetrators less problematic. Arguably, this possibility should be used more often in order to fulfil the purpose of the trafficking provision to criminalize all links of the trafficking chain and to view these links as equally necessary for the commission of the crime.

Previous Provisions

Placing a Person in a Distressful Situation

The provision on placing a person in a distressful situation was removed in 2004. It was located in Chapter 4, Section 3 of the Criminal Code and read as follows:

> A person who otherwise than as stated in Section 1 or 2, by unlawful coercion or deceit, causes the entry of someone into military or work service or other similar condition of restraint or induces someone to go or remain in a place abroad where he or she may be in danger of being exposed to persecution or exploited for casual sexual relations or otherwise fall into distress, shall be sentenced for placing a person in a distressful situation to imprisonment for at least one and at most ten years.
>
> If the crime is of a less serious nature, a fine or imprisonment for at most two years shall be imposed.

This provision criminalized certain qualified forms of abuse of a person's freedom of action. It applied in cases where someone by means of *unlawful coercion* or *deceit*[105] caused another person to enter into military service, work

104 See, e.g., case *NJA 1982, s. 525*, where an accomplice was considered a principal perpetrator although he did not physically participate in the commission of the crime, which was an attempt to smuggle narcotics. However, the person was the brain behind the whole operation and responsible for all the planning thereof and was therefore considered to have acted as a principal perpetrator.

105 See more on these prerequisites in the section on the present provision on trafficking.

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service, *or* a *similar condition of restraint*. Similar conditions of restraint concerned situations where a person's freedom of action was being violated. The deprivation of one's freedom of action could be total or partial. It needed, however, to hinder the victim from freely deciding her own actions in order to fall under the scope of the provision on placing someone in a distressful situation.

The provision *also* applied in situations where someone was induced to go abroad, where there was a risk that the person would be exposed to persecution or exploited for casual sexual services or otherwise fall into distress. This scenario applied primarily to the trafficking of women for sexual purposes.[106] The prerequisite *induced* implied that a specific disposition of the victim was necessary in order to make the provision applicable. In other words, the crime was first commissioned upon the induced person entering or deciding to stay in the foreign country. Before that point, the act might have been qualified as an attempt to commit the crime.

This can be compared to the present trafficking provision where the crime is considered commissioned at the point at which the perpetrator has made use of improper means for the purpose of exploitation. Although the actions of the victim must be influenced by the perpetrator, there is no need for the victim to, e.g., enter the country of destination in order for the act to be viewed as trafficking. The crime is, provided that other requirements are met, commissioned at an earlier stage.

However, compared to the trafficking provision, there was no requirement of direct intent in relation to the subsequent exploitation. The wording of the provision on placing someone in a distressful situation clearly indicated that the risk that a person may get exploited in prostitution was enough for an act to fall under the scope of the provision. In order to be punishable for placing someone in a distressful situation, the perpetrator did not need to desire the exploitation per se. It was enough that she acted knowing that there was a risk that the person might be exploited, persecuted, or otherwise fall into distress. This circumstance implies a more extensive area of application when compared to the present trafficking provision. Nevertheless, not all persons who were induced to go abroad for the purpose of prostitution were considered to have fallen into distress. In some instances, the provisions on procuring were instead applicable. To be considered to have fallen into distress implied a severely difficult situation that was not entirely temporary or of a passing nature.[107]

106 L. Holmqvist et al., p. 211.
107 Ibid, p. 212.

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One of the reasons for removing the provision on placing someone in a distressful situation was that there was a risk for overlap with the new trafficking provision.[108] In the preparatory works to the first trafficking provision, it was agreed that the majority of possible actions covered by the provision on placing someone in a distressful situation would be covered by the new trafficking provision. The latter provision was considered to be more adequate where anti-trafficking efforts were concerned, while the provision on placing someone in a distressful situation was considered to be archaic, having seldom been invoked in court proceedings.[109]

Provision from 2002

The first provision on trafficking in human beings in Swedish law entered into force in 2002. The aim of the first trafficking provision was to criminalize cross-border trafficking in human beings for sexual purposes. At that point, the legislator openly acknowledged that the provision was but a first step in the efforts to criminalize all forms of trafficking.[110]

The 2002 provision on trafficking in human beings set out various ways in which a person might have been induced to go abroad for sexual purposes. A person might have travelled independently or have been transported by the recruiter or by a third party. If the action was to be considered trafficking, the trade measures were to be carried out by means of unlawful coercion, deceit, or by any other such improper means for a specific purpose.

The purpose was to make the trafficked person victim of one of the following crimes as stated in Chapter 6, Sections 1, 2, 3, or 4 or to be used for casual sexual relations or to otherwise be used for sexual purposes. The 2002 provision on trafficking in human beings was located in Chapter 4, Section 1 (a) of the Criminal Code and read as follows:

> A person who, in cases other than those stated in Section 1, by unlawful coercion, deceit, or by any other such improper means induces someone to travel or to be transported to another country for the purpose of the person there becoming victim of a crime according to Chapter 6 Sections 1, 2, 3 or 4, being used for casual sexual relations or otherwise being used for sexual purposes, shall be sentenced for trafficking in human beings for sexual purposes for at least two and at most ten years.

108 Ds 2003/45, p. 183.

109 Ds 2003/45, p. 184.

110 Lagrådsremiss "Straffansvaret för människohandel", p. 1.

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> A person who receives, transports or harbours another person that has travelled into a country under the circumstances stated in Paragraph 1, and if such improper means as stated there have been used and for the purpose stated there, shall also be sentenced for trafficking in human being for sexual purposes.
>
> A person who commits a criminal act as defined in Paragraphs 1 or 2 against a person less than eighteen years of age shall be sentenced for trafficking in human beings for sexual purposes even if unlawful coercion, deceit or other such improper means has not been used.
>
> If a crime as defined in Paragraphs 1–3 is of a less serious nature, imprisonment for at most four years shall be imposed.

According to the preparatory works to the provision, the crime was to be made up of three constituent parts, i.e., measures by which the trade was to be carried out, means by which the victim was forced to submit to the exploitation, and the purpose behind the trade, i.e., to expose the victim to various forms of exploitation.[111]

The first paragraph of Chapter 4, Section 1 (a) related to the measures used by so-called agents, recruiters, organizers, and transporters, such as offering work, organizing a trip, or transporting and transferring the victim to the country of destination by means of employing improper means.

The second paragraph applied to measures undertaken in the country of destination, i.e., the country where the exploitation was to take place. These measures included receiving, transporting, or harbouring a person that had come to Sweden under the circumstances set out in Paragraph 1 of the relevant provision, if the perpetrator had made use of improper means for at least one of the purposes stated in Paragraph 1. Paragraph 3 of the provision dealt with victims less than eighteen years of age. In such cases, there was no requirement on the perpetrator for having made use of unlawful coercion, deceit, or any other improper means.

The provision concerned only cases of cross-border trafficking, i.e., instances where a person was made to travel or was transported to another country. The crime was considered consummated at the moment of the victim having entered the country of destination, i.e., the country where the subsequent exploitation was planned to take place. Cases where the victim was only in transit and where Sweden was consequently seen as a transit country did not fall within the scope of the provision. Also, cases of internal trafficking, i.e.,

111 For a detailed analysis of the constituent prerequisites of the provision on trafficking, see the section on the present trafficking provision.

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instances where a victim was being resold on the same territory, did not fall under the scope of the provision on trafficking in human beings.[112]

This was criticized by, among other experts, the Swedish Council on Legislation and Government Bills. The council argued that adhering to the obligations stemming from the Palermo Protocol would require all forms of trafficking, including cases of transit and internal trafficking as well as trafficking for other forms than just for sexual exploitation, to be criminalized.[113]

The council also stressed the importance of already existent legislation on which a new trafficking provision might have drawn, e.g., the provision on placing a person in a distressful situation. It underlined the potential danger of having multiple provisions for similar actions. The council also suggested that relevant provisions in force at that time should remain in place while a proper definition of trafficking in human beings was being developed.

The government, however, did not share this view. It was argued that there was a risk that the existent provisions might prove inadequate in relation to the multifaceted crime of trafficking. There was arguably no one coherent provision that covered all links of the trafficking chain. It was also mentioned that some of the relevant provisions were only applicable if a certain effect had materialized. Provisions, like kidnapping and unlawful deprivation of freedom, e.g., required some form of deprivation of freedom.[114]

As the need for a trafficking provision was considered rather dire, the provision, nevertheless and with no further preparation, entered into force. The government was, however, aware of the fact that the provision with regard to the preparatory work put into it was somewhat premature. As has been stated above, the government noted that the provision was but a first step towards a future legislation on trafficking, and so two years later the provision was amended.

Provision from 2004

Introduction

In 2004, an amendment of the trafficking in human beings provision was facilitated. The changes were considered necessary due to Sweden's international commitments, i.e., the Palermo Protocol as well as the EU framework decision on trafficking in human beings. One of the main changes was the expansion of the area of application of the trafficking provision. The new provision applied in cases of internal trafficking and not just transnational trafficking. It

112 Prop. 2001/02:124, p. 22.

113 Prop. 2001/02:124, p. 55 f.

114 Prop. 2001/02:124, p. 18.

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was also made applicable in other forms of trafficking than for just sexual purposes.

Another change was that the prerequisite of taking advantage of someone's vulnerable position was added as one of the improper means that could be enlisted by potential traffickers. The purpose of this addition was basically to make the prerequisite of 'other such improper means' more pronounced. It was by no means intended to change the meaning of the concept that was already existent in legal doctrine but was merely an exemplification of what the prerequisite of other such improper means may mean.[115]

Just like with the 2002 provision, at least one of the improper means was necessary in order for the action to be viewed as trafficking in human beings. This did, however, not apply to cases where control of a person was transferred to another person. In these instances, improper means might have already been used at an earlier stage by the person who first gained control over the victim.[116] The transfer of control was also in itself considered improper.

The 2004 trafficking in human beings provision remained divided into three constituent parts. The provision also continued to be located in Chapter 4, Section 1 (a) of the Criminal Code and read as follows:

> A person who, otherwise than as stated in Section 1, by unlawful coercion or deceit, by abuse of someone's vulnerability or by any other such improper means recruits, transports, harbours, receives or takes any other such measure with a person, and thereby takes control over that person, for the purpose of that person
>
> 1. being victim of a crime according to Chapter 6 Sections 1, 2, 3, 4, 5 or 6, being used for casual sexual relations or being otherwise used for sexual purposes,
> 2. being used in military service or forced labour or any other such forced state,
> 3. being used for the removal of organs, or
> 4. being used in another way that constitutes a personal state of emergency of the affected person shall be sentenced for trafficking in human beings to imprisonment for at least two and at most ten years.
>
> The same applies to a person, who for the purpose described in Paragraph 1

115 Prop. 2003/04:111, p. 59. Prop. 2001/2002:124, pp. 24–25 and pp. 34–35.

116 Prop. 2003/04:111, p. 53 f.

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1. relinquishes his control over someone for the benefit of another person, or
2. gains control over someone from another person.

A person, who commits a crime as described in Paragraph 1 against a person under the age of eighteen shall be sentenced for trafficking in human beings even if no improper means as stated therein has been used.

If the crime described in Paragraph 1 and 3 is of a less serious nature, imprisonment for at most four years shall be imposed.

Trade Measures

The first part of the trafficking in human beings provision from 2004 dealt with trade measures. As part of the 2004 amendment, another prerequisite was added, namely *or takes any other such measure with a person*. The general idea behind the inclusion of that prerequisite was to illustrate that all links of the trafficking chain, i.e., all actions that can be part of a transport or transfer of a person between various links of the trafficking chain that help to gain control over the victim are to be covered by the trafficking provision directly or at a later state.

The measures enumerated in the second paragraph of the abovementioned provision concerned actions that could be undertaken where control over the victim was already established. In these instances, additional improper means were not necessary. Every measure after obtaining such control over the victim, both the giving and receiving of a person where control was transferred for the purpose of exploitation, was seen as trafficking in human beings. In most cases, if a certain degree of control over the victim was already present, there was no need to again take control. Consequently, the existence of additional improper means was possible, but not necessary, in order to view such acts as trafficking in human beings.[117]

The provision can therefore be said to have had two main components. The first component, as stated in Paragraph 1 of the provision, dealt with trade measures that resulted in the perpetrator taking control over the victim. The second part, contained in Paragraph 2, dealt with instances where control was already established and merely switched hands.

Prerequisite of Control

Another change to the provision from 2004 was the adding of the requirement of control. In Paragraph 1 of the provision, it was stated that the perpetrator was to take measures by which she was to take control over the victim.

117 Prop. 2003/04:111, p. 59.

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The crime was considered commissioned when such control over the victim had been established. Albeit criticized by several experts, among them the Swedish Council on Legislation and Government Bills, for being inherently vague and for having no counterpart in the trafficking definition of the Palermo Protocol,[118] the prerequisite of control was incorporated into the trafficking provision.

It was said that if a subsequent exploitation was to take place, there had to be some sort of control over the victim. The provision was therefore based on a requirement that control over the victim had either been established by the perpetrator or that an already existent control was being transferred to the perpetrator(s). Causality between the measure undertaken by the perpetrator and the establishment of control over the victim was required in order for the act to be viewed as trafficking in human beings.

According to the preparatory works to the provision, in order for control to have been considered established, it was required that the victim be in a difficult situation or an actual state of dependence in relation to the perpetrator. The control could have been established by, e.g., locking the victim in or by making continuous threats. However, control might also have been established in more subtle ways. It was noted that the degree of control was not to be set too high.[119] It was considered enough that actual control was at hand, even if it was not of a legal nature. Control exercised through a power imbalance between the parties could also have been of a more limited character. It was, however, necessary that the victim be under pressure of a serious nature and importance to him, de facto affecting his ability to change the situation. This typically required a considerable position of disadvantage on behalf of the victim, with the perpetrator having a palpable and considerable influence over the victim's actions.

There were, in principle, no special recommendations on how the requirement of control was to be interpreted in relation to victims less than eighteen years of age. In criminal proceedings, prosecutors often argued that the very nature of the age of the victim and, by the same token, the age difference between the victim and the perpetrator had a considerable influence over the actions of the victim. Statements in the preparatory works concerning the power imbalance between an adult and a child seem to validate that presumption.[120]

118 Lagrådet. Yttrande till ändring av brottsbalken, utdrag ur protokoll vid sammanträde 2004-02-13, p. 2.

119 Prop. 2003/04:111.

120 Prop. 2003/04:111, p. 59–60 and pp. 66.

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In case law, however, the courts were not satisfied with just the age of the victim meeting the requirement of control. They looked at other circumstances such as the fact that the victim was in a foreign country without money and language skills or that there was a considerable age difference between the perpetrator and the victim. This prompted some experts, e.g., the Ombudsman for Children, to argue that in order to be able to live up to the obligations of the Palermo Protocol, the requirement of control had to be removed from the trafficking provision.[121]

One of the reasons for which the prerequisite of control was finally removed was that it was believed to hinder an effective application of the trafficking in human beings provision, especially with regard to victims under the age of eighteen.[122]

Other Relevant Provisions

Introduction

In the preparatory works to the first provision on trafficking in human beings, it was agreed that several of the actions that are carried out by various links of the trafficking chain were already criminalized in Swedish law.[123] The relevant provisions applicable in cases where a person by means of force or deception was induced to prostitute herself in Sweden or was subjected to sexual abuse were contained in Chapter 4 of the Criminal Code, titled Crimes against Liberty and Peace. The actions that were criminalized in these provisions concern the liberty and personal peace of the individual. Naturally, these provisions are still in force. They are, however, not the 'first choice' in potential trafficking cases.

Section 1 criminalizes kidnapping while Section 2 deals with illegal deprivation of freedom. Section 3, placing a person in a distressful situation, addressed specific actions that circumvented the freedom of movement and actions of the individual. This provision is no longer in force. Section 4 criminalizes unlawful coercion and is meant to protect the freedom of action. The personal peace of the individual is protected by the provision on illegal threat contained in Section 5.

121 2008-09-29 Remissvar: Betänkandet (SOU 2008:41) Människohandel och barnäktenskap – ett förstärkt straffrättsligt skydd. p. 3.

122 Prop. 2009/10: 152, p. 18.

123 Prop. 2001/02:124, p. 16.

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In instances of forced prostitution, provisions on procuring were sometimes used in relation to the different 'links' of the trafficking chain. Also, as a result of the present situation concerning the specific purpose of the perpetrator and the 'by means of requirment' described above, many potential cases of trafficking are still being qualified as procuring. The provisions on procuring therefore remain relevant in trafficking cases. As prostitution is seen as an integral part of trafficking, and both crimes are said to be driven by demand, the prohibition on the purchase of sexual services is also relevant. Provisions criminalizing various sexual crimes, as stated in Chapter 6 of the Criminal Code, are also relevant in trafficking cases. In the following, the abovementioned provisions will be set out.

Kidnapping

Kidnapping is a qualified form of trafficking as it can be used as a means of forcing someone into exploitation. The provision on kidnapping is contained in Chapter 4, Section 1 of the Criminal Code and reads as follows:

> A person who seizes and carries off or confines a child or some other person with intent to injure him or her in body or health or to force him or her into service, or to practice extortion, shall be sentenced for kidnapping to imprisonment for a fixed period of at least four and at most eighteen[124] years, or for life.
>
> If the crime is of a less serious nature, imprisonment for at most six years shall be imposed.

Issues of specific interest to Chapter 4, Section 1 pertain to the subjective elements of the crime, i.e., the intentions of the offender. It must be established that at the relevant time the defendant actually had intent to *take control* over *and confine or abduct* another person. In order to be able to establish responsibility for kidnapping, some additional circumstances are necessary. This means that the kidnapping must be carried out with the *ulterior intent* to hurt a person or to force her to provide a certain service. Kidnapping can also be undertaken with the ulterior intent to commit extortion. If this ulterior intent is not at hand, the provision on unlawful deprivation of liberty might instead become applicable.

However, direct intent is not necessary to establish criminal responsibility for kidnapping.[125] Intent based on knowledge or indifference is considered

124 In 2002, the maximum penalty for kidnapping was ten years. In 2004, it was changed to eighteen years.

125 L. Holmqvist, et al., p. 206.

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sufficient for the action to fall under the scope of the provision on kidnapping.[126]

Unlawful Deprivation of Liberty

The provision on unlawful deprivation of liberty is located in Chapter 4, Section 2 of the Criminal Code and reads as follows:

> A person who, in cases other than those stated in Section 1 or Section 1 a, kidnaps or confines someone or in some other way deprives him or her of liberty, shall be sentenced for unlawful deprivation of liberty to imprisonment for at least one and at most ten years.
>
> If the crime is of a less serious nature, a fine or imprisonment for at most two years shall be imposed.

In an instance where a person kidnaps or confines another person and the action does not qualify under Chapter 4, Section 1, the provision on unlawful deprivation of freedom may become applicable. A person can be unlawfully deprived of his liberty by means of *kidnapping* or *confinement* as well as in other ways. Other ways of unlawfully depriving a person of his liberty include placing a person under surveillance or, under certain circumstances, taking a boat from someone who is visiting a remote island or clothes from someone who is swimming in a public place or in other ways hindering a person from going from one place to another.[127]

Although the deprivation of freedom need not be of a permanent nature, instances where a person is only momentarily held down against her will do not fall under the scope of the provision. Moreover, if a person is unlawfully deprived of his freedom for a longer time span, this is naturally an aggravating circumstance. Also, physical abuse, e.g., if a person is tied up and/or locked in a room, is usually considered as a more serious form of the crime than placing someone under surveillance.[128]

How can this be related to trafficking cases? In some cases a person might be locked up and forced to perform sexual services or other work. However, in the majority of trafficking cases, more subtle methods of control are applied. A person's documents and money might be confiscated. This circumstance together with the victim's lacking language skills makes him particularly

126 For relevant case law, see *RH 1982:9*, *RH 1983:104* and *RH 1990:75*, *RH 1982:10,* as well as *RH 1989:37*.

127 L. Holmqvist et al., p. 207.

128 See, e.g., *RH 2008:36*.

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vulnerable to abuse, arguably placing the victim in a state of virtual submission.

Procuring and Gross Procuring

In cases where responsibility for trafficking in human beings, and previously for placing someone in a distressful situation, cannot be established, the provision criminalizing procuring and gross procuring might be applicable. The provision is located in Chapter 6, Section 12 of the Criminal Code[129] and reads as follows:

> A person who promotes or improperly financially exploits the casual sexual relations for payment of another person shall be sentenced for procuring to imprisonment for at most four years.
>
> A person who, holding the right to the use of premises, grants the right to use them to another in the knowledge that the premises are wholly or to a substantial extent used for casual sexual relations for payment and omits to do what can reasonably be expected to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be sentenced in accordance with the first Paragraph.
>
> If the crime provided for in Paragraphs 1 or 2 is gross, imprisonment for at least two and at most eight years shall be imposed for gross procuring. In assessing whether the crime is gross, special consideration shall be given to whether the accused promoted casual sexual relations for payment on a large scale, for considerable profit or ruthlessly exploited another.

A person who helps someone to engage in prostitution or who exploits another person's prostitution is guilty of procuring. *Prostitution* involves casual sexual relations for remuneration. The practice generally refers to sexual intercourse and comparable acts, i.e., to sexual acts as defined in Chapter 6, Sections 1 and 2 of the Criminal Code.[130] *Remuneration* is to be interpreted as not only payment in cash and comparable payments but also compensation in kind, such as jewellery, alcohol, or cigarettes.[131] Promoting or financially

129 In 2002, the provisions on procuring and gross procuring were located in Chapter 6, Sections 8 and 9 of the Criminal Code. The provisions were amended in 2005. The main changes were purely technical, with the two sections being merged into one. In addition, the maximum penalty for gross procuring was changed from six to eight years of imprisonment. Also, the prerequisite 'for considerable profit' was added to the definition on gross procuring.

130 RättsPM 2008:11, "Människohandel och koppleri", Utvecklingscentrum Stockholm, 2008, p. 16.

131 L. Holmqvist et al., p. 313.

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exploiting casual sexual relations other than prostitution services is not punishable as procuring.[132] Single events, where the contact information of a prostitute is given out or where a taxi driver, upon a person's request, agrees to take that person to a place where prostitutes might be found, do not fall under the scope of the provision.[133]

A person commits the offence of *procuring* if she intentionally commits certain acts aimed at its promotion. A person can, e.g., run a brothel, advertise the services of prostitutes on the Internet, or continually supply contact information of prostitutes to potential customers.[134] Prostitution can also be promoted by means of exerting psychological influence on another person in order for them to engage in prostitution or to continue with the practice. It is, moreover, not necessary that the actions of the perpetrator actually lead to a casual sexual relation. Provided that other necessary prerequisites are at hand, it suffices that the perpetrator has created the possibility of such a relation coming to pass or made its facilitation easier.[135] However, the degree of influence exerted by the perpetrator must be of strong enough nature, having actively contributed to the person's decision to engage in or to continue with prostitution.[136]

The prerequisite of *financial exploitation*, which constitutes the other form of procuring, means that the perpetrator receives some part of the prostitute's earnings. In order for the exploitation to be criminalized, it must be carried out in an improper manner. This is true in instances where a person benefits from another person's prostitution without offering remuneration or for an inadequate compensation in relation to his 'contribution'. Examples of when a person does not actively promote prostitution but nevertheless profits from it involve spouses or couples living together where one party is financially supported by the prostitute.[137] In the scenario sketched above, there is no requirement for the exploitation or abuse to be carried out on a continual basis, but also someone who improperly financially exploits a prostitute on a single occasion may be found guilty of procuring.[138]

Paragraph 2 of the provision on procuring exemplifies a form of promoting. A person who rents out her apartment to someone who uses it as a venue for

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132 SOU 2001:14, p. 290.

133 Holmqvist, L. et al., p. 312. See also *RH 1981:87* where sporadic sexual relations were not considered enough to establish responsibility for procuring.

134 SOU 2001:14, p. 291.

135 L. Holmqvist et al., p. 311.

136 Prop. 1983/84:105, p. 57, SOU 2001:14, p. 291.

137 Prop. 1983/84:105, p. 57.

138 Prop. 2004/05:45, p. 108.

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providing sexual services is guilty of having promoted prostitution and thus of procuring. The provision does not apply to cases where a person rents out her apartment for adequate compensation to a prostitute if the apartment is used as private lodgings. However, if the apartment is used wholly or to a substantial degree as a venue for providing prostitution services, the provision on procuring is applicable. This is true if the landlord is aware of the situation or if she becomes aware of the situation at a later stage. In order not to be guilty of procuring, the landlord needs to put a stop to the practice. She has the right not to terminate the lease if she manages to convince the tenant to stop providing prostitution services in the apartment.[139] If the tenant, however, refuses to stop the practice, the landlord should terminate the lease. If necessary, the landlord is entitled to state assistance in order to make the tenant vacate the premises.[140]

Paragraph 3 of the provision on procuring deals with *gross procuring*. Procuring is gross if undertaken as a more *large scale enterprise* for *considerable profit* or if the perpetrator has *ruthlessly abused* another person. The legislator intended to cover instances where procuring is carried out under forms similar to trafficking but where the prerequisite of improper means is not at hand.[141] A practice carried out on a larger scale may, e.g., pertain to a situation where a person in Sweden having connections in another country uses these connections in order to bring foreign women to Sweden for the purpose of prostitution.[142] Another circumstance that can render procuring gross is the nature of the financial profits. If the profits are extensive, procuring is normally considered to be gross.[143] Procuring is also gross in cases where the perpetrator has ruthlessly abused the prostitute. This is true in a situation where the perpetrator creates or sustains another person's drug addiction as a means of enticing that person to provide prostitution services for his benefit. Another way of ruthlessly abusing a person in order to compel him to engage in prostitution is by means of physical assault.[144]

Prohibition of the Purchase of Sexual Services

On 1 January 1999, a provision criminalizing the purchase but not the sale of sexual services was incorporated into Swedish criminal law. The provision on

139 Prop. 1983/84:105, p. 59 and p. 77.
140 SOU 2001:14, p. 62.
141 Prop. 2004/05:45, p. 112.
142 Prop. 2004/05:45, p. 151.
143 Prop. 2004/05:45, p. 151.
144 RättsPM 2008:11, p. 18.

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the prohibition of the purchase of sexual services is located in Chapter 6, Section 11 of the Criminal Code and reads as follows:

> A person who, in cases other than previously stated in this Chapter, has secured a casual sexual connection in return for remuneration, is guilty of the purchase of sexual services and is sentenced to pay a fine or to imprisonment for maximum of one year.

According to a government action plan against prostitution and human trafficking for sexual purposes, the main cause of prostitution is demand, i.e., the circumstance that people purchase sex. Since human trafficking for sexual purposes primarily affects women and girls and is deemed to be one of the most profitable forms of international organized crime, there is, according to the government, an indisputable connection between the existence of prostitution and human trafficking for sexual purposes.

In 2008, a government appointed committee[145] was tasked with determining how the ban against the purchase of sexual services was applied by courts and if it actually functioned adequately in terms of its impact on the occurrence of prostitution and human trafficking for sexual purposes in Sweden. In this evaluation, it is noted that street prostitution has diminished in Sweden and that the ban seems to have had an educational impact on the population. Possible offenders are said to be not so much scared of the penalties for the purchase of sexual services but rather of the social stigma associated with the label 'sex buyer'. Consequently, fewer purchase sex. The ban on the purchase of sexual services was intended as much a means of curbing prostitution and trafficking for sexual purposes as a societal statement that prostitution is an undesirable phenomenon. According to the abovementioned investigation, there has been a shift in attitude concerning the practice of prostitution. That being said, it is assumed that the ban has had tangible normative effect, especially among young people.[146]

One of the questions raised by the evaluation committee concerned the issue of cases of purchasing of sex abroad by Swedish nationals and residents. The investigation stated that there was a need to expand the opportunities for prosecuting cases of purchasing of sex that have taken place abroad. This was considered to be especially relevant in cases where a person representing Swedish public interests purchased sexual services abroad.

145 Committee of Inquiry to Evaluate the Ban against the Purchase of Sexual Services.
146 SOU 2010:49, p. 125.

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However, in most countries the purchasing of sex is not a criminal act. The opportunity to prosecute a Swedish national for buying sex abroad is therefore often lost as a result of the dual criminality requirement.

Moreover, since purchasing sex is in Sweden considered to be a crime of lesser severity, it is not eligible to fall under the category of crimes for which the dual criminality requirement has been removed. Although in accordance with the preparatory works to the recent amendment of the ban on the purchase of sexual services, the maximum penalty for buying sex was changed from six months to one year, it was also agreed that the dual criminality requirement for the purchasing of sexual services should remain in force.[147]

If the main objective is to rid Swedish society of the practice of street prostitution, the prohibition on the purchasing of sexual services seems to be working adequately. If a further objective is to assist prostitutes and eradicate a behaviour, such as men buying women or people buying people, it is more problematic, considering the fact that sex tourism occurs between Sweden and countries like Russia and Thailand as well as on the Internet. The issues of prostitution on the Internet and of Swedish citizens buying sex abroad in relation to the ban against the purchase of sexual services therefore deserve more attention.

Sexual Crimes

Other criminal provisions of relevance in trafficking cases include rape, sexual coercion, sexual abuse, sexual exploitation of a person in a state of dependence, etc. These are relevant as a result of the fact that some if not the majority of all trafficking cases include women and children being trafficked for the purpose of various forms of sexual exploitation.

Some experts claim that generally gender-based violence, e.g., rape and trafficking, constitutes not only specific crimes committed by individuals against others but also harmful social traditions.[148] In the Swedish context specifically, it has been argued that prejudices concerning both male and female sexuality as well as ideas of how a victim should behave before, during, and after rape sometimes hinder an effective application of the provisions on sexual crimes. These preconceived notions are also said to concern the ideas of what constitutes a 'true' rape (in Swedish law defined as rape or rape of normal

147 Prop. 2010/11:77, p. 11.

148 Y. Ertürk, "Report of the Special Rapporteur on Violence against Women, its Causes and Consequences", *Intersections between Culture and Violence against Women*, A/HCR/4/34, January 2007, p. 11.

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degree) and the ideal victim.[149] Also, some international studies of Swedish law on sexual crimes indicate that there is a gap between the criminal provisions and their actual application.[150] In addition, the Committee on the Elimination of Discrimination against Women expressed concern that too few reports of violence against women resulted in prosecutions and criminal convictions.[151]

Rape

The provision on rape is located in Chapter 6, Section 1 of the Criminal Code and reads as follows:

> A person who by assault or otherwise with violence or by threat of a criminal act forces another person to have sexual intercourse or to engage in or tolerate another sexual act that having regard to the nature of the violation and the circumstances in general is comparable to forced sexual intercourse shall be sentenced for rape to imprisonment for at least two and at most six years.
>
> The same applies to a person who with another person engages in sexual intercourse or a sexual act that according to Paragraph 1 is comparable to forced sexual intercourse by wrongfully abusing that the person due to unconsciousness, sleep, intoxication or other influence of drugs, sickness, bodily injury or mental disturbance or otherwise considering the circumstances in general is in a helpless state.
>
> If a crime referred to in Paragraph 1 or 2 is, with regard to the circumstances surrounding the crime to be considered less serious, a sentence to imprisonment for at most four years shall be imposed.
>
> If the crime referred to in Paragraph 1 or 2 is to be considered gross, a sentence to imprisonment for at least four and at most ten years shall be imposed for gross rape. In assessing whether the crime is gross, special consideration shall be given to whether the violence or threat were of a particularly serious nature or that more than one person violated the victim or otherwise participated in the assault or whether the perpetrator

149 "Fallet nedlagt. Våldtäkt och mänskliga rättigheter i de nordiska länderna", Amnesty International, svenska sektionen, 2008, p. 13.

150 Y. Ertürk, Y., "Report of the Special Rapporteur on Violence against Women, its Causes and Consequences", *Mission to Sweden,* A/HRC/4/34/Add.3, 6 February 2007.

151 "Concluding Observations of the Committee on the Elimination of Discrimination against Women: Sweden", CEDAW/C/SWE/CO/7.

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> having regard to the method used or other circumstances, exhibited particular ruthlessness or brutality.

The main rule, as stated in Paragraph 1 of the provision, is that rape can be carried out by means of *assault*, otherwise by *violence* or *threat*. The element of *coercion* is what typically separates rape from consensual sex. The concept of assault includes placing someone in a helpless state or in a state comparable to helplessness. The provision not only criminalizes sexual intercourse but also other acts comparable to intercourse such as inserting objects into or touching the reproductive organs. When evaluating if an act is comparable to sexual intercourse, it is the nature of the violation and not the sexual act per se that is of primary importance.[152]

Before the amendment of the rape provision in 2005, only acts containing the elements of assault, violence, or threat of criminal acts were viewed as rape. After the amendment, abusing of various forms of vulnerability, previously located in the provisions on sexual abuse and sexual coercion, was moved into the provision on rape. It was then noted that even if physical force or the threat thereof was not exercised by the perpetrator, the sexual assault might be just as grave for the woman involved as in a 'typical' rape case. Coercion and, by the same token, the physical resistance of the victim are thus not necessary prerequisites of rape.

As a result of the abovementioned amendment, a person can rape someone by means of abusing the victim's helpless state or her inability to protect her sexual integrity.[153] This is stated in Paragraph 2 of the provision. The paragraph covers instances where the victim is intoxicated, asleep, drugged, suffering from a mental or physical sickness, etc. In other words, in order to be convicted of rape, the perpetrator need not create but only take advantage of the state of helplessness of the victim.

The last two paragraphs of the section on rape set out various forms of the crime based on their severity. Paragraph 3 deals with less severe forms of rape while Paragraph 4 criminalizes gross rape. Aggravating circumstances might be at hand as a result of the nature of the violence or the threat. Particularly serious threats like holding a knife to someone's throat, typically classify as aggravating circumstances. If there are multiple perpetrators, this is also considered an aggravating circumstance. The same applies if the perpetrator has shown particular ruthlessness.

152 Prop.1997/98:55.

153 See, e.g., *RH 2008:84,* where the perpetrator took advantage of the victim's inability (mental disability) to protect her sexual integrity.

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Sexual Coercion

Another relevant provision on sexual crimes concerns sexual coercion. If a crime cannot be qualified as rape, this provision may become applicable. It is located in Chapter 6, Section 2 of the Criminal Code and reads as follows:

> A person who, under circumstances other than those defined in Section 1 Paragraph 1, makes someone engage in or tolerate a sexual act by unlawful coercion shall be sentenced for sexual coercion to imprisonment for at most two years.
>
> The same applies to a person who performs on another person another sexual act than what is defined in Section 1 Paragraph 2 under the general circumstances as defined there.
>
> If the crime described in Paragraph 1 or 2 is to be considered gross, a sentence to imprisonment for at least six months and at most six years shall be imposed for gross sexual coercion. In assessing whether the crime is gross, special consideration shall be given to whether more than one person violated the victim or otherwise participated in the assault or whether the perpetrator otherwise exhibited particular ruthlessness or brutality.

The difference between rape and sexual coercion is based primarily on the type of abuse involved. The provision applies to sexual acts other than sexual intercourse and acts comparable thereto that are criminalized in the provision on rape. An act of sexual coercion can include the touching of a person's reproductive organs without penetration.[154] The victim is forced to participate in or to tolerate a sexual act by means of *unlawful coercion*.[155]

According to Paragraph 2, a person can also be guilty of sexual coercion by taking advantage of another person's state of helplessness as defined in the section on rape. Again, the difference between rape and sexual coercion lies in the nature of the sexual act. In a case from the Supreme Court,[156] a seventeen year old boy was abused by his employer. The boy got drunk on a company trip and fell asleep in a hotel room. His employer, a fifty-two year old man, then proceeded to touch the boy's genitalia with his hand. He stopped when the boy woke up and protested. This was considered sexual coercion and not rape. What is interesting here is how the boundary between rape and sexual coercion is drawn. A case referred to below illustrates this delimitation.

154 Prop. 2004/05:45, p. 46, 59 and p. 135 f.

155 This prerequisite is addressed in the section on the present provision on trafficking.

156 *NJA 2008, s. 482 II.*

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In that case,[157] the court of first instance viewed the assault as sexual coercion. A woman was abused during her sleep, with the perpetrator having inserted his fingers into the woman's vagina. Although the preparatory works clearly state that insertion of fingers is at par with sexual intercourse when the establishing of criminal responsibility for rape is concerned,[158] the court held that the short period of duration of the assault and the fact that the perpetrator stopped what he was doing and was apologetic upon the protests of the victim rendered the act sexual coercion and not rape.

The Court of Appeal seconded the judgment of the court of first instance. Two dissidents, however, noted that, according to the preparatory works, the act was to be qualified as rape. The case was decided by the Supreme Court, which found the perpetrator guilty of rape based on the abovementioned comments in the preparatory works.

Sexual Exploitation of a Person in a State of Dependence

The provision on sexual exploitation of a person in a state of dependence is located in Chapter 6, Section 3 of the Criminal Code and reads as follows:

> A person who induces another person to engage in or tolerate a sexual act by gross abuse of his or her dependent state shall be sentenced for sexual exploitation of a person in a state of dependence to imprisonment for at most two years.
>
> If the crime is gross, a sentence to imprisonment for at least six months and at most four years shall be imposed for gross sexual exploitation of a person in a state of dependence. In assessing whether the crime is gross, special consideration shall be given to whether more than one person violated the victim or otherwise participated in the assault or whether the perpetrator has otherwise exhibited particular ruthlessness.

If someone *induces* a person to either engage in or to tolerate a sexual act by means of abusing that person's state of dependence, she might be found guilty of sexual exploitation of a person in a state of dependence. As has been mentioned before, the word *induce* implies that a sexual act must come to pass in order for the act to be covered by the relevant provision. By a *state of dependence*, a situation where the victim is truly dependent on the perpetrator is meant. In order to be able to establish criminal responsibility, it does not

157 *NJA 2008, s. 482 I.*

158 Prop. 2004/05:45, p. 31 f and p. 135 f.

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suffice that the perpetrator merely holds a superior position in relation to the victim.

A state of dependence may be of both direct and indirect nature. A person can, e.g., be directly economically dependent on the perpetrator, while a drug addict may be indirectly dependent on his dealer. Sexual exploitation of a person in a state of dependence may, e.g., be at hand in a situation between a student and a teacher. In a case from the Göta Court of Appeal,[159] a forty year old teacher was found to have had repeated sexual intercourse with his fourteen year old student. He was convicted to three years of imprisonment for rape of a minor concerning intercourse that took place before the girl turned fifteen and for the sexual exploitation of a person in a state of dependence for the acts that were carried out after that point.

In instances of dependence of both direct and indirect nature, in order for the act to fall under the scope of the provision on sexual exploitation, it is necessary for the person to be under severe pressure from the perpetrator.[160] In order for the provision to become applicable, the abuse of the dependent position must be gross. Furthermore, there needs to be a clear connection between the actions of the perpetrator and the reactions of the victim. It has to be established that the victim would not engage in or tolerate the sexual act if there was no position of dependence and that the perpetrator was aware of that and abused that circumstance.

Rape of a Minor

The provision on rape of a minor is located in Chapter 6, Section 4 of the Criminal Code and reads as follows:

> A person who engages in sexual intercourse with a child under fifteen years of age or who with such a child performs another sexual act that, having regard to the nature of the violation and the general circumstances, is comparable to intercourse, shall be sentenced for rape of a minor to imprisonment for at least two and at most six years.
>
> The same applies to a person who commits an act as defined in Paragraph 1 against a child that has turned fifteen but not eighteen years and who is that person's offspring or for whose upbringing he or she is responsible or has a similar relation to the perpetrator or for whose care or supervision he or she is responsible by decision of a public authority.

159 Se case from 2010-03-29 from the Göta Court of Appeal, *case no. B 352–10*.

160 L. Holmqvist et al., pp. 294–295.

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> If the crime is gross, a sentence to imprisonment for at least four years and at most ten years shall be imposed for gross rape of a minor. In assessing whether the crime is gross, special consideration shall be given to whether the perpetrator has used violence or threat of a criminal act or more than one person violated the victim or otherwise participated in the assault or whether the perpetrator with regard to the method used or the minor's young age or otherwise exhibited particular ruthlessness or brutality.

The difference between the rape of an adult and a minor is that in the latter case force, threat, or other improper means are not necessary in order for the act to be qualified as rape. It is basically considered impossible for a minor to consent to sexual acts.[161] Furthermore, children are considered to be especially vulnerable to abuse and should be protected by law even if they initiate the criminal act in question.

In one case,[162] a forty-nine year old man was found guilty of rape against a minor for having repeated intercourse with a girl of fourteen. The court found that the girl, due to her mental state and intoxication, was unable to protect her integrity. It also held that the adult should always take full responsibility for his actions even if the sexual act has been initiated by the child.

Paragraph 2 of the provision deals with persons older than fifteen but who have not yet turned eighteen that are somehow related to or have a similar relation with the perpetrator. Paragraph 3 deals with the gross forms of the crime. The crime is gross if violence or threat of a criminal act has been used by the perpetrator. The nature and degree of the compulsion, however, need not to be equal to those in a rape concerning an adult victim.[163] The prerequisites concerning gross rape of a minor are otherwise similar to those concerning gross rape of an adult victim.

Section 5 of Chapter 6 contains the provision on sexual exploitation of a minor. This provision is applied in instances where the circumstances at hand at the time of the commission of the crime make the crime set out in Chapter 6, Section 4 less severe. The maximum penalty is four years of imprisonment. In this context it is also important to note Section 14 of Chapter 6. It contains a rule on relief from criminal responsibility with regard to offences stipulated by Section 5, Section 6, paragraph 1, and Paragraph 1 of Sections 8 and 10 respectively. It relates to the age of the victim and perpetrator and their

161 Prop. 2004/05:45, p. 71.

162 *RH 2006:32*.

163 Prop. 2004/05:45, p. 75.

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respective level of maturity. Although Section 14 is generally to be applied rather restrictively, if the age difference between the parties is small and if they are close in maturity, the older party is to be exempted from criminal responsibility.[164]

Swedish Legislation through the Prism of Legal Transplants

Legal transplants can instigate change but they cannot (instantly) replace or eradicate the role played by history and culture. These two variables create specific preconditions or predispositions for certain mechanisms such as legal transplants to work or fail in each particular case.[165] Below, I employ the tool of legal transplants to study the Swedish situation in the area of trafficking. This is done according to the factors of accessibility, receptivity and perception.

Firstly, the role and standing of international law in the Swedish legal system is discussed. Also, the history of Swedish criminal law is summarized. Secondly, the attitudes of the state, public, and media in the area of trafficking are described and their impact on the transplant is discussed. When the policies of the state are described, distinction is made between written sources and their practical application.

Accessibility in the Swedish Context

Introduction

Sweden has been part of the international community for a long time and has enjoyed a long tradition of implementing and interpreting international law. The country has, moreover, been an active member of the international community. This means that when it comes to creating international human rights documents, Sweden, unlike, e.g., Russia (and to a certain extent Poland), has not been a passive receiver. The circumstance above might suggest a potential success of the transplant.

However, the Swedish trafficking provision has led to very few convictions. Statistics from 2010 indicate that eighty-four instances of trafficking were

164 See, e.g., *NJA 2007, s. 201*, where a boy of seventeen was relieved from criminal responsibility for having sex with a fourteen years and seven months old girl. The parties, who were friends, were also considered to be equally mature and the sexual act was seen as consensual.

165 Z. Brzezinski, Z, "The Primacy of History and Culture", *Journal of Democracy,* vol. 12, no. 4, 2001, pp. 197–198.

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reported to the police during that year but only six persons were convicted of the crime. During the year 2011 the police received 98 reports of trafficking but only two people were convicted. The latest available statistics indicate that during the year 2012, 69 instances of trafficking were reported to the police, resulting in nine convictions.[166] In the previous sections of this chapter, we have seen some of the reasons for this development. Below, additional reasons for this development are discussed. However, first the standing of international law in Sweden and the Swedish criminal law tradition are touched upon.

International Law in Sweden

Sweden officially recognizes international law, especially the institution of human rights, as an area deserving the utmost respect. Consequently, the ambition to respect and follow international law is said to permeate all areas of government action on the national, regional, and international levels.[167] It should be noted, however, that one of the most important international legal acts in Sweden, namely the ECHR, was incorporated into Swedish law as late as in the 1990s. The legislator was thus somewhat reluctant to allow the document to influence Swedish case law.

In criminal law, the ambition is to implement international obligations such as conventions in conformity with the intentions of the drafters. Attention is hereby given even to the smallest of details. Generally speaking, national legislation ought to as far as possible be consistent with Sweden's international obligations.[168] At the same time, the legislator allows herself a margin of appreciation. This means that during the implementation process account is taken of the Swedish legal system and its values and interests.[169] Also, international law is usually considered or used as a source of interpretation to a larger extent where there is uncertainty on the national level about how a rule or area is to be interpreted. In such cases, international law might be used to more clearly define the area of interest of a specific rule or obligation.

166 "Personer lagförda för brott", Statistik, 2010, 2011, 2012, BRÅ, www.bra.se, (accessed 19 May 2014).

167 "Folkrätt och mänskliga rättigheter", Regeringskansliet, http://www.regeringen.se/sb/d/3303, (accessed 19 May 2014).

168 "Mänskliga rättigheter i Sverige". Regeringskansliet, p. 6, http://www.manskligarattigheter.se/dm3/file_archive/071114/b2a8e5d5eaeeac2cb34334ea85d4c51f/ma%C2%A6%C3%AAnskl%20ra%C2%A6%C3%AAtt.pdf, (accessed 19 May 2014).

169 P. Asp, "Folkrätten och den svenska straffrätten" i R. Stern, I. Österdahl (eds.), *Folkrätten i svensk rätt*, Malmö, Liber, 2012, p. 61.

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Traditionally, the Swedish legal system can be described as dualistic. International law is considered to govern the relation between states. In addition, it is said to function as a legal framework for the legislator and to a certain extent as a source when seeking solutions to or trying to interpret, e.g., a specific rule.[170] International law might be transposed into criminal provisions, e.g., in the case of the trafficking provision. In other instances, international legal acts might be directly incorporated into Swedish legislation as is, e.g., the case with regard to the ECHR.[171]

The ECHR is part of the Swedish Constitution, i.e., the Swedish Instrument of Government, Section 19, Chapter 2 on Fundamental Rights and Freedoms. The section reads as follows:

> No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As we have already seen, Article 4 of the ECHR prohibits forced labour and places an obligation on states to protect their citizens from the crime. Moreover, according to case law from the ECtHR, this prohibition forms not only a negative obligation for individuals not to get trafficked but also a duty to criminalize the practice and to prosecute and prevent trafficking as well as a requirement to protect the victims of this crime.[172] In a sense, the ECtHR provides a mechanism of control in that it has now taken upon itself to evaluate whether or not national laws and their practical application are in accordance with the international definition of trafficking. Sweden is also by virtue of its membership in the EU bound by the *acquis communautaire* and thus by extension the ECHR.

When direct reference is made in national legislation to an international obligation (as in the case of the ECHR), the rules of that obligation as well as possible case law and preparatory works thereto are directly applicable. In instances where a provision or rule is the result of an implementation of a specific international act, e.g., the Palermo Protocol's definition of trafficking, this act and the preparatory works thereto are to be taken into consideration when interpreting the national provision.[173] This would explain why Swedish lawyers are aware of the preparatory works to the Palermo Protocol, e.g., with

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170 Ibid, p. 58.

171 "Mänskliga rättigheter i Sverige", p. 5.

172 Case of *Rantsev v. Cyprus and Russia*, (Application no. 25965/04), Judgment Strasbourg, 7 January 2010, final 10 May 2010.

173 P. Asp, 2012, p. 68.

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regard to the elements of border crossing and involvement of organized criminal groups as potential prerequisites of national trafficking provisions.

International law might also influence future national criminal legislation. This can be done by means of discussing and studying, e.g., cases from the International Criminal Court (ICC) where various concepts of interest are discussed. When these concepts are brought down to the national level, they are usually discussed in doctrine. This might, in the long run, affect how the Swedish legislator perceives and criminalizes certain acts.[174]

On the linguistic level, the Swedish and English languages belong to the same family which makes legal transplantation and harmonization easier than in the Polish and Russian cases. That is not to say that there are no problematic concepts, only that the degree of accessibility increases when we are dealing with languages belonging to the same family.

Swedish Criminal Law Tradition

Swedish criminal law, unlike, e.g., Polish law, has developed organically without hostile interruptions from occupying powers. In 1811, a committee was established, the task of which was to propose reforms concerning the criminal law from 1734. In 1834, the committee, led by Johan Gabriel Richert, delivered its proposal concerning a new criminal law. The committee was partly inspired by the ideas of Feuerbach, an influential German philosopher and legal scholar at that time.[175]

One of the main features of the proposed criminal law was deterrence, i.e., to deter people from committing crimes. It was, however, also quite humanitarian for its time, as another suggested purpose was to rehabilitate the perpetrator. The committee also drew on the ideas of Kant concerning retribution as well as proportionality between crime and punishment. The proposal also incorporated the principle of legality. It thus contained features of both general and individual prevention. At the time, however, the proposal was considered too liberal. It was not until some thirty years later that a new law was adopted.[176] It included principles such as guilt and responsibility as well as the idea that the punishment was to be proportional to the crime. The principle of legality was, however, not incorporated into the law.[177]

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174 Ibid, p. 69.

175 SOU 2002:3, p. 233.

176 The new Criminal Law (Strafflagen) entered into force in 1864. For the original text, see, e.g., http://wisberg.se/wisberg.se/pdf/strafflagen1864.pdf, (accessed 19 May 2014).

177 The principle first appears in the Act (1964:163) on the Introduction of the Criminal Code, Section 5.

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In 1934, the idea of rehabilitation resurfaced. Although it had been discussed in the past, it is mainly associated with Sweden's Minister of Justice at that time, Karl Schlyter, and the slogan 'depopulate the prisons'. The main arguments were that mentally disabled people and underage offenders should not be imprisoned but receive special care and education instead with the ultimate aim of facilitating a reintegration into society.[178] These ideas influenced to a significant degree the Criminal Code of 1962.

The Criminal Code from 1962 that came into force in 1965 thus differed from its predecessors with regard to the range of penalties and how these were to be decided. Focus was on rehabilitation, which was to be decided according to the perceived need of such a measure with regard to each offender. The courts were to make an individual prognosis concerning the need and scope of rehabilitation. The courts were also to consider the likelihood of recidivism and adjust the penalty accordingly. The aim was to incapacitate dangerous criminals so that no more harm could be inflicted by them upon society. The idea that the severity of the criminal act and not the nature of the offender should impact on how the penalty was to be decided was moved into the periphery.[179]

This development was later criticized in a report from the Swedish National Council for Crime Prevention. The organization argued that the motive behind criminalization should be general prevention and not a combination of general and individual prevention.[180] The main thrust of the report was that a person is to be punished not because they need rehabilitation and care but because they have committed a crime and that the punishment should be foreseeable and proportional to the crime. It was also argued that the idea of incapacitation as a concept was questionable since it was not based on the unlawful act but on what was expected about a person (such as recidivism, etc.)[181] The idea of justice, equality before the law, and proportionality between crime and punishment became the leading ideas in criminal law discussion.

These ideas were later embraced by a special investigative committee (Fängelsestraffkommittén) in its report titled 'Penalty for Crimes'.[182] The committee propagated for new rules on sentencing and the range of penalties. The range of penalties for a specific type of crime was to be decided by the severity

178 K. Schlyter, "Avfolka fängelserna!: tal å auditorium den 5 december 1934", Bilaga: Utdrag ur statsrådsprotokollet.

179 Prop. 1997/98:96, p. 219.

180 "Nytt straffsystem – Idéer och förslag", Rapport 1977:7, BRÅ, pp. 400–404.

181 Ibid, p. 195.

182 SOU 1986:14, pp. 13–15.

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of the acts covered by the description of the crime while the penalty was to be decided in accordance with the nature or rather the severity of the crime.[183] Furthermore, these circumstances were not to be acknowledged due to individual prevention but as a result of the fact that it would be unfair if the courts did not take these into consideration.[184] In later proposals, the suggestion (or rather the content of this suggestion) to reform the sentencing system was said to be in accordance with case law.[185]

The changes introduced in 1989 did not, however, cover all relevant areas. Again, it was expressed that the nature of the crime should decide the penalty. Mitigating circumstances might be considered and in effect lower the sentence or allow exemption from criminal responsibility while the risk of recidivism would work in the opposite direction. The main principles for the criminal justice system were to be proportionality, justice, clarity, foreseeability, and consistency, but the courts were still to retain flexibility and the possibility of making individual prognosis in certain cases, e.g., when deciding between conditional penalty and probation.[186]

The current (1962) Criminal Code is clearly influenced by the neoclassical thought in criminal law, the most important principle of which is proportionality. Proportionality between the crime and the corresponding punishment is in its turn to be decided by the harmfulness of the act and the guilt of the perpetrator. General (and individual) prevention is, furthermore, in a sense built into the current penal system, as it is acknowledged with regard to the nature (e.g., severity) of the crime and, in certain specific instances, also when it comes to deciding the proper penalty (e.g., underage offenders). It should be noted that although the change referred to above did concern the penalties, it also affected the way of viewing and addressing criminal responsibility.[187]

Another important principle is that of legality, *nullum crimen sine lege*. It forms the foundation of Swedish criminal law. Its primary objective is to guarantee legal certainty to all Swedish residents. The legal meaning of the principle is that no person can be punished for an act that at the time of its commission was not explicitly criminalized by law. Requirements on specificity, non-retroactivity, foreseeability, and accessibility of the law are main features of the principle of legality. These principles are guaranteed in the Swedish Constitution, i.e., Chapter 2, Section 10 of the Instrument of Government, and

183 SOU 1986:14, p. 21.
184 SOU 1986:14, p. 71 and 75.
185 Prop. 1987/88:120, pp. 37–38.
186 Prop. 1997/98:96, pp. 76–77.
187 See, e.g., *NJA 2011, s. 563*. See also Prop. 2000/01: 85, p. 53.

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also in Section 5 of the law on the introduction of the Criminal Code, and Chapter 1, Section 1 of the Criminal Code.

The Criminal Code entails provisions concerning some of the acts that constitute crimes in Sweden, sanctions for these crimes, as well as provisions concerning jurisdiction. Other crimes are instead criminalized in special legislation. The Criminal Code is separated into three parts. Each part in turn is divided into chapters, and each chapter into sections. Part one contains the definitions of crimes and corresponding sanctions as well as the boundaries for the application of the criminal law. Part two outlines specific offences, rules on attempt, preparation, conspiracy, and complicity as well as the concepts of self-defence and other acts of necessity. Part three lists the penal measures, principles of the assessment of penalties and the administration of criminal justice, rules on confiscation, etc. Below, the transplant will be analysed according to the factors of receptivity and perception.

Reception and Perception of the Original Source in Sweden

Introduction

As has been mentioned in the chapter on legal transplants, successful reception hinges on a number of things such as the attitudes of the public and the will of the authorities to reform a particular system, provision, etc. We can study the reception and perception of the original source and the subsequent transplant by looking at state policy in this particular area, at public attitudes (as expressed in national polls and the media), as well as the work of NGOs.

Sweden is considered a forerunner in the field of anti-trafficking efforts. The Palermo Protocol was therefore seen as a welcome initiative. The public and state alike considered trafficking reprehensible. This created a favourable climate for transposing the original source and for the transplant to thrive. Nevertheless, the transplant and the application thereof is at least partially a failure. Below, I will describe on what counts the transplant and anti-trafficking measures have failed and speculate in the possible reasons for this failure.

State Policy on Trafficking and Anti-Trafficking Measures

> Recent decades have seen the growth of a new kind of slave trade – trade in humans for sexual exploitation, a trade that is driven by demand. Human trafficking is, just like the slave trade of the past, a cynical exploitation. Human trafficking may involve the violation of several fundamental human rights, such as the right to liberty, the right to human dignity, the right not to be held in slavery, and the right to be free from torture and inhumane or degrading treatment. Human rights violations

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> are both a cause and a consequence of human trafficking. It is difficult to grasp how it is possible to treat human beings as goods for trading, and yet this practice exists everywhere – Sweden included.[188]

Since the mid-1990s Sweden has been very much involved in the struggle against human trafficking. The EU framework decision on trafficking was mainly negotiated under the Swedish presidency in the EU Council during the first half of 2001.[189] During the Swedish EU presidency in 2009, efforts were again made toward improving the EU's anti-trafficking measures and putting trafficking more firmly on the union's agenda. Sweden is also involved in various regional co-operations in the area of trafficking such as the Council of the Baltic Sea States, more specifically the Task Force against Trafficking in Human Beings.[190]

An important feature affecting the perception and reception of human trafficking in Sweden is that it has not been 'claimed' by a specific political party. On the contrary, all parties seem to acknowledge the practice as a threat against the individual, democracy, and national security. One of the main priorities of the Swedish government within the area of human rights is to curb the discrimination of women and girls and to protect their rights and freedoms in Sweden as well as internationally. Efforts directed at countering trafficking in human beings are, furthermore, said to constitute one of the most important steps in this area.[191]

Sweden considers trafficking in human beings to be a severe violation of human rights, especially human dignity.[192] Therefore, the provision criminalizing the practice is (and has always been) located in the chapter of the Criminal Code on crimes against personal freedom. This can be compared to the situation in Poland, where until the latest amendment of 2010 all human trafficking provisions were contained in the chapters on public order and sexual crimes.

Presently, there are various anti-trafficking measures undertaken by different state agencies. There are annual reports on the scope and character of the crime that also contain recommendations on how to prevent and combat

188 "Human Trafficking and Prostitution. From a Swedish Perspective", p. 10.

189 Prop. 2003/04:111, p. 7.

190 "Regeringen finansierar Östersjösamarbete mot människohandel" http://www.regeringen.se/sb/d/10333/a/114156, (accessed 19 May 2014).

191 "Mänskliga rättigheter i svensk utrikespolitik", Regeringens skrivelse 2007/08:109, p. 21.

192 "Handlingsplan mot prostitution och människohandel för sexuella ändamål", Regeringens skrivelse 2007/08:167, p. 4.

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trafficking. The annual reports are prepared by the Swedish National Police Board which is also Sweden's national rapporteur on trafficking. The duties of the rapporteur include collecting, processing and analysing data about trafficking in human beings for different exploitative purposes into and through Sweden.[193]

The Swedish National Council for Crime Prevention is also of relevance. This agency supplies crime statistics and evaluates government action plans on trafficking. It is commendable that there is such a mechanism and that this task is carried out by an independent body. In comparison, Polish action plans are drafted and evaluated by the Ministry of Interior, while Russia lacks such (officially published) plans. There is also the Swedish Crime Victims Compensation and Support Authority. One of the mains tasks of this agency is to assist victims of crime, e.g., by paying damages in cases where the perpetrators are insolvent. It also supports research in this area. In 2013 and 2014, one of the main areas of research that is financed by the authority deals with men's violence against women, including trafficking and prostitution.

There is also a unit called National Support Operations against Prostitution and Trafficking in Human Beings (Nationellt metodstödsteam mot prostitution och människohandel/NMT). This body is composed of representatives from the Swedish National Police Board, the National Criminal Police and the Specialized Police Units on Human Trafficking, the Border Police, the Migration Board, the Prosecutors Chambers, and the Social Welfare Authorities from the three big-city areas in Sweden. It is responsible for coordinating the efforts of various authorities in the area of trafficking. NMT has, among other things, created guidelines for how to deal with victims of trafficking for sexual exploitation.

The government's action plan against trafficking and prostitution for the years 2008–2010 covers thirty-six measures, the aims of which are to improve anti-trafficking efforts within various state agencies and organizations.[194] Altogether, the government invested 213 million SEK during these years. One of the main aims of the report was to raise standards and increase efficiency in the justice system and to improve training and education on prostitution and trafficking for public servants. Consequently, extensive training of members of the police force and prosecution was reportedly carried out during

193 See, e.g., "Trafficking in Human Beings for Sexual and Other Purposes", Situation Report 12, RPS, 2011.

194 "Action Plan against Prostitution and Human Trafficking for Sexual Purposes", http://www.government.se/content/1/c6/11/06/29/fcd261a4.pdf, (accessed 19 May).

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that period.[195] Findings indicating that trafficking for sexual exploitation seems to be decreasing may be partly attributed to this very fact.[196]

Another important purpose of the action plan was to offer rehabilitation to victims of trafficking for sexual purposes and to facilitate safer returns.[197] One way of doing this was to improve the cooperation of the different authorities involved in the process of investigating the crime and assisting the victims. At the same time, this has been one of the major challenges. Below, I will attempt to describe these challenges.

Practical Application of State Policy on Trafficking and Anti-Trafficking Measures

The efforts and measures of various state agencies are somewhat disjointed and uncoordinated. The main problem is that authorities sometimes follow their own agendas and do not always take into consideration the fact that they are dealing with trafficking victims. Measures may also vary depending upon in which municipality the victim ends up. According to the Social Service Act, the municipalities are responsible for the assistance to victims of crime. Most often, these tasks are performed by local NGOs. However, some municipalities have established their own resources for dealing with different target groups, such as women in prostitution or sexually abused children. Swedish municipalities are, in principle, independent from the state and the assistance measures offered to victims may differ from one place to another.[198] This problem was highlighted by Swedish practitioners as early as in 2004.[199] However, a decade later the problems remain despite the action plan. This failure can best be illustrated by the following story.

195 "Fortfarande brister i kunskap om prostitution och människohandel", BRÅ, http://www.bra.se/bra/nytt-fran-bra/arkiv/press/2011-11-30-fortfarande-brister-i-kunskapen-om-prostitution-och-manniskohandel.html, (accessed 19 May 2014).

196 According to Kajsa Wahlberg, detective inspector and national rapporteur on trafficking in human beings, other contributing reasons seem to be the law criminalizing the purchasing of sexual services and the extensive coverage that trafficking for sexual purposes has received in the Swedish media. See "Forced Labor Now More Common than Sex Traffic", Radio Sweden, 2012, http://sverigesradio.se/sida/artikel.aspx?programid020546 artikel=4909826, (accessed 19 May 2014).

197 "Action Plan against Prostitution and Human Trafficking for Sexual Purposes".

198 N. Mörner, p. 210.

199 "Slumpen avgör stöd till offer för människohandel", Svenska Dagbladet, 30 March 2004, http://www.svd.se/nyheter/inrikes/slumpen-avgor-stod-till-offer-for-manniskohandel_139362.svd, (accessed 19 May 2014).

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In 2011, a thirty-five year old Romanian mother of two followed her boyfriend to Sweden. The woman was told that she would be doing cleaning work. Upon her arrival in Sweden she was forced to sell sex. She refused at first. The perpetrators responded by threatening to hurt her children who remained in Romania. They also gang raped the woman in order to force her into obedience. When she did not sell enough she was beaten and kicked. She had no key to the apartment and was sometimes forced to sleep outside. She did not receive any of her earnings. After several weeks, the woman was finally discovered by the Swedish police. She was questioned without a lawyer present. At that point the perpetrators had managed to intimidate her to the point that she saw no other option than to lie in her statements to the police. Among other things, the perpetrators told her that if she did not say that she prostituted herself voluntarily her children in Romania would pay the price.

> Different experiences and studies in Sweden and internationally show that victims of human trafficking for sexual purposes often do not trust the public authorities and are unwilling to be interviewed by the Police, or testify against their attackers. They may also not have trusted the available interpreters since they may come from the same background as the victim or come from the same place or country. This means that the victim may feel uneasy about her/his personal safety, and because humiliating and sensitive information may be spread in their home countries and among their compatriots in the destination country. They may also fear reprisals from the perpetrators and feel ashamed and guilty about discussing the serious, degrading sexual abuse they have experienced, and which has often been taking place for a long time. There are also cases in which a perpetrator initiates a sexual relationship with the victim, which may create unwillingness in the woman to report her 'partner'. The women will thus be more loyal with the perpetrators and less inclined to act as a witness against them.[200]
>
> Interviews with the vulnerable women showed that the perpetrators often instructed the victims, if met by the police, to state that they were involved voluntarily in the business of prostitution on their own behalf.[201]

There were no more attempts made in Sweden to interview the woman about her experiences. She was not offered assistance, housing, or rehabilitation.

200 "Trafficking in Human Beings for Sexual and Other Purposes", RPS Report 2011, Situation Report 12, p. 9.

201 Ibid., p. 12.

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Most importantly, she was not offered the legalized possibility of a reflection period. In fact, reportedly, very few victims are offered the possibility of temporary residence permits or a period of reflection (thirty days).[202] As victims of trafficking undergo severe trauma, it is apparent that they need time in order to start functioning normally. If given time to recuperate, the chance to talk to a psychologist, and an assurance that the Swedish police department was in contact with its Romanian counterpart to ensure her children's safety, the woman might have agreed to testify against her oppressors. Instead, after only one attempt to get her story she was put in custody at the Gothenburg Migration Board. Reportedly there still are too few adequate housing facilities for victims of trafficking, and even less for persons trafficked for purposes other than prostitution.[203] Moreover, rehabilitative measures are carried out on an ad hoc basis. Victims are seldom offered a job during their stay. Victims are usually returned home immediately after the end of the trial. What is worse is that so-called safe returns are not always guaranteed.[204] After eight days, the woman and her compatriots were expelled to Romania. The expulsion decision was based on Chapter 8, Section 2, Paragraph 1, Point 2 of the Swedish Aliens' Act. This part of the provision reads as follows:

> An alien may be expelled
> if it can be assumed that he or she during the stay in Sweden or another Nordic country is not going to earn his or her living in an honest manner, or will be doing business that requires a working permit, without having such a permit.

According to a 2010 report on return from the Stockholm County Administrative Board, there is a need to develop concrete guidelines and routines on safe return.[205] In addition, the work of the various authorities in this area must be properly coordinated.[206] This report has, however, not led to concrete changes, as the women were not afforded safe return. The police escorted them as far as the airport in Frankfurt and then pointed them in the direction of the flight to Bucharest. The Romanian police or NGOs were not notified of the women's

202 See, e.g., M. Carlsson, "Få offer erbjuds tillfälligt skydd", Dagens Nyheter, 28 February 2013, http://www.dn.se/nyheter/sverige/fa-offer-erbjuds-tillfalligt-skydd, (accessed 19 May 2014).

203 N. Mörner, p. 210.

204 Ibid.

205 C. Lyckner, "Ett tryggare återvändande för person utsatta för prostitution och människohandel i Sverige", Rapport 2010:03, Länsstyrelsen i Stockholms län, 2010, p. 9.

206 Ibid. p. 45.

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arrival.[207] At the airport in Bucharest, the women were instead met by the traffickers. For one week they were imprisoned in an apartment and were then transported back to Sweden for continued exploitation.

The woman reported the expulsion to the Swedish Ombudsmen for Justice.[208] The ombudsman, however, deemed the actions of the Swedish police to be in accordance with law. The ombudsman held:

> Prostitution as a practice must (…) be viewed as a substantially criminal and thereby forbidden business. The person who intends to earn her living in such a way can therefore, according to my opinion, be expelled according to Chapter 8, Section 2, Paragraph 1, point 2 of the Aliens' Act.[209]

This decision has been criticized by NGOs.[210] Prostitution is not criminalized under Swedish law. Therefore the woman in question could not have committed a criminal offence. Since the woman was an EU-citizen the expulsion was arguably carried out in violation of EU-law, notably the right to free movement. The woman was thus doubly victimized. Not only was she trafficked and forced to prostitute herself,[211] but this circumstance 'allowed' the Swedish police to expel her. In this context, it should also be mentioned that in the case that the woman was involved in the Court of Appeal changed the district court's decision, which resulted in lowered penalties. One of the explanations given by the Court of Appeal was that the women in this case in their country

207 According to the Swedish NGO Stifletsen Tryggare Sverige, there are skilled and active NGOs in Bucharest which the Swedish state might have contacted. See "Utsatta för människohandel har rättigheter – Alexandra borde ha få stöd och hjälp", Stiftelsen Tryggare Sverige, 28 February 2013, http://tryggaresverige.org/utsatta-for-manniskohandel-har-rattigheter-%E2%80%93-alexandra-borde-ha-fa-stod-och-hjalp, (accessed 19 May 2014).

208 The Ombudsmen of Justice are to ensure that public authorities and their staff comply with the laws and other statutes governing their actions. See JO Riksdagens Ombudsmän, at http://www.jo.se/en/, (accessed 19 May 2014).

209 See "Avvisning av rumänsk prostituerad kritiseras inte", Justitieombudsmannen Hans-Gunnar Axberger, Beslut, Dnr 4468–2011. Translation my own.

210 See, e.g., "JO skuldbelägger offer för människohandel", Stiftelsen Tryggare Sverige, 8 March 2013, http://tryggaresverige.org/jo-skuldbelagger-offer-for-manniskohandel, (accessed 19 May 2014).

211 The court found it to be proven beyond reasonable doubt that the woman was on several occasions assaulted by the accused. Case from 2012-05-19 from the District Court of Gothenburg, *case no. B 8184–11*.

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of origin were living in such poor and vulnerable circumstances that the possibility of them lying in order to receive damages could not be precluded. The court stated:

> The district court says in its judgment that it has been shown that for A-M B or for any other of the plaintiffs there were no significant reasons to give false information. The Court of Appeal does not share that view. The plaintiffs obviously come from poor circumstances. A conviction in this case means that several of them can be afforded so much damages that it, according to what has been shown in this case, will be enough for them to afford simple housing in Romania. This is a noteworthy reason for them to give false information. The plaintiffs could also have had other reasons for giving out false information.[212]

The court found it proven beyond reasonable doubt that the women were beaten and intimidated, that the police had found one woman locked inside a room, and that one woman was seven months pregnant while forced to sell sex, etc. Yet, the testimonies of these women, supported by the abovementioned facts, were not considered particularly trustworthy as a result of the fact that in their country of origin the women were living in vulnerable situations. Firstly, it is puzzling how a circumstance that is actually a prerequisite of the trafficking provision can be held against a victim of the crime. Secondly, most women do not even know about the possibility of claiming damages. Thirdly, in most cases the perpetrators do not have the money to pay the damages, and an application must instead be made to the Swedish Crime Victim Compensation and Support Authority. According to a representative from that authority, few women are actually aware of that possibility. Also, this is only possible after all appeals have been completed and the judgment has gained legal force. By then, the assignment of the legal counsel is finished and the women are left without legal assistance.[213]

Since 2009, the Crime Victim Compensation and Support Authority has awarded damages to four victims of trafficking. In the case referred to above,

212 See Case from 2012-09-21 from the Court of Appeal for Western Sweden, case no. B 2827:12, p. 19. Translation my own.

213 M. Carlsson, "Alexandra har gett upp hoppet om skadestånd", Dagens Nyheter, 1 March 2013, http://www.dn.se/nyheter/sverige/alexandra-har-gett-upp-hoppet-om-skadestand, (accessed 19 May 2014). Case from 2012-05-19 from the District Court of Gothenburg, *case no. B 8184–11*.

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only two out of eleven women applied for damages.[214] This makes the statement made by the Court of Appeal even more inappropriate.

Moreover, it is also puzzling for another reason. While the Court of Appeal found the women to be in vulnerable situations, in its judgment the *district court* noted:

> The district court finds it per se undisputed that C C was pregnant, that N S was young, and that S S had a serious disease, an ill son in Romania and that she was illiterate. Without additional investigation about their general situation no sufficiently reliable conclusions about their vulnerability can be made.[215]

We thus see that there are certain problems on the operational and judicial levels. These include a lack of coherent methods on how victims of trafficking are to be identified and treated pre-, during, and post-trial. There seems to be a lack of knowledge on the mechanisms of trafficking and the circumstances in the countries of origin as well as on how the crime affects the victims. It is also apparent that there are prejudices concerning women victims of trafficking. How a victim fares seems to a certain extent to be dependent on the knowledge and empathy of individuals involved in the process in their capacity as social workers, legal counsels, prosecutors, members of the police force, etc.

How presupposition and knowledge of the circumstances in the countries of origin affect the interpretation of law is illustrated in two judgments where the same prerequisite was afforded different valuations by the courts involved in the case.[216] The case at hand involved two teenage Romanian boys who were brought to Sweden by two fellow countrymen. The boys and their families were allegedly told by two locals from their village that the boys would be offered legitimate jobs in Sweden. The parents thus agreed to sign a document giving the two men temporary guardianship over the boys.

The party left for Sweden, with the men paying for the trip. The boys had no money and basically no personal belongings, not even a change of clothes. Upon arrival, they were forced to live out of a car. In fact, the party stole a vehicle and subsequently forced the boys to steal and commit petty robbery. The boys did not dare to tell their parents what was happening, and the thefts continued until the boys were finally caught by the authorities and detained. Eventually, their status as potential trafficking victims became known.

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214 M. Carlsson, "Alexandra har gett upp hoppet om skadestånd".

215 Case from 2012-05-19 from the District Court of Gothenburg, *case no. B 8184–11*.

216 *RH 2010:34*.

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In a ruling from the District Court of Stockholm, the case was not considered to be trafficking. This was mostly due to the fact that the court did not judge that the alleged perpetrators exercised over the victims the level of control required by the provision. Interestingly, however, the court also commented indirectly on the prerequisite of *other such improper means* by discussing whether or not the men had taken advantage of the boys' vulnerable position or rather if the boys were in such a position upon arrival. The verdict was changed by the Svea Court of Appeal where the men were sentenced for trafficking.

The same circumstances were given different interpretations or rather were understood differently by the two courts. While the court of first instance acknowledged the boys' language skills as an advantage, the Court of Appeal considered them a weakness. The boys spoke some 'school-English'. The pre-understanding of the first court probably hindered it from delivering the same decision as the Court of Appeal. The circumstance was evaluated from an internal perspective where the court probably thought the skills equivalent to those of a sixteen year old Swedish student. The Court of Appeal in its turn considered the level of English education in a rural Romanian school by stating that the boys 'spoke *only* some school-English'.

This case indicates that what complicates things most is not the fact that the judge must undertake a valuation but rather that it is unclear which reasons she is to consider and how these should be considered as both normative and other prerequisites can be interpreted in different ways and circumstances can be used in different ways regarding the known facts, i.e., the issue of evidence.

In the abovementioned case, the court of first instance decided that the circumstance that the victims spoke some school-English led to a situation where the prerequisite of control was not fulfilled while the higher court considered it to be the opposite. While this was not the only circumstance that made the Court of Appeal view the case as trafficking in human beings, it illustrates the importance of legal valuation and pre-understanding and, by extension, language.

Lacunas in State Policy on Trafficking

Another important part of reception and perception of the transplant is that it has mostly been associated with trafficking for sexual exploitation. This becomes apparent when reading official government policies and writings in this area, both when considering the amount of texts on trafficking for sexual purposes compared to the information pertaining to its other forms and the quality of the information.

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In one document, the purpose of which it is to examine the phenomenon of forced labour and organ trafficking, the experts note that little guidance exists on how the latter practice should be interpreted. At the same time, they seem to agree that a typical organ donor within the domain of the black market is an adult who in order to achieve financial benefits voluntarily sells his organs.[217] They also note that it seems clear that we are not dealing with force but persuasion. Not one word is said about vulnerability, which forms one of the integral prerequisites of the trafficking provision. The experts also add that trafficking *might* be at hand if the 'donors' do not receive the promised remuneration.[218]

Common sense implies that a person would not sell his own organ if not desperate. The fact that someone is abusing another person's vulnerable situation (irrespective of if it involves violence or not) in order to acquire his organ should be enough to establish criminal responsibility for trafficking.

> Information concerning the trade in human organs with links to Sweden is extremely limited. However, information has been confirmed concerning people resident in Sweden who have chosen to travel abroad to purchase organs and organ transplants. The scope in which this trade takes place is unknown, but one possible indicator of the scope would be the number of people seeking after-care in Sweden, having undergone a transplant abroad. According to unpublished research at the Karolinska Institute in Stockholm, it is estimated that there have been around thirty cases since the 1980s of kidney transplant patients in Sweden who have had their surgery abroad, and who have since been treated at Swedish hospitals.[219]

International experts note that substantial profits are being made in the illegal trade in organs. This, however, does not imply that the profits go to the 'donors'. On the contrary, the latter receive a fraction of the remuneration while the rest goes to so-called brokers. Should the $1,000 out of $150,000 given to a donor who has sold his kidney to put a roof over his family's head and clothe his children render him a criminal who has illegally sold his organ on the black market or a victim of trafficking in need of state assistance? According to the definition given in the Palermo Protocol, he is a victim of trafficking yet if one is to trust the abovementioned document his status in Sweden might be unclear.

217 Ds 2008:7, p. 58.

218 Ibid, p. 58.

219 "Trafficking in Human Beings for Sexual and Other Purposes", Situation Report 12, p. 15.

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Arguably, what is essential here is the fact that the broker/trafficker abuses another person's extremely vulnerable situation by convincing him to sell his kidney. If the person was not in a desperate state, he would not have agreed to sell his own organ as it means rapid deterioration of health and possibly even death. Placing disproportional weight on the fact that someone pays him for this trouble seems unethical and insensitive. Moreover, we are not dealing with significant sums that might be used to actually improve the lives of the victims or help them to stay healthy but instead negligible amounts that are used to cover the basic needs of the victims and their families.

Sweden has identified trafficking in human beings as an acute problem. Focus has, however, been on trafficking for sexual exploitation. Time will tell if and how the state will address other forms of trafficking. Below, the role of NGOs, the media, and the public in the area of trafficking are addressed in some detail.

The Media, NGOs and the Public

The potential success of a transplant is not only affected by official attitudes of the state but also by the actions and values of NGOs, the media, and the public. However, much like the state, the focus of the Swedish NGOs has been on trafficking for sexual exploitation. Roks (the national organization for women's and young women's shelters in Sweden) believes that men's violence against women, such as rape, incest, and prostitution, is the result of a power imbalance between the sexes.[220] The same is true concerning the Swedish Association of Women's Shelters and Young Women's Empowerment Centres (SKR). According to Amnesty in Sweden, human trafficking of women and girls is usually facilitated in order to coerce them into prostitution that in turn is carried out under circumstances resembling slavery.[221]

The NGO Safer Sweden (Stiftelsen Tryggare Sverige) seems to be one of the few to acknowledge also other forms of trafficking than those carried out for sexual purposes. One of the aims of the organization is to influence public opinion in this area. It also considers if the relevant laws are being followed and if the victims of trafficking receive the assistance to which they are entitled.[222]

220 "Mäns våld mot kvinnor", ROKS, http://www.roks.se/mans-vald-mot-kvinnor, (accessed 19 May 2014).

221 "Trafficking är en av de grövsta formerna av våld mot kvinnor", Amnesty International, http://www.amnesty.se/vad-gor-vi/kvinnors-rattigheter/trafficking/, (accessed 19 May 2014).

222 "Tryggare Sveriges arbete mot människohandel", Stiftelsen Tryggare Sverige, http://tryggaresverige.org/tryggare-sveriges-arbete-mot-manniskohandel, (accessed 19 May 2014).

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There are also some organizations that focus specifically on child victims of trafficking. ECPAT refers to the situation of child victims of trafficking for sexual exploitation. Among other measures, the organization has, in cooperation with the Body Shop, been responsible for the campaign *Stop Sex Trafficking of Children and Young People*.[223] Save the Children (Rädda Barnen) has a more comprehensive view of the crime, stating that children are also trafficked due to wars and natural disasters and not just for the purpose of sexual exploitation. The organization's aim is to help children in Sweden and abroad and to influence public opinion in this area.[224]

The study of public opinion in any society supplies information about how people perceive certain institutions and developments. Citizen participation, or the lack thereof, has proven crucial, most notably in the political domain. Its importance has been acknowledged in a variety of issues ranging from legitimacy questions in international intervention and thus post-conflict peacekeeping to support for public institutions and the very foundation of democracy. This means that public opinion to a large extent influences the actions of the state in this area as well as the overall perception of the trafficking phenomenon.

The perception of trafficking among the population is to a certain extent influenced by the actions of NGOs which in turn often use media as an outlet for various anti-trafficking campaigns. In 2010, e.g., one of the main Swedish newspapers featured a series on trafficking including a 'Safe Trip' campaign.[225] The project was connected to a hotline run by the National Center for Knowledge on Men's Violence against Women (Nationellt kunskapscentrum för kvinnor, NCK). The calls could only be made by women. No concerted efforts have been made yet to inform persons migrating to Sweden for work purposes on the risks of human trafficking for forced labour.[226] Again, focus has predominately been on women and trafficking for sexual exploitation. Mostly, the media focuses on the victims' perspectives. There has been an isolated article of more questionable content[227] but it was met with strong criticism.

223 "Detta gör ECPAT", http://www.ecpat.se/vad-gor-ecpat, (accessed 19 May 2014).

224 "Så drabbas barnen", Rädda Barnen, http://www.raddabarnen.se/vad-vi-gor/vad-vi-gor-i-varlden/krig-och-katastrofer/sa-drabbas-barnen/, (accessed 19 May 2014).

225 For more information, see the home page of the Council of the Baltic Sea States (CBSS), http://www.cbss.org/Civil-Security-and-the-Human-Dimension7press, (accessed 19 May 2014).

226 N. Mörner, p. 211.

227 See, e.g., "Populistiskt och principlöst", Dagens Nyheter, 26 November 2012, http://www.dn.se/ledare/huvudledare/populistiskt-och-principlost, (accessed 19 May 2014).

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Some scholars criticize the Swedish state and NGOs for presenting too narrow a picture of trafficking, e.g., by using the film *Lilja 4-ever*[228] in their campaigns.[229] It is argued that it is not demand but supply that fuels trafficking and that desperate people choose to come to Sweden and other countries of destination even if they are aware of the fact that they are risking exploitation.[230] Even if the last part is true, namely that desperate people will take desperate measures, it does not mean that demand is irrelevant. On the contrary, if there was no demand, there would be no industry for practices such as forced prostitution or illegal organ transplants.

As has been mentioned above, the focus of the Swedish state has been on trafficking for sexual purposes. The latter is said to be intrinsically linked to prostitution. Most polls and studies conducted in this area therefore concern that form of trafficking. For example, in 1996, 1999, 2002, and 2008, national polls were conducted on how Swedish society perceives the buying and selling of sex. While in 1996, only 32% were in favour of criminalizing purchasing of sexual services,[231] in 2008 71% of all respondents (79% of the women and 60% of the men) were in favour of keeping the provision in place.[232] This is similar to the results from 2002[233] and suggests that the provision has had an impact on opinions.

However, faith in the law's practical effect as a tool against trafficking and prostitution seems to be quite low. Only one-fifth of the respondents believed that the number of prostitutes had diminished, while 38% believed there had been an increase and 48% thought that the number had not changed.[234] More strict measures were asked for, as 59% percent of the respondents (and 66% of the women) believed that selling sex should also be criminalized.

The number of men buying sex openly on the streets has clearly diminished. In 2008, 8% percent of the male respondents answered that they at some point

228 *Lilja 4-ever* is a movie directed by Lukas Moodysson about an Estonian girl deceived and sold into trafficking by her boyfriend. Some experts argue that this picture of a trafficking victim is not entirely accurate and that in most cases people are aware that they are sold into prostitution.

229 S. Dodillet, "Därför misslyckas trafficking-politiken", Expressen, http://www.expressen.se/debatt/darfor-misslyckas-trafficking-politiken/, (accessed 19 May 2014).

230 Ibid.

231 "Allmänheten om sexuella tjänster", SIFO, 1999.

232 "Prostitution och människohandel för sexuella ändamål. En första uppföljning av regeringens handlingsplan", Brå rapport 2010:5, p. 70.

233 "Ska det vara lagligt/olagligt att köpa sex i Sverige", SIFO, 2002.

234 "Prostitution och människohandel för sexuella ändamål. En första uppföljning av regeringens handlingsplan", p. 70.

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had bought sex, as compared to 14% in 1996.[235] As prostitution is considered to be an inherent part of trafficking, and both phenomena are said to be demand-driven, these are positive findings indeed. A more worrying finding indicates that some men still buy sex in conjunction with business trips or vacations abroad, which would suggest a risk calculating behaviour.[236] It is interesting to study how society's view of prostitution and of measures imposed against it and practices similar to it, e.g., trafficking, has changed over time. The measures have gone from semi-legalizing prostitution while imposing strict legal rules for prostitutes (such as what clothes to wear, which streets and places not to frequent, forced health controls, etc.) to the criminalization of procuring and purchasing sex. Even though the view of the phenomenon has changed, it is still biased toward so-called visible heterosexual prostitution with female prostitutes and male buyers.[237] Prostitution and trafficking for sexual exploitation are often believed to be part of the subordination of women and of men's exploitation of women.[238] The Swedish law on purchasing sexual services was partly intended to express that view and to work as a deterring factor for traffickers wanting to start up prostitution services in Sweden.[239]

Sweden – Summary

Introduction

In this section, the problems seen in legislation, state attitudes, the media and the public as well as in the practical application of trafficking measures are summarized. The findings are divided into legal and non-legal issues. As the non-legal issues often influence legal ones, however, the legal issues are also discussed from a non-legal perspective.

Legal Issues

One of the most important legal issues includes the wording *by means of* (*genom*), which has been interpreted as a requirement on the perpetrator to

235 Ibid, p. 71.

236 This has been highlighted by the media. See, e.g., "Dags att kriminalisera svenskars sexköp utomlands", Dagens Nyheter, 24 November 2012, http://www.dn.se/debatt/dags-att-kriminalisera-svenskars-sexkop-utomlands, (accessed 19 May 2014).

237 C. Holmström, "Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduktion" in C. Holmström, M.L. Skilbrei (eds.) *Prostitution i Norden. Forskningsrapport*, TemaNord 2008:604, p. 323.

238 Kvinnofridspropositionen 1997/98, p. 55.

239 Ibid.

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actively influence the disposition of the victim, e.g., by initiating recruitment. Another important question concerns the intent of the perpetrator as the wording *for the purpose of* means direct intent with regard to exploitation. These and other issues are summarized in the following sections.

Improper Means

Already when the first trafficking provision entered into force, there was a debate concerning the prerequisite of improper means. The question was whether *all* improper means were to be removed from the trafficking provision, leaving only the trade measures and the specific purpose of exploitation. Although the debate has somewhat ebbed out, the question remains if the abovementioned difficulties to effectively apply the trafficking provisions were the result of the constituent prerequisites or of the legal valuation thereof. After reviewing the findings made in this chapter, we clearly see that it is a combination of both.

The crime of human trafficking is a complex phenomenon, and the criminal provision has to cover several possible scenarios as well as a specific chain of events. Due to its transnational nature, circumstances of the countries of origin are also of importance. These cases are by the same token difficult to prove and judge.[240] The requirement to include improper means was motivated by the claim that the crime of trafficking was first and foremost in place to protect people from other persons' intentional behaviour to place them in a situation where they could easily be exploited for sexual purposes. Whether such exploitation actually took place or not was to be irrelevant when establishing criminal responsibility. The ambition was to illustrate that the provision was about violating the victim's integrity and freedom rather than about the exploitation per se.[241]

Another reason for including improper means within the scope of the trafficking provision was that procuring was already criminalized in Swedish law, and the new crime of trafficking in human beings for sexual purposes was to be considered as more serious than procuring, with more severe penalties.[242]

In 2004, the government was again considering ways to make the provision more effective. It noted that in court verdicts difficulties had arisen in proving that (all forms of) improper means had been used by the perpetrator as part of recruitment and transporting to Sweden. Also, it was claimed that the prerequisite could lead to too much focus being placed on how the victim behaved in

240 RättsPM 2006:12, Rapport del 1, Utvecklingscentrum Stockholm, 2006, p. 35.

241 Prop. 2001/02:124, p. 24.

242 Ibid.

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the country of origin as opposed to the actions of the perpetrator in the country of destination. Moreover, it was said to be in accordance with the reasons behind Sweden's criminalization of the purchasing of sexual services to remove the prerequisite and strengthen the claim that prostitution was an integral part of trafficking.[243] The question is whether it is truly necessary to remover the prerequisite altogether or if the concerns mentioned above might be taken care of by means of more subtle amendments. I will return to this question in the following.

In most cases of trafficking in Sweden, the prosecutors make use of the fact that the perpetrator had abused the victim's vulnerable situation. This is just one of the improper means that may be employed by the perpetrator, but the other prerequisites usually seem more difficult to prove. There is quite a heavy burden of proof on the prosecutor. First, she needs to establish that the victim was actually in a financially especially vulnerable situation and that the accused had knowledge of this situation. As the second part of the burden of proof, the prosecutor must show that the victim had no other viable option than submitting to the will of the offender. The prosecutor must indicate the options that were available at the time of recruitment and support her claim that these were not real or acceptable to the victim.

What often seems to go amiss is that the victim might not see prostitution as a way of making a living but rather as a means of survival. In most cases, the differences between the context and experiences of the victim as compared to those of the judges are diametrical. Therefore, the difficulty of making statements on how one would have acted in a similar situation must be noted. This cannot be done by departing from a strictly hypothetical situation but should at all times refer to the specific circumstances of the victim. Their choice to engage in prostitution is not always what we would call free.

One of the main questions should therefore be about how to learn more about the situation in countries of origin, both concerning the situation of a typical victim and the view of the victim concerning authorities. As has been mentioned above, victims of trafficking are often reluctant to cooperate with the authorities. Prosecutors sometimes complain that it is difficult to get comprehensive statements from the victims. By soliciting the help of a psychologist, we might learn more about how people in these specific situations behave and how to approach them.[244] We could also enlist the help of experts

243 Prop. 2003/04:111, pp. 57–58.

244 Compare, e.g., case from 2005-06-02 from the District Court of Stockholm, *case no. B 4156–04* and case from 2005-09-22 from the District Court of Helsingborg, *case no. B 1230–05*, and case from 2006-01-11 from the Scania and Blekinge Court of Appeal,

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to learn about specific risks to victims, e.g., being punished by remaining members of the trafficking gang, being stigmatized by their own communities upon testifying to being sexually abused, the possibility of being re-trafficked upon return, etc.

As the trafficking provision stands today, it is clear that the prerequisites of force, threat, etc., are rarely used in order to support potential trafficking cases. As has been mentioned above, since these prerequisites are so difficult to prove, prosecutors usually refer to the prerequisite of vulnerability. However, very few instances of vulnerability are qualified as trafficking. This does not mirror reality where most people are forced into trafficking by means of subtle measures.

Thus, it should be a priority not to reduce human trafficking to cases where violence has been used as a way of forcing the victim into exploitation. It is in this context that it has been considered whether an amendment of the trafficking provision where all of the improper means are removed should take place. In such a case improper means might still be relevant when interpreting the concept of exploitation; the difference being that they would be an inherent part of the prerequisite of exploitation instead of, as is the case today, being connected to the initial trade measure.

It should be borne in mind that a possible removal of improper means from the trafficking provision would not necessarily equate the new provision with procuring. First of all, trafficking also includes other forms of exploitation than sexual abuse. Despite the fact that trafficking can occur within a single country (so-called internal trafficking), most victims of this crime are transported across borders. This circumstance makes them especially vulnerable and the crime different from domestic crimes. Further, in trafficking cases the perpetrator might, e.g., confiscate the victim's passport and place her under surveillance. This can be compared to procuring, where a person is entitled to keep at least part of her earnings, is not necessarily placed under surveillance, etc. Putting a person under surveillance equals improper means. However, the improper means would be connected to the concept of exploitation. In the present situation, they are more connected to the various trade measures,[245] thus shifting focus from the exploitation and behaviour of the perpetrator to

case no. B 2429–05, where interviews of the victims with certified psychologists were used as part of the evidence concerning victims' reactions to being trafficked and used in prostitution.

245 Although the prerequisite should also cover situations in the country of destination (as trafficking needs not be transnational), in practice legal evaluations of this prerequisite focus on the circumstances in the country of origin.

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the actions of the victim before the exploitation, and from the events in the country of destination to what happened in the country of origin.

Even if a person is recruited without the employment of improper means, she might fall victim to exploitation at a later stage, i.e., improper means might be used against her at that point in time. The difference from the present provision would be that improper means such as violence or the threat thereof would be connected to the exploitation and not necessarily the trade measures.[246] Naturally, there already are provisions that might possibly become applicable in such cases. For example, if a person is first kidnapped and then forced to prostitute herself, we might be dealing with kidnapping. If she is kept under lock and key, we might be dealing with unlawful deprivation of freedom, etc.

However, it is important to acknowledge that trafficking is a modern form of slavery. It has, as has already been mentioned above, been defined as such. The need for coherent legislation, e.g., a specific criminal provision, has been highlighted both on the national and international levels. Also, trafficking is on both the national and international levels seen as one of the main forms of organized crime. Many international conventions, EU-acts, etc., apply with regard to trafficking crimes, while other rules, such as the double criminality requirement, mutual extradition, and extended confiscation of criminal proceeds, are in relevant cases directly dependent on the existence of a trafficking provision. However, as has been mentioned above, it might not be necessary or even desirable to remove the prerequisite of improper means from the trafficking provision. Arguably, a better way of reforming the provision would be to somehow indicate that the perpetrator must not initiate a trade measure. This concerns the words *by means of* (*genom*) and would indicate that exploitation is possible if the perpetrator is aware of the victim's vulnerable situation and takes advantage of it, but irrespective of the fact whether or not he has initiated the trade measure.

Intent of the Perpetrator

Another legal issue concerns intent of the perpetrator vis-à-vis the exploitation. The provision on trafficking in human beings is construed in such a way that the perpetrator has to have a certain purpose behind her actions. She is to act with the *purpose* to exploit, and this requires direct intent. This constitutes the ulterior intent requirement and forms an integral prerequisite of the trafficking provision. In order to be found guilty of trafficking in human beings as a principal perpetrator, the perpetrator must therefore have had direct intent

246 See more on this subject in Chapter 8.

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in relation to the exploitation of the victim or direct intent with regard to another person's intent to exploit. If the intent of the perpetrator is to exploit the victim, the crime is considered commissioned even before the actual exploitation has taken place. This is a way of putting the point of consummation earlier in the trafficking chain in order to reinforce the view that trafficking in human beings is an assault on the personal integrity of the individual. It is meant to protect victims from the violation of their personal freedom which occurs already at the stage when a person, e.g., recruits another person by means of deceit and with the purpose of exploitation.

This protection, however, is of little practical relevance to the victims, as all cases brought before courts constitute consummated crimes. At present, this protection does more harm than good as it allows the requirement of direct intent of the perpetrator vis-à-vis the exploitation of the victim to remain in place thus hindering an effective application of the trafficking provision.

As has been illustrated above, few links of the trafficking chain actually qualify as principal perpetrators to the crime. As direct intent is required in relation to the subsequent exploitation, in many cases only the person responsible for it is believed to have such intent. Other links, whose primary motive is to receive remuneration, are said to be lacking direct intent with regard to the exploitation. However, if all trade measures are to be considered equally important and the crime of trafficking is consummated even prior to the actual exploitation then it seems that only direct intent to exploit as such can be considered trafficking (in the sense of someone acting as a principal perpetrator and not as an accomplice). If you only get the recruiter or transporter, you will probably only be able to convict them for acting as accomplices, save for cases where the recruiter, transporter, and exploiter are one and the same person, and, reversely, if you manage to get the person responsible for the subsequent exploitation and the transporter, you will probably only be able to convict the exploiter for trafficking as a principal perpetrator. What happens then in cases where you cannot find all the links of the trafficking chain and thus no one with direct intent? The question is if you can assume that there is such a person.

Sweden is obligated to follow international law on this matter, and one of the main motives of the Palermo Protocol is to recognize trafficking in human beings as a multifaceted offence and by the same token criminalize all links of the trafficking chain accordingly. This view is further reinforced when considering that all links of the trafficking chain are seen as necessary if the final exploitation is to take place as well as in light of the fact that the people responsible for recruiting, transporting, harbouring, receiving, and exploiting the victim are usually all working for an illicit organization and are therefore not only

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fulfilling their tasks that are equally necessary for the commission of the crime but are also acting on direct orders of the main trafficker(s).

We may therefore argue that the trafficking provision should, not least for the sake of consistency, be amended. For reasons of coherence, we may argue that all of the links of the trafficking chain, from the recruiter to the final exploiter, should be viewed as co-perpetrators. These co-perpetrators might in their turn be acting on the orders of an instigator. The instigator, e.g., the boss of an illegal organization that in no way takes physical part in the trade, may after proper relabeling actually be viewed as the principal perpetrator and the co-perpetrators as accomplices. A common denominator that unites all of these links of the trafficking chain is their effort to earn money off a person by treating her as mere commodity.

Of course, this problem might be mitigated by the possibility of applying similar penalties. In some cases (if there are similar circumstances), the penalty for trafficking as a principal perpetrator might not differ from the penalty for acting as an accomplice. However, labelling someone as an accomplice as opposed to principal perpetrator is arguably about more than just the severity of the penalty imposed. It also has both symbolic and practical value for the victim. Furthermore, the international community has stated the importance of coherence and consistency among countries when qualifying acts as potential cases of trafficking. If we are to meet this requirement, we need to be aware of the abovementioned problem.

Underage Victims of Trafficking

Although the perpetrator must not use improper means, she must nevertheless exert some form of influence on the will and disposition of the underage victim. There is a certain level of discrepancy between how this influence has been described in preparatory works to the trafficking provision and how it is interpreted in case law. Simply put, the courts have often applied the same rules as with regard to adult victims. In effect, the influence of the perpetrator has in certain cases been equated with improper means or at least there has been a requirement on the perpetrator to influence the victim *by means of* a specific measure. Therefore, also in these cases the personal history and behaviour of the victims prior to the exploitation have been influential on the decisions of the courts.

Non-Legal Issues

Problems at the Operational Level

We have seen that there are problems on the operational level. These concern a lack of (legally binding) guidelines on how to identify victims of trafficking as

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well as on how to approach and assist these people pre, during and post-trial. Although the problems of assistance and safe return have been discussed by various state agencies, in practice these efforts are disjointed and vary depending on the municipality in which the victim resides and sometimes on the knowledge and involvement of the individual(s) with the relevant state authorities that come into contact with victims of trafficking.

Lacunas in State Policy on Trafficking

Sweden is strongly involved in the fight against human trafficking. This is generally supported by all political parties as well as the public. However, to date focus has mostly been on trafficking for sexual exploitation. The latter (perhaps with the exception of forced begging) constitutes the most visible form of trafficking. Today, official reports indicate that other forms of trafficking are on the increase. When reading about this crime,[247] one sometimes gets the impression that it is indeed about choosing where to put focus, as if it were only possible to focus on either the one or the other form of exploitation. Also, things are often painted in black and white and are quite frequently generalized. Either trafficking is connected to prostitution and demand driven or it is the situation in the countries of origin and restrictive migration policies of the destination countries that create supply and sustain trafficking or it is simply about organized crime. Women victims of trafficking are either calculating or they are docile and ignorant with no free will to speak of. The only correct generalization in this context appears to be that extremes are seldom true.

It is crucial to view trafficking from a holistic perspective and its victims as individuals. Trafficking is about supply which consists of poor and desperate people. Sometimes these people are close to apathetic but more often they are determined to change their situations for the better. Then, we have the cynical organizations and individuals profiting from the supply of victims and the demand for the services of the latter, as well as from restrictive migration and labour policies of the richer countries. Last but not least, demand in the countries of destination for sex services, cheap goods and services, organs for transplantation, etc. generates profits for the illicit organizations and sustains trafficking.

The fact that, e.g., trafficking for forced begging seems to be on the increase and that it should be adequately acknowledged by the state does not mean that the state must then turn a blind eye to other forms of trafficking, e.g., sexual exploitation. On the contrary, research from all over the globe indicates that the various forms of trafficking are usually intrinsically linked to one

247 Here, I refer primarily to writings in the media.

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another. Child beggars, e.g., are often sexually exploited or forced to commit theft.[248] What makes the situation even more alarming is that sometimes whole families are affected by the exploitation. The perpetrator might, e.g., force a mother to beg with one of her children while he keeps the other child with him for leverage. Sometimes, whole families come to Sweden of their own accord and involve the whole family in begging. The children do not feel used since the family as a whole has always lived like this. The question is how such cases should be evaluated and whether it helps to see the parents as potential traffickers when the problem obviously lies somewhere else.[249]

Sweden has taken decisive and important steps in the right direction, but in order to make progress in all areas it needs to nuance its picture of trafficking not by taking away from the progress already made in the field of trafficking for sexual exploitation but by extending that knowledge and ambition to other contexts in which people are currently exploited in Sweden and abroad.

In the next chapter, Polish laws and attitudes concerning human trafficking are analysed. The chapter starts with a legal analysis and then proceeds to look at the situation through the prism of legal transplants.

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248 I. Åkerman, "Barn utsatta för människohandel – en nationell kartläggning", Rapport 2012:27, Länsstyrelsen i Stockholms Län.

249 See case from 2010-11-18 from the District Court of Stockholm, *case no. 14880–10,* where the whole family was involved in begging and lived in destitution. The parents were not seen as traffickers.

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CHAPTER 6

Poland

Introduction

Trafficking was not identified by the Polish state as a serious crime until the 1990s. Before that period, it was considered more myth than reality. The few known victims were usually blamed for their destinies, but as more and more persons, sometimes even neighbours or acquaintances, became affected by the crime, people could no longer just shrug their shoulders in disbelief. Statistics indicate that every eleventh Polish citizen personally knows a trafficking victim.[1]

Today, the crime of human trafficking is set firmly on the state's agenda. The Ministry of Interior and Administration has formed an anti-trafficking unit. The task of this unit is to coordinate the work of the inter-ministerial Committee for Combating and Preventing Trafficking in Human Beings, to draft national action plans against trafficking and to oversee their implementation.

Trafficking has also been the subject of research. The University of Warsaw, e.g., has a special centre that conducts research on this topic.[2] Similar centres are to be found in other big cities. As in the Swedish case, focus in public policy and research alike has been on trafficking for the purpose of sexual exploitation. Scholars note that more research is needed on other forms of the crime, especially on forced labour and similar practices, which seem to be on the increase.[3]

It should be noted that Polish legislation differs from Swedish legislation as well as from the legal tradition that has influenced the Palermo documents. This has actually been acknowledged as one of the main obstacles concerning

1 J. Wilczak, "Co wiemy o handlu ludźmi. Oszustwem lub siłą", Polityka, 23 March 2010, http://www.polityka.pl/kraj/opinie/1504546,1,co-wiemy-o-handlu-ludzmi.read, (accessed 19 May 2014).

2 Ośrodek Badań Handlu Ludźmi, Katedra Kryminologii i Polityki Kryminalnej, IPSiR UW, http://www.ipsir.uw.edu.pl/informacje_o_instytucie/katedry_i_zaklady/katedra_kryminologii_i_polityki_kryminalnej/osrodek_badan_handlu_ludzmi/publikacje, (accessed 19 May 2014).

3 "Memorandum w sprawie pracy przymusowej", Aktualności, 2010, Ośrodek Badań Handlu Ludźmi, Katedra Kryminologii i Polityki Kryminalnej, IPSiR UW, http://www.ipsir.uw.edu.pl/informacje_o_instytucie/katedry_i_zaklady/katedra_kryminologii_i_polityki_kryminalnej/osrodek_badan_handlu_ludzmi/aktualnosci, (accessed 19 May 2014).

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a successful implementation of the international definition of trafficking. Although the new trafficking provision is modelled on the international definition of trafficking, thus being lengthier than its predecessor, other relevant provisions remain quite short. The doctrine concerning these provisions is also comparatively sparse. Moreover, there is little written about the definition of trafficking. Since many of the concepts used in the present provision such as recruitment and harbouring are new to Polish criminal law, reference is simply made to their dictionary meanings. This makes the chapter on Poland shorter than the chapters on Sweden and Russia.

Also, it should be noted that Polish laws differ from Russian and Swedish laws in a very specific respect. Some provisions have an additional article where the definition of the crime or a central prerequisite of the crime is more closely set out. Article 189 (a) concerning trafficking, e.g., has an additional provision, namely Article 115, Section 22 that contains its definition. Below, relevant laws will be analysed. The analysis will be conducted in reversed chronological order, starting with the current trafficking provision.

Present Provisions on Trafficking in Human Beings

Introduction

On September 8, 2010, new provisions criminalizing trafficking in human beings entered into force. The former trafficking provision, i.e., Article 253, was amended and moved from the chapter on offences against public order into Article 189 (a), the chapter on offences against personal liberty.[4] Section 2 of Article 253 on illegal adoptions was moved to Article 211 (a). Also, Article 115, Section 22 was enacted. The latter contains the definition of the crime of trafficking as stipulated in Article 189 (a) and is basically a verbatim transposition of the trafficking definition of the Palermo Protocol. Before analysing this definition in more detail, Article 189 (a) will be set out.

Trafficking in Human Beings – Article 189 (a)

Article 189 (a) of the Criminal Code stipulates the penalty for trafficking and for preparation to commit the crime and reads as follows:

> A person guilty of trafficking in human beings is liable to the punishment of deprivation of freedom for a minimum period of three years.

4 Ł. Wieczorek, "Przestępstwo handlu ludźmi w prawie międzynarodowym i krajowym", Ośrodek Badań Handlu Ludźmi, Uniwersytet Warszawski, p. 2.

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> A person, who prepares the commission of a crime as defined in Section 1, is liable to the punishment of deprivation of freedom from three months to five years.

One novelty is the criminalization of preparation to commit the trafficking offence. There were three main reasons for criminalizing the preparation of the crime in the trafficking provision. Firstly, Poland was obligated to do so by virtue of the country's ratification of the Palermo Protocol. Secondly, the legislator wanted to emphasize that the trafficking provision protects not only the freedom of movement of the individual but also his dignity and personal freedom. Its purpose is to safeguard that no person is treated like a commodity.[5] Thirdly, the act has a high level of so-called social harm or dangerousness, which calls for a criminalization of not only commissioned acts but also attempts to commit the crime.[6]

According to most scholars, the prerequisite *guilty of trafficking* covers both single acts and a specific chain of acts.[7] This seems to be a correct interpretation, especially when seen in light of the fact that the wording *practices the trade in human beings* of the previous provision on trafficking, i.e., Article 253, Section 1, has been replaced by the words *guilty of*. This view is supported by case law also with regard to the old terminology. In a judgment from the Wrocław Court of Appeals,[8] the court stated that a single act including one victim was enough to establish criminal responsibility for trafficking.

However, some argue that Article 189 (a), much like its predecessor, covers only multiple acts concerning more than one victim.[9] A judgment from the Lublin Court of Appeals seems to validate that interpretation. In this case, an act concerning only one person was not categorized as trafficking.[10] According to doctrine, the decision was based on the fact that there was only one victim.[11] The two judgments mentioned above illustrate the discrepancy in case law concerning the crime of trafficking that was at hand prior to the 2010 amendment of the relevant criminal provisions. It remains to be seen whether this recent amendment will bring some clarity on this issue. When doctrine is concerned, we can see that conflicting views concerning this question remain.

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5 M. Mozgawa in M. Mozgawa (edt.), *Kodeks karny. Praktyczny komentarz*, Warszawa, Oficyna, 2010, p. 386.

6 Ibid, p. 387.

7 M. Filar in M. Filar (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2010, p. 908.

8 Case from 21-02-2003 from the Wrocław Court of Appeals, *II AKa 586/02*, OSA 2003.

9 M. Mozgawa, p. 386.

10 Case from 29-04-2002 from the Lublin Court of Appeals, *II AKa 330/02*.

11 M. Mozgawa, p. 386.

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One thing that the experts seem to agree upon is that at present trafficking can only be committed with direct intent. This is due to the fact that the definition of the crime contained in Article 115, Section 22 mentions specific purpose. The perpetrator must act with specific purpose to exploit the victim in, e.g., prostitution or forced labour.[12] According to doctrine, this seems to narrow the scope of the trafficking provision when compared to its predecessors.[13] Article 253 allowed for both forms of intent[14] existent in Polish criminal law,[15] i.e., direct intent (*dolus directus*) and intent based on the probability of a certain result of one's actions (*dolus eventualis*).[16]

Definition of Trafficking in Human Beings – Article 115, Section 22

Introduction

The former provisions on trafficking in human beings were located in the chapter on disturbance of public order and the chapter on sexual crimes. Trafficking in human beings is considered to be a violation of basic human rights such as the right to life, freedom, and personal safety as stated in numerous human rights acts such as the Universal Declaration of Human Rights and the ECHR.[17] In consequence, the relevant provision is now located in the chapter on crimes against freedom of the individual. As has been mentioned before, Article 115, Section 22 supplies a definition of the act of trafficking as criminalized in 189 (a). It reads as follows:

> Trafficking in human beings shall mean the recruitment, transport, transfer, giving away, harbouring or receipt of a person by means of:
>
> 1. violence or unlawful threat,
> 2. abduction,
> 3. deceit,
> 4. by misleading someone or by means of abusing someone's mistaken view or a person's incapability of an adequate understanding of his or her actions,

12 J. Piórkowska-Flieger in T. Bojarski (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2012, p. 452.

13 M. Filar, p. 894.

14 These two forms of intent will be further elaborated upon in the section on intent.

15 M. Mozgawa, p. 387.

16 W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków, Wydawnictwo Znak, 2011, p. 204.

17 I. Nowak, K. Przybysławska, "Raport na temat zjawiska handlu dziećmi w Polsce 2010", Centrum Pomocy Prawnej Im. Haliny Nieć, 2010, p. 6.

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5. misuse of a position of dependence, abuse of a distressful situation or of a state of helplessness,
6. giving or receiving of financial or personal benefits or the promise thereof to a person that takes care of or supervises another person for the purpose of his or her exploitation, even with his or her consent, especially in prostitution, pornography or other forms of sexual abuse, in labour or services of a forced nature, in begging, in slavery or other forms of exploitation that violate the dignity of the human being or for the purpose of acquiring cells, tissues or organs contrary to law. If the action of the perpetrator pertains to a minor, it shall be seen as trafficking in human beings, even if the measures and means set forth in points 1–6 have not been used.

The provision starts by enumerating different trade measures that might be employed by the perpetrator. These measures include recruitment, transport, transfer, giving away, harbouring, or receipt of a person. The list is exhaustive, i.e., no other trade measures than those listed in the provision are possible.[18] Some experts argue that this has narrowed the area of application of the provision when compared to its predecessor.[19] For example, measures relating to the advertising of the services of victims of trafficking are said to no longer be covered by the trafficking provision.[20] This issue was raised during the drafting process of the provision.[21] The legislator, however, did not before enumerating the different trade measures incorporate the word *especially* into the provision. The list of measures was thus made exhaustive.[22]

Trade Measures

In doctrine, little has been written about the concept of trade measures. Instead, reference to the various prerequisites' dictionary meaning is made.

18 P. Kozłowska-Kalisz in M. Mozgawa, *Kodeks karny. Praktyczny komentarz*, Warszawa, Oficyna, 2010, p. 263.

19 "Komisja Kodyfikacyjna Prawa Karnego", KKPK 403/9/05, p. 8.

20 O. Górniok, J. Bojarski, in M.Filar (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2010, p. 614.

21 See, e.g., W. Wróbel, "Opinia w sprawie rządowego projektu ustawy o zmianie ustawy – Kodeks karny, ustawy – Przepisy wprowadzające Kodeks karny oraz ustawy – Kodeks postępowania karnego oraz ustawy o Policji (druk sejmowy nr 2387)", http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=2387, p. 2, (accessed 19 May 2014).

22 O. Górniok, J. Bojarski, p. 614.

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Recruitment is said to mean persuasion, propitiation,[23] i.e., trying to persuade someone to partake in something.[24]

Transport means transporting people over certain distances by means of communication (e.g., bus, train, etc.). *Transfer* means giving something to someone for further disposition. *Harbouring* means letting someone store something or to keep something or someone in hiding. *Receiving* means taking care of someone, providing lodgings, employment, etc.[25] Due to the fact that little has been written about the legal meaning of the various trade measures, a more practical outline of recruitment in Poland will follow below.

A typical recruiter in Poland is a male, although female recruiters, often with a past as trafficking victims, have become more common.[26] A typical victim is young and inexperienced, often a troubled teen, and desperate enough to accept any offer of work abroad, no questions asked. Recruiters lure the victims with promises of high earnings, a good life in the West, the possibility of an education, lucrative marriages, etc. Some victims are promised that they might become famous models, some are just promised a good time, while others are aware that they will be prostituting themselves abroad but not that they will end up in a situation much resembling slavery.[27]

Recruitment usually occurs locally in the communities where potential victims live. There might be ads about lucrative job offers abroad posted on fences and buildings as well as in the local newspapers. Some recruiters work on a more personal level, approaching potential victims in bars, parks, or even on the streets. The recruiter usually approaches the victim when she is alone, avoiding both home visits and getting to know her friends. There are generally two types of recruitment. The first type is based on a 'formal' job offer abroad and the second one is based on some sort of a personal relationship between the victim and the perpetrator. Sometimes, women are seduced by recruiters, agreeing to accept offers that they would otherwise have refused. Sometimes, people who have entered Poland as illegal migrants are recruited into prostitution by local buyers. In that way, the latter do not risk getting caught while illegally crossing borders.

23 P. Kozłowska-Kalisz, p. 263.

24 J. Piórkowska-Flieger, p. 266 and O. Górniok, J. Bojarski, p. 616.

25 O. Górniok, J. Bojarski, p. 616.

26 "Prawa człowieka a handel kobietami i młodymi ludźmi w Europie. Przybornik edukacyjny", Raport Krajowy Polska, Projekt Daphne, p. 21.

27 Ibid, p. 22.

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Improper Means

The trafficking provision lists various improper means that may be utilized by the perpetrator. It mentions violence, unlawful threat, abduction, and deceit. Other improper means include misleading someone or abusing someone's mistaken view or a person's incapability of having an adequate understanding of his or her actions, misuse of a position of dependence, abuse of a distressful situation or of a state of helplessness, and the giving or receiving of financial or personal benefits or the promise thereof to a person that takes care of or supervises another person.

Violence

The first improper means set out in the trafficking provision is violence. With regard to how the concept of violence is to be interpreted in the context of the trafficking provision, reference is made to Article 197 on rape.[28] By violence in the context of the provision on rape, a set of means of a physical nature that make impossible or override the resistance of the victim is meant. These means should be employed in order to force the victim to do, tolerate, or omit to do something. Physical force might be used directly so as to make any resistance of the victim impossible by, e.g., handcuffing the victim. It can also be used in order to override resistance of the victim, e.g., by means of assault.[29]

This distinction is explained in terms of two forms of force, namely absolute force (*vis absoluta*) and compulsory force (*vis compulsiva*). The first is absolute in the sense that all of the willpower of a person is taken away by the perpetrator. A person might get handcuffed, knocked out, or paralyzed by gas. In other words, the physical control of the perpetrator over the victim is absolute. The compulsory type of force offers the victim (at least on a theoretical level) a choice. A person might be prompted to act in a certain manner by various means of torture such as being beaten, burned with cigarettes, etc.[30] Compulsory force can be used directly against the victim or against members of her family, e.g., a child.[31] It can also be directed against the property of the victim.

Unlawful Threat

The second alternative prerequisite of improper means regards the concept of unlawful threat. According to the definition set out in the provision on

28 P. Kozłowska-Kalisz, p. 263.

29 M. Mozgawa, p. 406.

30 A. Marek, *Kodeks Karny. Komentarz*, Warszawa, Dom Wydawniczy ABC, 2004, p. 444.

31 Ibid, p. 453.

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unlawful threat in Article 115, Section 12, this notion is divided into three parts. Article 115, Section 12 reads as follows:

> Unlawful threat shall mean both the form of threat that is set out in Article 190 and the threat of initiating criminal proceedings against someone or of disclosing information detrimental to the threatened person or his or her next of kin; if a person informs another person that he or she will initiate criminal proceedings and this is only due to protect a right that has been violated by a crime, it shall not be an unlawful threat.

The first part corresponds to the concept of punishable threat as set out in Article 190, while the second part covers threats of initiating criminal proceedings against the threatened person, and the third part deals with disclosing detrimental information about a person. Article 190, Section 1[32] reads as follows:

> A person who threatens another person with committing a crime to that person's detriment or the detriment of that person's next of kin, if the threat creates in the threatened person a validated apprehension that the threat will be realized, is liable to pay fines or to the punishment of deprivation of freedom for a maximum period of two years.

This provision protects the psychological integrity or safety of a person such as the freedom from fear and threats. It protects a person from threats of a criminal act commissioned against him or his loved ones. According to case law, the threat need not be pronounced or even made orally. It can be made in writing, by a gesture – e.g., pointing a gun at someone – or even without actual intent to carry out the threat.[33]

In order for the crime to be considered commissioned, it is necessary that the threat has aroused a validated or justified apprehension in the victim that it will actually be carried out.[34] If the threatened person does not experience this apprehension, yet the perpetrator is serious about the threat (and does not know that the threatened person is not afraid), we are dealing with an attempt to commit an unlawful threat.[35]

32 Only Section 1 of the Article is applicable in our case.

33 Case from the Supreme Court, SN from May 17 1997, *II KKN 171/96*, Orz. Prok. i Pr 1997, no. 10, as referred to in A. Marek, p. 443.

34 T. Bojarski, p. 252.

35 M. Mozgawa, p. 388.

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The question of the possibility of the threat being carried out is to be viewed from a subjective perspective, i.e., the point of view of the victim. This is a clear shift from previous codes from 1932 and 1969 where the probability of carrying out the threat and justified fear, respectively, were the concepts around which the provisions were to be interpreted, i.e., from a more objective point of view. However, the wording *the apprehension must be validated* suggests that not all forms of threats are covered by the provision, even in cases where the victim takes the threat seriously. Jokes, sarcasm, and repeated quarrels among spouses, where empty threats are routinely made, are mentioned as examples of when the provision does not apply.

To commit the offence of unlawful threat, intent is required. This is due to the fact that this behaviour is intentional, aimed at bringing about a certain outcome (to make the threatened person fearful of the perpetrator in order to make her act in a certain way). There are different views in doctrine on whether only direct intent is possible or if *dolus eventualis* is also allowed.[36]

The second and third parts of the provision on illegal threat as defined in Article 115, Section 12 apply to situations where a form of extortion or blackmailing is at hand. To initiate criminal proceedings, not in order to protect a violated right but as a means of blackmailing someone into doing, tolerating, or omitting to do something, is covered by the provision. Threatening to disclose detrimental information about the victim is also considered to be a form of unlawful threat. In order to be able to establish criminal responsibility for this type of threat, a certain number of recipients of the detrimental information are necessary. It is, for instance, not considered an unlawful threat to threaten to disclose detrimental information to one's spouse.[37]

Abduction

The trafficking provision mentions abduction as one of the improper means that can be enlisted by the perpetrator. While some commentaries to the Criminal Code make reference to the dictionary meaning of abduction,[38] others point to Article 211 that also mentions the concept.[39] Article 211 deals with abduction of a minor less than fifteen years of age or of a mentally or a physically disabled person. It reads as follows:

36 Ibid.
37 A. Wąsek in M. Filar (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2010, p. 798.
38 J. Piórkowska-Flieger, T. Bojarski in T. Bojarski (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2012, p. 267.
39 P. Kozłowska-Kalisz, p. 263.

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> A person, who against the will of a person who has the guardianship or supervision over another person, abducts or confines a minor less than fifteen years of age or a physically or mentally disabled person, is liable to the punishment of deprivation of freedom for a maximum period of three years.

This provision safeguards the rights of parents and other legal guardians, not the child. Some experts argue that it is wrong to make reference to Article 211 when discussing abduction in the context of trafficking. Abduction, in the context of trafficking, can concern both children and adults. Also, in trafficking cases the abduction violates the will of the abducted person and not just that of possible guardians.[40] There are no other specific provisions criminalizing abduction. If, e.g., the will of the child is also violated by the abduction (which is obviously true in cases of trafficking), Article 189 on illegal deprivation of freedom becomes cumulatively applicable.[41] This article reads as follows:

> A person, who deprives another person of his or her freedom, is liable to the punishment of deprivation of freedom for at least three months and at most five years.
>
> If the deprivation of freedom lasted for more than seven days, the perpetrator is liable to the punishment of deprivation of freedom from one year to ten years.
>
> If the deprivation of freedom, mentioned in Paragraphs 1 or 2, was accompanied by particular ruthlessness, the perpetrator is liable to the punishment of deprivation of freedom for a minimum period of three years.

This provision safeguards the physical freedom of the individual, i.e., the right of a person to freely decide upon his or her course of actions such as where to reside, for how long, etc.[42] As we can see, there is no specific mentioning of abduction, e.g., forcefully moving a person to another location. Instead, illegal deprivations of freedom are seen as a form of violation of the freedom of movement. You can deprive someone of his freedom by your direct actions as well as, although on a more limited scale, by omissions to act. In the first instance, you can lock someone in or tie them up while in the second instance

40 O. Górniok, J. Bojarski, pp. 613–614.

41 M. Szwarczyk in T. Bojarski (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2012, p. 531.

42 A. Marek, p. 441.

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you can, e.g., refrain from releasing someone who has been arrested after the legally stipulated timeframe for keeping someone under arrest has run out. You can commit the crime with both direct and probable intent.[43]

The latter can be exemplified by a situation where a burglar ties up a house owner to prevent resistance. Albeit, the main purpose of the actions of the burglar is not to restrict the freedom of movement of the victim, he needs to restrict that freedom in order to further his own ends, i.e., to escape with the stolen goods. The thief undertakes his actions knowing that there is a possibility that the freedom of the victim might be restricted for an unknown period of time, i.e., we are dealing with de facto deprivation of freedom. Anyone can become guilty of illegal deprivation of freedom by direct actions while only public servants can become guilty of the crime due to an omission to act.[44]

Longer periods of time, which are perceived as exhibiting particular ruthlessness, are also seen as aggravated forms of illegal deprivation of freedom. This applies to periods longer than seven consecutive days. Examples of particular ruthlessness include locking someone in a dark basement, starving someone, separating a mother from her children, etc.[45]

Deceit

The next prerequisite of improper means set out in the trafficking provision is deceit. Here the doctrine on the trafficking provision makes reference to Article 197 on rape, where deceit is a prerequisite. Deceit in the context of the provision on rape relates to two different scenarios. Firstly, it relates to instances where certain methods that eliminate the resistance of the victim are applied. This pertains both to situations where the perpetrator actively deceives a person and instances where she abuses an already existent mistaken view of the victim. This mistaken view must have bearing on the decision-making of the victim concerning the sexual act. Examples include situations where someone subjects another person to a sexual act claiming it to be part of a gynaecological examination.[46]

Secondly, deceit might be used in order to eradicate the victim's ability to make conscious decisions.[47] A person might pretend to give another person a necessary medication that actually renders that person in a helpless state and then have intercourse or perform another sexual act on her. In trafficking cases

43 M. Mozgawa, p. 384.
44 T. Bojarski, p. 450.
45 Ibid, p. 450.
46 J. Piórkowska-Flieger, p. 486.
47 A. Marek, p. 453.

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this occurs, e.g., when victims are forced to consume drugs by the perpetrators in order to make them more easily controllable. However, if a person provides another person with alcohol and the latter drinks voluntarily and then offers no resistance to the sexual advances of the perpetrator, rape by means of deceit has not taken place. Neither has it taken place when a person is promised marriage in return for sexual favours.[48]

Misleading Someone, etc.

The next prerequisites of improper means concern situations where the victim is misled by the perpetrator or where the latter takes advantage of the fact that the victim has been misled by someone else or is otherwise mistaken, e.g., about the nature of the work. It also concerns situations where the victim is incapable of properly understanding her actions as well as the consequences of the actions of the perpetrator.

We can perhaps argue that abusing someone's mistaken view or inability to comprehend his own actions is different from deceit since the latter presupposes active action on behalf of the perpetrator. The question is, however, how and if misleading someone actually differs from the prerequisite of deceit mentioned above. The reason for addressing these prerequisites together is that they are all set out in Article 286 on financial fraud, to which the doctrine on the trafficking provision makes reference. Paragraph 1 of Article 286 reads as follows:

> A person who, in order to achieve financial benefits, induces another person to detrimental handling of his or her property or the property of another person, by the means of misleading him or her or by abusing the fact that the person is mistaken or by abusing the person's incapability of adequately understanding his or her own actions, is liable to the punishment of deprivation of freedom from six months to eight years.

Misleading someone typically concerns a situation where actions are undertaken by the perpetrator in order to give a false picture of reality to the victim. This is sometimes referred to as *active deceit*.[49] It involves actively creating a false understanding about something. The other form of misleading someone is sometimes referred to as *passive deceit*.[50] This occurs when the perpetrator

48 Ibid.

49 M. Kulik in M. Mozgawa (edt.), *Kodeks karny. Praktyczny komentarz*, Warszawa, Oficyna, 2010, p. 591.

50 A. Marek, p. 582.

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abuses an already erroneous view of the victim. Although she does not have to be responsible for the creation of that view, she must nevertheless act actively to abuse the mistake of the victim.

A person might be incapable of comprehending the consequences of his own actions due to various reasons such as old or young age, disability, illness, etc. This inability pertains both to permanent illnesses and inflictions of shorter duration. It is also applicable in situations where the victim is extremely naïve or uneducated.[51]

In doctrine, these prerequisites of the trafficking provision have been criticized. It is noted that the new trafficking provision is more or less a verbatim transposition of the trafficking definition of the Palermo Protocol. The latter document is said to have been influenced by a common law tradition. In the Polish context, this has led to some difficulties, as abusing someone's mistake and taking advantage of a person's inability to comprehend a given situation are both prerequisites of the provision on fraud. Yet in the trafficking provision, these are listed as separate prerequisites.[52] However, it should be noted that there is no requirement in the Palermo Protocol for states to transpose the definition of trafficking word for word. Moreover, Article 3 of the protocol mentions only fraud and deceit and does not go into detail about how either of these prerequisites is to be interpreted. The Polish legislator might have followed lead instead of enumerating all the ways in which fraud can be carried out.

Misuse of a Position of Dependence and of a Distressful Situation

With regard to how both prerequisites are to be interpreted, the doctrine on the trafficking provision makes reference to Article 199 where the prerequisites of dependence and distressful situation are used. This article deals with making a person engage in sexual intercourse or a thereto comparable act by means of misusing a position of dependence or by abusing a distressful situation. Article 199 reads as follows:

> A person, who by misuse of a position of dependence or by abusing a distressful situation, makes another person engage in sexual intercourse or to tolerate or perform another sexual act, is liable to the punishment of deprivation of freedom for a maximum period of three years.

51 Ibid.

52 O. Górniok, J. Bojarski, p. 615.

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> If the act set out in Paragraph 1 has been committed against a minor, the perpetrator is liable to the punishment of deprivation of freedom for a period from three months to five years.
>
> The punishment set out in Paragraph 2 also applies to a person, who makes a minor engage in sexual intercourse, or to tolerate or perform another sexual act, by misuse of trust or by providing the minor with financial or personal benefits, or a promise thereof.

Both concepts deal with psychological pressure that is applied by the perpetrator in order to make a person engage in a sexual act. They both violate the victim's freedom of sexual disposition as a possible refusal of the victim to perform a sexual act has detrimental consequences for the victim.

A position of dependence might be of either a temporary or a permanent nature. What is of importance here is that the interests of the victim, both material and personal, are dependent on her avoiding a conflict with the perpetrator. This state of dependence can be derived from law, e.g., a legal guardianship, or an employment contract. In cases of work-related dependence, the employment per se is not enough to establish criminal responsibility according to Article 199. It must also be established that the fate of the employed person, such as her economic situation or other life circumstances, is decidedly dependent on the will of the perpetrator. The position of dependence can also be of a factual nature. Here, the doctrine mentions a person being rescued by a lifeguard.[53]

However, a position of dependence alone is not enough to make Article 199 applicable. This state must also be misused by the perpetrator. It means that the perpetrator must consciously use this situation as a way of exerting mental pressure on the victim in order to gain her consent with regard to sexual intercourse or another sexual act. It is also crucial that the act is initiated by the perpetrator. If a person initiates the act, e.g., in order to gain material benefits from her employer, Article 199 is not applicable.[54]

Abuse of a distressful situation means that the difficult living situation of the victim is being used by the perpetrator. It is not necessary that the life or health of the victim is dependent on a specific action being undertaken by the perpetrator. It is enough that the perpetrator, e.g., supplies a much needed financial loan or prolongs the stipulated period of its payment and, by the same token, frees the victim from unpleasant circumstances. It does not, however, apply to providing such luxury items like jewellery, furs, trips, etc.[55]

53 M. Mozgawa, p. 411.

54 A. Marek, p. 457.

55 M. Mozgawa, p. 412.

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Abuse of a State of Helplessness

With regard to how the prerequisite of a state of helplessness as set out in the trafficking provision is to be interpreted, the doctrine thereto makes reference to Article 198 on the sexual abuse of helplessness and the doctrine regarding that provision. The article reads as follows:

> A person who, by abusing another person's helplessness or her or his inability to, due to mental disability or illness, comprehend the act or direct her or his own actions, makes that person engage in sexual intercourse, or tolerate or perform another sexual act, is liable to the punishment of deprivation of freedom from six months to eight years.

This provision safeguards the sexual freedom of the individual. A state of helplessness typically implies a situation where a person cannot protect herself from a certain act. This inability can be the result of both physical and psychological circumstances. Physical circumstances include situations where a person is paralyzed, physically disabled, handcuffed, etc. These circumstances *cannot* be brought on by the perpetrator. If the perpetrator, e.g., handcuffs a person and has intercourse with her, he is guilty of rape. If he, however, finds a victim of robbery that has already been handcuffed by the first perpetrator and then has intercourse with her, Article 198 will instead become applicable.[56]

Psychological forms of helplessness include situations where the victim is under the influence of drugs or alcohol or even hypnosis.[57] Again, Article 198 is applicable when the perpetrator has taken advantage of these circumstances. If she has created them, she is answerable for rape.

The Giving or Receiving of Financial or Personal Benefits or the Promise thereof to a Person that Takes Care of or Supervises another Person

With regard to the receiving and giving of payments in the context of trafficking, the doctrine thereto makes reference to Article 228 where this prerequisite also appears. This is a quite lengthy provision addressing the corruption of public servants. The relevant part of the provision mentions the concept of financial and personal benefits. The doctrine on this provision and the abovementioned concepts specifically make reference to Article 155, Section 4 where these notions are more closely defined.[58] Below, we will address the purpose of the perpetrator

56 J. Piórkowska-Flieger, p. 491.

57 M. Filar, p. 952.

58 M. Kulik, p. 477.

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and the various forms of exploitation as stipulated in the trafficking provision. But first, the issues of consent and age of the victim will be discussed.

Consent of the Victim

The trafficking provision states that consent is irrelevant when any of the improper means have been used or if the victim is a minor. By way of comparison, the former trafficking provision, i.e., Article 253, stated that trafficking could be committed even if the victim had given her consent. Interestingly, this was not possible in cases of forced prostitution abroad. According to Article 204, Section 4, the perpetrator was to lure or abduct another person in order for that person to engage in prostitution abroad.

According to some voices in the doctrine, the new trafficking provision has a more narrow area of application than its predecessors. It is argued that the old provisions penalized the trade in human beings, even with their consent, as a result of the conviction that human beings should not be treated like property. It is further argued that, within the context of the new provision, the disposition of the victim must in some way be influenced by the perpetrator *by means* of employment of improper means. So far, this is true. It is then added that if at some point the victim decides that she wants to consent to the subsequent exploitation, trafficking has still taken place.[59]

While this point of view seems correct, the explanation for it is not as convincing. It is said that trafficking has taken place not due to the planned/final exploitation but rather as a result of the circumstance that at the initial stage of the trafficking chain (for example, recruitment) the will of the victim was somehow (for example, through abduction, violence, or deceit) violated or otherwise influenced. Of course, it is right to argue that improper means such as deceit or unlawful threat preclude consent. However, it should also be impossible to consent to exploitation, such as forced prostitution, at a later stage.

Slavery is said to be one of the possible forms that exploitation might assume and according to both Polish law and doctrine it is impossible to consent to that state. Hence, in that respect, it seems as if the new provision does not differ from the old one. However, the interpretational difficulties in this respect should be noted as Article 3 of the Palermo Protocol indeed might be read as suggested above, i.e., that trafficking is *only* possible if any of the improper means has been used to facilitate a trade measure at the *initial stage of the trafficking chain*.[60]

59 O. Górniok, J. Bojarski, p. 615.

60 This can be compared to the situation in Sweden, where focus has also been placed on the initial stage of the trafficking chain, arguably due to the *by means of* requirement.

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It is clear that the interpretation of the concept of consent within the context of the new provision is problematic not least when comparing the doctrine on Article 8 which details the practice of slavery. It is sometimes argued that Article 8 deals with instances where the victim has explicitly withheld consent while the trafficking provision deals with the other cases, i.e., situations where consent has been obtained. Again, improper means and the purpose of exploitation listed in the trafficking provision do preclude the possibility of consent. This illustrates how problematic it is to interpret and apply the new trafficking provision.

Age of the Victim

According to law, with regard to underage victims, there is no requirement on the perpetrator having made use of improper means. However, the only thing said in the doctrine (one commentary does not even address this issue) about underage victims is that if the victim is younger than eighteen years of age, the methods and means used by the perpetrator are legally irrelevant.

It seems plausible, however, that some sort of intent on behalf of the perpetrator in relation to the age of the victim must be established. For lack of specific input on this matter, we can perhaps draw a parallel to the discussion on the age of the victim concerning other provisions. These provisions, e.g., the article on rape refer to comments on Article 200 where intent of the perpetrator in relation to the age of the victim is to be established. It therefore seems plausible that also in cases of trafficking reference to the doctrine on Article 200 can be made.

A minor in the context of Article 200 is a person under the age of fifteen. It is said that in order to be able to establish criminal responsibility for sexual abuse of a minor, the perpetrator must be aware of the young age of the victim.[61] According to some of the opinions expressed in the doctrine, only direct intent is possible. Others argue that a form of *dolus eventualis* is also possible. This applies in cases where the perpetrator is not sure whether the minor is younger than fifteen years or not but expects such a possibility and although she does not wish for it accepts it.[62]

However, if the perpetrator actually makes a mistake in the sense of being unaware of the minor's true age, this precludes criminal responsibility for the act in question.[63] This mistake relates to strictly factual, objective circumstances, so-called *error facti*. It basically amounts to a discrepancy between

61 W. Wróbel, A. Zoll, p. 208.

62 A. Mozgawa, p. 414. See also A. Marek, p. 458.

63 See Article 28, Section 1 on error concerning the facts forming the forbidden act.

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objective reality and its reflection in the mind of the perpetrator. It therefore applies strictly to the prerequisites of the forbidden act.[64]

Translated to the trafficking context, this might imply that if the perpetrator truly believes that the victim is an adult, e.g., perhaps the victim showed him a fake ID or otherwise gave an objective impression of being a certain age, criminal responsibility for trafficking may not be possible to establish unless of course the perpetrator has made use of improper means.

It is also possible to argue that, in many cases, the perpetrators are not interested in knowing the age of the victim. As a result of the circumstance that *dolus eventualis* is also possible in some cases where intent of the perpetrator vis-à-vis the age of the victim is to be established, one may be able to argue that trafficking takes place if the perpetrator indeed can be said to have such intent. This is true if the perpetrator is not sure whether the victim is underage yet, expecting such a possibility, still decides to follow through with her actions.

Purpose of the Perpetrator

Trafficking in human beings is a so-called direction-oriented crime (*przestępstwo kierunkowe*).[65] This means that the criminal provision lists a specific purpose of the perpetrator as one of the prerequisites of the forbidden act. This implies a specific form of direct intent, so-called *dolus directus coloratus*. This means that the forbidden act can only be carried out with direct intent, i.e., *dolus eventualis* is not enough.

Polish experts claim that the new trafficking provision narrows the area of application when compared to its predecessor which allowed both forms of intent.[66]

Types of Abuse

Possible forms of exploitation include forcing someone to provide prostitution services or participate in the making of pornography and other forms of sexual abuse.[67] The relevant provisions on sexual abuse are contained in Chapter 25 on crimes against sexual freedom and decency.[68]

Other forms of possible exploitation mentioned in the trafficking provision include begging, labour services of a forced nature, slavery, and other forms of exploitation that go against the dignity of the human being. Begging is said to

64 P. Kozłowska-Kalisz, pp. 81–82.
65 M. Kulik, p. 264.
66 Ibid.
67 J. Piórkoska-Flieger, p. 267.
68 M. Kulik, p. 264.

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imply a continuous practice of asking for help. It can relate to monetary assistance as well as other types of help such as asking for food and clothes. The non-monetary items asked for must, however, have a specific monetary value.[69] Another form of exploitation may be to acquire human cells, tissues, or organs contrary to law.[70]

General Intent

Introduction

Before proceeding to a discussion on intent, let us first establish the meaning of a forbidden *intentional* act. Article 9, Section 1 of the Criminal Code reads as follows:

> A forbidden act is committed intentionally, if the perpetrator has intent to commit it, i.e., wants to commit it or, suspecting the possibility of committing it, agrees to it.

A person intentionally commits a forbidden act if he has intent to commit it. The person must have some form of intent in relation to the description of the forbidden act. Intent in this context is said to have two aspects. The first aspect is called the intellectual one. It relates to the perpetrator's awareness in relation to the chain of actions described in a relevant criminal provision. The second aspect, called voluntary, concerns the psychological stance of the perpetrator in relation to the commission of the act in question.[71]

Article 9, Section 1 of the Criminal Code sets out the two main forms of intent. The first form concerns situations where the perpetrator *desires to* commit the forbidden act, i.e., direct intent (*dolus directus*). The second form regards instances where the perpetrator suspects the possibility of committing a forbidden act yet agrees to it, i.e., *dolus eventualis*.

Dolus Directus

According to doctrine, *dolus directus* is very much associated with will. It is said that the perpetrator has to desire to commit the crime. This, however,

69 Ibid.

70 Provisions on how to lawfully extract human tissue, etc., are contained in the Statue from 1 July 2005 on extracting, storing, and transplanting cells, tissues, and organs, located in Dziennik Ustaw, Nr. 169, Poz. 1411.

71 W. Wróbel, A. Zoll, p. 204.

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presupposes some form of awareness. The perpetrator needs to be aware of the meaning of the forbidden act in order to be able to want to commit it.[72] Then, the perpetrator must actively wish for its commission.

For example, a person who destroys another person's property must be *aware* of the fact that the property being destroyed by him belongs to another person, but he does not need to have the specific desire for the property to belong to another person. His desire is connected to the whole act of destroying another person's property.[73]

In the specific context of trafficking, this would imply that the perpetrator needs not desire the exploitation of the victim per se but that he desires the whole act of trafficking in human beings. In other words, he wishes to commit trafficking and thus to exploit the victim.

The concept of *dolus directus* can be further divided into two main forms. The most severe form of direct intent is called *dolus directus praemeditatus*. It is a premeditated form of direct intent which usually results in more severe penalties. It basically implies that the perpetrator has carefully planned her actions (usually during a longer time span), scrupulously striving to achieve the desired end. This suggests that the decision of the perpetrator to commit the unlawful act is much more informed and thought-through than it would have been under more spontaneous circumstances. In more spontaneous cases, the perpetrator is said to have sudden direct intent, so-called *dolus repentinus*.[74]

***Dolus Eventualis* (*zamiar wynikowy*)**[75]

This form of intent is outcome-oriented. Even if the perpetrator does not desire to commit an unlawful act, he nevertheless agrees to it. This is often described as a facultative form of will. He does not want to commit the crime yet suspects that it may be committed by him and he agrees to it. The doctrine exemplifies this by a person setting a building on fire. Even though her intent is to destroy the property of another person, she may also be agreeing to additional results or rather consequences such as accidentally killing a person residing in the building.[76]

72 T. Bojarski, p. 44.

73 W. Wróbel, A. Zoll, p. 209.

74 T. Bojarski, p. 45.

75 This might be directly translated as an outcome or result oriented intent. What that concept implies can, however, best be described as dolus eventualis.

76 T. Bojarski, p. 47.

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Though the primary desire of the perpetrator is not to kill another person, she is aware of this possible outcome of her action and agrees to it so as to be able to pursue her desired end.

As has been mentioned above, Polish legal scholars claim that the area of application of the new trafficking provision is smaller than that of its predecessor. This is due to the fact that presently only one form of intent, namely direct intent is possible if an act is to be qualified as trafficking. This suggests that some cases that would previously have been qualified as trafficking will be qualified as procuring. Also, in some cases criminal complicity might become relevant. Below, the concept will be addressed in more detail.

Criminal Participation

Introduction

In Polish criminal law, there are different forms of perpetration. Aside from principal perpetration *strictu sensu*, there is incitement (principal perpetration *sensu largo*), aiding, co-perpetration, instigating, and assigning of perpetration. Money laundering, belonging to a criminal organization, financing terrorist groups, etc., can also be seen as special forms of criminal complicity.[77]

The abovementioned forms of perpetration and complicity are set out in Article 18 of the Criminal Code. The provision reads as follows:

> Not just the person committing an unlawful act, alone or in agreement with another person, answers for perpetration, but also a person, who directs the commission of the unlawful act by another person or, by abusing another person's dependence on him or her, assigns that person the commission of such an act.
>
> A person, who wants another person to commit an unlawful act, and is persuading him or her to do so, answers for instigation.
>
> A person, who with intent for another person to commit an unlawful act, by his or her behaviour makes the facilitation of that act easier, especially by providing a tool, means of transportation, advice or information, answers for aiding; also, a person, who in violation of a legal, specific obligation to prevent the commission of an unlawful act, by his or her omission to act, makes the facilitation of the unlawful act easier for another person, answers for aiding.

77 W. Wrὁbel, A. Zoll, p. 247–248.

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Perpetration *sensu stricto* involves a main perpetrator (or co-perpetrators), i.e., the person(s) responsible for the commission of the unlawful act. The area of principal perpetration is, furthermore, extended to cover also instances where the actions of the person responsible for committing the crime are *directed* by another person or where the first person is *assigned* to commit the crime by someone on whom the person is dependent. This is different from, e.g., instigating in that the person responsible for assigning the commission of the crime or for directing the actions of the person physically responsible for the commission of the crime assumes a leading role. He is considered the brain of the organization, responsible for the crime in all but its physical commission.[78]

Directing and assigning by abusing the dependence of another person are both special forms of *incitement*. Assigning occurs, e.g., within criminal organizations where more low-ranking members may be assigned to commit various unlawful acts by their bosses. What is crucial here is that there is a position of dependence that is abused by the person responsible for inciting.[79]

In our specific context of trafficking, this means that a person responsible for inciting the unlawful act might be considered a principal perpetrator instead of an accomplice to the crime. This, in turn, has impact on the severity of the penalty imposed.[80]

Apart from principal perpetration, there are various forms of complicity. One way of acting as an *accomplice* is by means of *instigation*. This includes various manners of influence exerted on a person in order to induce that person to commit an unlawful act.

However, instigation relates not only to situations where a person is being induced to commit a crime but also to instances where a person is strengthened in an already existent resolve to commit an unlawful act.[81] Instigation must be of an individual nature, i.e., addressed to a specific person or group of persons. Public actions aimed at making people commit an unlawful act are not viewed as instigation.[82]

Aiding of a crime is yet another possible form of criminal complicity. In order to aid a crime, one must have intent for another person to commit the

78 T. Bojarski, p. 77.

79 Ibid.

80 T. Bojarski, p. 78.

81 M. Kulik, p. 59.

82 In those instances, criminal responsibility might instead be possible according to Article 255 on public outcry to commit a crime.

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crime in question. Both forms of intent, i.e., direct intent and *dolus eventualis*, are possible. The person aiding the crime is to make its facilitation easier. This can be done by employing both physical (both actions and omissions to act) and psychological means. Physical means include various tools such as guns, maps, etc. The tool in question must be relevant for the commission of the crime. One can also provide means of transportation, e.g., drive an escape vehicle. These range from obvious vehicles such as escape cars to bicycles and even horses. If, e.g., a car is necessary to actually make the facilitation of the crime easier, e.g., by transporting the stolen goods from the crime scene or to be used as an escape car, then aiding has taken place.[83]

Psychological aiding pertains to *advice* and *information*. One can, e.g., supply a map of a bank vault or security system with advice on how it can be turned off, etc. In a decision from 2007, the Supreme Court held that psychological aiding might also take on more subtle forms. These forms are said to create an atmosphere of solidarity or approval in which the resolve of the perpetrator to commit an unlawful act is created, matures, and then is strengthened.[84] According to comments in the doctrine, it might be difficult to in the abovementioned case draw a clear line between instigating and aiding.[85]

As has been mentioned above, a person can also aid a crime by his *omission to act*. Omissions to act include instances where, e.g., a guard lets thieves enter the premises which he is meant to protect and does not alert the police.[86]

Penalty for complicity is imposed within the framework of the provision containing the unlawful act of principal perpetration. This means that there are usually no specific provisions detailing how an act of complicity is to be judged in each individual case. Penalties for instigation and aiding are set out in Article 19. The provision reads as follows:

> The court sets the penalty for instigation or aiding within the boundaries stipulated for perpetration.
>
> When setting the penalty for aiding the court can apply special mitigation of punishment.

83 T. Bojarski, pp. 82–83.

84 Decision of the Supreme Court from December 19, 2007, *VKK 101707* (KZS 2008, nr 4, poz. 23).

85 T. Bojarski, p. 83.

86 T. Bojarski, p. 82.

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According to the legislator, acts of instigation are more reprehensible than acts of aiding. This is said to be explained by the fact that instigation aims at developing the intent of another person to commit an unlawful act while aiding concerns situations where the perpetrator already has such intent. Therefore, the court has the power to mitigate the sentence in cases of the aiding, but not the instigating, of the crime.

Section 2 has been criticized in the doctrine. It is argued that one should not make such a distinction between instigation and aiding but that each act should be judged according to its specific circumstances. An act of instigation, on the one hand, might not be that serious. A person might, e.g., already be on his way toward developing his own resolve to commit the act in question or he might not need a lot of convincing. An act of aiding, on the other hand, could be instrumental for the successful commission of the crime.[87]

Intent of the Accomplices

The main rule is that each accomplice answers according to his own intent or negligence irrespective of the responsibility of other possible perpetrators and accomplices. This is expressed in Article 20 which reads as follows:

> Each one of the accomplices to the unlawful act answers within the boundaries of his or her intent or negligence irrespective of the responsibility of the remaining accomplices.

This provision is said to express three main ideas. Firstly, it reflects the concept of individual responsibility. This means that criminal responsibility is based on one's own participation in an unlawful act and not on participation in another person's crime. Secondly, the provision puts forward the idea of the individualization of guilt. This implies that the responsibility of the principal perpetrator and the accomplice need not converge. Basically, if an instigator tries to persuade someone to commit theft and that person commits robbery instead, the instigator will answer only for theft while the principal perpetrator will answer for the more severe act. This also applies in the other direction. Thirdly, the provision expresses the concept of non-conditional responsibility. Also, in order to be able to establish criminal responsibility for instigating or aiding, there must be an unlawful act but not necessarily a crime. This applies in instances where the principal perpetrator is a minor or a mentally disabled person.[88]

87 Ibid, p. 84.

88 T. Bojarski, pp. 85–86.

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Previous Provisions

Trafficking Provision from 1969

The first provision on trafficking in human beings entered into force in 1969. It was, however, not located in the part of the Criminal Code containing the criminal provisions. Instead it was placed in Article 9 in the part containing the provisions implementing the Criminal Code.[89] The article read as follows:

> A person, who brings, lures or abducts another person for the purpose of prostitution, even with that person's consent, is liable for the punishment of deprivation of freedom for a minimum period of three years.
>
> This punishment is also applicable to a person practicing the trade in women, even with their consent, or children.

Section 1 of Article 9 set out a behaviour where the perpetrator brought to someone, lured or abducted another person, even with her consent, for the purpose of prostitution. The consent of the person was irrelevant for establishing criminal responsibility for the offence. It could, however, impact on the severity of the penalty imposed.

Section 2 of Article 9 dealt with all forms of trafficking in women and children, including those undertaken with their consent. In this case, the perpetrator did not need to have the specific purpose of prostitution. Trafficking in human beings or rather in women and children for various purposes was thus criminalized.

Trafficking Provision from 1997

The abovementioned Section 2 of Article 9 that dealt with trafficking in human beings was transformed into Article 253 of the 1997 Criminal Code. This Article contained a basic provision on trafficking in human beings. While its first Section contained a general prohibition concerning the trade in human beings, the second Section dealt with the practice of illegal adoptions. Article 253 on the trade in human beings and illegal adoptions read as follows:

> A person, who practices the trade in human beings, even with their consent, is liable to the punishment of deprivation of freedom for a minimum period of three years.

89 Ustawa z 19 kwietnia 1969 roku – Przepisy wprowadzające kodeks karny (Dz.U. nr 13 poz. 95). Criminal provisions located in this section are believed to be of a more symbolic value, rarely being invoked in criminal proceedings.

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> A person, who in order to achieve material benefit, engages in the organizing of adoptions in violation of statutory provisions, is liable to punishment of deprivation of freedom from three months to five years.

In the case of Article 253, as opposed to Article 204, Section 4, there was no requirement of a specific purpose, e.g., prostitution. Also, consent of the victim was irrelevant for establishing criminal responsibility. In many cases, however, both provisions became relevant, which made cumulative qualification of the acts quite frequent when formulating the charges.[90]

Many experts were of the opinion that Article 253 did not provide a proper definition of trafficking, something that they argued created several problems. For one, there were difficulties concerning the question of formulating the charges as several provisions[91] could become simultaneously applicable.[92] In case law, this resulted in different, sometimes conflicting, interpretations of trafficking in roughly similar cases.[93] Article 253 was therefore criticized for being too general and imprecise thus violating the principle of *nullum crimen sine lege certa*.

There were also conflicting views in doctrine on how the provision was to be interpreted. While some experts held that the trafficking of one person was enough for the offence to fall under the scope of Article 253, others argued that transactions involving at least two persons were necessary for the crime to qualify as trade in human beings.[94] This primarily concerned the prerequisite 'practices' and the fact that the provision mentioned the trade in human beings as opposed to trade of a person thus using the plural form.

In my opinion the first view seems to be the most accurate one. The legislator probably did not intend to diminish the area of application of the provision as this would undoubtedly lead to a situation where a single individual would

90 K. Karsznicki, "Handel ludźmi w świetle badań postępowań karnych prowadzonych w latach 1995 2006", in *Handel ludźmi w Polsce. Materiały do raportu*, Ministerstwo Spraw Wewnętrznych i Administracji, Warszawa, 2007, p. 48.

91 Other relevant provisions applicable in trafficking cases included all sections of Article 204 on procuring, Article 203 on forced prostitution, Article 197 on rape, etc. All of these prescribe more lenient penalties than Article 253.

92 U. Kozłowska, "Problematyka Prawna – handel ludźmi w dokumentach międzynarodowych ratyfikowanych przez Polskę", Ministerstwo Spraw Wewnętrznych i Administracji, Warszawa, 2007, p. 12.

93 U. Kozłowska, 2007, p. 12.

94 J. Przeniczna, "Handel ludźmi. Prawo i praktyka, zapobieganie i ściganie" in *Taktyka i technika kryminalistyczna – Wczoraj, dziś, jutro*, Materiały z konferencji, Poznań-Rzeszów, 2009, p. 138.

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not enjoy the same protection as victims of cases where there had been at least two victims. Also, according to a formal statement from the Supreme Court, the fact that the legislator chooses to use the plural form in a specific criminal provision does not necessarily imply that the provision covers only actions with two or more victims.[95]

The reason for choosing the notion of trade in human beings/trafficking in Article 253 was to highlight that traffickers treated people as mere commodities.[96] However, the prerequisite of 'trade in human beings' raised many other questions among legal scholars and practitioners. Some argued that its vagueness led to a situation where people did not know what kind of behaviours that were actually covered by the provision.[97] Some scholars adopted a more narrow, albeit linguistically correct, interpretation of the concept of trade, i.e., selling and buying. Others considered the concept to also pertain to measures similar to or encompassing the concept of trade such as the advertising of the services of prostitutes.[98]

While some held that a chain of events was necessary for the commission of the crime, others believed that one action carried out with specific intent was enough to qualify it as trafficking. Recruitment, e.g., was enough if there was intent to use a person as a commodity. Furthermore, the intent of the perpetrator did not need to be direct.[99] Consent of the victim was irrelevant for the establishing of criminal responsibility as it was believed that people should not be able to consent to being treated as commodities.[100]

Section 2 of Article 253 criminalized illegal adoptions, i.e., procedures violating the statutory provisions on adoptions. Usually, the organizers of illegal adoptions abuse the difficult financial and social circumstances of the biological parents in order to obtain consent for adoption. The purpose of the actions of the perpetrator is to gain material benefits. The concept of material benefits is more closely defined in Article 115, Section 4 of the Criminal Code. The provision reads as follows:

> By material or personal benefit is meant benefit for oneself, as well as for another person.

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95 Uchwała SN z dnia 21 listopada 2001 r., sygn. *I KZP 26/01*, OSNKW 2002, nr 1–2, poz. 4.

96 W. Górowski, "Przestępstwo handlu ludźmi (wybrane zagadnienia)", *Państwo i Prawo* 2007, no. 12, p. 61.

97 L. Gardocki, *Prawo karne*, Warszawa, Wydawnictwo C.H. Beck, 2009, p. 305.

98 F. Radoniwicz, "Przestępstwo handlu ludźmi", *Prokuratura i Prawo,* 2011, p. 137.

99 Ibid, p. 138.

100 A. Marek, p. 533.

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By obtaining financial benefit, not only transactions where one is paid money or the equivalent thereof, such as bonds, is meant but also instances where a debt is considered settled or where a tax benefit is obtained by the perpetrator. The benefit can be obtained by the perpetrator or another person, organization, criminal gang, etc.[101]

Other Relevant Provisions

Slavery

In addition to the trafficking provisions, there is also a general provision prohibiting slavery. It is not located in the part of the code that contains the criminal provisions but instead in the part with provisions implementing it. Before the 2010 amendment, Article 8 read as follows:

> A person, who brings about the enslavement of another person, or practices the trade in slaves, is liable to punishment of deprivation of freedom for a minimum period of three years.

In 2010, the prerequisite of 'or keeps him or her in that state' was added to the provision. The prerequisite 'that state' implies a state of slavery. Before the amendment, it was only punishable to bring about a person's enslavement or to engage in the selling and buying of slaves. The provision did, however, not criminalize the upholding of an already established state of enslavement. The legislator also added an explanatory provision in the form of Article 115, Section 23 where the concept of slavery was more closely defined. The article reads as follows:

> Slavery is a state of dependence where a person is treated as property.

Slavery implies situations where people are treated as property. Although legally a person can never be regarded as property, factual situations might arise where a person is treated as such. The article pertains to a state where a person has complete or partial power over another human being. The person in power decides over the disposition of the enslaved person much like one would do with an object. In addition, the person benefits from the work done by the enslaved person.[102]

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101 Ibid, pp. 335–336.

102 M. Mozgawa, p. 264.

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Some legal scholars argue that confusion might arise with regard to how charges are to be formulated in cases where both Article 8 and Article 189 (a), i.e., the present trafficking provision, may become applicable. Some argue that Article 189 (a) deals with instances where the perpetrator has acted with consent of the victim, while Article 8 covers acts where consent was not at hand. This would thus make Article 8 a *lex specialis* in relation to Article 189 (a).[103] However, it does not seem that simple. Article 189 (a) is to cover all forms of trafficking as defined in Article 115, Section 22. The latter definition includes instances where force, abduction, deceit, etc., have been used, i.e., circumstances that normally preclude consent.

Another way of looking at the relevant provisions is to view Article 8 as a qualified form of trafficking. According to Article 115, Section 22, slavery constitutes one form of exploitation to which trafficking can lead, but trafficking can also lead to other forms of exploitation of lesser severity such as forced labour that perhaps borders on but does not entirely amount to slavery.[104]

Illegal Adoptions

The provision on illegal adoptions might under certain circumstances be cumulatively applicable with the trafficking provision. In 2010, Section 2 of Article 253 on trafficking and illegal adoptions was moved from the chapter of the Criminal Code concerning crimes against public peace into Article 211 (a), the chapter on crimes against the family and guardianship. Article 211 (a) criminalizes illegal adoptions, i.e., adoption procedures carried out in violation of the statutory provisions on the organization of adoptions. The provision reads as follows:

> A person, who with the purpose to achieve financial benefits, engages in the organizing of child adoptions contrary to statutory rules, is liable to punishment of deprivation of freedom from three months to five years.

The provision is the result of international obligations, among other documents, the UN Convention on the Rights of the Child. It safeguards the procedure of adoption, i.e., the specific relationship established between a child and his adoptive parents upon adoption. One of the inherent traits of this procedure is that it should be non-commercial.[105]

Although there is some leeway to extract remuneration, the payment cannot be inappropriate, i.e., indicate that the transaction has been marked by a

103 M. Kulik, p. 718.
104 O. Górniok, J. Bojarski, p. 616.
105 J. Flieger-Piórowska, p. 531.

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high level of commercialism. All measures pertaining to adoption, such as searching for potential children for adoptions as well as for prospective parents, are considered illegal if carried out in violation of the statutory rules on adoptions contained in the Code on Family and Guardianship.[106]

Direct intent is required in order to be able to establish criminal responsibility for illegal adoptions as the perpetrator must act with the specific purpose to receive financial benefits. If a person acts for other reasons, such as possible welfare of the child or wanting to assist a prospective parent or even for personal but not financial benefits, the action will not fall under the scope of Article 211 (a).[107] For the commission of the crime, it is enough that the perpetrator has carried out one of the links in a specific chain of action, e.g., found prospective parents. The final act of adoption is thus not necessary in order to establish criminal responsibility under Article 221 (a).[108]

The provision pertains only to illegal adoptions carried out on a professional scale. This means that a single act will not fall under the scope of the provision. In that context, a case that has frequently been discussed and debated in the media should be mentioned. This case illustrates the confusion at hand on the judicial level, especially in smaller cities where prosecutors and judges might not have received proper training, concerning the crime of trafficking. The case involved a mother of six who attempted to sell her newborn to a Danish woman. She was arrested and placed in custody (because of a supposed risk of absconding) first on charges of illegal adoption and then human trafficking.

Although some argued that the woman did not violate any laws, she was first accused of having carried out an illegal adoption. However, as this provision only applies to illegal adoptions carried out on a professional scale and for remuneration, the provision was simply not applicable in the above case. The charges were instead hastily changed to trafficking in human beings. Since the woman did not give up her child for the purpose of exploitation, and as she did not ask or received any payment, it was apparent that trafficking in human beings was not at hand. Apparently these circumstances were known to both the police and the prosecution.[109]

106 The procedures on adoptions are contained in Article 114 of the Code on Family and Guardianship.

107 Z. Siwik, in M. Filar (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2010, p. 1010.

108 Ibid.

109 "Nie chciałam jej sprzedać", Gazeta.pl Lublin, 1 April, 2011, http://lublin.gazeta.pl/lublin/1,35640,9359486,_Nie_chcialam_jej_sprzedac__Historia_internetowej.html, (accessed 19 May 2014).

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The woman was released since neither trafficking nor illegal adoption had been committed.[110]

This case illustrates the lack of knowledge on this issue pervading the legal system, or at least parts of it. The prosecution did not know how to apply the trafficking provision or the provision on illegal adoptions and simply took a chance.

The issue of women selling their children has basically divided the country into two camps. Simply put, while one camp finds the actions of the women despicable, the other addresses these actions in their specific context. In the case referred to above, the family was devastatingly poor. They were living without hot water, electricity, a toilet, and even floors. The woman was desperate and did not know how to feed her other children. The husband drank and was unemployed. When asked why he did not react when the woman returned home without the baby after giving birth, his response was that he did not care or ask any questions, yet only the woman was arrested and put in custody.

Some critical voices argue that this is the result of the subordination of Polish women. This is visible in the media and articles on that subject with titles such as *A mother sells her child* or even *Degenerate mother sells her newborn*,[111] often accompanied by a picture of a crying baby. There are very few articles where both parents or, for that matter, the state are depicted as the culprit. What we learn from these articles is not only that there are many people in such desperate circumstances that they see no other option than to sell or simply give up their children but also that the pregnancies are often unwanted. It is a failure of society to assist these families and to meet their needs. In that context it should also be noted that abortion is basically prohibited under Polish law and that it is often quite difficult and above all costly to acquire contraceptives.

Making a Person Engage in Prostitution

Article 203 of the Criminal Code deals with forced domestic prostitution and reads as follows:

> A person, who by violence, illegal threat, deceit or by abusing someone's dependent or critical position makes another person engage in

110 "Chciały kupić niemowle, nie odpowiedzą za handel ludźmi", Lubelski Kurier, 10 November 2011, http://www.kurierlubelski.pl/artykul/471232,chcialy-kupic-niemowle-nie-odpowiedza-za-handel-ludzmi,id,t.html?cookie=1, (accessed 19 May 2014).

111 "Wyrodna matka sprzedała własne dziecko", Super Express.pl, 15 September 2011, http://www.se.pl/wydarzenia/kronika-kryminalna/dolnoslaskie-wyrodna-matka-sprzedala-wlasne-dziecko_205274.html, (accessed 19 May 2014).

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> prostitution, is liable to the punishment of deprivation of freedom from one year to ten years.

This provision safeguards the sexual freedom of the individual. It draws mainly on the obligations set out in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This provision applies in cases where normal persuasion is not at hand but one or several of the improper means listed above have been used.[112]

The perpetrator makes a person engage in prostitution. This means that she either forces a person who has never prostituted herself before to engage in prostitution or forces a prostitute who wants to quit prostituting herself to continue the practice.[113] She can also force a former prostitute to take up the practice. By prostitution a practice of a more or less continuous nature is meant. Single or even sporadic sexual contacts, even if combined with remuneration, are not covered by the provision.[114]

If the provision is to become applicable, a certain result must take place.[115] The crime is commissioned at the point at which a person as a result of the means applied by the perpetrator starts to provide prostitution services or continues with the practice.[116] The perpetrator needs to have direct intent if criminal responsibility for forced prostitution is to be established. She needs to have direct intent in relation to the result of her actions, i.e., with regard to the prostitution.

It should be noted that the Palermo Protocol also criminalizes internal trafficking including forced prostitution. The provision above thus seems superfluous. Its existence might have something to do with the lack of awareness on the preparatory works to the Palermo documents where the elements of transnationality in national trafficking provisions have been thoroughly explained.

Procuring

The provision on procuring was set out in Article 174 of the 1969 Criminal Code. The provision criminalized inducing a person to engage in prostitution as well as profiting from someone's prostitution and helping another person to engage in prostitution for the sake of financial benefits.

112 These means are further elaborated upon in the section on the present trafficking provision.
113 M. Mozgawa, p. 425.
114 A. Marek, p. 463.
115 J. Piórkowska-Flieger, p. 511.
116 A. Marek, p. 463.

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In the new Criminal Code from 1997, the provisions on procuring and forced prostitution are contained in Article 204. Section 4 of Article 204 on forced prostitution abroad was removed in 2010 when Articles 189 (a) and 115, Section 22 on trafficking entered into force.[117] Article 204 on profiting from another person's prostitution reads as follows:

> A person, who in order to achieve material benefits, persuades another person, or makes it easier for the person, to engage in prostitution, is liable to the punishment of deprivation of freedom for the maximum period of three years.
>
> A person, who draws material benefits from another person's prostitution, is liable to the punishment stipulated in Section 1.
>
> If the person as defined in Sections 1 or 2 is a minor, the perpetrator is liable to punishment of deprivation of freedom from the period of one year to ten years.
>
> A person, who lures or abducts another person for the purpose of having the person prostitute herself or himself abroad, is liable to the punishment stipulated in Section 3.

One of the main changes when Article 9, Section 1 was transformed into Article 204, Section 4, was that the wording *even with her consent* was removed. This was done to emphasize that it is impossible to abduct someone with their consent.[118]

Sections 1–3 of Article 204 remain in force today. The first Section deals with the promotion of prostitution. The wording suggests that this can be done by both psychological and physical means. A person can either be persuaded by the perpetrator to prostitute herself or to continue with the practice or the perpetrator can make the facilitation of someone's prostitution easier. The word *persuades* implies that only acts of mental persuasion are covered by this provision. There are different ways of making the facilitation of someone's prostitution easier. One way is to offer a venue where prostitution services may be provided, another is to contact potential buyers, etc.[119]

According to case law, single events where someone makes the facilitation of another person's prostitution easier are not covered by the provision.

117 "Sprawozdanie z wykonania Krajowego Planu Działan Przeciwko Handlowi Ludźmi Na Lata 2009–2010", Zespół do Spraw Zwalczania i Zapobiegania Handlowi Ludźmi, Warszawa, 2011, p. 19.

118 K. Krasznicki, p. 48.

119 J. Piórkowska-Flieger, p. 513.

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Procuring must be of a rather continuous nature. A person who on a single occasion takes another person to an address where prostitutes might be found is not guilty of procuring according to Article 204, Section 1.[120] Also, certain services that may be provided to prostitutes are not covered by the provision. These include, e.g., medical help and taxi fares.[121] It could be questioned, however, whether at least taxi fares should not fall under the scope of the provision. After all, in some cases taxi drivers cooperate with pimps, brothel owners, and the like. Some scholars hold that such transfers of clients to places where they can obtain sexual services may in some instances be considered procuring.[122] The offence can only be committed with direct intent as the purpose of the actions of the perpetrator is to obtain material benefits by means of promoting someone's prostitution.

Section 2 of Article 204 deals with profiting from another person's prostitution. There must be a clear connection between the profit stemming from the prostitution service and the involvement of the perpetrator. For example, if a taxi driver takes a prostitute to a client, this is typically not seen as profiting from another person's prostitution. However, if the prostitute has a designated taxi driver who always takes her to see the buyers and who receives part of her earnings, profiting from someone's prostitution is at hand.[123] Again, single acts of profiting are not covered by the rule. Moreover, the perpetrator needs to have direct intent, as the purpose of his action is to obtain material benefits.[124] Finally, Section 3 deals with aggravated forms of procuring. It is applicable if the prostitute is a minor, i.e., less than eighteen years of age.

Obligation to Notify Authorities in the Case of Knowledge of Certain Crimes

There is also another provision that is relevant in trafficking cases. It penalizes the omission to report serious offenses or the preparation of such offences to the authorities. Article 240 reads as follows:

> A person who having a credible knowledge of a penalized preparation, attempt or commission of a criminal act as defined in Article 118, 118 a, 120–124, 127, 128, 130, 134, 140, 148, 163, 166, 189, 189 (a) Section 1, Article 252 or offenses of a terrorist nature, without delay does not notify

120 Case from the Supreme Court from 2009-02-05, *II KK 251/08*, LexPolonica nr 208 5016.

121 A. Marek, p. 464.

122 J. Piórkowska-Flieger, p. 513.

123 M. Filar M, p. 972.

124 J. Piórkowska-Flieger, p. 513.

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> the authority responsible for the investigation of crimes, shall be sentenced to deprivation of freedom for a maximum period of three years.
>
> A person has not committed a crime as stated in Section 1, if he or she did not notify the authority set out in Section 1 due to having adequate reason to assume that the authority was aware of the preparation, attempt or commission of an unlawful act; a person who stopped the preparation, attempt or commission of an unlawful act shall also not be guilty of the crime as stated in Section 1.
>
> A person shall not be subjected to punishment, if he or she has refrained from reporting the crime due to criminal responsibility that might have been imposed on himself or herself or near ones.

This provision contains the penalty for not reporting especially serious offences to the proper authorities. The report must be immediate and based on trustworthy information about the unlawful act in question. The relevant offences include genocide; mass attack; applying means of mass destruction; creating, amassing, or trading in means of mass destruction; unlawful deprivation of freedom; trafficking in human beings; terrorist crimes; etc.[125]

Sexual Crimes

Sexual crimes are important because they illustrate certain prejudices against women. Parallels can be made to trafficking in human beings. These prejudices are closely linked to the stigmatization and even blaming of victims of these crimes by some segments of Polish society. This question will also be more thoroughly addressed in the section on the situation in Poland through the prism of legal transplants. As most of the sexual crimes have been discussed in the section on the present trafficking provision, only rape and sexual abuse of a minor will be discussed here.

Rape

The provision on rape is contained in Article 197 and reads as follows:

> A person, who by violence, unlawful threat or deceit makes another person engage in sexual intercourse, is liable to the punishment of deprivation of freedom for a period of two to twelve years.
>
> If the perpetrator, in the manner set out in Section 1, makes another person tolerate or perform another sexual act, he or she is liable to the

125 M. Mozgawa, p. 500.

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punishment of deprivation of freedom for a period of six months to eight years.

If the perpetrator commits the offence of rape

1) together with another person,
2) against a minor less than fifteen years of age,
3) against a family member,[126] he or she is liable to the punishment of deprivation of freedom for a minimum period of three years.

If the perpetrator of the deed set out in Sections 1–3 acts with special ruthlessness, he or she is liable to the punishment of deprivation of freedom for a minimum period of five years.

There are two main forms of rape as well as two aggravated forms of rape. The first main form of rape concerns situations where a person makes another person engage in sexual intercourse by means of violence, unlawful threat, or deceit. By sexual intercourse, penetration (oral, anal, and vaginal) is meant. *Violence* is believed to be the primary method when making another person engage in sexual intercourse. Violence can be directed against the victim, another person, or against a thing, e.g., the property of the victim.[127] The aim of the violence is to override the resistance of the victim. In order to be able to establish that violence has been used, the victim must show some form of resistance. The latter can be of oral (e.g., saying no) or physical (e.g., trying to escape from the rapist) nature.

Another way of making a person engage in sexual intercourse is by means of unlawful threat.[128] Again, the threat can be directed both against the victim and against another person. It need not be pronounced. It suffices, e.g., to hold a knife against the victim's throat.[129]

A third method of committing rape is by means of deceit.[130] Simply stated, the perpetrator can either deceive the victim by supplying misleading information, e.g., that he is actually performing a gynaecological examination, or by means of deception remove the victim's ability to make informed decisions.

126 The provision mentions concepts that are not translatable into English. They refer in this order to relatives such as father, mother, and grandparents; child, grandchild, and grand-grandchild; adoptee; adoptive parent; brother or sister.

127 J. Piórkowska-Flieger, p. 486.

128 This prerequisite is described more closely in the section on the present trafficking provision.

129 A. Marek, p. 453.

130 This prerequisite is described more closely in the section on the present trafficking provision.

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The second form of deceit applies in instances where the perpetrator tricks the victim into taking a medication that, e.g., renders her unconscious.[131]

The second main form of rape concerns sexual acts other than sexual intercourse. The means of committing this type of rape are otherwise the same as in the main form of rape. However, the second form of rape carries lower penalties. It therefore appears that acts of penetration by genitalia are considered more serious than other acts of penetration or acts comparable to sexual intercourse.

The first form of aggravated rape includes various circumstances such as gang rape (at least two persons), the rape of a minor (under the age of fifteen), and rape of a family member. Especially aggravated rape concerns situations where the perpetrator has acted ruthlessly. This pertains primarily to the methods used by the perpetrator such as the nature of the violence or threat. A person acts ruthlessly in instances where the violence goes beyond what is reasonably needed to override the resistance of the victim and is used to either degrade the victim or to inflict pain or other suffering upon her.[132] Rape can only be prosecuted on the initiative of the victim. According to doctrine, this is to avoid double victimization, i.e., the shame of having confessed to being a rape victim.[133] It sounds as if this rule is in place to protect the victims, while in reality it sends the message that victims of rape should be ashamed of what happened to them.

Sexual Abuse of a Minor

The offence of sexual abuse of a minor is set out in Article 200 of the Criminal Code and reads as follows:

> A person, who has sexual intercourse with a minor less than fifteen years of age or performs another sexual act on that person or makes her or him tolerate or perform such acts, is liable to the punishment of deprivation of freedom from two to twelve years.
>
> A person, who in order to gratify his or her sexual needs, in front of the minor presents a sexual act, is liable to the same punishment.

The prerequisites of sexual intercourse and other sexual acts have the same meaning as in Article 197 on rape.[134] The wording *makes him or her* implies an

131 J. Piórkowska-Flieger, p. 486.
132 J. Piórkowska-Flieger, pp. 488–489.
133 A. Marek, p. 455.
134 M. Mozgawa, p. 413.

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active act of influencing the decision-making of the minor. Consequently, acts where the minor initiates certain sexual activities are not covered by the provision.[135]

According to other experts, however, this does not apply to situations where sexual intercourse has taken place or where the perpetrator has performed another sexual act on the minor. The wording *a person, who has sexual intercourse with a minor* is said to suggest that instances where the minor initiates sexual intercourse are also covered by the provision.[136]

Section 2 concerns both instances where the perpetrator performs a sexual act with someone or on herself and where she shows, e.g., pornographic movies to a minor. The act in Article 200, Section 2 can only be committed with direct intent. This pertains to the ulterior intent requirement. According to the provision, the perpetrator must act with the purpose of sexual gratification.[137] With regard to the general intent requirement, including the victim's age, both direct intent and quasi-probable intent are possible.[138]

Polish Legislation through the Prism of Legal Transplants

Introduction

The Polish case illustrates the following specific circumstances which make the country's experience in the area of trafficking different from that of Sweden. As has been described above, the 1990s were characterized by major geo-political changes in Central and Eastern Europe. Although the positive effects of the changes that took place in Poland during that time were substantial, there were also negative side-effects. Many people were impoverished and their standards of living dropped dramatically. Growing unemployment rates (especially among women), an unstable labour market, and few opportunities of improvement induced many people to emigrate.

Women in Poland make up more than half of the unemployed population. At the same time there is a large gap in salaries between men and women.[139] More than 60% of women with higher education consider themselves to be discriminated against. This seems to be reinforced by statistics indicating that,

135 A. Marek, p. 458.
136 J. Piórkowska-Flieger, p. 497.
137 M. Mozgawa, p. 413.
138 Ibid, p. 414.
139 "Krajowy Program Działan Na Rzecz Kobiet – II etap wdrążeniowy na lata 2003–2005", p. 19.

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although often more well-educated than men, women receive lower salaries than their male counterparts.[140] Extreme and lasting poverty can force a person to migrate from her country without any safety nets, such as a legitimate job offer in the country of destination. Some of these people risk exploitation. Human trafficking is, thus, said to be permanently growing in Poland since the 1990s.[141] Moreover, Poland's geographical location between the 'East' and the 'West' has always put the country in a delicate position. In the context of trafficking, Poland is a country of origin and destination but also an important country of transit. In addition, after the accession to the EU, Poland is said to be at risk of becoming something of a buffer country from which women would be distributed across Europe.[142]

Poland also seems to be located somewhere in the middle not just where geography is concerned but also with regard to its communist past and its present state as one of the new member states of the EU and the effect that these events have on how trafficking, international law, etc., are perceived.

Accessibility in the Polish Context

Introduction

One of the factors that is said to increase the level of accessibility is similarity in legal traditions between the donor and the recipient. As has been noted above, Polish scholars often claim that the Palermo documents are influenced by a common law tradition, which makes the international definition of trafficking quite casuistic in nature. Polish laws, by contrast, are synthetic. This might be compared to the situation in Sweden. Although Sweden too has a civil law tradition, the transplant and the understanding thereof have been more successful than in Poland. Therefore, the legal tradition variable might be of smaller importance than what might be expected.

What seems more important is that Poland has a shaky history concerning her independence. The country has had long and recurring periods of foreign occupation, a fact which might influence how international law, including the provision on trafficking, is perceived and applied. Below, a short outline of Polish legal history will follow in order to illustrate the foreign influence on Polish law and the standing of international law.

140 Ibid, p. 11.

141 Z. Izdebski, J. Dec, "Criminal Justice Responses to Trafficking in Human Beings in Poland", Institute of Social Pedagogy Counseling and Sexual Education Unit, University of Zielona Góra, coordinated by UNICRI, p. 4.

142 Ibid.

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Polish Legal History and International Law in Poland

Since Polish law did not develop organically but instead often by means of influence from occupying powers it is relevant to present a short history of Polish legal tradition. In medieval Poland, there were four basic sources of law: (native) Polish law, German law, Canon law, and, to a lesser extent, Roman law. Canon law reached the country when Poland embraced Christianity in the tenth century thus placing the country under the influence of the Latin (Western European) civilization as opposed to Russia which was under the influence of Eastern Rome and Byzantine law. Through Canon law, which richly cited Roman law, the Polish clergy and educated classes first learned about Roman law.[143]

The native Polish law was by no means coherent but had developed in different parts of the country rather *sui generis*.[144] German law was brought to Poland by German settlers thus mostly affecting the provinces where these settlers dwelled. Finally, Poland's richest noblemen received their educations in Italian universities where they learned about Roman law. However, Roman law was not widely received in Poland at that time. The situation in Poland can by no means be compared to the situation in, e.g., Germany, where Roman law was wholeheartedly received. On the contrary, Polish jurists regarded Roman law with scepticism. After all, it was the law of emperors and thus a product of imperial ambitions and conquests. This was something that Poland feared, namely to become the conquest of either of its two powerful neighbours. For a long time, there was therefore an instinctive and almost primal opposition towards Roman law. The only area where Roman law was being applied was in the field of international relations.

Lex naturae, the law of nature, was believed to form the foundation of every educated society as well as the pillar for all codified norms. It could be observed through celestial providence, the law of the divine, *ius divinum*, and in natural law, *ius naturale*. Natural law was believed to be an inherent part of human nature and was identified with human rationality which on a micro-level manifested itself through *recta ratio*, i.e., the right course of human action, and on

143 J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia ustroju i prawa polskiego*, Warszawa, Wydawnictwo Prawnicze LexisNexis, 2005.

144 The country was fragmented in townships and not properly united until the late-fourteenth century. Until that time, ancestral precedents were considered the main source of law and the perceived need for codified legislation, e.g., Roman law, was nil.

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the macro-level in inter-human action that resulted in the rights of the peoples, *ius gentium*.[145]

Roman law did not gain a strong foothold in the country until the time of Poland's partitions. In the Austrian parts, the Austrian Civil Code ABGB from 1811 was applied while the Prussian parts applied the Prussian Landrecht from 1794 and subsequently the German Civil Code (BGB). All of these codes where highly influenced by Roman law. In the only sovereign part of Poland (which was actually under the protection of the French), Królestwo Polskie, Code Napoleon was applied. This document also drew largely on Roman law. After the partitions ended, Poland was in dire need of a unified legislation. During the independence period, a time of codification commenced. Inspiration was drawn from the abovementioned codes. Where the codes of the former occupants diverged, solutions were usually found in Roman law. Thus Roman law eventually came to influence Polish legal thought.

Article 9 of the Polish Constitution states that the country honours and is bound by international law. This means that Polish laws are to be drafted with this obligation in mind and that the Polish legislator is to strive to create legislation that is in conformity with international obligations.[146] In addition, Article 87, Section 1 lists next to the constitution and Polish laws international treaties as an integral part of Polish legal sources.

In certain cases, there is no need to transpose a ratified treaty into national law for it to be regarded as domestic legislation. Some treaties are transformed or transposed into Polish law while others are self-executing. According to Article 91, Section 1 of the Constitution, a treaty is directly applicable in Polish courts provided that three requirements are met. Firstly, the treaty must be ratified (either just by the president or by the president and the parliament). Secondly, the treaty must be announced in the *Journal of Articles* (a journal where new laws are announced). Thirdly, the treaty must be self-executing.[147] This means that it must contain obligations to, e.g. criminalize certain acts and that these obligations are complemented by specific penalties.

If an international treaty is to take precedence over Polish laws, it has to be ratified by both the parliament and the president. This is spelled out in

145 S. Wielgus, "Prawo w średniowiecznej Europie Zachodniej oraz w średniowiecznej Polsce" in T. Guz et al. (eds.), *Prawo Polskie. Próba syntezy*, Warszawa, Wydawnictwo, C.H. Beck, 2009, pp. 24–25.

146 D. Dudek, "Prawo konstytucyjne Rzeczypospolitej Polskiej" in T. Guz et al. (eds.), *Prawo Polskie. Próba syntezy*, p. 207. See also W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wydanie IV, Kraków, Zakamycze, 2002, pp. 20–21.

147 W. Skrzydło, pp. 110–111.

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Article 91, Section 2 of the Constitution. One of the major discussions in doctrine and case law before the new trafficking provisions entered into force was how to interpret Article 253 (the former provision on trafficking) with regard to Poland's international obligations. While in one court verdict the provision was interpreted in light of the trafficking definition of the Palermo Protocol, in other cases only Polish rules were acknowledged. The first judgment was criticized since the Palermo Protocol was not believed to be self-executing. It seems as if there is some confusion with regard to the concepts of application versus interpretation of international law. For example, even if a treaty is not self-executing, if ratified one might still use it to interpret a concept. It seems as there still is much work to be done within this particular field.

Polish Criminal Law Tradition

After World War I, as Poland regained her independence, one of the most important tasks of the new government was to unify the law inherited from the different legal systems of the powers that had occupied the country during its partitions. The Criminal Code of the independent republic entered into force in 1932 and was commonly viewed as quite liberal. Article 1 defined the principle of legality, stating that a person could only be punished for an act that constituted a criminal offence at the time of its commission. The Criminal Code also stipulated the principles of subjectivism and humanitarianism.[148] However, it also introduced the concept of preventive measures.

Subjectivism meant that the criminal responsibility depended upon the perpetrator's intent toward and comprehension of the unlawful act in question as well as its consequences. The rule of humanitarianism was expressed in a at that time quite liberal sentencing. For example, the capital punishment was 'only' possible for five crimes, always with the alternative of imprisonment. The introduction of preventive measures, however, was a step in the other direction. These measures created a situation where mentally ill people and recidivists were increasingly being separated from society.[149] In the late 1930s, the highly authoritarian Polish government frequently used these measures against opponents of the regime.[150]

After World War II, Poland became a communist state. The new government used the Criminal Code of 1932 in order to sentence political opponents to jail. In the late 1940s and early 1950s, communist judges were technically allowed to sentence many people to death without a fair trial. This led to a situation where

148 J. Bardach, B. Leśnodorski, M. Pietrzak, p. 565.

149 These ideas were also en vogue at that time in other countries.

150 J. Bardach, B. Leśnodorski, M. Pietrzak, p. 566.

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numerous people went missing. Capital punishment was a feature of Polish criminal law until 1998. From 1989, however, there was a moratorium on executions. The last execution took place in 1988. Presently, the death penalty is prohibited for all offences. The majority of the political parties are against the idea of reintroducing the death penalty. Nevertheless, the idea does enjoy support from certain influential politicians.

Work on a new Criminal Code did not begin until in the 1960s. The Criminal Code of 1969 was very repressive, one of its main aims being to protect the communist regime.[151] In the late 1980s, and with the advent of the demise of communist rule in Poland, a Criminal Law Reform Commission was formed. The commission eventually presented a comparatively liberal draft which clearly clashed with the code of 1969.

Although the current code from 1997 contains all the features of modern criminal law such as principles of humanism, proportionality, legality, etc.,[152] it is often criticized by legal practitioners. Some even claim that the code contains a number of serious mistakes.[153] The criticism relates primarily to legal-technical issues, but the document is also criticized from a more linguistic perspective. One such example is the concept of public dangerousness. The notion was quite hastily changed from social to public dangerousness, but its meaning remained basically unaltered.[154] Most scholars seem to agree that the amount of time devoted to the drafting of a new Criminal Code was simply too small. In the area of trafficking, we can see this circumstance reflected in overlapping provisions, questions relating to the definition of trafficking, etc.

Reception and Perception of the Original Source in Poland

Introduction

Although Poland was one of the first countries to take the initiative toward the creation of the Palermo documents, after that, the development stagnated. Although being vague and supposedly violating the principle of legality, the Polish trafficking provision remained in place. What is worse, some legal commentaries did not even refer to the Palermo Protocol. This led to varying results in case law concerning similar cases. While some interpreted the Polish law in

151 J. Kochanowski, "Redukcja odpowiedzialności karnej. Analiza i ocena założeń kodeksu karnego z 1997 na tle innych polskich kodyfikacji karnych", Instytut Prawa Karnego Uniwersytetu Warszawskiego, Warszawa, 2000, p. 10.

152 A Grześkowiak, "Polskie prawo karne" in T. Guz et al. (eds.), *Prawo Polskie. Próba syntezy*, pp. 653–655.

153 See, e.g., J. Kochanowski, p. 10.

154 Ibid, p. 11.

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light of the protocol, others argued that this was not possible since the protocol was not self-executing.[155]

The provision was not amended until 2010, and even at that point the commission for codification of criminal law at the Ministry of Justice did not agree with the criticism concerning the former's provision violation of legality and claimed that there was no need to reform the law.[156] Nevertheless, the law was amended or rather replaced by two new provisions. What most experts seem to agree upon is that the trafficking provision is a bad translation of the trafficking definition of the Palermo Protocol, a situation that creates a lot of problems concerning interpretation.

State Policy on Trafficking and Anti-Trafficking Measures

Today, trafficking has been identified as a serious problem by the Polish government. To this end Poland has undertaken several anti-trafficking measures. Firstly, national action plans against trafficking have been enacted and implemented since September 2003. The primary objective of the National Action Plan against Trafficking in Human Beings for 2011–2012 was to create necessary conditions to be able to effectively prevent and combat trafficking in human beings in Poland and to support and protect victims of this crime. Actions taken under the plan are to improve the detection of trafficking with the hope of increasing the number of criminal proceedings in this area as well as being able to assist more victims of this crime.[157]

Other objectives include informing at-risk groups about the crime, disseminating knowledge about trafficking to relevant authorities, and improving the efficiency of institutions responsible for the prosecution of trafficking in human beings. The latter is to be done by means of education on the present legal rules and best practices. The tasks to be performed under the action plan are nationwide. They relate either to actions of central institutions in terms of developing legal regulations or best practices, or to actions undertaken in all voivodships through appropriate institutions such as voivodeship police headquarters, border guard divisions, branch offices of the public prosecutor, or social policy departments of voivodeship offices. There are, however, no proper

155 E. Zielińska, "Zakaz handlu ludźmi w polskim prawie karnym" in Z. Lasocik (edt.), *Handel ludźmi. Zapobieganie i ściganie*, Warszawa, Katedra Kryminologii i Polityki Kryminalnej IPSiR UW, 2006, p. 226.

156 Komisja Kodyfikacyjna Prawa Karnego, KKPK 403/9/05.

157 S. Buchowska, "Poland" in *Report on the Implementation of Anti-Trafficking Policies and Interventions in the 27 EU Member States from a Human Rights Perspective (2008–2009)*, E-notes, p. 186, http://www.e-notes-observatory.org/, (accessed 19 May 2014).

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monitoring mechanisms in place that would guarantee that the objectives set out in the action plan are actually met.[158]

In 2006, a program called Program for Support and Protection of a Victim/ Witness of Human Trafficking was initiated on the order of the Minister of the Interior and Administration. The program is financed through the state budget and is primarily intended to help foreign nationals identified as victims of trafficking in Poland.[159]

There are also Units for Combating Trafficking in Human Beings within the structures of the Criminal Divisions of each voivodeship. The Central Unit for Combating Trafficking in Human Beings at the Central Investigation Office of the National Police Headquarters coordinates the actions of voivodeship units for combating trafficking in human beings. There is also a similar unit concerning the work of border guards. This agency, called the Unit for Constant Monitoring and Coordination of Actions of the Border Guard, was established in June 2008. The main tasks of the unit consist of the day-to-day monitoring and identifying of potential trafficking victims. In 2009, the National Consulting and Intervention Centre for Victims of Trafficking started its activities following a public task assigned by the Minister of the Interior and Administration. The task of the centre is to assist victims of trafficking as well as persons belonging to so-called at-risk groups. It helps both Polish nationals and foreigners. Foreign nationals are, e.g., assisted by the organization's staff via telephone.[160]

Police officers, judges, and border guards have received more training, to a large extent as a result of internationally sponsored projects. Projects are usually sponsored by the EU or various agencies of individual countries such as the British Embassy or the Dutch NGO La Strada. Due to the international element, some level of prestige is often involved.

In a similar vein, some of the efforts are conditioned by Poland's membership in the EU and the CoE. The country must, e.g., implement the trafficking directive. However, the interest seems to be genuine. This is reflected by the number of research institutions that are currently conducting studies on this subject. Below, the attitudes of the public, NGOs, and the media in this specific area are discussed in some detail.

158 Ibid, p. 188.

159 "Krajowy Plan Działań Przeciwko Handlowi Ludźmi Na Lata 2011–2012", p. 3.

160 "What is the National Consulting and Intervention Center for the Victims of Trafficking? (Krajowe Centrum Interwencyjno-Konsultacyjne dla Ofiar Handlu Ludźmi; KCIK)", http://www.kcik.pl/en/index.html, (accessed 19 May 2014).

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Practical Application of Anti-Trafficking Measures

Before the new trafficking provisions entered into force in 2010, opinion in case law on what constituted trafficking diverged. There was disagreement on several counts, e.g., concerning the necessary number of victims and acts in order to be able to qualify an act as trafficking. Another important question was if the trafficking provision was to be interpreted in light of Polish rules or if one was allowed to take the Palermo Protocol or other international obligations into consideration. There were also overlapping provisions that often became simultaneously applicable.

Although the new provision is much more explicit than its predecessor, problems remain. These are visible mostly in smaller, poorer cities, where practitioners have not always received proper training. The practitioners seem to struggle with interpreting and comprehending the new rules. The case of the woman selling her child, referred to above, illustrates this confusion. Under the old provisions her actions might have been seen as trafficking, but this was, however, no longer the case. Instead of acting in accordance with current legislation, the prosecution acted as if the old rules still applied. They first arrested the woman on charges of illegal adoption, then trafficking, but as neither was at hand, the woman was released from custody.

Another important question concerns the action plan on trafficking and the objectives stated therein. It is questionable whether the Ministry of Interior should both draft these and overlook and evaluate their implementation. In this context it should be noted that the plan was actually suspended at one point since the Ministry, according to its own statements, was busy preparing more urgent matters.

One of the more urgent questions concerns the sentencing for trafficking and the conditional suspension of punishment. The vast number of such penalties suggests that the crime is not taken seriously and the stories of the victims are trivialized. It should be noted that this corresponds to how victims of trafficking are portrayed in the media, on which more is written below. This arguably also reinforces the fact that the victims are often stigmatized by their own communities. The provision on rape is also an interesting parallel. As has been mentioned above, the state does not prosecute rape if a complaint is not first lodged by the victim which, according to doctrine, is a way of protecting the victim from double victimization.[161]

The Media, NGOs, and the Public

In Poland, as is also the case in Sweden, focus has mostly been on trafficking for sexual exploitation. Most NGOs in this area specialize in this form of

161 A. Marek, p. 455.

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trafficking, sometimes with a special focus on child victims. The most influential NGOs in this area include the La Strada Foundation against Trafficking in Persons and Slavery, Caritas Poland, Nobody's Children Foundation, ITAKA Foundation – Centre for Missing Persons, and Halina Niec Legal Aid Centre.

One of the main objectives of the NGOs is to prevent trafficking by disseminating prevention materials and carrying out specific activities that aim to spread information about the risk of trafficking among the so-called at-risk groups.[162]

In 2004–2006, one of the largest NGOs in this area, La Strada, mainly assisted women between twenty-one and twenty-five years of age. The youngest female victim was thirteen, the oldest fifty-two. Only 15% of the people assisted were male. The majority of the trafficked men was above thirty years of age and had been trafficked for the purpose of forced labour, begging, and petty crimes.[163]

The media also has an important role to play when it comes to disseminating information about the crime and influencing public opinion. Human trafficking is a phenomenon that is increasingly publicized and highlighted in Polish daily newspapers, as evidenced by the growing number of publications on this topic. This trend should be viewed positively, as there is likelihood that the information will reach the readers, potentially increasing public awareness on the subject. At the same time, the quality of these articles is not satisfactory.[164] They are said to describe the victims of trafficking for sexual exploitation in a largely stereotypical way that differs from reality.

The women are often dehumanized and discussed in terms of objects such as *living commodity* (*żywy towar*). Often, economic terms such as *large number of pieces sold*, *ladies for export*, *how much for a blonde*, etc., are used. There have supposedly been articles depicting women as *damsels in distress* or women suffering from *Pretty Woman Syndrome* or being on *road duty*. Other common epithets are *naïve*, *stupid*, and *pretty*.[165]

In a similar vein, trafficking is seldom addressed as a violation of rights. The stories are intended to function either as sensationalist tales or as

162 S. Buchowska, p. 186.

163 Ibid.

164 "MSWiA o handlu ludźmi w Polsce", Onet. Wiadomości, 18 October 2010, http://wiadomosci.onet.pl/kraj/mswia-o-handlu-ludzmi-w-polsce,1,3737275,wiadomosc.html, (accessed 19 May 2014).

165 M. Pomarańska-Bielecka, "Obraz handlu kobietami w prasie polskiej" in Z. Lasocik (edt.), *Handel Ludźmi. Zapobieganie i ściganie*, Warszawa, Katedra Kryminologii i Polityki Kryminalnej IPSiR UW, 2006, p. 339. See also M. Koss-Goryszewska, "Same sobie winne? Postrzeganie ofiar handlu ludźmi w polskich mediach", Seminarium w ramach projektu 'Doktoraty dla Mazowsza', Warszawa, Instytut Stosowanych Nauk Społecznych, Uniwersytet Warszawski, 9 August 2011.

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descriptions of investigations or court proceedings. The victims are said to often be described in a dismissive manner which adversely affects perception among readers.[166] In a national poll conducted in 2001, every ninth respondent with lower-level education held that victims of trafficking for sexual exploitation had themselves to blame for their fates. This opinion was not expressed by people with higher education. Moreover, 88% of all the respondents believed that the women working as prostitutes should be deported, while one-third believed that the victims should be punished.[167] Since the media is a place of expression as well as a source of information and knowledge for the general public, it is imperative to give a correct picture of trafficking.

This is a two-tier system where the media affects the public and vice versa. It is thus possible that media reports simply correspond to the ideas of the majority. However, while it is true that there are certain misconceptions and prejudices concerning the crime and its victims, a large portion of the population is eager to seek job opportunities abroad.

In a poll from 1998, 25% of the respondents claimed that they would accept an illegal job offer abroad. In 2005, this number had gone up to 31%. Not all of them, however, were equipped to do that, as one-fifth of the respondents did not know any foreign languages. The by far largest number of respondents interested in illegal job offers abroad was between eighteen and twenty-five years of age.[168] Another important group was made up of people belonging to the poorest strata of society where the middle income per person was not higher than 500 zloty per month (approximately $162).

The level of education also seemed to influence the answers of the respondents. In 2001, 36% of the respondents with only a basic education or lower-level education answered that they would consider an illegal job offer abroad while 15% held that they would immediately accept it. This can be compared to the answers of the respondents with secondary education, where 20% held that they would possibly consider it while only 5% claimed that they would accept it without any further consideration.[169]

166 M. Koss-Goryszewska, "Wizerunek handlu ludźmi i kobiety-ofiary w prasie polskiej na przykładzie Gazety Wyborczej", Warszawa, Instytut Spraw Publicznych, 2010, pp. 22–23.

167 "Wiedza i opinie o handlu kobietami. Komunikat z badań", Centrum badania opinii społecznej, Warszwa, 2001, p. 5, http://www.cbos.pl/SPISKOM.POL/2001/K_124_01.PDF, (accessed 19 May 2014).

168 "Polacy o zjawisku handlu kobietami. Komunikat z badań", Centrum badania opinii społecznej, Warszawa, 2005, p. 3.

169 "Wiedza i opinie o handlu kobietami. Komunikat z badań", p. 1.

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Another important finding can tells us something about the perception of the transplant and in addition help to explain the victims' rampant fear of and reluctance to cooperate with authorities in the destination countries. Only 14% of the respondents would in the event of being trafficked contact the law enforcement agencies in the country of destination and only 2% would contact other institutions. There is a quite widespread (mis) understanding among the Polish population that people working abroad illegally are usually deported (92%), fined (39%), and even jailed (26%). What is even more alarming is the fact that some respondents considered certain infringements on the freedom of the illegal workers to be acceptable. Only 40% were of the opinion that freedom of movement of Polish workers abroad should be protected while only 32% held that the workers should be entitled to adequate working conditions.[170] The majority thus took a rather lenient approach. This might reflect how the public perceives the transplant since it considers some of the actions prohibited by it to be acceptable under certain circumstances. This would suggest that the crime is not taken as seriously as it is in, e.g., Sweden.

Poland – Summary

Introduction

We see that Poland struggles with both legal and non-legal issues. Below, these issues will be summarized.

Legal Issues

Introduction

The main issues concern the lack of understanding of the new trafficking terminology and the fact that this terminology clashes with already existent Polish legislation. They also pertain to the confusion in both doctrine and case law concerning how the trafficking provision is to be interpreted. Finally, there are the issues of improper means, consent of the victim, and intent of the perpetrator.

Lack of Understanding of the Present Legal Terminology

Although there was anti-trafficking legislation before Poland's accession to the EU and the country's ratification of the Palermo documents, it was believed to be flawed. Many Polish scholars claimed it to be in violation of basic principles

170 Ibid, p. 8.

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of a rule of law state, most notably the principle of legality. While some courts applied the provision in light of Poland's international obligations, other courts interpreted it in light of Polish legislation and the case law thereto. Moreover, some authoritative commentaries to the Criminal Code did not even mention the Palermo Protocol in the context of trafficking. In the doctrine, there were also other ambiguities as to how the provision was to be interpreted. Even so, the codification committee still argued that there was no need to reform the law.

In 2010, probably as a result of international pressure (including the EU framework decision and, later, directive on trafficking) and prestige in this area, the provisions were finally amended. However, the question is whether the current provision is better than its predecessor. First, it is considered to be a rather poor translation, incorporating concepts previously unknown in Polish criminal law. Not surprisingly, reference is often made to the dictionary meaning of these prerequisites, e.g., recruitment, etc. This is, *inter alia*, illustrated by the confusion concerning trade measures and what actions are covered by the new terminology.

Second, it is said that the Polish tradition of law-making differs so much from that of the original source that it makes it hard to interpret for a Polish lawyer. However, not only the Palermo Protocol is to blame. For example, deceit and fraud are mentioned as two of the improper means in the Palermo Protocol, while the Polish law lists deceit, fraud, misleading someone, abusing someone's mistake and someone's inability to comprehend the situation as alternative improper means, although the last three concepts are all part of the prerequisite of fraud.

Diverging Views on What Constitutes Trafficking

We have seen that opinions in both doctrine and case law diverge on a number of matters such as whether trafficking requires a chain of events or if just one trade measure paired with improper means for the purpose of exploitation is enough. Another question concerns the number of victims. While some argue that one person is enough to qualify an act as trafficking, others hold that at least two victims are necessary.

There is also the issue of overlapping provisions. Several provisions might become cumulatively applicable, e.g., forced domestic prostitution, trafficking, slavery, and illegal adoptions. The situation is most confusing with respect to slavery, where some experts claim that the provision is reserved for cases where the victim expressly withholds consent. However, the presence of improper means in the trafficking provision clearly precludes consent as well.

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Intent of the Perpetrator

The current provision is said to have a smaller area of application than its predecessor which allowed for both forms of intent. The wording *for the purpose of* indicates that only direct intent with regard to the exploitation is possible if an act is to be qualified as trafficking. This is clearly something that both Sweden and Poland have in common and is thus attributable to the Palermo Protocol. Moreover, direct intent seems to be required also where general intent is concerned.

Improper Means and Consent

There are basically three different scenarios concerning consent:

1. Consent in the country of origin, i.e., no improper means in the country of origin, and consent in the country of destination. This would not qualify an act as trafficking.
2. No consent in the country of origin, i.e., improper means in the country of origin, and no consent in the country of destination. This constitutes the 'ideal' case of trafficking.
3. Consent in the country of origin, i.e., no improper means in the country of origin, and no consent in the country of destination. This would potentially qualify an act as trafficking (since trafficking needs not to be transnational). Here is where the opinion of *some* Polish legal scholars diverges (or is confused). In their opinion the situation described above would not be qualified as trafficking.

It has been argued that previous case law concerning trafficking is irrelevant since the women, who were also in vulnerable situations, knew what they would be doing and thus consented to being trafficked. There thus seems to be a lack of knowledge on the prerequisite of vulnerability and the fact that possible consent is irrelevant if the perpetrator takes advantage of such as situation. Also, it does not seem apparent that the victim can withdraw her consent at a later stage (in the country of destination). The prerequisite *by means of* might, as in the Swedish case, be to blame for this situation, as it could suggest that women who actively agree to a trafficker's offer are not as worthy of protection as the coerced innocents and that undue focus is placed on the initial stage of the trafficking chain, like recruitment. However, it should be noted that the Palermo Protocol supplies only minimum standards and that there is no reason for not imposing stricter rules.

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Non-Legal Issues

Practical Application of the Trafficking Provision and other Relevant Provisions

Although efforts to educate members of the judiciary have been undertaken, these appear as somewhat disjointed and have not reached all regions of the country. We know that the former trafficking provision led to varying results in similar cases because many judges were unaware of the existence of the Palermo Protocol and the preparatory works thereto. The question is whether the new definition of trafficking will not further complicate the situation since many members of the legal community are unsure as to how the new prerequisites are to be interpreted. As we have seen in the case of illegal adoptions, the confusion as to how this provision and the trafficking provision are to be interpreted remains.

Another alarming development is the number of suspended sentences for trafficking and the fact that there are no impartial mechanisms of evaluation concerning the government action plan on trafficking.

Attitudes of the Media and the Public

The potential success of a transplant also hinges on how people perceive it. As a result of the fact that many people regard some violations of basic human rights as justifiable under certain circumstances, the perceived need and respect for the transplant automatically diminishes. We also see that a certain part of the population harbours misconceptions about victims of trafficking and that these prejudices are sometimes created or reinforced by the media. The crime is either trivialized and the victims dehumanized in terms of comparisons with merchandise or women are demonized as degenerate mothers for selling their children.

Lacunas in State Policy and Anti-Trafficking Measures

National research and policy documents on trafficking are still in their cradle. Discussions of root problems such as the discrimination of women or poor development are comparatively rare in this context. Connections between forced prostitution and trafficking are rarely identified. Also, Polish researchers have pointed out that other forms of trafficking than trafficking for sexual exploitation remain under-researched.

As we can see, Poland is on its way but is not quite where Sweden is today. Even though the country did sign the Palermo Protocol, it did not amend its trafficking provisions until forced to do so due to the EU framework decision on trafficking being replaced by a directive.

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We thus see that there are many internal problems affecting the wording and application of the transplant. However, two problems are present in both Poland and Sweden. They regard the intent of the perpetrator vis-à-vis the exploitation and the 'by means of' requirement. This issue will be revisited in Chapter 8.

Below, the situation in Russia in this area is analysed. The question is how that country has fared with little own impetus to initiate anti-trafficking efforts and with no mechanism of control such as the EU.

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CHAPTER 7

Russia

Introduction

We have now studied a country that is considered a forerunner where anti-trafficking measures are concerned as well as a country that shares Russia's communist past but is also a relatively new member of the EU. We have seen that both of these countries struggle with country-specific and common problems. The country-specific problems are arguably more serious in Poland than in Sweden as there is some confusion in both doctrine and case law about how the new trafficking provision is to be interpreted. The questions posed in this chapter are, firstly, if Russia shares the common challenges of Poland and Sweden and, secondly, what kind of country-specific challenges the country faces.

The Russian state has not been interested in combating trafficking in the past. Although there has been international pressure to act, there was no incentive in the form of an EU membership, no control mechanism in terms of being forced to implement the EU trafficking directive, etc. Until 2003, there were no specific provisions on trafficking[1] in the Russian Criminal Code.

The draft law on trafficking was repeatedly voted down by the *duma*. The crime was simply not perceived as an important issue. Statements made by Russian officials at that time implied that the occurrence of trafficking in Russia was slim, with only isolated incidents having been blown out of proportion by the Western media.

Eventually, the advocates of the trafficking law took on new tactics. Firstly, they pointed to links between trafficking and terrorism. Secondly, they referred to the situation of Russian military personnel in the Caucasus where Russian soldiers were being kidnapped and enslaved. Parallels were made to the Russian conquest of the Caucasus in the nineteenth century when this procedure was first put into practice. Thus, partly due to international pressure and partly due to domestic considerations, in 2003 a draft law on trafficking was signed by the president.

While Polish laws are comparatively short and concise, Russian laws are the opposite of that. For example, there are two provisions criminalizing trafficking. Both are quite lengthy but they basically only differ on one important

1 In 1998, a provision on trafficking in minors was enacted.

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account. This essentially means that there are numerous and quite unnecessary duplications. This chapter is therefore lengthier than the one on Poland and Sweden. The following section examines the present provisions on trafficking.

Present Provisions on Trafficking in Human Beings

Introduction

According to Russian doctrine, the aim of the trafficking provisions is twofold, namely to safeguard the constitutional rights of the individual and to fulfil Russia's obligations under international law. Russia has, among other international documents, ratified the Palermo Protocol.

In December 2003, Russia adopted two specific trafficking provisions. The first provision, titled trafficking in human beings, is located in Article 127.1 of the Criminal Code. It is a general provision criminalizing the trade in human beings. The second provision is more specific, criminalizing the use of slave labour. It is located in Article 127.2 of the Criminal Code. Reportedly, very few cases of human trafficking are brought to courts under the new provisions.[2]

Most people explain this development in terms of corruption. However, even though the impact of corruption should not be underestimated, research indicates that Russia's criminal justice system is at least partially to blame for this development. It has been argued that the structure of the law enforcement, where investigative and prosecutorial aspects are separated, creates a situation in which no one can take responisibility in a case and see it into completion.[3] This is further complicated by the Russian career advancement strategy that rests principally on the number of solved cases. The fact that law enforcement still struggles with comprehending and interpreting the new provisions further perpetuates the situation. Reportedly, Russian practitioners turn to other more familiar provisions that were applied in trafficking cases before the trafficking provisions entered into force. These pertain primarily to various forms of procuring. Again, Russian criminal courts are said to be informally instructed by the prosecution and expected to follow the prosecutors'

2 See, e.g., "Russia", TIP Report, 2012 and 2013. See also L. McCarthy, "Beyond Corruption. An Assessment of Russian Law Enforcement's Fights against Human Trafficking", *Demokratizatsiya*, 2010, World Affairs Institute, p. 5. There seem to be no official statistics concerning this crime.

3 L. McCarthy, p. 6.

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suggestions concerning how an act should be qualified and judged. If the judges repeatedly abstain from following instructions, they risk losing their individual bonuses and even getting fired. In addition, they struggle under enormous workloads, reportedly having less than an hour per case.[4]

Nevertheless, in my opinion there is also another dimension to this problem that is *not* uniquely Russian. After examining the Palermo Protocol's definition of trafficking and the Swedish, Polish, and Russian provisions, a certain trend becomes detectable. For example, Swedish prosecutors, much like their Russian counterparts, often turn to provisions on procuring, as trafficking is very difficult to prove in court. Without further elaborating on the specific cause of this development in this section, it seems plausible to argue that as all three countries have transplanted the trafficking definition of the Palermo Protocol into their legislations, the common difficulties experienced by the states can at least partially be attributed to this document. These findings seem worth mentioning already at this point as they add another dimension to the current research on this specific area of Russian criminal law.

Since 2003, when the trafficking provisions first entered into force, there have been several amendments made to their wordings. The most important one, undertaken in 2008, aimed to clarify the concept of exploitation. Legal practitioners were unsure as to how to interpret the concept within the ambit of the trafficking provision. The question primarily under debate was whether the prerequisite 'buying and selling' of a human being had to be carried out for the purpose of exploitation. It was expressed that such a requirement created a situation where people (e.g., parents, legal guardians) selling their children for the purpose of receiving remuneration and not with intent to exploit were not convicted of trafficking. The 2008 amendment clarified the matter somewhat, as the concept of trafficking was more closely defined by the legislator. Trafficking was said to include all forms of transactions where a person was treated like property. In these general cases, there was no requirement of a specific purpose of exploitation. The provision also criminalized other measures commonly used to facilitate trafficking such as recruitment, transportation, etc., *if* these actions were carried out for the purpose of exploitation.

Trafficking in Persons – Article 127.1

As has been mentioned above, there are two main provisions on trafficking. The general provision is contained in Article 127.1, and it reads as follows:

4 Lecture titled "The Russian Judicial System in the Perspective of Empirical Sociology of Law", held by Dr. Vadim Volkov at UCRS, Uppsala University, 4 October 2012.

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1. The buying and selling of a human being, other transactions regarding a human being, as well as recruitment, transportation, transfer, harbouring or receipt committed for the purposes of his or her exploitation –
   are punishable with hard labour for a maximum period of five years or imprisonment for a maximum period of six years.
2. The same acts committed:
   a) against two or more persons;
   b) against a minor;
   c) by a person using his or her official position;
   d) by moving the victim across the borders of the Russian Federation, or by illegally detaining him or her abroad
   e) with the use of fraudulent documents, as well as with withdrawal, concealment or destruction of documents certifying the identity of the victim;
   f) with the use of violence or threat thereof
   g) for the purpose of extracting the victim's organs or tissues;
   h) against a person known to the perpetrator to be in a helpless state, or financially or otherwise dependent on the perpetrator;
   i) against a woman known to the perpetrator to be pregnant –
   is punishable by imprisonment for a period of three to ten years, with possible disqualification to hold certain posts or practice certain activities for a maximum period of fifteen years and with a possible restraint of liberty for a maximum period of two years.
3. Actions envisaged in Parts 1 or 2 of this Article:
   a) Having, by negligence, caused death, serious bodily injury of the victim or other grave consequences;
   b) Committed in a manner dangerous to life and health of many people;
   c) Committed by an organized group, –
   are punishable by imprisonment for a period of eight to fifteen years with a possible restraint of liberty for a maximum period of two years.

Official notes:

1. A person, who, for the first time, has committed the acts punishable under Part 1 or Point (a) of Part 2 of this Article, has voluntary released the victim and contributed to solving the crime is exempt from criminal liability, if his or her actions do not contain another crime.
2. By exploitation of a human being in this Article is understood the use in prostitution by other persons and other forms of sexual exploitation, slave labour (services) and servitude.

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Part 1 of Article 127.1 contains, as has been mentioned above, the general provision on trafficking. The *object* of this provision is, first and foremost, the physical freedom of the individual. The doctrine on Article 127.1 makes reference to Articles 22 and 27 of the Russian Constitution. These deal with individuals' freedom of movement and their right to freely choose where to reside.[5] There are also other so-called secondary objects, the protection of which is envisaged by the law. These include the honour and dignity of the individual, the ability of the minor to develop both emotionally and physically, prohibition of illegal crossings of the borders of the Russian Federation, forging and falsifying documents, servitude of others, and the health and life of the individual.

The provision starts with criminalizing all types of trade and similar transactions where people are treated like commodities. An amendment specifies that this type of trade need *not* be carried out for the purpose of exploitation. Next, save for the lack of improper means, a nearly verbatim transposition of the trafficking definition of the Palermo Protocol follows. It enumerates possible trade measures that, when combined with intent on behalf of the perpetrator to exploit the victim, qualify the act as trafficking. These will be analysed in more detail below.

The *objective side* of the offence of trafficking in human beings is thus to be found in the form of acts that are constituted by the *buying/selling* of a person *or* by the *recruitment, transfer, giving away, harbouring, or receiving of a person for the purpose of exploitation*. For qualification of an act under Part 1 of Article 127.1, at least one of the alternative actions specified in the provision must be carried out. One act is thus enough to qualify as trafficking. Moreover, the objective side of the crime is expressed in the form of active actions (not omissions to act) which can be further classified into two main forms or alternative types of the offence. The first form of the crime refers to actions of the perpetrator concerning the purchase and sale of, as well as other transactions regarding, a human being. If a person is treated like a commodity, this will constitute trafficking.[6] This is true even if there is no purpose of exploitation. The second form of the crime deals with actions aiming toward the promotion of the exploitation of another individual such as recruitment, transportation, hiding of the victim, transfer, and reception. These are also viewed as trafficking.

The act of buying or selling a person is constituted by a mutual transaction being *concluded* between a seller and a buyer in conformity with which the

5 A.B. Borisov, *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, 6: e izdanie, Moskva, Kniznij Mir, 2012, p. 313.

6 V.I. Radtjenko, *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, 2: e izdanie, Moskva, Prospekt, 2010, p. 204.

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seller sells the victim and the buyer takes possession of her.[7] The victim is sold in exchange for remuneration, monetary or otherwise, as if she were a commodity. The doctrine further highlights that the term *agreement* here means a *quasi-agreement*, i.e., that it is by no means legal. This is interesting since it is fairly obvious that trafficking in human beings is indeed illegal.

In addition to 'typical' acts of selling and buying, it is also possible to qualify other transactions under the relevant provision. The 'transaction' can also take place in exchange for material assets other than money such as real estate, cars and bonds, as well as for debt pardons, promotions, etc. A person can also be rented or bought for a period of time and for a specific sum.[8]

Some voices in the doctrine point to civil law when discussing the concept of buying and selling and the question of when an agreement is made.[9] The crime of trafficking according to Part 1 of Article 127.1 is consummated at the conclusion of any of the alternative actions mentioned in its wording irrespective of the ensuing of possible negative consequences. Accordingly, the act of buying/selling a person is consummated at the point of concluding the transaction mentioned above.[10] According to some legal scholars, the actual physical transfer of the victim from the buyer to the seller is thus not necessary for the act to be qualified as trafficking in human beings.[11]

The other form of committing the main type of trafficking is, as has been mentioned above, by various acts that are made in order to exploit the victim or rather to facilitate her exploitation. First is *recruitment*, which according to the draft law on trafficking means hiring, retaining for certain work, or involving someone in certain activities, including those of an illegal nature.[12] This is basically a dictionary definition of the word. Recruitment methods can be various (promises, fraudulent behaviour, blackmail, etc.) A perpetrator can, e.g., promise substantial financial remuneration in order to create a situation where trafficking can occur.[13] The methods do not influence qualification of the crime (where Part 1 of the trafficking provision is concerned). Recruitment

7 A.I. Tjutjaev, *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, Moskva, Infra-M-Kontrakt, 2011, p. 348.

8 Ibid.

9 A.B. Borisov, p. 314.

10 V.I. Radtjenko, p. 204.

11 A.B. Borisov, p. 314.

12 Federal Law No. 162-FZ "On Amendments and Additions to the Criminal Code of the Russian Federation" passed by the state *duma* on 21 November 2003, entered into force 16 December 2003, *Rossijskaya Gazeta*, 16 December 2003, pp. 10–12, http://legislationline.org/documents/action/popup/id/4188, (accessed 19 May 2014).

13 V.I. Radtjenko, p. 204.

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is ended at the moment of the fulfilment of actions (for the purpose of exploitation), irrespective of whether the consent of the recruited person was present or not.

The other trade measures are not further elaborated upon in the draft law. In doctrine, *transportation* is defined as deliberate actions aimed at moving the sold person from one place to another, including within the same territory, using any kind of transport or any object applied in the form of a transportation facility.[14]

Harbouring or hiding of the victim means keeping a person hidden against her wishes so that she cannot be discovered by agents of law enforcement, relatives, etc. The person can be placed under the radar of the authorities in the traditional way, i.e., by being locked up in special facilities, etc., but also by use of more subtle methods. The latter include confiscating the victim's documents or money, administering drugs so as to suppress the victim's physical and mental resistance, etc.[15]

Transfer and reception of the person means receiving her as a result of the fulfilment of a specific transaction. A person can, e.g., be transferred to a brothel as part of a compensation, as a way of fulfilling an agreement, etc. In order to be able to qualify an act as transfer under Article 127.1, it is not necessary for the transferred person to be used in the brothel, only that she is actually transferred to such a facility.[16] Transfer and reception are usually the results of a previous agreement, but other types of reception are also possible. Here, voluntary transactions where a person is offered to another person without remuneration are also possible to qualify as acts of human trafficking.[17]

The list of actions or measures directed toward the victim in order to facilitate a subsequent exploitation is exhaustive. Other socially dangerous actions taken prior to exploitation that place the victim in a servile status or put restrictions on her freedom of movement thus making it possible to perform transactions concerning that person might instead be qualified as kidnapping for the purpose of trafficking in human beings or as illegal imprisonment for the same purpose.[18]

The *subjective side* of the crime is characterized by direct intent. The perpetrator is to understand the social dangerousness of the act of human trafficking

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14 A.I. Tjutajaev, p. 348.

15 Ibid.

16 Ibid.

17 A.B. Borisov, p. 314, A.A. Tjekalin, *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, 3: izdanie, Moskva, Jurajit, 2006, p. 383.

18 A.I. Tjutjaev, p. 348.

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and wish for its commission. In instances where the crime is committed through the acts of recruitment, transportation, hiding of the victim, transfer and reception, the specific purpose of the exploitation forms an obligatory indicium or prerequisite of the subjective side of the crime.[19] The *subject* of the crime can be any sane person sixteen years of age and older.[20]

The concept of exploitation within the context of the trafficking provision is more closely defined in the Official Note (Number 2) to Article 127.1, according to which it is understood as the use of employment in prostitution by other persons and other forms of sexual exploitation, slave labour (services), and servitude.

Use of employment in prostitution means income extraction (material or other) from prostitution by third parties, i.e., from the regular introduction of persons, both female and male, in illegitimate sexual relations for payment.

Sexual exploitation includes exploitation in prostitution but does not need to be connected to it. The victim might, e.g., be used for the fulfilment of actions of a sexual character, in creating pornographic materials and the like.[21] In certain cases, a person kept in a state of slavery might also be subjected to sexual exploitation.

In addition to doctrine, the concept of exploitation is also defined in the draft law to the trafficking provisions. The concept is understood as forced labour or services, slavery or customs similar to slavery, servitude, or the removal of human organs or tissues. It also encompasses the exploitation of prostitution of others as well as other forms of sexual exploitation.[22] This is interesting since the Official Note to Article 127.1 does not mention organ or tissue removal as specific forms of exploitation. On the contrary, these are, per Part 2 of the Article, seen as aggravated forms of trafficking.

The crime is consummated at the point of the specific action being undertaken with the purpose of exploitation. This means that the actual exploitation need not take place in order to qualify an act as trafficking. Actual exploitation will demand an additional estimation of a criminal conduct under Article 127.2 or other relevant articles of the Criminal Code.

It is important to note that the general provision on trafficking, i.e., what one would refer to as trafficking of normal severity, does not require the

19 Ibid.

20 S.M. Kotjoij, *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, Moskva, Wolters Kluwer, 2011, pp. 291–292.

21 S.M. Kotjoij, p. 291.

22 Federal Law No. 162-FZ, pp. 10–12.

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perpetrator to have made use of improper means. It is enough that she has treated a person as a mere commodity or acted for the purpose of exploitation. Trafficking of normal severity is punishable with hard labour for a term not exceeding five years or imprisonment for up to six years.

Aggravating Circumstances

Aggravating circumstances in Part 2 of the Article include committing the offence against two or several persons as well as against a minor. Before the amendment, the provision read 'against a person known to the perpetrator to be a minor'. This meant that the perpetrator either knew the true age of the victim or that the age of the victim was apparent from the victim's appearance. The wording has changed in order to favour a more strict interpretation of this prerequisite. According to the draft law, a minor within the context of the article is a person under the age of eighteen.[23]

As corruption is a phenomenon known to plague Russian society, committing trafficking by using one's official position is also considered an aggravating circumstance. Thus only special subjects can answer for this form of the crime. The concept, however, encompasses a rather broad interpretation, ranging from civil servants, persons carrying out organizational or administrative obligations in commercial organizations or in non-profit organizations, to members of the law enforcement, medical staff, etc.[24] The person responsible for abusing her official position can do it in two different ways: Firstly, by abusing her own position, i.e., being directly involved in trafficking or secondly, by making someone professionally dependent on her (employee) do something to facilitate the trade.[25]

Moving a trafficking victim across state borders or illegally detaining her abroad forms another aggravating circumstance. This should be seen in light of how Russians conceptualize trafficking, i.e., as an offence directed not only against the individual but also against the state. It also highlights the idea that trafficking in human beings is a form of organized crime. Consequently, the use of fraudulent documents forms another aggravating circumstance as does the withdrawal, concealment, or destruction of documents certifying the identity of the victim. Two improper means directed at controlling the disposition of the victim are also considered to be aggravating circumstances. These include violence and the threat thereof. For the act to fall under this part of the provision, the threat must be real to the victim and substantial enough so as to

23 Ibid.
24 A.A. Tjekalin, p. 385.
25 S.M. Kotjoij, p. 293.

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override any resistance on her part. It does, however, not matter whether the perpetrator actually intended to carry out the threat.[26]

Another aggravating circumstance is affected by the manner of the exploitation. If it is carried out in order to extract organs or tissues from the victim, it is seen as an aggravated from of trafficking. By contrast, the Palermo Protocol does not distinguish between possible forms of exploitation in terms of their severity. In other words, the protocol does not view trafficking for sexual exploitation or forced labour as less severe than trafficking for the purpose of organ removal.

If a person is in a helpless state or is financially or otherwise dependent upon the perpetrator and the perpetrator is aware of that situation, this too is seen as an aggravating circumstance. The same holds true in cases where the victim is pregnant and her condition is known to the perpetrator. Aggravated forms of trafficking, as set out in Part 2, are punishable by imprisonment for a term of three to ten years with possible additional restrictions on the right to hold certain posts or practice certain activities for up to fifteen years as well as possible subsequent restraints on liberty for up to two years.

Severely Aggravating Circumstances

The more severe aggravating circumstances, set out in Part 3, include having negligently caused the death of or serious bodily injury or other grave consequences to the victim. According to doctrine, the death must be a logical consequence of the trafficking offence. The death or injuries can be the consequences of the trafficking transaction, of violence applied by the perpetrator, or of actions of the victim. Examples of the latter include the victim trying to escape from the perpetrator and falling down from a balcony. This part of the offence is consummated when the relevant consequence, such as death of the victim, actually ensues.[27] The prerequisite of other serious consequences includes trauma and the subsequent suicide of the victim or of her family members. It can also include serious illness, infection with HIV, psychological breakdown, and serious financial loss.[28]

Guilt is not simultaneously established for the entire offence. For any ensuing consequences, criminal responsibility (either intent or negligence) must be established separately. To decide whether trafficking has taken place, direct intent is necessary. If the victim died or sustained serious injury as a result of the crime, this circumstance can qualify the act as a severely aggravated form

26 A.B. Borisov, p. 315.

27 A.B., Borisov, p. 316.

28 Ibid.

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of trafficking. In this case, intent in relation to the result (e.g., death, serious injury) is not necessary, but negligence is enough. Criminal responsibility for that particular result will be possible if the offender foresaw the possibility of such consequences but still, and without having ground for it, was counting on their prevention. This is also true if the offender did not foresee the possibility of such consequences although he both should and could have done so.

If the crime has been committed in a manner dangerous to the life and health of many people or by an organized group, it too will qualify under Part 3. An example of when an act is considered dangerous to the life and health of many people is when the illegal transport of victims is carried out in a dangerous manner, e.g., by transporting people in containers on water.[29]

The severely aggravated forms of trafficking are punishable by imprisonment for a term of eight to fifteen years with subsequent possible restraint of liberty for up to two years.

Official Notes to the Article

As has been mentioned above, the Official Note (Number 2) deals with the concept of exploitation. Note Number 1 details the rule on relief from criminal responsibility. A person who for the first time has committed the crime stipulated by Part 1 or Part 2, Point (a) of Article 127.1 may be exempted from criminal responsibility. This is only possible if the person voluntarily releases the victim, agrees to cooperate with the authorities (for example, by naming accomplices, producing evidence, etc.), and if her actions do not contain another crime.

This Note can be compared to the general rules on relief from criminal responsibility as stated in Articles 75 and 76. Article 75, titled Exemption from criminal liability in connection with active repentance, reads as follows:

1. A person who for the first time commits a crime of minor or moderate severity may be exempted from criminal liability if he or she, after the commission of the crime, voluntarily confessed, contributed to the disclosure and investigation of the crime, compensated for damages or otherwise made amends for harm that incurred as a result of the crime, and as a result of active repentance ceased to be socially dangerous.
2. A person who commits a crime of another category shall be exempt from criminal liability only in cases specifically provided for by the relevant Articles of the Special Part of this Code.

29 A.I. Tjutjaev, p. 352.

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Article 76 is titled Exemption from criminal liability in connection with reconciliation with the victim and reads as follows:

> A person who for the first time commits a crime of minor or moderate severity may be exempted from criminal liability if he or she reconciles with the victim and makes amends for the harm caused to the victim.

These articles are general provisions on repentance and reconciliation applied only in relation to minor crimes and offences of moderate severity and first-time offenders. One may argue that the gravity of the trafficking offence should make exemption from criminal responsibility impossible. Let us illustrate this with an example. We are dealing with a trafficker and one or several adult victims. The victim(s) have not been forced or threatened but 'only' deceived about the nature of the promised work. This would fall either under the main provision, namely Part 1 of Article 127.1 or Part 2, point (a) of Article 127.1.

Under such circumstances, exemption from criminal responsibility is de facto possible. Since exemption from criminal responsibility applies only with relation to Part 1 and Part 2, point (a) of Article 127.1, it would not be an option had the perpetrator, e.g., used force or illegally moved the person across Russian borders. In other words, the Russian legislator differentiates between violence and deception to the detriment of the victim. This implies that victims who have been lured into trafficking are less worthy of state protection than those who have been forced into it. This undoubtedly stands in stark contrast to the motives of the Palermo Protocol, including the document's definition of trafficking. It should also be mentioned that at the present time most victims of trafficking are believed to be deceived as opposed to physically forced into exploitation.

Use of Slave Labour – Article 127.2

Some of the main concepts of the trafficking provisions have been more closely described in the draft law on trafficking mentioned above. A victim of trafficking has been defined as a person who has been subjected to the crime even if the person has given his consent to recruitment, transportation, transfer, sale, or other actions concerning trafficking. What is meant by the concept of trafficking is the recruitment, transportation, transfer, harbouring or receipt of persons by means of force or threat of use of force or by coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or by means of bribery in the form of payments or benefits, in order to achieve the consent of a person having control over another person.[30]

30 Federal Law No. 162-FZ, pp. 10–12.

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Article 127.2 on the use of slave labour reads as follows:

1. The use of the labour of any person over whom authority similar to the right of ownership is exercised, in the case where the person, for reasons beyond his or her control, cannot refuse to perform such labour (services) – is punishable by hard labour for a term not exceeding five years or imprisonment for the same period.
2. The same action, committed:
   a) regarding two or more persons;
   b) regarding a minor;
   c) by a person using his official position;
   d) with the use of blackmail, violence or threat thereof;
   e) with the removal, concealment or destruction of identity documents of the victim – is punishable by hard labour for a term not exceeding five years or imprisonment for a term of three to ten years, with the restriction of the right to hold certain posts or practice certain activities for up to fifteen years or without it.
3. Actions envisaged in the Part 1 or 2 of this Article which negligently caused death, serious bodily injury of the victim or other grave consequences, or were committed by an organized group –
   are punishable by imprisonment for a term of eight to fifteen years with a possible restraint of liberty for up to one year.

The main *object* of the provision is to honour Russia's international obligations, such as the Slavery Convention signed in Geneva in 1926 and Article 4 of the ECHR. Reference is also made to Article 37 of the Russian Constitution according to which all persons have the right to use their professional skills in free employment. The *objective side* of the crime is formed by an act where a person is treated like a commodity and where the person cannot end that practice.[31]

According to the draft law, slavery, on the one hand, implies a state where a person exercises over another person all or some of the powers inherent in the right to property. This corresponds to the definition of slavery supplied by the Geneva Convention from 1926, mentioned above. Hence, slave labour is defined as work of the person who is in slavery in cases where the person cannot stop performing the work or services.[32]

Serfdom, on the other hand, is defined as a state where a person is obligated to live and work in a certain place such as land owned by another person for

31 A.B. Borisov, p. 317, V.I. Radtjenko, p. 206.

32 Federal Law No. 162-FZ, pp. 10–12.

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whom the serf must carry out work for remuneration or for free and where the latter is not allowed to alter these conditions.

Servitude is interpreted as the performing of any work or rendering of services under the threat of punishment and where the person does not voluntarily consent to performing the work. Debt bondage implies a position that is a result of a pledge made by the debtor to the creditor. The pledge concerns the personal work of the debtor for the benefit of the creditor, the aim of which is to repay the debt. Debt bondage is at hand if the properly determined value of performed work is not being deducted from the debts. The same is true if the duration of the service is not limited or where its character is not specified.[33]

Slavery can be the result of abduction, trafficking in human beings, debt dependence, etc. Further, there are basically two forms of sustaining slavery, namely through economic and non-economic means. The first form relates to debt bondage while the second and non-economic form concerns instances where violence is used to keep a person in a state of slavery.[34]

The crime is consummated from the moment the use of slave labour begins, irrespective of its duration and implications. The use of slave labour can involve various acts. A person can, e.g., use the services of a prostitute who is in slavery or use slaves to build his house. The practice can also amount to the extracting of profits stemming from the use of slave labour such as selling goods produced by enslaved labour. The *subjective side* of the crime can only be in the form of direct intent. The perpetrator must understand the social dangerousness of his actions and wish for their commission. The *subject* can be any sane person sixteen years of age and older.[35]

The aggravating circumstances are the same as in Article 127.1 with the exception that blackmail or the threat thereof is added to the list. Blackmailing is to be interpreted as coercing a victim of trafficking into any acts under the threat of violence, injury, or destruction of property of the victim or of her family. In essence, it is about applying psychological pressure.[36] A person might also threaten to disclose humiliating information about the victim,[37] or to disseminate damaging evidence about the victim or her family or any other information that could cause significant harm to the rights or legal interests of the victim or her family.[38]

33 Ibid.
34 S.M. Kotjoij, p. 295.
35 A.B. Borisov, p. 318.
36 S.M. Kotjoij, p. 296.
37 A.I. Tjutjaev, p. 353.
38 A.B. Borisov, p. 318.

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Consent of the Victim

If a person is treated as a commodity or traded for the purpose of exploitation, consent will not preclude criminal liability. Furthermore, force and threat thereof, i.e., circumstances that normally preclude consent, form aggravating circumstances. As consent is irrelevant for qualifying the offence, deceit is not an issue. However, the question arises whether it should not be made an aggravating circumstance such as violence or the threat thereof, in consequence affording all improper means listed by the Palermo Protocol equal weight.

The message sent by the current provision risks being that trafficking carried out by employment of violence or threat thereof is considered as more reprehensible than trafficking facilitated by means of deceit. This is interesting both with reference to the Palermo Protocol, which does not seem to differentiate between various improper means, and with regard to the prevalence in Russia of illegal agencies specializing in offering employment or marriage abroad used as fronts for trafficking.

Of course, one might argue that there is no need to adopt the view of the Palermo Protocol in this respect since all forms of trafficking including those carried out with the consent of the victim are de facto criminalized in Part 1 of Article 127.1. In that sense, the transplant is more generous than the original source. However, if one takes into account the possibility of relief from criminal responsibility, this view changes. As we have seen, relief from criminal responsibility is possible with regard to acts described by Part 1 and point (a) of Part 2 of the Article. This means that a perpetrator who has used deceit in order to facilitate the exploitation of the victim might walk free.

Age of the Victim

In a recent amendment, the wording *against a known minor* has been changed to *against a minor*. This indicates a more strict interpretation. Before the amendment, the perpetrator needed to be aware of the victim's age if the aggravating form of trafficking, i.e., committing trafficking against a known minor, was to become applicable. This meant that the offender either knew the victim personally or that he had seen the victim's identification documents or that it was clear from the appearance of the person that he was a minor.

The draft law on trafficking in human beings defines trafficking, among other things, as the giving and receiving of payment to attain control over a person who is under the control of another person. In these cases, intent to exploit is explicitly required in order to establish criminal responsibility for trafficking. This prerequisite specifically addresses the situation where parents or other legal guardians, e.g., orphanage personnel, are selling children. However, it was soon reported that the requirement of the purpose of

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exploitation led to a situation where parents or guardians selling their children were not considered guilty of trafficking as their purpose was to receive remuneration. Even though a subsequent amendment made all trade in human beings illegal, including instances where there is no purpose of exploitation, the question remains if this change also applies in this particular instance.

The giving and receiving of payments must still be carried out for the purpose of exploitation if the act is to be covered by the trafficking provision. The question is how this is to be reconciled with the main rule on buying and selling being possible to qualify as trafficking even if there is no purpose of exploitation. Generally speaking, there seems to be little knowledge on how the provision is to be applied, when exploitation is a necessary prerequisite, and when it is not.

General Intent and the Specific Purpose of Exploitation

Introduction

The Russian Criminal Code stipulates two forms of guilt as acts can be committed intentionally or negligently. Furthermore, there are two forms of intent, namely direct and indirect intent.[39] Chapter 5 of the Criminal Code deals with the concept of guilt. Article 24 sets out various forms of guilt. The provision reads as follows:

1. A person is guilty of committing an offence if he or she has committed an act intentionally or through negligence.
2. An act committed only by negligence is a crime only when it is specifically provided for in a relevant Article of the Special Part of this Code.

The concept of guilt concerns the psychological understanding or view of the perpetrator vis-à-vis the unlawful act. The doctrine on Article 24 makes reference to Article 49 of the Russian Constitution. This constitutional provision stipulates the three main rules applicable in criminal proceedings: Firstly, the presumption of innocence, i.e., a person charged with a crime shall be considered not guilty until his guilt has been proven in conformity with the procedures stipulated by the federal law and established in a court of law verdict; secondly, that the burden of proof rests on the prosecution; and thirdly, that the benefit of doubt shall be interpreted in favour of the defendant.

39 W.E. Butler, *Russian Law*, New York, Oxford University Press, 1999, p. 554.

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The reference to Article 49 of the Russian Constitution should be seen in its specific historical context. Soviet criminal law[40] did not acknowledge the principle of legality. At times, people were convicted of crimes unknown to the Soviet Criminal Code by means of analogy. It was said that rather than becoming too preoccupied with the letter of the law, the Soviet people should rely upon the revolutionary consciousness of the judges,[41] and so the doctrine on Article 24 explicitly sets out that without a specific criminal provision penalizing the relevant behaviour a person is always to be considered innocent.[42] According to Article 24, acts can be committed either intentionally or, in rarer cases, negligently. Before proceeding to a discussion on the two forms of intent, the definition of a crime will be touched upon.

The notion of a crime as well as various forms of crime (according to their severity) are set out in Chapter 3 of the Criminal Code, titled Concept of Crime and the Types of Crime. Article 14 on the concept of crime reads as follows:

1. A socially dangerous act committed with guilt and prohibited by this Code under threat of punishment shall be deemed to be a crime.
2. The commission of an act, or an inaction, although formally containing the indicia of any act provided for by this Code, but which, by reason of its insignificance, does not represent a social danger, that is, which caused no harm and has not created a threat of damage to a person, society, or the state, shall not be deemed a crime.

Firstly, Article 14 stipulates the principle of legality, as only acts prohibited by the Criminal Code can be considered crimes. Secondly, the act in question must be considered socially dangerous. This works in two different ways. On the one hand, even if an act is prohibited by the Criminal Code it might not be considered a crime if it is not seen as socially dangerous. On the other hand, a socially dangerous act is not a crime and is thus not punishable if not explicitly set out in the Criminal Code. Also, an act must be committed with guilt either intentionally or negligently.[43] These are cumulative requirements.

40 Analogy remained a formal feature of the Soviet Criminal Code until 1958. However, it continued to be used even thereafter. It was formally prohibited under Article 3 of the 1996 Criminal Code.

41 P.H. Solomon, *Soviet Criminal Justice under Stalin*, Cambridge, Cambridge University Press, 1996, p. 32.

42 A.A. Tjekalin, p. 87.

43 W.E. Butler, pp. 552–553.

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The element of guilt in deliberate crimes consists of a conscious direction of intellectual and physical efforts to achieve the planned or expected result (desire). In negligent acts, the element of guilt consist in the person not applying the necessary efforts toward the prevention of socially dangerous consequences of the act although they should have done so and were able to do so (unwillingness). This presupposes that a person is mentally capable of making free and informed decisions. Guilt is thus a person's mental relation toward a socially dangerous act. The concept of guilt can thus be further divided into two parts. One part is of a strictly intellectual nature and concerns the person's comprehension of a socially dangerous act. The other part concerns the will of the person and includes considerations of her motive and purposes.[44]

The Russian Criminal Code distinguishes between four different elements of a crime. These include the object of the crime, the objective side of the crime, the subject of the crime, and the subjective side of the crime. The interest that is considered to be threatened by a certain behaviour forms the object of the crime. The main part of the objective side of a crime is the criminal act itself, i.e., the definition of a certain crime as contained in the special part of the Criminal Code. Russian law criminalizes both positive actions as well as failing to act when required by law, so-called omissions to act.

The subject of the crime is the person who commits it, i.e., the offender. The attitude of the person who has committed the act toward the crime is referred to as the subjective side of the crime. The main element of the subjective side is the offender's guilt, i.e., either direct or indirect intent or negligence. Other elements of the subjective side also include the offender's motive and purpose. If those four parts of the crime are present, this normally results in criminal responsibility and subsequent punishment. This is true under the condition that there are no circumstances that remove the social dangerousness of the act. This suggests that in normal cases social dangerousness is present in criminalized acts if there are no special circumstances that imply otherwise. Self-defence, force majeure, and necessity are mentioned as the most common examples that are said to remove social dangerousness from forbidden acts.[45]

As has already been mentioned, in cases of trafficking there needs to be general intent. The perpetrator is to know the social dangerousness of trafficking and actively wish to commit that crime. All parts of the trafficking provision (except the general rule on the buying/selling of a person) also contain an

44 See more in V.N. Kudrjavtjev, *Ugolovnoe Pravo. Osobennaja chast*, Moskva, Jurist, 2006, p. 52 f.

45 F.J.M. Feldbrugge et al. (eds.), *Encyclopedia of Soviet Law*, second revised edition, Dordrecht, Martinus Nijhoff Publishers, 1985, p. 218.

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ulterior intent requirement as the acts of the perpetrator must be carried out for the specific purpose of exploitation. This requirement is an integral prerequisite of the trafficking provision. Concerning some of the especially aggravating circumstances contained in Part 3 of Article 127.1, negligence is enough to invoke criminal responsibility for this specific outcome, i.e., the perpetrator might be guilty of negligently causing death, injury, or another serious consequences to the victim.[46] Below, various forms of guilt will be set out in more detail.

Direct Intent and Indirect Intent

Article 25 states the rule on intentional acts. The provision reads as follows:

1. A crime committed intentionally is an act committed with direct or indirect intent.
2. A crime is considered committed with direct intent if the person is aware of the social danger of his or her actions (inaction), foresaw the possibility or inevitability of the ensuing of socially dangerous consequences, wishing the ensuing thereof.
3. A crime is considered committed with indirect intent if the person is aware of the social danger of his or her actions (inaction), foresaw the possibility of the ensuing of socially dangerous consequences, did not wish them, but consciously permitted those consequences or was indifferent to them.

As we have already seen, there are two main forms of intent, i.e., direct and indirect intent. Intent is covered by the intellectual act, namely a person's understanding of an unlawful act as well as of her own actions and their consequences, and by that person's will. Certain unlawful acts such as rape allow only direct intent. In these cases, the person must understand the meaning of the act (intellectually) and desire its commission (will).

The crime is committed with direct intent if the person realized the social danger of the actions (failure to act), expected the possibility or inevitability of socially dangerous consequences, and wished for them to come to pass. Direct intent thus has three components: 1) comprehension by the person of the social dangerousness of the act (failure to act); 2) a prediction of or understanding of the possibility of socially dangerous consequences; and 3) desire for these consequences to come to pass.[47]

46 See more on this in the section on Article 127.1.

47 A.I. Tjutjaev, p. 54.

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The first two characteristics constitute the intellectual element of intent while the third concerns the element of will. Comprehension means understanding of the actual meaning and social value of an act as well as the relationship of cause and effect between the action (failure to act) and its consequences. For example, a thief must be aware of the fact that he is illegally entering another person's apartment to steal from her. He must understand the act and its consequences as well as actively wish for it to come to pass.

In instances of indirect intent, the person also realizes the public danger of her actions (failure to act) and expects the possibility of socially dangerous consequences, and although she does not actively wish for these consequences, she is indifferent to them.

A person acting with direct intent purposefully directs her will toward the achievement of the conceived result while a person acting with indirect intent expects the real possibility of socially dangerous consequences but either regards them indifferently or does not per se desire them, instead considering them possible for the sake of the achievement of other aims. For example, when setting a residential building on fire for the sake of the destruction of property, we should also acknowledge the risk of people getting seriously hurt. Even if not desired it is a plausible outcome.[48] In doctrine, intent is often further divided into premeditated and sudden intent. Sudden intent in turn can be definitive or alternative. You can strike a blow to a person's head and cause death. If death was your desire, then your sudden intent was definitive. If you, however, see death as one of several alternative results, your intent is alternative.

Negligence and Thoughtlessness

With regard to both direct and indirect intent, the will of the perpetrator forms a central feature as the perpetrator either wishes for certain consequences or considers them possible but is indifferent to them. This can be compared to the two forms of negligence existent in Russian criminal law where an element of will is not present. These forms of guilt are set out in Article 26 which reads as follows:

> A crime committed through negligence is an act committed through thoughtlessness or carelessness.

1. A crime is considered committed through thoughtlessness if the person had foreseen the possibility of the ensuing of socially dangerous consequences

48 A.B. Borisov, p. 32.

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of his or her actions (or inaction) but without sufficient grounds presumptuously counted on the prevention of these consequences.

2. A crime is considered committed through carelessness if the person did not foresee the possibility of the ensuing of socially dangerous consequences of his or her actions (inactions) but when, with necessary attentiveness and prudence, these consequences should and could have been foreseen.

The first form of negligence is termed *thoughtlessness*. It applies in situations where the perpetrator foresees the possibility of socially dangerous consequences of his action or inaction but without sufficient reason counts on the prevention of these circumstances.[49]

The intellectual element of thoughtlessness consists of a prediction and understanding by the person of the possibility of dangerous consequences ensuing as a result of her actions or failure to act. The person wishes that these consequences will not ensue and without sufficient reason calculates on their prevention. In other words, the person either hopes that the consequences will not ensue or she incorrectly estimates the actual circumstances of her actions or failure to act. The person might, e.g., misunderstand external conditions and their influence on her actions or miscalculate the actions of other persons, etc.

The prediction in the case of thoughtlessness has an abstract character. The accused person sees the abstract possibility of socially dangerous consequences. The person understands that her actions or failure to act can have socially dangerous consequences, but she cannot picture them concretely and ventures that in her case no bad consequences will ensue.

The other form of negligence is seen from a more objective perspective, i.e., what a normal person under normal circumstances should have had foreseen.[50] In cases of thoughtlessness, on the one hand, the person expects the possibility of socially dangerous consequences but without sufficient reason counts on their prevention.

Carelessness, on the other hand, is characterized by the person not expecting the possibility of socially dangerous consequences although he should have done so and is capable of doing so. The person does not show the necessary attentiveness and foresight to make necessary actions or to refrain from them in order to prevent socially dangerous consequences. There are no acts of behaviour directed toward the prevention of consequences.[51]

49 V.I. Radtjenko, p. 31.

50 W.E. Butler, p. 554.

51 V.I. Radtjenko, p. 32.

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Carelessness is characterized by two signs. These are negative and positive signs. A negative sign means the absence of comprehension of the public dangerousness of one's act and not foreseeing the criminal consequences. The positive sign consists of the fact that the accused person should and could show necessary attentiveness and foresight and thus expect the socially dangerous consequences. The positive sign of negligence is established by means of two criteria: objective and subjective. The objective criterion means that the person should normally have expected socially dangerous consequences of his actions or failure to act. The question is if the person has displayed proper attentiveness and foresight. Here, the given obligation can follow as a result of law, the person's profession, or other normative acts or specific rules that the person is meant to obey, etc. On the subjective level, consideration is taken to the specific person in regard to, e.g., her level of development, the specific situation, etc., i.e., an attempt to answer what the person could have expected is made.

Another way of convicting someone of trafficking where there is no purpose of exploitation might be through the rules on criminal complicity. Below, these rules will be discussed in some detail.

Participation

Criminal Participation – Introduction and General Structure

Chapter 7 of the Criminal Code stipulates the provisions on criminal complicity. Article 32 sets out the main rule on complicity in a crime. The provision reads as follows:

> The intentional joint participation of two or more persons in the commission of a deliberate crime shall be deemed to be complicity in a crime.

The concept of complicity contains four basic traits, two objective and two subjective. The two objective traits are the participation of *two or more persons* in a crime and their actual *cooperation*. The two subjective characteristics include *intentional participation* in a *deliberate crime*. Firstly, the two or more persons must be of a certain age and otherwise mentally stable so that they can be subject to criminal responsibility. Secondly, there has to be functional communication between the accomplices and their respective acts of participation. They are to promote (help) each other with the execution of the crime.

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The harmful consequences of the relevant crime are, furthermore, to be connected by a causal relationship with the acts of the accomplices.[52]

In consequence, absence of functional communication between the accomplices excludes partnership and thus criminal complicity. For example, a person who is present at a robbery but who does not make any actions directed toward the stealing of property can be viewed as an accomplice only if she somehow helps the principal perpetrator with the commission of the crime, e.g., by acting in a way that strengthens the threats of the perpetrator. Deliberate participation implies not only comprehension by the person of the fact of participation in a crime and a strong will for the crime to come to pass but also assumes the minimum bilateral subjective communication of accomplices as well as their mutual comprehension that the crime is committed by them in partnership, i.e., that criminal complicity has taken place.[53]

The two subjective characteristic of criminal complicity are intentional acts in deliberate crimes. The intent of the accomplices must cover the basic circumstances characterizing a crime. There must be a comprehension of the social danger of one's own actions as well as those of the principal offender and possibly of other accomplices. Intent of the accomplices must cover both the unlawful act and its consequences. Direct intent is required.[54]

Types of Accomplices

Article 33 lists various types of accomplices to a crime. The provision reads as follows:

1. In addition to the perpetrator, organizers, instigators, and accessories shall be deemed participants in a crime.
2. A person who has actually committed a crime or who directly participated in its commission together with other persons (co-perpetrators), and also a person who has committed a crime by using other persons who are not subject to criminal responsibility by reason of age, insanity, or other circumstances provided for by this Code, shall be deemed to be a perpetrator.
3. A person who has organized the commission of a crime or has directed its commission, and also a person who has created an organized group or a criminal community (criminal organization) or has guided them, shall be deemed an organizer.

52 A.I. Tjutjaev, p. 85.

53 V.I. Radtjenko, p. 46 f.

54 A.B. Borisov, p. 41 f.

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4. A person who has abetted another person in committing a crime by persuasion, bribery, threat, or by any other method shall be deemed an instigator.
5. A person who has assisted in the commission of a crime by advice, instructions on committing the crime, or by removal of obstacles to it, and also a person who has promised beforehand to conceal the criminal means and instruments of commission of the crime, traces of the crime, or objects obtained criminally, and equally a person who has promised beforehand to acquire such objects, shall be deemed to be an accessory.

The main form of carrying out a crime is general perpetration. This means that a single person is responsible for carrying out, wholly or partially, the objective elements of the crime. There are three forms of general perpetration. Firstly, there is the perpetrator, i.e., the person who has carried out the unlawful act on his own. Secondly, there is the concept of co-perpetration, which pertains to a situation where two or several participants have committed the crime jointly. Thirdly, perpetration is also at hand in cases where a person has used another person (or other persons) in the commission of the crime, if these persons, according to specific provisions of the Criminal Code, cannot be subject to criminal responsibility.[55] This might regard minors, mentally ill persons, etc.

In addition, there are other forms of participation in a crime. These include organizing and instigating as well as acting as an accessory. There are various ways of organizing a crime. One way is to create a criminal group. Another manner in which one can organize a crime is to instruct an already existent criminal organization to carry out the deed.

The concept of instigation is quite broad, ranging from actions aiming at persuading a person to carry out an unlawful act to bribery and actual threats. Instigation is an active act, the aim of which is to compel another person to commit an unlawful act. Approvals of such already existent resolve therefore do not qualify as acts of instigation. The basic difference between acting as an organizer and an instigator consists in the circumstance that the latter is not responsible for planning or administering the preparation or execution of the crime.

Finally, a person can be seen as an accessory if she has provided advice, instructions or some form of practical aid. The aid can be either of a physical or of a psychological nature. The physical aid can be divided into material help and actual physical assistance. The first form of aid includes providing means that make the facilitation of the crime possible, such as weapons or means of

55 Ibid, p. 42.

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transportation, while the second concerns situations where the accomplice directly physically assists in the commission of the crime. This applies in situations where the accomplice, e.g., switches off an alarm system.[56]

Psychological advice pertains to situations where the accessory, e.g., supplies information of importance for a successful commission of the crime in question. A person can be found guilty of having acted as an accessory both by virtue of direct actions and by omissions to act. The latter situation pertains to persons acting in their formal capacities such as guards at banks, soldiers at their posts, etc.[57] Organizing, instigation, and acting as an accessory can only be committed with direct intent as the accomplice desires the crime to come to pass and acts in accordance with that wish.

Responsibility of the Accomplices

Article 34 stipulates how the responsibility of possible accomplices to a crime should be determined. The provision reads as follows:

1. The responsibility of accomplices in a crime shall be determined by the character and the degree of the actual participation of each of them in the commission of the crime.
2. Co-perpetrators shall be answerable under the relevant Article of the Special Part of this Code for a crime committed by them jointly, without reference to Article 33 of this Code.
3. The criminal responsibility of an organizer, instigator, and accessory shall ensue under the Article that provides for punishment for the crime committed, with reference to Article 33 of this Code, except for in cases when they simultaneously were co-perpetrators of the crime.
4. A person who is not a participant in a crime specially indicated in the relevant Article of the Special Part of this Code, and who has taken part in the commission of the crime as stipulated by this Article, shall bear criminal responsibility for the given offence as its organizer, instigator, or accessory.
5. If the perpetrator of a crime fails to carry out this crime owing to circumstances beyond his control, then the rest of the co-perpetrators shall bear criminal responsibility for preparations of a crime or for attempted crime. A person who has not managed to abet other persons in committing a crime owing to circumstances beyond his control shall also bear criminal responsibility for preparations of the crime.

56 A.A. Tjekalin, p. 110.

57 Ibid.

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In cases where the crime has been committed jointly, all participants are viewed as co-perpetrators. This is the main rule, as expressed in Article 33, Part 2. These persons answer according to the relevant criminal provisions. If a person (or persons) cannot be viewed as co-perpetrators, criminal responsibility may instead be based on Article 33. Furthermore, each accomplice is to be judged according to her own intent. This is expressed in Article 36 that reads as follows:

> The commission of a crime that is not embraced by the intent of other participants shall be deemed to be an excess of the perpetrator. Other participants to the crime shall not be subject to criminal responsibility for the excess of the perpetrator.

If the perpetrator commits excess perpetration, the accomplices will normally not be held answerable for that. This means that if the accomplice, e.g., urges the perpetrator to commit theft and the perpetrator commits robbery, the accomplice will answer only for theft, i.e., the act covered by his intent.

This corresponds to the principle of guilt as defined by Article 5 of the Criminal Code. According to Article 5, a person is criminally liable only for those socially dangerous acts (or omissions to act) and their socially dangerous consequences for which her guilt can be established.

Previous Provisions

Introduction

Before the present articles on trafficking and the use of slave labour entered into force in 2003, other criminal provisions were applied in trafficking cases. These provisions pertain primarily to crimes against the personal liberty of the individual and include Article 126 on kidnapping and Article 127 on unlawful deprivation of freedom. Before the trafficking provisions entered into force, there was also a specific provision criminalizing the trade in children. It was contained in Article 152 of the Criminal Code and was removed in 2003.

Other provisions of interest are contained in the Articles on procuring, namely Article 240 on involving another person in prostitution and Article 241 on the organization of prostitution. As practitioners are uncertain as to how the new trafficking provisions are to be applied, they often continue to apply the rules on procuring. The provisions on various sexual crimes are also relevant. These include Article 131 on rape, Article 132 on sexual assault, Article 133 on sexual coercion and Article 134 on sexual intercourse and other sexual acts with a person under the age of sixteen.

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Kidnapping

The provisions criminalizing crimes against the personal freedom of the individual are listed in Chapter 17 on Crimes against the freedom, honour and dignity of the individual. Article 126 criminalizes kidnapping and reads as follows:

1 Kidnapping –
is punishable by hard labour for a maximum period of five years or imprisonment for the same period.

2 The same act committed:
a) by a group of persons by prior conspiracy;
b) no longer valid.
c) with the use of violence dangerous to life or health, or the threat of such violence;
d) with the use of weapons or objects used as weapons;
e) against a person known to be a minor;
f) against a woman known to the perpetrator to be pregnant;
g) against two or more persons;
h) out of selfish motives, –
is punishable by imprisonment for a period of five to twelve years with possible restraint of liberty for a maximum period of two years.

3 The actions envisaged by Part 1 or 2 of this Article, if:
a) committed by an organized group;
b) no longer valid.
c) having by negligence caused the death of the victim or other grave consequences to the victim –
are punishable by imprisonment for a period of six to fifteen years with a possible restraint of liberty for a maximum period of two years.

Official note: A person, who voluntarily releases the victim, is exempt from criminal responsibility if their actions do not contain another crime.

The doctrine concerning Article 126 makes reference to Article 22 of the Russian Constitution. This constitutional article safeguards the individual's freedom of movement as well as her rights to freely decide where to reside. It also protects people's right to leave Russia and Russian citizens' right to return to Russia.[58] The motive behind Article 126, or the *object* of the provision, is to

58 This constitutional provision should be seen in its specific historical context. During communist rule, people were forbidden to freely decide their place of residence as well as to leave the USSR.

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protect the freedom of the individual, i.e., her right to make autonomous decisions and to be able to decide where to reside.[59]

According to doctrine, the *objective side* of the crime of kidnapping contains two elements.[60] This is, however, impossible to see just by means of studying the provision. The first part relates to the capturing and moving of a person to a different location while the second part concerns keeping that person prisoner there.[61] Capturing a person implies taking control over her and restricting her freedom of movement. Other elements of the objective side include moving a person from their place of temporary or permanent residence against their will and keeping him in another location against their desire.[62] Kidnapping can be carried out by means of violence or without it. A person can, e.g., be deceived. Kidnapping can be undertaken openly or in secret.

The period of unlawful confinement does not matter for the qualification of the crime. There have been cases lasting only a few hours and instances where the confinement lasted for several months. The crime is consummated after the perpetrator captures the victim and moves him to another location. If the actions of the perpetrator are prevented at the stage of the capture of the victim, the actions are to be qualified according to Article 30, Part 3 (attempt to commit a crime) and the relevant part of Article 126.[63]

Article 126 on kidnapping should be distinguished from Article 127 on the illegal deprivation of freedom. The difference is that Article 127 criminalizes instances where a person is illegally confined at a location where he first voluntarily chose to reside. The doctrine also notes that the offence of kidnapping is to be distinguished from the crime of taking hostages as set out in Article 206. In the latter situation, the perpetrator makes the release of hostages optional on him getting a free passage, which is not the case in instances of kidnapping.[64]

The *subjective element* of the crime is characterized by direct intent. The motives of the perpetrator are relevant for qualification purposes only in cases where they regard the self-interest of the perpetrator. The *subject* of the crime is any sane person fourteen years of age and older.

Part 2 of Article 126 lists aggravating circumstances. The first aggravating circumstance is that the act has been committed by a group of persons by means

59 A.I. Tjutjaev, p. 341.
60 Ibid.
61 A.B. Borisov, p. 304.
62 Ibid.
63 A.I. Tjutjaev, 341.
64 Ibid.

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of prior agreement. In order to determine that a pre-agreement has taken place, it is necessary that the participants have acted in advance by agreeing on the commission of the crime, subsequently acting as co-perpetrators.[65] If the roles are distributed in such a way that the parties are also among the organizers, instigators or accomplices, their actions must be qualified according to Article 33 on criminal complicity and relevant parts of Article 126.

Using violence that is dangerous to the life or health of the victim or threatening to use this type of force form other aggravating circumstances. The violence can be of both a physical and psychological nature. What is crucial is that it inflicts harm (light or moderate) on the health of the victim or poses a real danger to his life or health. The doctrine further states that the threat must be real. The threat can be made orally, in writing, or by demonstrative actions. It can be made directly against the victim or against her family.[66] Another aggravating circumstance concerns the use of weapons, including self-made weapons. Weapons can be chosen beforehand or spontaneously at the site of the crime.

The kidnapping of a known minor also forms a more severe form of the crime. In order for criminal responsibility for this aggravated form of kidnapping to become relevant, the perpetrator must be consciously or explicitly aware of the victim's age, i.e., that the person in under eighteen years of age. The same applies in cases where the perpetrator commits the offence against a woman known to be pregnant. The doctrine states that there are obviously some typical signs that distinguish a pregnant female from non-pregnant women, but other forms of awareness on behalf of the perpetrator are also possible.[67] An aggravated form of kidnapping is also at hand when the perpetrator has committed the crime against two or several persons or when she has committed the crime due to motives of self-interest. The perpetrator can either abduct all persons simultaneously or act with premeditated purpose on repeated occasions.

Kidnapping for motives of self-interest includes instances where people are kidnapped to extract material benefits (e.g., to terminate a debt or to extract payment for the release of the victim) for the benefit of perpetrator or others.

Severe aggravating circumstances, set out in Part 3 of Article 126, involve kidnapping by an organized criminal group as well as negligently causing the death of the victim or severe harm to his health. Although there needs to be direct intent to commit abduction, in relation to the aggravating circumstance

65 S.M. Kotjoij, p. 284.

66 A.A. Tjekalin, p. 376.

67 Ibid, p. 377.

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of causing the death of or serious injury to the victim negligence is enough to establish criminal responsibility.[68] Other serious consequences, according to Article 126, Part 3 include the victim committing suicide or developing a mental illness as a result of the trauma incurred during the kidnapping.[69]

According to the Official Note to Article 126, a person who voluntarily releases the victim might be exempted from criminal responsibility if their actions do not contain another crime. Liberation of the victim in the context of this provision means that the perpetrator is to release the victim at a point in time where he is able to hold her captive. The motives for releasing the victim can be arbitrary, ranging from fear of criminal repercussions to compassion. However, if the perpetrator acts as a result of actions of the law enforcement, the release of the victim will not count as voluntary.[70] Moreover, if the perpetrator is to be exempted from criminal responsibility, his actions cannot contain another crime. If he in the course of his actions, e.g., injures the victim or acquires weapons, he will answer for these offences.

Unlawful Deprivation of Liberty

Article 127 of the Criminal Code establishes criminal liability for unlawful deprivation of liberty that is not connected to prior abduction. As has been mentioned above, the difference from abduction is that the victim chooses the location freely but is then not allowed to leave.[71] Article 127 reads as follows:

1. Unlawful deprivation of liberty of a human being that is not connected to his or her abduction –
   is punishable by restraint of liberty for a maximum period of two years, or hard labour for a maximum period of two years, or arrest for a period of three to six months, or imprisonment for a maximum period of two years.
2. The same action committed:
   a) by a group of persons by prior conspiracy;
   b) no longer in force.

68 A.I. Tjutjaev, p. 343.

69 V.V. Koryakovtsev, K.V. Pitulko, *Ugolovnoe pravo. Osobennaja chast*, 2-e izdanie, Moskva, Lidijer, 2010, p. 34.

70 V.I. Radtjenko, p. 202.

71 Ibid. See also a decision from the Supreme Court where the distinction between kidnapping and illegal deprivation of freedom was further elaborated upon. Postanovlenie Presidijuma Verchovnovo Suda RF ot 3 oktijabra 2007, *No. 304-P07//SPS*, as cited in S.M. Kotjoij, p. 287.

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c) with the use of violence dangerous to life or health;
d) with the use of weapons or objects used as weapons;
e) regarding a person known to be a minor;
f) regarding a woman known to the perpetrator to be pregnant;
g) regarding two or more persons –
is punishable by hard labour for a maximum period of five years or imprisonment for a period of three to five years.

3 Actions envisaged in Part 1 or 2 of this Article, if committed by an organized group or having by negligence resulted in the death of the victim or other grave consequences to the victim
– are punishable by imprisonment for a period of four to eight years.

The *object* of the crime is personal freedom while the health of the individual forms a facultative object. The *objective element* of the crime entails keeping someone prisoner against his will, i.e., the victim is to be prevented to move as he desires. He can, e.g., be locked in a room or handcuffed to furniture. He can also be threatened to stay put by means of the use of weapons.[72]

The doctrine explains unlawful deprivation of liberty by means of listing lawful forms of detention. One of the forms mentioned includes administrative detention as set out in Article 27.3 of the Administrative Code. There is also involuntary admission to a psychiatric institution. This procedure is detailed in Article 29 of the Federal Law on psychiatric care and guarantees of citizens' rights in its provision. Finally, there is criminal procedural compulsion as set out in Articles 91 and 107–109 of the Criminal Procedural Code and criminal penalties as stated in Articles 44–59 of the Criminal Code. Individuals have a very limited right to restrict the liberty of their fellow citizens. This can only be done in cases of self-defence or when the other person is in the midst of committing a crime or in a state of emergency in accordance with Articles 37–39 of the Criminal Code. Any other detention forms an unlawful deprivation of another person's freedom of movement.[73]

The crime of unlawful deprivation of liberty is consummated at the moment of the victim becoming aware of the situation, i.e., the fact that his liberty has been restricted. In other words, the crime is consummated when the victim cannot freely decide where to reside.[74] In cases where the victim due to circumstances such as old age, infancy or mental disorder is unable to properly grasp her situation, the crime is consummated from the point of the actual

72 A.B. Borisov, p. 309.
73 V.V. Koryakovtsev, K.V. Pitulko, p. 36.
74 A.I. Tjutjaev, p. 345.

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deprivation of liberty. The *subjective side* of the crime is characterized by direct intent, meaning that the perpetrator is aware that he has unlawfully imprisoned another person and that he wishes to do so. The motive of the perpetrator may be greed, revenge, promotion of the commission of another crime, bullying, etc. The offender, i.e., *subject* of the crime, may be any sane individual sixteen years and older.[75]

Aggravating circumstances for unlawful deprivation of freedom are similar to those in instances of kidnapping as deprivation of liberty forms an element of kidnapping.

Procuring

There are two separate provisions dealing with procuring. Article 240 criminalizes making someone engage in or remain in prostitution while Article 241 deals with organizing of prostitution. Article 240 reads as follows:

1. Making a person engage in prostitution, or forcing them to continue with the practice –
   is punishable by a the amount of up to 200,000 rubles or of the salary or other income of the convicted person for a period of eighteen months, or restraint of liberty for a maximum period of three years, or hard labour for a maximum period of three years, or imprisonment for the same period.
2. The same acts committed:
   a) with the use of violence or the threat thereof;
   b) with the movement of the victim across the state borders of the Russian Federation or by illegally keeping him or her abroad;
   c) by a group of persons or by prior conspiracy –
      is punishable by imprisonment for a maximum period of six years with a possible restraint of liberty for a maximum period of two years.
3. Acts envisaged by Part 1 or 2 of this Article if committed by an organized criminal group or against a minor –
   are punishable by imprisonment from a period of three to eight years with possible disqualification to hold certain posts or practice certain activities for a maximum period of fifteen years and with possible restraint of liberty for a maximum period of two years.

The *object* of the crime is said to be public morality.[76] The health of the individual as well as the normal physical and moral development of the minor are

75 Ibid.
76 S.M. Kotjoij, p. 648.

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but facultative objects. This seems somewhat strange since the provision criminalizes making someone engage in or coercing someone to continue with the practice of prostitution, so the main object should be the personal integrity and sexual freedom of the individual. Moreover, it is important to note that providing sexual services carries administrative liability in instances where the prostitute is sixteen years old or older.

The *objective side* of the crime is characterized by two alternative actions. A person might either involve someone in the practice of prostitution or coerce someone already working as a prostitute to continue with the practice. The concept of prostitution is understood as repeated sexual contacts with casual sex partners for the purpose of receiving financial remuneration or other benefits.[77] The main form of the crime involves making someone engage in or continue with the practice of prostitution by means of applying psychological pressure. The concept does not include violence or the threat thereof.[78] Coercion means a requirement for the victim to continue providing sexual services by means of applying mental pressure. The latter includes threats. These can pertain to the confiscation or destruction of property of the victim or distribution of data aimed at dishonouring the victim or her relatives or other information the announcement of which can do essential harm to the rights and legitimate interests of the victim or her relatives.

The *subjective side* of the offence is formed only be acts committed intentionally, usually for selfish motives. The *subject* of the crime is any sane person sixteen years of age or older.

Aggravated forms of the act include making the person prostitute herself by means of applying violence or by the threat thereof. Other forms include moving a person across Russian borders or illegally keeping her abroad. A person can be moved across borders by means of threats or violence. The prerequisite of illegally keeping the victim abroad means that the victim is either prevented from moving freely in the territory of the Russian Federation or from taking contact with Russian diplomatic institutions abroad.[79]

If the act is committed by a group of persons or by prior conspiracy, this too is considered an aggravated form of the crime. The most serious form of the crime, however, is committed either against a minor or by an organized criminal group. This indicates that organized forms of procuring are seen as more reprehensible than those carried out by single individuals. In instances of underage victims, the perpetrator must be aware of the age of the victim.

77 V.I. Radtjenko, p. 436.
78 S.M. Kotjoij, p. 648.
79 A.B. Borisov, p. 730.

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She can, e.g., approach a person known to be a minor and try to make him engage in prostitution by telling stories of the financial rewards awaiting him if he agrees to prostitute himself.[80] The crime is commissioned at the point in time at which the perpetrator exerts pressure on the victim in order for him to engage in or continue with prostitution. It does not matter whether this pressure actually leads to the providing of prostitution services or not.[81] The question is how the aggravated form of procuring is to be applied in relation to the trafficking provision.

Article 241 criminalizes various forms of the organizing of prostitution and reads as follows:

1. Acts aimed at organizing the prostitution of other persons, as well as maintaining premises for prostitution or the systematic provision of venues for prostitution –
   is punishable by a fine of the amount of 100,000 to 500,000 rubles or the salary or other income of the convicted person for a period of one to three years, or hard labour for a maximum period of five years, or imprisonment for the same period.
2. The same acts committed:
   a) by a person using his official position;
   b) with the use of violence or the threat thereof;
   c) in order to organize prostitution of minors –
      is punishable by imprisonment for a maximum period of six years with possible disqualification to hold certain posts or practice certain activities for a maximum period of fifteen years and with possible restraint of liberty for a maximum period of two years.
3. Acts envisaged by Part 1 or 2 of this Article, committed in order to organize prostitution of persons under the age of fourteen –
   are punishable by imprisonment for a period of three to ten years with possible disqualification to hold certain posts or practice certain activities for a maximum period of fifteen years and with possible restraint of liberty for a period of one to two years.

Again, public safety and order as well as the health and morality of the population form the main *objects* of the crime while health protection of the individual forms a facultative object.[82]

80 S.M. Kotjoij, p. 649.
81 V.I. Radtjenko, p. 436.
82 A.B. Borisov, p. 732.

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The *objective* part of the crime can take on three different forms. Firstly, it concerns actions directed at the organization of prostitution services by other persons. Secondly, it can be about the creation and maintenance of brothels. Thirdly, it also pertains to the regular granting of premises for providing prostitution services.[83]

The organizing or facilitating of prostitution of others means recruiting prostitutes, transferring them to brothels or clients, offering protection, i.e., measures that pertain to the sexual exploitation of others.[84]

There are two forms of actions that aim at the organizing of brothels. Firstly, there are actions that actually create the brothel such as choosing a proper venue. Secondly, one can offer an already existent brothel. Other acts include maintaining the brothel by searching for potential prostitutes and prospective buyers; purchasing various products such as alcohol; handling the brothel's finances, e.g., charging the buyers; offering brothel protection; keeping order, etc. One or several persons can be jointly responsible for organizing a brothel and their tasks may vary. If these persons act for a common purpose, their actions are to be qualified as co-perpetration under Article 241 without reference to Article 33 on criminal complicity.

The repeated granting of premises for providing sexual services means that it is necessary to establish regular granting. Single acts of granting toward a person involved in prostitution do not fall under Article 241.[85]

The organizing of prostitution of others is consummated at the point in time at which the perpetrator attempts to organize another person's prostitution. It does not matter if the person actually goes on to provide this service. The act of organizing or maintaining a brothel is consummated at the point of its establishment and irrespective of whether the purpose of its creation is fulfilled or not. The act of the regular providing of venues for prostitution services is consummated at the point in which the act becomes systematic.[86]

The *subjective* part of the crime is characterized by direct intent. The purpose of the act is to organize prostitution, maintain a brothel, or systematically provide venues where sexual services are provided.[87] The *subject* of the crime can be any sane person sixteen years of age or older.

Part 2 of the Article lists aggravating circumstances. The first such circumstance is if any of the acts envisaged in Part 1 of the provision has been

83 V.I. Radtjenko, p. 438.

84 Ibid.

85 S.M. Kotjoij, p. 650.

86 A.I. Tjutjaev, p. 707.

87 A.B. Borisov, p. 732.

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undertaken by a person abusing his official position. The prerequisite of official position is interpreted quite extensively, covering state officials, members of the local governments, servants of state and municipal authorities, as well as heads and employees of commercial and non-profit organizations.[88]

Violence or the threat thereof forms the second aggravating circumstance. The prerequisite is said to have the same interpretation as in Article 240. A third aggravating circumstance is if the act is committed against a minor, i.e., a person less than eighteen years of age. It is said that the person must obviously be a minor, either due to the perpetrator being somehow previously acquainted with the victim or as a result of objective and observable circumstances such as a youthful appearance, an ID, etc. If the person has not reached the age of fourteen, this will qualify the act as especially aggravated.[89]

Other Relevant Provisions

Introduction

Other relevant provisions include Article 154 which criminalizes illegal adoptions and Article 120 which deals with the forced removal of human organs or tissue for transplantation. The provisions on rape and other sexual offences are also of relevance.

Illegal Adoptions

The provision criminalizing illegal adoptions is contained in Article 154 of the Criminal Code and reads as follows:

1. Illegal acts committed in order to facilitate the adoption of children, place them under guardianship (ward), to have them raised in a foster family, committed repeatedly or out of selfish motives –

   are punishable by a fine of the amount of up to 40,000 rubles, or of the salary or other income of the convicted person for a period of up to three months, or by compulsory works for a maximum period of 360 hours, or correctional labour for a maximum period of one year, or arrest for a maximum period of six months.

The *object* of the crime is the interests of the family unit while the *objective side* is constituted by the unlawful facilitation of adoptions and other actions

88 A.I. Tjutjaev, p. 708.

89 S.M. Kotjoij, p. 651.

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aimed at transferring guardianship over children as well as placing them in foster families.[90] The adoption procedure is more closely defined in the Russian Civil Code. Examples of adoptions or transfers carried out in violation of the statutory provisions include adoptions where the prospective parents have been declared unfit by a court of law or previously have been stripped of their parental rights as well as situations where the parents to be due to health reasons are not considered able to perform their parental duties.[91]

In order to qualify as an illegal adoption or a similar procedure, the illegal acts must be either of a repeated nature or the perpetrator must act out of selfish motives. According to doctrine, two acts suffice in order for them to be qualified under Article 154. The acts in question might pertain to the same child (as placing a child under someone's protection and then establishing custody, e.g., are seen as two separate acts) as well as to two or several children.[92] An act carried out due to selfish considerations implies that the perpetrator has acted in order to receive remuneration. In cases where the illegal adoption amounts to trafficking in children, charges might be cumulatively made under Article 154 and Article 127.1 on trafficking in human beings.[93]

The *subjective side* of the crime is characterized by direct intent, i.e., the perpetrator must be aware that his actions are in violation of law and are for the purpose of facilitating illegal adoptions and the like, and he must desire these actions. According to some experts, any person of a certain age can be the *subject* of the crime.[94] Others indicate the person who illegally adopts or takes guardianship of a child or a person who in their professional capacity helps with the procedure as possible subjects.[95] In addition, yet still others hold that only those professionally involved in the adoption process can become guilty of the crime criminalized by Article 154.[96] There are also additional criminal provisions that are to be applied cumulatively for civil servants such as judges. Instances mentioned in the doctrine include a judge allowing an illegal adoption to take place, public servants forging documents, etc.

Forced Removal of Human Organs or Tissues for Transplantation

The provision criminalizing the forced removal of organs and tissues for the purpose of transplantation is contained in Article 120 of the Criminal Code. It reads as follows:

90 V.I. Radtjenko, p. 248.
91 A.B. Borisov, p. 407.
92 Ibid.
93 V.I. Radtjenko, p. 248.
94 S.M. Kotjoij, p. 369
95 A.I. Tjutjaev, p. 421.
96 V.I. Radtjeno, p. 249.

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1. Coercion in order to harvest human organs or tissues for transplantation, committed with violence or the threat thereof–
   is punishable by imprisonment for a maximum period of four years with possible disqualification to hold certain posts or practice certain activities for a maximum period of three years.
2. The same act committed against a person that is known to the perpetrator to be in a helpless state, or against a person who is financially or otherwise dependent on the perpetrator –
   is punishable by imprisonment for a maximum period of five years, with possible disqualification to hold certain posts or practice certain activities for a maximum period of three years.

The main *object* of the provision is to protect the individual's right to life and health.[97] The compulsion, or *objective side* of the crime, can take on two different forms. Firstly, a person (a live donor or, for instance, a relative of a diseased person) might be coerced in order to consent to organ removal. Secondly, a person can be directly coerced into such removal, meaning that organs or tissues are harvested without even trying to force consent. This can be done directly to a live donor or a diseased one. The latter can be done by, for instance, forcing a member of the hospital staff to remove the organs.

The coercion is to be carried out by means of violence or the threat thereof. Coercion must be active, deliberate, and aimed at influencing the will of the victim. It can be of both a physical and psychological nature. Examples of physical violence include assault as well as inflicting light or moderate harm upon the health of the victim. If the victim sustains an injury of severe degree, it will also be cumulatively qualified under other relevant criminal provisions.[98]

Psychological violence is exerted by means of the threat of violence, i.e. death or serious injury. Other threats, like destruction of property, do not fall under the ambit of this provision. In order for the act to qualify under Article 120, the threat must be real and the victim must truly apprehend its realization. The crime is commissioned at the point in time at which the victim as a result of the coercion either consents to having her organs or tissues removed or where these are actually removed without her permission.[99]

The *subjective element* of the crime is characterized by direct intent as well as a special purpose. The perpetrator must will the act to come to pass while

97 S.M. Kotjoij, p. 274.
98 Ibid, p. 275.
99 A.I. Tjutjaev, p. 327.

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being aware of the social dangerousness of his actions. The special purpose is said to be to harvest organs or tissues for medical transplantation contrary to law. It does not matter if this is done to preserve life or to perform plastic surgery. The *subject* of the crime can be any sane person sixteen years of age and older.[100]

Aggravated forms of the offence include abusing the victim's state of helplessness or her being dependent, financially or otherwise, upon the perpetrator.[101] In order to qualify as an aggravated form of forced organ removal, the act must be carried out against a person *known* to be in a helpless state. In some cases, Article 120 and Article 127.1 on trafficking in human beings are cumulatively applicable.

Sexual Crimes

Introduction

The reason for including sexual crimes in the analysis is that they not only illustrate certain prejudices against women but also an instrumental view of law and the individual. Here, parallels to trafficking might be drawn. In addition, they show the prevalent discrimination against homosexuals. As many victims of trafficking in Russia are young boys selling sex to men, this might create (and reportedly has created) negative circumstances for these victims.

Rape

The provision criminalizing rape is contained in Article 131 of the Criminal Code. It reads as follows:

1. Rape, i.e., sexual intercourse carried out by means of violence or the threat thereof against the (female) victim or other persons, or by using the helpless state of the (female) victim –
   is punishable by imprisonment for a period of three to six years.
2. Rape, if:
   a) committed by a group of persons, group of persons by prior conspiracy or by an organized group;
   b) coupled with the threat of death or serious physical harm, as well as when committed with extreme cruelty to the (female) victim or other persons;
   c) resulting in the (female) victim getting infected with venereal disease –

100 Ibid.

101 For an analysis of these prerequisites, see the sections on sexual crimes.

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is punishable by imprisonment for a period of four to ten years with possible restraint of liberty for a maximum period of two years.

3 Rape:
a) against a (female) minor;
b) having negligently caused serious bodily injury to the victim, the infection with HIV or other grave consequences, –
is punishable with imprisonment for a period of eight to fifteen years, with possible disqualification to hold certain posts or practice certain activities for a maximum period of twenty years and with restraint of liberty for a maximum period of two years.

4 Rape:
a) having negligently caused the death of the victim;
b) against a (female) victim that has not attained the age of fourteen, –
is punishable by imprisonment for a period of twelve to twenty years, with possible disqualification to hold certain posts or practice certain activities for a maximum period of twenty years and with restraint of liberty for a maximum period of two years.

5 The act provided for in Point (b) of Part 4 of this Article, if committed by a person previously convicted for a crime against the sexual integrity of a minor –
is punishable with imprisonment for a period of fifteen to twenty years, with disqualification to hold certain posts or practice certain activities for a maximum period of twenty years or with life imprisonment.

Official Note: The offences provided for by Point (b) of Part 4 of this Article, and Point (b) of Part 4 of Article 132 of this Code shall also include acts within the elements of offences under Part 3–5 of Article 134 and Part 2–4 of Article 135 of this Code, committed against a person who has not attained the age of twelve, because such a person due to their age is in a helpless condition, i.e., cannot understand the nature and significance of their own actions.

The *object* of the crime of rape is the sexual freedom of *women*,[102] i.e., each woman's right to freely choose her sexual partner and to decline to engage in sexual relations. In the case of underage victims, the object is said to be the sexual inviolability of the female minor, i.e., the prohibition to engage in sexual relations with a person under the age of sixteen.[103] An additional object of the

102 Only a man can be the principal perpetrator and only a woman can be the victim. 'Homosexual and lesbian sexual crimes' are dealt with in Article 132 on sexual coercion.

103 A.B. Borisov, p. 324.

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crime is to safeguard the health and life of the victim. This is a consequence of the fact that for the suppression of the resistance of the victim the perpetrator might use physical force, thus endangering the life and health of the victim.

Rape is considered possible *only* in cases of forced *sexual intercourse* involving a *man assaulting a woman*. This is explicitly expressed in the provision, which refers to sexual intercourse, female victims, and male perpetrators (the word *victim* is in its feminine form while the word *perpetrator* is in its masculine form). This opinion is also held by the Russian Supreme Court. In a Resolution from 2004, the court stated that sexual intercourse within the ambit of the provision on rape means a 'natural' sexual act between *man and woman*, i.e., vaginal penetration.[104]

Rape is considered possible not only with regard to strangers but also relatives, wives and the like.[105] The *objective side* of the crime is specified as forced sexual intercourse with the application of violence or the threat thereof to the victim or to other persons or by means of abusing the victim's helpless position.[106]

The doctrine on Article 131 refers to violence as a force of both a physical and psychological nature. Physical violence can be carried out by means of circumventing the woman's freedom of movement, e.g., by tying her up, by means of assault, or by other forms of inflicting pain that are undertaken with the purpose of overriding her resistance. The violence does not need to be of external character. It can also be applied internally. This means that the woman might be forced to consume narcotics, psychotropic or toxic substances, etc. If the violence results in minor injuries or injuries of medium severity to the health of the victim, it will be qualified only under Article 131. If, however, the injuries sustained by the victim are of a serious nature, the act will be cumulatively qualified under Articles 131 and 111 (intentional causing of grave harm to health).[107]

Psychological violence is exerted by means of influencing the decision making of the victim. This is done by employing the threat of violence, the aim of which is to suppress the resistance of the victim. The threat of violence can be made against the victim or in regard to other people whose safety is of

104 Item 1 of the Resolution of the Plenum of the Supreme Court of the Russian Federation from 15 June 2004, No. 11 "About Court Practice on the Crimes Provided by Articles 131 and 132 of the Criminal Code of the Russian Federation", Bulletin of the Supreme Court of the Russian Federation, No. 8, 2004.

105 V.V. Koryakovtsev, K.V. Pitulko, p. 41.

106 S.M. Kotjoij, p. 306.

107 S.M. Kotjoij, p. 307.

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importance to the victim. It must be clear from the actions of the perpetrator that he plans to use violence against the victim or other persons if the victim does not comply with his wishes. If the threat is expressed in terms of death or serious physical harm, these actions qualify as aggravating circumstances according to Point (b) Part 2 of Article 131. The threat referred to in Point (b), Part 2 of Article 131 must be made in terms of immediate violence of severe nature that is meant to cause death or serious injury to the victim, members of her family or other people (including persons unknown to the victim). The victim is to truly apprehend the threat with the result of being paralyzed by it and therefore unable to show any resistance. It does, however, not matter whether the perpetrator truly intended to carry out the threat.[108]

Only violence and threats thereof used to force a woman to have sexual intercourse may qualify an act as rape. If a woman is, e.g., promised marriage or payment in exchange for intercourse, Article 131 will not apply.[109]

Rape can also be committed by means of abusing a helpless state of the victim. The woman might be in a helpless state due to different circumstances of both internal and external nature. She might be suffering from mental disturbance, have certain physical defects or other similar afflictions, or be in an unconscious state. The latter state can be induced by an illness such as diabetes or epilepsy, but it can also be brought on by outside circumstances, e.g., stress, exposure to heat, etc. In cases of intoxication by alcohol, narcotics, or other such substances, a helpless state is only at hand in cases where the woman is truly unable to show any resistance to the perpetrator. It does, however, not matter for the establishment of criminal responsibility if the woman was placed in this state by the perpetrator, i.e., that he supplied the alcohol or narcotics, or if she was in this state independent of the actions of the perpetrator.[110]

A woman might also be in a helpless state due to her age. She might be a juvenile or elderly and therefore either unfit to understand the nature and meaning of the act or unable to defend herself from the perpetrator. The prerequisite is at hand in cases where the victim is objectively considered unable to comprehend the situation or offer resistance and where the perpetrator is aware of this condition.[111] Young age alone does not mean that the victim is in a helpless state. To be able to establish that the victim was in a helpless state, it is necessary not only to take into consideration the age of the victim but also to

108 A.I. Tjutjaev, p. 362.
109 S.M. Kotjoij, p. 307.
110 V.I. Radtjenko, p. 212.
111 V.V. Koryakovtsev, K.V. Pitulko, p. 41.

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specify whether she understood the concept of intercourse. The court must also establish the level of her development and awareness of sexual relations and their social value. Possible sexual experience is also to be taken into consideration.[112]

The crime of rape is consummated at the point of the beginning of the act of sexual intercourse and irrespective of its end and implications.[113] Attempted rape is to be distinguished from voluntarily refusal of crime execution as stated in Article 31 of the Criminal Code, as the latter precludes criminal responsibility. Voluntary refusal to commit a crime is at hand in situations where the perpetrator realizes that he has the possibility of finishing the criminal act but voluntary refrains from doing so. This decision must be arrived at independently and not be affected by outside reasons such as the fear of getting caught. Voluntary refusal is therefore only possible prior to the beginning of the 'natural physiological act', i.e., penetration.[114] Refusal cannot be considered voluntary in cases where the perpetrator after overriding the resistance of the victim is not able to continue his actions for physiological or other reasons beyond his control such as loss of erection.[115]

If voluntary refusal to commit rape has taken place but the perpetrator has already used other criminal acts such as unlawful threat or violence he will answer for these acts but not for rape or attempted rape. However, it seems difficult to establish in practice whether a person who actually used violence or threatened a woman with violence to try to have intercourse has really voluntarily refrained from committing rape or if he has done so due to other reasons like fear, loss of erection, etc. It might be tempting to explain such circumstances as voluntary withdrawal from committing a crime rather than attempted rape.

The *subjective element* of rape is characterized by direct intent. This means two things. Firstly, the perpetrator *must know* the meaning of his actions, namely that he is having sexual intercourse with a woman against her wishes and that he is employing violence, threat, etc., to do so. Secondly, he must *wish for* exactly that situation.[116] Specific motives of the perpetrator do not matter for the qualification of the act, but establishing them is necessary and relevant when deciding proper punishment. Possible motives include gratification of the sexual desires of the perpetrator, the humiliation of the woman, revenge, etc. As has

112 V.I. Radtjenko, p. 212–213.

113 V.V. Koryakovtsev, K.V. Pitulko, p. 42.

114 Ibid.

115 V.I. Radtjenko, p. 213.

116 A.I. Tjutjaev, p. 366.

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been mentioned above, only males (mentally healthy and over the age of fourteen) can be the principal perpetrators, *subjects*, of the crime.[117]

Part 2 of Article 131 sets out aggravating circumstances. If the woman is raped by a group of persons, they are to be seen as co-perpetrators. It does not matter how many of the participants actually rape the woman. For the act to be qualified as an aggravated form of rape, it is enough that only one actually performs sexual intercourse and the other partake in other ways.[118] It is also possible to act as an accomplice by assisting another person in committing rape. This can, e.g., be done by means of assault or by holding the woman down during the act. Accomplices are qualified according to Article 33 on criminal complicity. In these instances, females can also act as accomplices to rape if they promote the act by being directly involved in its facilitation.[119] Group rape is consummated at the point of penetration by the first participant.

As has been mentioned above, death threats and other serious threats the content of which is that the woman will be seriously injured form aggravating circumstances. These need not to be expressed verbally, but also demonstrative action, e.g., holding a knife to the victim's throat, waving an axe, pointing a gun, etc., might be interpreted as such threats.[120] There must be a connection between the threat and the lack of resistance of the victim. The perpetrator must use the threat as a means of overcoming the resistance of the victim, and the victim must truly fear that the perpetrator will act on his threat if she does not comply. In these cases, the objective side of the crime involves both rape and the threat of murder or serious injury. Therefore, additional qualification under Article 119 on threats of death or serious bodily harm is not required.

The deliberate causing of harm in rape or attempted rape should be qualified according to Article 131 and Article 111 on the deliberate causing of serious harm to health. The same is true in cases where a victim's death ensues as a result of an injury sustained during the assault, e.g., when trying to escape or defend herself from the perpetrator.[121] If the perpetrator uses murder in order to cover up the crime of rape, he will also answer according to Article 105 on deliberate murder. This is not only true in cases where rape and subsequent murder were planned from the very beginning but also in instances where the perpetrator, e.g., leaves the woman handcuffed and naked in a cold secluded place, i.e., for more or less certain death.

117 S.M. Kotjoij, p. 308.
118 A.B. Borisov, p. 326.
119 A.I. Tjutjaev, p. 366.
120 A.B. Borisov, p. 327.
121 A.I. Tjutjaev, p. 361.

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Rape with special cruelty involves mockery of the victim during the act, inflicting bodily harm, committing the act in the presence of a family member (for example, a spouse or a child), applying torture, and other similar methods that may lead to trauma in order to suppress the resistance of the victim. The perpetrator must be aware of the fact that he is inflicting this cruelty upon the victim and possibly on other persons.[122] If the perpetrator infects the victim with venereal disease, this too might be an aggravating circumstance. This is true if he knew that he himself was infected and therefore expected the possibility or inevitability of infecting the victim yet carried on with his actions.[123]

Before the latest amendment, rape against known female minors formed an aggravating circumstance. The prerequisite 'known' meant that the perpetrator had to know the age of the victim. This was at hand if the minor was a family member, neighbour, etc., or as a result of the victim's appearance, and, conversely, if a person looked older than her true age, the prerequisite was not fulfilled. The prerequisite was removed in the latest amendment, which at least theoretically has made the interpretation more restrictive.

Parts 3 and 4 of Article 131 contain especially aggravating circumstances. These are at hand if the victim dies as a result of the crime, contracts HIV, or sustains other serious injuries. If the victim commits suicide as a result of the crime, this too might qualify as an especially aggravated form of rape. It is enough that the perpetrator has acted negligently, i.e., he does not need to desire to kill the victim. Death might, e.g., ensue as a result of the perpetrator trying to suppress the resistance of the victim by means of suffocation. Serious injuries can be in the form of the loss of speech, sight, hearing, etc. Causal relation between these events and rape must be established in order to be able to qualify the act as an especially aggravated form of rape.[124] Rape of a girl under the age of fourteen also forms an aggravated circumstance. Recidivism in this area can negatively impact on the penalty imposed, even resulting in a life sentence.

Sexual Assault and Sexual Coercion

As has been noted above, the Article on rape only covers sexual intercourse carried out by a man against a woman. Forced sexual acts not involving sexual intercourse (vaginal penetration) as well as 'homosexual and lesbian sexual acts of forced nature' are criminalized in Article 132 on sexual assault and Article 133 on sexual coercion. Article 132 reads as follows:

122 S.M. Kotjoij, p. 309.

123 Ibid, p. 310.

124 V.V. Koryakovtsev, K.V. Pitulko, p. 45.

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1. Homosexuality, lesbianism or other sexual acts involving violence or threat thereof against the victim or other persons or by using the helpless state of the victim –

   are punishable by imprisonment for a period of three to six years.
2. The same act if committed by
   a) a group of persons, group of persons by prior conspiracy or an organized group;
   b) with a threat of death or serious physical harm, as well as when committed with extreme cruelty to the victim or to other persons;
   c) resulting in infection of the victim with venereal disease –

      is punishable by imprisonment for a period of four to ten years and possible restraint of liberty for a maximum period of two years
3. Actions envisaged in the Part 1 or 2 of this Article, if
   a) committed against a minor;
   b) by negligence, having caused grievous bodily harm to the victim,
   c) infected the victim with HIV or led to other grave consequences –

      are punishable by imprisonment for a period of eight to fifteen years, with possible disqualification to hold certain posts or practice certain activities for a maximum period of twenty years and with possible restraint of liberty for a maximum period of two years.
4. Actions envisaged in the Part 1 or 2 of this Article, if
   a) resulted in the death of the victim;
   b) were committed against a person under the age of fourteen, – are punishable by imprisonment for a period of twelve to twenty years, with possible disqualification to hold certain posts or practice certain activities for a maximum period of twenty years and with possible restraint of liberty for a maximum period of two years.
5. The actions specified in Point (b) of Part 4 of this Article committed by a person previously convicted for a crime committed against the sexual integrity of a minor –

   are punishable by imprisonment for a period of fifteen to twenty years, with disqualification to hold certain posts or practice certain activities for a maximum period of twenty years or life imprisonment.

The provision establishes criminal liability for sexual assault, i.e., a sexual act that is accompanied by violence or the threat thereof but that does not involve sexual intercourse (penetration) between a man and a woman. The *object* of the crime is the sexual freedom and sexual inviolability of the

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individual.[125] Unlike in cases of rape, victims of sexual assault can be of both sexes.

Homosexual acts are defined as sexual acts between males involving anal sex, while lesbian acts are said to involve oral/genital contact, masturbation, etc.[126] Sexual acts that are not homosexual or lesbian can also be in the form of anal or oral sex. They might also include women forcing men to engage in intercourse by means of violence or the threat thereof, etc.[127]

An essential element of the *objective* side of the crime of sexual assault is the violent nature of the sexual act that is committed against the will of the victim by means of overcoming the victim's resistance. The means of carrying out the act are the same as in cases of rape, i.e., a person can be forced or threatened or the perpetrator can abuse the person's helpless state. The crime is considered consummated at the point of starting the sexual act.

The *subjective* side of the crime requires direct intent as the offender must know that he violates the will of the victim in order to force the person to carry out or tolerate a sexual act and wish do so. The offender, i.e., the *subject* of the crime is any sane person who has reached the age of fourteen.[128]

Aggravated forms of the offence are also similar to aggravated forms of rape. The doctrine also mentions the nature of the sexual violence. It is said that performing sadistic acts on the victim or inflicting physical pain might be equated with torture. In cases where this is done to gratify sexual desires, additional qualification under Article 117 on torture, etc., is not possible. However, if the perpetrator tortures the victim after committing the sexual assault, charges will be brought under both articles, i.e., Article 132 and 117.[129]

Article 133 deals with sexual coercion. The Article reads as follows:

1. Forcing a person to sexual intercourse, sodomy, lesbianism, or to commit other acts of a sexual nature by means of blackmail, threats of destruction, damage or withdrawal of property, or by using the material or other dependence of the victim –
   is punishable by a fine of up to 420, 000 rubles or the amount of the perpetrator's salary or other income, for a maximum period of one year, or by compulsory works for up to 480 hours, or correctional labour for a

125 S.M. Kotjoij, p. 312.
126 A.I. Tjutjaev, p. 374.
127 Ibid.
128 S.M. Kotjoij, p. 312.
129 V.V. Koryakovtsev, K.V. Pitulko, p. 46.

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maximum period of two years or hard labour for up a maximum period of one year, or imprisonment for the same period.

2. The same act committed against a minor –
is punishable by hard labour for a maximum period of five years with possible disqualification to hold certain posts or practice certain activities for a maximum period of three years, or by imprisonment for a maximum period of five years with possible disqualification to hold certain posts or practice certain activities for a maximum period of three years.

Unlike in instances of rape and sexual assault, sexual coercion does not require the use of violence or the threat thereof or the abusing of the victim's helpless state. The *object* of the crime is to safeguard the sexual freedom and integrity of the individual. Additional objects include interests of the individual to protect his property, honour, and dignity.

The *objective side* of the crime is to compel but not physically force a person into having intercourse or homosexual, lesbian, or other acts of a sexual nature. The perpetrator is to compel or psychologically coerce the victim by means of applying psychological pressure.[130]

One way of doing so is by means of blackmail. The threat can be made orally, in writing, to a third person, etc. The perpetrator can, e.g., threaten to disclose detrimental or humiliating information about the victim. Examples in doctrine mention spreading the information that the victim has a sexually transmitted disease, a prior criminal conviction, an immoral lifestyle, etc. It does not matter if the information is true or invented by the perpetrator. It is enough that the information is directed at one recipient. Another way of applying psychological pressure is to threaten with destruction or confiscation of the victim's property. In order to be able to qualify the actions of the perpetrator under Article 133, the destruction or confiscation must be of a substantial enough nature. Blackmail can only pertain to the abovementioned acts. If the perpetrator tries to blackmail the victim by means of threat of violence, the act will instead qualify as rape or sexual assault.[131]

The perpetrator can also abuse the victim's state of dependence. This state can be of an economic or a factual nature, such as the relationship between a student and his teacher or an employer and her employee.[132] The crime is considered consummated at the point of the beginning of the sexual act after the application of mental coercion.

130 A.I. Tjutjaev, pp. 375–376.

131 A.B. Borisov, p. 339.

132 S.M. Kotjoij, p. 314

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The *subjective side* of the crime is characterized by direct intent as the perpetrator must desire the act to come to pass, at the same time being aware of the fact that it is against the will of the victim. The *subject* is a mentally sane person sixteen years of age and older.[133]

Sexual Intercourse and other Sexual Acts with a Person under the Age of Sixteen

The provision criminalizing sexual intercourse with a minor is located in Article 134 of the Criminal Code and reads as follows:

1. Sexual intercourse with a person who has not reached the age of sixteen and sexual maturity carried out by a person who has reached the age of eighteen –
   is punishable by compulsory work for a term of up to 480 hours, or with restraint of liberty for a maximum period of four years, or with hard labour for a maximum period of four years with possible disqualification to hold certain posts or practice certain activities for a maximum period of three years, or imprisonment for a maximum period of four years with possible disqualification to hold certain posts or practice certain activities for a maximum period of ten years.
2. Homosexuality or lesbianism with a person who has not reached the age of sixteen and sexual maturity carried out by a person who has reached the age of eighteen –
   is punishable with hard labour for a maximum period of five years with possible disqualification to hold certain posts or practice certain activities for a maximum period of three years, or imprisonment for up to six years with possible disqualification to hold certain posts or practice certain activities for a maximum period of ten years.
3. Acts stipulated in Parts 1 or 2 of this Article, committed against a person who has reached the age of twelve but not fourteen –
   are punishable by imprisonment for a term of three to ten years with possible disqualification to hold certain posts or practice certain activities for up to fifteen years, and with possible restraint of liberty for a maximum period of two years.
4. Acts stipulated in Parts 1, 2 or 3 of this Article, committed against two or more persons –

133 V.V. Koryakovtsev, K.V. Pitulko, p. 47.

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are punishable by imprisonment for a period of eight to fifteen years with possible disqualification to hold certain posts or practice certain activities for a maximum period of twenty years.

5. Acts stipulated in Parts 1, 2, 3 or 4 of this Article, committed by a group of persons, group of persons by prior conspiracy or by an organized group –
   are punishable by imprisonment for a period of twelve to twenty years with possible disqualification to hold certain posts or practice certain activities for a maximum period of twenty years, and with possible restraint of liberty for a maximum period of two years.
6. Actions envisaged in Part 3 of this Article, if committed by a person previously convicted of a crime against the sexual integrity of the minor –
   are punishable by imprisonment for a period of fifteen to twenty years, with disqualification to hold certain posts or practice certain activities for a maximum period of twenty years, or with life imprisonment.

Official Notes:

1. A first-time offender, who has committed an offence under the Part 1 of this Article, shall be exempted from punishment by the court if it is established that the person and the offence ceased to be socially dangerous due to marriage with the victim.
2. In cases where the age difference between the victim and the perpetrator is less than four years, the perpetrator is not liable to imprisonment for committing an offence pursuant to the Part 1 of this Article or the Part 1 of Article 135 of this Code.

This article deals with voluntary sexual acts with a person under the age of sixteen. The *object* of the crime is the sexual inviolability of a person (both male and female) under the age of sixteen as well as to safeguard normal physical and moral development of the minor. The *objective* part of the crime concerns voluntary sexual connections, including 'homosexual and lesbian' acts, between a person less than sixteen years old and a person aged eighteen years or older. This provision is applicable in cases where no violence or threat thereof or blackmail, etc., has been used, and where the underage person understands the meaning and value of the sexual act. If there is no voluntariness, the act can instead be considered as an aggravated form of rape or sexual assault.[134]

134 S.M. Kotjoij, p. 315

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The act is consummated at the beginning of the sexual act. One act suffices to qualify it under Article 134. The *subjective* element of the crime is characterized by direct intent. This means that the perpetrator must be aware of the fact that the victim is under the age of sixteen and desire for the act to come to pass. Examples mentioned in the doctrine include situations where the victim is a relative, family friend, or neighbour of the perpetrator, or where her looks clearly indicate her young age, and, reversely, if a person looks older than his true age, the perpetrator is considered to have been objectively deceived, and the act will not fall under Article 134.[135]

What is most interesting with regard to this provision is its open discrimination of homosexuals. This is something that is not mentioned in the doctrine. It seems to be accepted as the normal state of things. We clearly see that homosexuals are discriminated against on three different counts. Firstly, there is the matter of penalty. Heterosexual acts are dealt with in Part 1 of Article 134. In contrast to homosexual and lesbian acts stated in Part 2 of the Article, heterosexual acts are punished by compulsory work or the restraint of liberty. This is not possible for homosexual acts. These are instead punishable by hard labour for up to five years or imprisonment for up to six years. Although imprisonment and hard labour can also be imposed with regard to heterosexual acts, the length of the penalties differs. Secondly, a person guilty of an act criminalized in Part 1 of Article 134, i.e., a heterosexual act, can be exempted from criminal responsibility if he marries the victim. This is not possible in instances of homosexual and lesbian acts. Thirdly, the person is not guilty of the crime stipulated by Article 134 if he has committed an act according to Part 1, i.e., a heterosexual act, and the age difference between him and the victim is less than four years. Again, this does not apply to homosexual and lesbian offenders.

Russian Legislation through the Prism of Legal Transplants

Introduction

The different ways in which trafficking is conceptualized today in the three countries of this study hinges partly on the factors of accessibility, perception, and reception. While Sweden has a long tradition of implementing but also actively creating international law, Poland has had some periods of relative democracy. Russia, however, was fairly isolated in this respect. If international documents were signed, it was merely to prove a point, but they rarely meant

135 V.V. Koryakovtsev, K.V. Pitulko, p. 48.

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more than that. The former Soviet Union did not view international law, especially the documents pertaining to the protection of human rights, as admissible before or enforceable by national courts. The 1977 USSR Constitution did not allow for international law to be directly applied in the national legal system. Although Art. 29 of the Constitution stipulated that the relations of the USSR with other states were to be based on the principle of mutual recognition of obligations arising from the generally recognized principles and rules of international law, including treaties signed by the country, this provision was never seen as a general incorporation of international norms into Soviet domestic law. Thus, the Soviet legal order did not embrace international legal norms.[136]

The question is to what extent this view has changed during the last two decades. In the following we will have a short look at Russian legal history, followed by a discussion of the standing of international law in the Russian legal system, and the nature of Russian criminal law. These discussions will account for the factor of accessibility. In addition, the factor of reception and perception will also be considered by taking into account state policy and the attitudes of the media, NGOs, and the public in this particular area.

Accessibility in the Russian Context

As was mentioned before, the trafficking provisions do not exist in a vacuum but in a certain legal and historical context. All of the aspects of the legal transplants theory, e.g., accessibility, perception, and reception of the legal transplant, are affected by a country's specific soil and historical trajectory. Below, a short summary of Russian legal history follows.

Russian Legal History and the Standing of International Law in Russia

Trafficking is a multifaceted offence. In cases of trafficking for sexual exploitation, a person's freedom of movement as well as her sexual freedom are violated. The victim might also be subjected to violence or the threat thereof. However, these violations can be summed up as breaches of the person's integrity. This implies not only breaches of statutory offences such as rape or use of threat but also a moral violation of the person's natural right to her humanity and dignity.

136 G.M. Danilenko, "Implementation of International Law in Russia and Other CIS-states", 1998, pp. 2–3, http://www.nato.int/acad/fellow/96-98/danilenk.pdf, (accessed 19 May 2014).

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Mitigating circumstances,[137] e.g., the manner of recruitment in Russian legislation, suggest an instrumental view of not only the law but also of the individual. The crime is considered less severe if the perpetrator deceives the victim instead of physically forcing her into trafficking, so much so that the perpetrator can actually, if certain conditions are fulfilled, walk free. This is not the case in the Palermo Protocol where all improper means listed are considered to be equally reprehensible. Arguably, some explanations for this development might be found in the study of Russian history and legal tradition.

Although democracy and the modern concept of human rights are clearly phenomena of the twentieth century, Russia never had that democratic experience. Firstly, there was no struggle between the king and the clergy and no religious reformation. There was instead a tradition of absolute state power, of the Church being totally subordinated to the state. This arguably created a different cultural context not only in relation to Western and Central Europe but also to other parts of Orthodox Europe such as Greece, Serbia, or Bulgaria, where the Church was never as fully subjected to state authority as it was in Russia.[138] Russia's Byzantine tradition and state ideology made for a rather peculiar relationship between the tsar and the Church.[139] The tsar was considered to be Christ's representative on earth. His actions were beyond reproach. The Church answered to the tsar, to the benefit of both parties. While the priests preached total obedience to the tsar, the tsar ordered the people to believe.

Secondly, the country's geographical location and demography also affected the situation. Russia was remote and difficult to access from the Western part of the European continent. The events in Russia after the October Revolution can in part be attributed to its geography, including the multi-nationality of its people.[140] The state ideology was repeatedly used as glue by the Russian authorities to keep the various nationalities seemingly united. Moreover,

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137 This reference is made to circumstances that may allow a person to be exempted from criminal liability. Other examples of laws with a rather instrumental and not individual-oriented nature include the provisions on rape (where only a man can rape a woman), the provision on sexual acts with a minor, where a perpetrator might redeem himself by marrying the victim, etc.

138 Z. Brzezinski "The Primacy of History and Culture", *Journal of Democracy*, vol. 12, no. 4, 2001, p. 197.

139 F. Feldbrugge, (edt.), *Russia, Europe and the Rule of Law*, Leiden, Martinus Nijhoff Publishers, 2007, p. 216.

140 F. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, Dordrecht, Martinus Nijhoff Publishers, 1993, p. 31.

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throughout its history Russia has sought security through means of expansion. This often moved the country's borders in different directions, mostly to the east. It was a costly enterprise requiring vast resources which were often supplied at the expense of the population. It also required a centralized power. Thus, a relation of interdependence among the Russian people ranging from the serf to the nobleman was established by means of referral to a common enemy.

The resources of the land were highly centralized. The tsar owned virtually all the resources in his realm. Therefore, he could act freely. For that reason, until late in the history of the country the Russians knew of duties but not of rights.[141] It has been argued that this interdependence, exercised, e.g., through the institution of serfdom, instilled certain characteristics in the Russian society and its citizens, something that made it easier for subsequent rulers to force the Russians into obedience. Serfdom, or forced labour was said to constitute the environment in which the Russian people lived out their lives. It has been blamed for a range of issues from the emergence of the command economy to political absolutism. It is said to have restrained the development of towns, private property and human rights.[142]

Thirdly, as late as in the beginning of the twentieth century, the majority of the Russian population lived in rural areas. Only 2% of the society was made up of the educated classes, the Russian intelligentsia.[143] City life was arguably more anonymous and individualistic than life in rural villages. Throughout Western Europe, this produced an urban elite that saw the individual human being not just as a part of society but as a rational creature that could, and should, be the ultimate judge of what was in her own best interests.

Russian villages, by contrast, were remote and sparsely populated, which scarcely allowed for any contact with the outside world. Therefore, only a privileged few could actually learn about liberal ideas. Although the ideas of Enlightenment were popular with Catherine the Great, the ideas were never put into practice due to fear of decentralizing power.

The peasants and workers had their own courts of jurisdiction. There, they were judged by their own social groups and according to their own customary laws. Due to the size and characteristics of the rural population, this main form of law was passed on between generations orally. The peasants were convinced that their own customs serviced their needs and standing in society more

141 R. Pipes, "Private Property, Freedom, and the Rule of Law", *Hoover Digest*, no. 2, 2001, p. 2.

142 B. Mironov, *A Social History of Imperial Russia 1700–1900*, Volume 2, New York, Westview Press, 2000, p. 102.

143 Ibid, pp. 367–370.

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adequately than the modern laws of the educated classes. Consequently, the official laws never penetrated the sphere of the general public, which led to a situation where legal norms were not separated from social, religious, and moral customs and where individual human rights never really thrived.

It is in this particular setting that we should view the Russian transplant. Such an approach may possibly answer questions as to why the trafficking provisions are so seldom applied, why there is a possibility of criminal relief for a convicted trafficker, why some victims are considered less worthy than others, etc.

The enforcement of the rules of the 1993 Constitution was crucial in the development of judicial practice concerning the application of international law in Russia. One of the principal aims of the Constitution is to define the status of international obligations in Russian law. To this end Article 15, Part 4 was created. This provision sets out the relationship between international law and Russian domestic law and reads as follows:

> The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

This provision has two main features. Firstly, it states that all international law is part of the Russian domestic legal system. It thus refers to both treaty law and 'the generally recognized principles and norms of international law'. This formulation is said to include sources of general international law, in particular general customary law. Secondly, the provision holds that treaty rules have a higher normative status than domestic laws.[144]

Consequently, legal regulations in force within Russia do not apply if their application is inconsistent with treaty provisions. Domestic courts must therefore let treaty norms take precedence over domestic legislation. However, Art. 15(4) is said not to confer such powers on 'the generally recognized principles and norms of international law'.[145]

However, Article 17, Part 1 of the Russian Constitution states that:

> In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally

144 G.M. Danilenko, p. 14.

145 Ibid.

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recognized principles and norms of international law and according to the present Constitution.

According to some scholars, it is possible to interpret this provision as securing a higher hierarchical status for 'the generally recognized principles and norms of international law' concerning human rights than for other 'generally recognized principles and norms' set out in Art. 15(4).[146]

However, not all treaties can become applicable in court proceedings.[147] A relevant treaty can only be applied if the following cumulative requirements are met. Russia must be a party to the treaty, the treaty must have entered into force and have been officially published, and it must be legally binding in Russia. It must also be self-executing. The latter means that the provisions of the treaty must not require special domestic laws for them to be applied and that the treaty must establish rights and obligations for the subjects of national law. These requirements have been detailed in a 2003 ruling of the Supreme Court Plenum where the court applied the 1995 Federal Law on International Treaties of the Russian Federation.[148]

The Russian legal system is often described as specific due to the circumstance that legal precedents are supposedly not viewed as legal sources. It is said to be difficult to find a certain court decision that has influenced legal practice. However, the rulings and determinations of superior courts, mostly the Plenums of the Supreme Court and the Supreme Arbitrazh Court of the Russian Federation, do influence legal interpretation. They are said to create certain tendencies in the development of judiciary practice. The Ruling of the Plenum of the Supreme Court (10 October 2003) on the application of international law is said to constitute one of the most important acts in this area. It sets out general provisions of the Constitution and Federal Laws and interpretational guidelines for lower courts. Subsequent court decisions seem to have followed the recommendations enshrined therein.[149]

Russian Criminal Law

In 1917, the Soviet Government initially continued to use the Imperial Russian Criminal Code of 1903. The Soviet courts were allowed to use the code as long as it did not violate the revolutionary spirit. Eventually, criminal offences and

146 G.M. Danilenko, p. 14.

147 S.Y. Marochkin, "International Law in the Courts of the Russian Federation: Practice of Application", *Chinese Journal of International Law*, vol., no. 2, 2007, p. 333.

148 Ibid, p. 335.

149 Ibid, p. 344.

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corresponding sanctions were established by means of decrees. In 1927, a Criminal Code was adopted and subsequently repeatedly revised. It remained in force for roughly three decades.[150] Another Criminal Code was enacted in 1960, while the present Criminal Code entered into force in 1997. The main ambition and challenge has been to distance Russian criminal law from its communist heritage. The main aim of the 1960 Criminal Code according to its portal article was "[....] the protection of the social system of the USSR, of its political and economic system, of socialist ownership, of the person and the rights and freedoms of citizens, and the entire socialist legal order, against criminal infringements."[151]

The present Criminal Code does not contain any references to the protection of the socialist order. Instead, it makes the protection of the individual paramount. Russian criminal law is said to be governed by principles such as legality, equality of citizens before the law, justness, and humanity.

Article 20 of the Russian Constitution states that everyone has the right to life and that the death penalty, until it is finally abolished, may only be dealt out for the most serious crimes against human life. Additionally, all such sentences require trial by jury. The inclusion of the concept of abolition in the wording of Article 20 has been interpreted by some as a requirement that the death penalty be abolished at some time in the future. The current Criminal Code stipulates the death penalty for five offences. These crimes include murder with aggravating circumstances (Article 105 Part 2), infringement on the life of a person administering justice or conducting a preliminary investigation (Article 295), infringement on the life of an officer of a law-enforcement agency (Article 317), infringement on the life of a statesman or a public figure (Article 277), and genocide (Article 357).

No crime has a mandatory death sentence as each of the five provisions mentioned above also permits sentences of life imprisonment as well as imprisonment. Moreover, according to Article 59, Part 2 of the Criminal Code, males who at the time of the case being brought before court are under the age of eighteen or above the age of sixty, as well as all women, cannot be sentenced to death. Per Part 3 of Article 59, a death sentence can also be pardoned at which point it can be commuted or changed into a life sentence or to twenty-five years of imprisonment.

The CoE made abolition of the death penalty one of its conditions for Russia to join the organization. Although the country did not abolish it, there is currently a moratorium in place. According to recent polls, however, 62% of the

150 W.E. Butler, p. 549.

151 As quoted in W.E. Butler, p. 551.

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country's residents believe that the moratorium should be lifted. Respondents suggested using capital punishment for sexual offences against teenagers (72%), murder (64%), terrorism (54%), drug trafficking (28%), and treason (12%). Moreover, there were also those who suggested using the death penalty for espionage, desecration of religious sites, bribery, theft, looting and robbery.[152]

Reception and Perception of the Original Source in Russia

As has been mentioned above, a draft law on trafficking was voted down by the Russian *duma* on repeated occasions. Some people considered this unwillingness to take a stand against trafficking as a form of corruption. It was argued, and in some cases even proven, that politicians and other high ranking officials were either directly or indirectly involved in trafficking. Either they themselves were pulling the strings or they were receiving bribes in order to turn a blind eye to the practice. In view of the international criticism, Russian politicians tried to depict Westerners as the enemy. The Russian media promptly responded by describing Western men as the culprits. If Russian girls were truly being trafficked, it was due to the demand of the Western men for their services. Of course, they were partially right, as demand does sustain trafficking. However, they also ignored their part in this development. As has been mentioned, the law was eventually passed by appealing to broader ideals. Its role in countering kidnappings of Russians in the Caucasus was highlighted, as well as trafficking's supposed links to terrorism.

State Policy on Trafficking and Anti-Trafficking Measures

Although trafficking provisions have been enacted, they are rarely invoked in criminal proceedings. The Russian state remains reluctant to take any further anti-trafficking measures. Currently, it is barely doing the required minimum. According to the TIP Report on Russia from 2013, the country's government has not increased its efforts to counter human trafficking compared to the previous years. Previously Russia was placed on Tier 2 Watch List and granted a waiver from an otherwise required downgrade to Tier 3 because its government had a written plan that, if implemented, would constitute making significant efforts to meet the minimum standards for the elimination of trafficking.[153]

The plan referred to above is probably the CIS Program to Combat Trafficking for 2011–2013 which was signed in 2010 by the then president, Medvedev. As of

152 "Capital Punishment: Russians Want Return of Death Penalty", RT, 29 March 2012, http://rt.com/news/death-penalty-return-russia-787/, (accessed 2014-05-14).

153 "Russia", TIP Report, 2012, p. 295.

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yet, this plan has not been implemented and Russia has ended up with a Tier 3 placement for the year 2013.[154] Whether the government of Russia actually cares is another question.

At present, there is a lack of formal guidelines with regard to the identification of and assistance offered to trafficking victims. Reportedly, no formal legal alternatives to deportation for foreign victims exist. Witness protection is only provided on an ad hoc basis. The majority of foreign victims are not deported but they are also not assisted in criminal proceedings. In many cases, victims are simply released and can either go home or stay in Russia to look for work.

One of the few official documents on the subject of trafficking is a memo, the aim of which seems to be to warn the public of the dangers of human trafficking. The memo is written by the Ministry of Internal Affairs and is called 'Look out, human trafficking and how not to become a victim of this crime'. It states that trafficking is an extremely serious offence and that the Ministry hopes that informing the public will help considerably, and reduce the number of victims of trafficking in the country. The manual is further said to provide the answers to the basic questions concerning human trafficking.[155]

The memo basically describes the elements of the crime and encourages people to contact the appropriate authorities if they fall victim to the crime. There are, however, no specific contact details, e.g., a special police unit that one might call in cases of trafficking. Not even shelters or NGOs are listed, nor is even a number one might call to get more information. Instead, the text lists some tips on how not to get trafficked. These tips include not trusting offers that sound too good to be true. They also advise people not to borrow money from strangers.[156]

It seems as if the state actually considers this booklet helpful. On the homepage of the Moscow police, e.g., we can read that the practical advice offered in the booklet will help citizens not to fall into the hands of traffickers.[157] Although openly acknowledging trafficking as a serious problem is a step in the right direction, more practical efforts are necessary. At the moment, however, these are limited.

154 "Russia", TIP Report, 2013, p. 310.

155 "Ostorozhno, torgovlija lijudmi i kak ne stat jeje zhertvoij", MVD Rossii, Moskva, 2012, p. 3, http://mvd.ru/upload/site1/oper_up/booklet_trafficing_web_1.pdf, (accessed 19 May 2014). Translation my own.

156 Ibid, p. 10.

157 "Ostorozhno, torgovlija lijudmi i kak ne stat jeje zhertvoij", Moskovskaja Policija, http://petrovka38.ru/gumvd/torgovlya_ludmi/, (accessed 19 May 2014).

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Practical Application of Anti-Trafficking Measures

Russian authorities emphasize that they often charge sex trafficking cases under Article 241 (organization of prostitution) as the elements of that crime are often easier to prove than those of trafficking. This is common for all three countries. The difference from the other two countries is that Russian prosecutors rarely base their cases on the trafficking provisions. In comparison, charges in Sweden are at least brought under the relevant provisions even if the outcome is the same, i.e., most cases of trafficking are seen as procuring. What also seems to be uniquely Russian is the element of corruption in this particular area.

Although during the years 2008–2011 there were alleged cases of official complicity in human trafficking, the government did not report specific progress on any of these cases. Moreover, there is some evidence suggesting Russian police officers' involvement in trafficking. Allegations include returning victims to their exploiters, and of receiving bribes from employers who wish to avoid penalties for employing irregular workers.[158] Also, according to a report from Human Rights Watch, large numbers of migrant workers suffered abuse and exploitation with impunity while working on different venues for the Winter Olympics in Sochi.[159]

NGOs, Media and Public Opinion

Anti-trafficking measures in Russia are usually carried out in the form of foreign-financed projects over limited periods of time. Thus, there is a lack of sustainability. In 2003, e.g., the Angel Coalition conducted a Russian-Swedish informational campaign. The campaign was financed by the Swedish organization SIDA and carried out in cooperation with the Swedish organization ROKS and focused mostly on the dissemination of information through the media. Information was also disseminated among educational institutions, employment and tourism agencies, orphanages, youth clubs, and government agencies.

Generally speaking, NGOs are mostly sporadically financed by foreign sources, so even when a project (like the one referred to above) is extremely effective, there is no stability or continuity. Experts argue that in order to achieve continuity and stability, the government must start assisting these projects both financially and practically. One of the major challenges in this

158 "Russia", TIP Report, 2013, p. 311.

159 "Race to the Bottom. Exploitation of Migrant Workers Ahead of Russia's 2014 Winter Olympic Games in Sochi", Human Rights Watch, 2014, http://www.hrw.org/sites/default/files/reports/russia0213_ForUpload.pdf, (accessed 19 May 2014).

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area is thus to combine isolated programs under a coherent and coordinated anti-trafficking policy.[160]

The Angel Coalition was reportedly the first registered association of women's organizations in the Russian Federation. It was founded in St. Petersburg in 1999, and subsequently developed into an active consortium of sixty-one regional organizations from twenty-five different regions of the Russian Federation and nine former Soviet republics. The organization was funded by foundations, private donors and foreign governments.[161] Currently a page with that address cannot be found, and it is unclear whether the organization is still active.

There is also the Moscow Sexual Assault Recovery Centre called Sisters. The centre supports former victims of various sexual assaults. It offers hotline services, counselling, and support groups for women. It also carries educational programs for representatives of law-enforcement agencies. An additional aim of the centre is to collaborate with the media with the aim of changing social attitudes to victims of sexual assault.[162]

The media mostly reports on trafficking in other countries such as Nigeria. In order to improve the media's efforts in this area, in 2012 an international project was launched between the Organization for Security and Cooperation in Europe (OSCE) and the Russian Union of Journalists. The aim of the project was to establish a special course on trafficking titled 'Trafficking in Human Beings: the Global Perspective and the Role of the Media' for students and postgraduates of the Moscow State University's Faculty of Journalism.[163]

Although the media to some extent influences or has the power to influence the opinions of the public, in the Russian case these seem to diverge somewhat. While reports in the media have tended to demonize the West in terms of describing the Westerners' excessive hunger for Russian women,[164] or

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160 E.V. Tiurukanova and the Institute for Urban Economics, "Human Traffikcing in the Russian Federation. Inventory and Analysis of the Current Situation and Responses", UN/IOM Working Group on Trafficking in Human Beings, 2006, p. 64.

161 "Angel Coalition", Humantrafficking.org. A Web Resource for Combating Trafficking, http://www.humantrafficking.org/updates/281, (accessed 19 May 2014).

162 "Sisters", http://owl.ru/eng/women/aiwo/sisters.htm, (accessed 19 May 2014).

163 "OSCE Special Representative Meets Russian Journalists to Discuss Media's Role in Combating Human Trafficking", OSCE, http://www.osce.org/cthb/87679, (accessed 19 May 2014).

164 See, e.g., "Ni odna Rossiianka ne prodala sebia v rabstvo dobrovolnovo", *Pravda*, 11 December 2003, www.pravda.ru/news/world/12-11-2003/16435-0 (accessed 19 May 2014) and "Lolity ponevole, ili kto torguet russkimi devoshkami", *Pravda*, 16 October 2003, www.pravda.ru/districts/northwest/murmansk/16-10-2003/38952-lolita-0, (accessed 19 May 2014).

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foreigners stealing or even killing Russian children,[165] a national poll indicates that only 13.9% of Russians actually believe that to be the true reason behind trafficking in human beings.

Under certain circumstances public opinion can constitute a strong impetus for the government to act. The question is whether public opinion on trafficking in Russia has gained such a momentum so as to be able to propel the government into some sort of action. Here, it is crucial to see how Russians perceive trafficking as well as the victims of this crime. The figures and overall findings appear somewhat dismal.

It has previously been noted that there appears to be stigma attached to the label *trafficking victim*. This often results in double victimization, i.e., in women being stigmatized by their own societies upon return. In a national poll conducted in 2007, 41% of the population held that the trafficking victims have themselves to blame. This result is said to be connected to or rather reinforce the lack of political incentive in this area.[166] We clearly see that this is a mutually reinforcing two-tier system. As the public does not supply the necessary impetus, the government does not take the necessary measures, and as the government reportedly does nothing to raise public awareness in this area,[167] the people remain if not indifferent then not active enough with regard to the phenomenon.

In addition, some 35% of the male respondents and almost 32% of the female respondents expressed the view that trafficked persons were basically prostitutes hoping to earn more in other countries.[168] There is thus no connection made between trafficking and forced prostitution. On the contrary, some tend to view trafficked women as voluntary prostitutes, with the only difference being that they have chosen to work abroad.

Generally, the findings are similar to those found in Polish polls. Few believe in the power of public authorities and their efficiency in countering trafficking. Only 2.1% believed in the ability of the state *duma* in this particular area, while the judiciary received a staggering 2.7% percent.[169] This is also interesting when the situation in Sweden and other countries of destination is considered.

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165 See more on this subject in "Putin Signs Bill Barring Adoptions of Russian Children by Americans", CBS, http://www.cbsnews.com/8301-202_162-57561074/putin-signs-bill-barring-adoptions-of-russian-children-by-americans/, (accessed 19 May 2014).

166 M. Buckley, "Public Opinion in Russia on the Politics of Human Trafficking", *Europe-Asia Studies*, vol. 61, no. 2, March 2009, p. 221.

167 "Russia", TIP Report, 2012, p. 295.

168 M. Buckley, p. 221.

169 Ibid, p. 223.

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Victims of trafficking in Sweden mostly originate in the former Soviet region. They usually continue to distrust the state authorities, which makes them reluctant to testify in Swedish trials.

Russia – Summary

Legal Issues

It has taken international pressure and national lobbying for Russia to identify trafficking as a real problem, and even though the president signed the law in 2003, the trafficking provisions are rarely applied. One reason for this development seems to be the circumstance that Russian practitioners do not always comprehend the Palermo Protocol's terminology. In this section the main findings are briefly summarized and specific questions are raised. These will be further discussed in Chapter 8.

Objects Safeguarded by the Trafficking Provisions

One of the main objects of the trafficking provision is to prevent illegal crossings of the Russian borders, as is the forging, destroying, and falsifying of documents. This is interesting since trafficking is generally viewed as a crime against the individual while the smuggling of human beings is considered to be a crime against the state. The Russian legislator not only included these prerequisites in the trafficking provision, he also criminalized them as aggravated circumstances.

Intent of the Perpetrator

As has been mentioned above, trafficking requires direct intent. Excepting the buying/selling of a person and similar transactions where a person is treated as a commodity, other actions detailed in the trafficking provision require specific purpose. The perpetrator must undertake these actions for the purpose of exploitation. This arguably narrows the area of application of the trafficking provision. This is similar to the situation in Sweden and Poland, i.e., difficulties with proving the specific purpose of exploitation and, as a direct outcome, few convictions based on the trafficking provisions but rather on the provisions criminalizing procuring.

Improper Means

The trafficking provision has some peculiar components. Although all forms of buying and selling and similar transactions where a person is treated as a commodity are criminalized, under certain circumstances traffickers can be

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exempted from criminal responsibility. The law clearly differentiates between victims based on the nature of recruitment. Using violence or the threat thereof constitutes an aggravating circumstance. Deceit and vulnerability are not even mentioned in the text of the provision. Arguably, these prerequisites are covered by Part 1 of the trafficking provision. In these cases, however, exemption from criminal responsibility is possible. This seems to be connected to prejudices toward women. According to national polls, some Russians see trafficking victims as prostitutes working abroad. The image of the happy prostitute who simply asked for too much, arguably, influences the perception of trafficking.

Possibility of Exemption from Criminal Responsibility

We have seen that buying and selling and similar transactions where a person is treated as a commodity may be exempted from criminal responsibility. This is true even if the perpetrator is responsible for trafficking multiple victims. This will, however, not be possible in cases of border crossing or the forging of documents, etc. Moreover, if a person was deceived into trafficking or ended up in trafficking due to her vulnerable situation, exemption from criminal responsibility might also be possible.

This suggests a rather instrumental view of the individual and the law. It is also not consistent with the true nature of trafficking, more specifically the fact that most victims are coerced into the practice by more subtle measures, such as destitution, than pure physical force or the threat thereof.

Non-Legal Issues

The non-legal issues include corruption and a lack of state responses to trafficking. There are no guidelines on how to identify and assist victims of the crime. NGOs do not receive enough state funding, which renders their efforts limited and sporadic.

There are prejudices against victims of trafficking and sexual assault. The women are often stigmatized by their own societies. In addition, there are also prejudices against homosexuals. For example, the rape of a male by another male is not considered possible. Homosexuals receive stricter penalties than people of a heterosexual orientation and not just as a result of discriminating interpretations of law but due to what the laws actually prescribe. This is an unfortunate development, since many victims of trafficking are men and young boys sold for sexual exploitation. There have been reports of these persons not receiving the proper care, including from NGOs.

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There are also problems on the procedural level. Too many people are involved in one case but no one takes the lead where responsibility is concerned. In addition, there is a low level of trust in state authorities including the police and judiciary.

In the next chapter, the difficulties concerning the implementation of the international definition of trafficking are divided into country-specific problems and problems stemming from the Palermo Protocol. Also, possible reforms of the international definition of trafficking and avenues for future research are discussed.

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CHAPTER 8

Conclusions and Comments de Lege Ferenda

Introduction

The main question posed by this work is why, despite the scope and severity of the crime as well as the awareness and increased international efforts in the area, there are so few trafficking convictions worldwide. As has been shown, insufficient political will and inadequate national laws are usually blamed for this development. States are often encouraged to get their legislation in line with the definition of trafficking given in the Palermo Protocol as a step toward a possible solution to the trafficking problem.

However, even after implementing the Palermo Protocol and transplanting the international definition of trafficking, the problem not only persists but even seems to be growing. Why do these transplants fail? Usually internal circumstances such as corruption are indicated as reasons for this failure. While this is partly true, it is not a satisfactory explanation.

In this study, a wider approach was applied in order to see if there are additional reasons as to why countries with different preconditions fail to successfully implement the original source. This was done by means of employing the following steps.

Firstly, the approach of legal transplants was used to create a framework where certain factors according to which both the original source and the transplants were studied were extrapolated. These include the factors of transmissibility, accessibility, perception, and reception.

Secondly, a background, in which the practice of trafficking was described, was set. The reasons for doing so were twofold. First of all, the aim was to illustrate that the crime can take different forms and be seen from various perspectives. The fact that there are different perspectives also means that there are multiple stakeholders. This partly explains why trafficking has mostly been seen or rather practically treated as a criminal law issue (since states are the most influential in this context). Then, the purpose was to show how specific push and pull factors influence the patterns and mechanisms of trafficking. This background was intended to function as a reference point with regard to the legal definition of trafficking, as contained in Article 3 of the Palermo Protocol, with the aim of ultimately answering the question whether the definition is sensitive to the nature of the crime.

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Thirdly, the original source was studied according to one of the factors of legal transplants, namely transmissibility. This was done by taking into account the Palermo Protocol's historical and cultural discourse. Then, the international definition of trafficking was analysed. The analyses highlighted certain questions that could potentially influence national implementation processes. Fourthly, the next logical step was to study the transplants. The question was if any problems exist with regard to the transplants, and if so, if a connection to the original source could be established. To this end, three mutually very different countries were chosen as case studies.

While one of these countries, namely Russia, is generally seen as one of the worst in terms of both its anti-trafficking efforts and the scope and nature of the crime, another of these countries is commonly referred to as a forerunner where awareness on and measures against trafficking are concerned. Sweden has a legislation prohibiting the purchasing of sexual services. It acknowledges the gender dimension in its official policies, supports efforts against the discrimination of women, and is generally considered one of the more progressive countries in the world where equality between the sexes is concerned. In addition, Poland, a country located somewhere between these two opposites was chosen. If the assumption that only the circumstances in the countries of origin are to blame for the failure of the transplant is true, then the Swedish transplant should be a success. In any case, Sweden should be first, Poland second, and Russia third.

Although, generally speaking, the country-specific challenges might be graded in the above manner, i.e., Russia suffers from the most serious country-specific problems, certain problems appear in all three countries. At the same time, these difficulties have an impact on the potential success of the transplant.

In each country, the problems can be divided into legal and non-legal issues. It should be noted, however, that this distinction is, at times, fluent. Some of these problems are country-specific and some are, as has already been mentioned above, common. When the latter are compared to the findings made concerning the international definition of trafficking, it becomes apparent that there is a connection between the two. These common issues concern the prerequisites of the purpose of the perpetrator and improper means.

Arguably, this has importance for future anti-trafficking efforts. If there is something inherently wrong with the international definition of trafficking, then states should not be implementing it into their legislation. This important fact has been overlooked. In consequence, the current situation is somewhat of a vicious circle. As a flawed definition of trafficking is being reproduced both in international law and in domestic legal systems, little progress is actually made toward diminishing the occurrence of the crime.

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The major findings of this work will be presented in the following order. First, the main discoveries made in Chapter 4, i.e., possible problems with regard to the original source, are recaptured. Then, the results of the empirical studies of Russian, Polish, and Swedish legislation and of the overall situation in these countries in the area of trafficking are presented. These presentations are divided into legal and non-legal issues. Next, the common problems are distinguished and discussed in some detail, and possible reforms are suggested. The chapter concludes with possible suggestions on how trafficking might be re-conceptualized and on avenues for future research.

Central Findings Concerning the Original Source

Introduction

The following findings were made concerning the original source. These can be divided into legal and non-legal issues. These categories are, however, mutually reinforcing. This is the result of the fact that certain presuppositions concerning the crime of trafficking and the people involved in it influenced its legal definition, and, reversely, the legal definition reinforces and upholds these presuppositions.

Legal Issues

I have found that there are four main legal issues in the Palermo Protocol that impact on national implementation of the definition of trafficking. These are the issues of border crossing and an organized crime group as possible prerequisites of domestic trafficking provisions as well as the prerequisites of improper means, consent of the victim, and purpose of the perpetrator.

Elements of Border Crossing and an Organized Criminal Group

A reading of the Palermo Convention and its protocol on trafficking might suggest that the elements above should form necessary prerequisites of national offences. However, the preparatory works to the Palermo documents clearly state that this is not the case. Not only are these elements not necessary, they *should not* form prerequisites of national offences. This can be quite confusing to some parties who are not familiar with the preparatory works to the Palermo documents or even preparatory works as a concept. It should also be noted that although it is not necessary, in national proceedings focus is usually put on the trade measures, most notably recruitment, in the country of origin. This means that the transnational dimension is usually in focus.

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Purpose of the Perpetrator

The wording the perpetrator is to act with a specific purpose suggests that direct intent is required with regard to the exploitation. This creates certain difficulties since the primary objective of most links of the trafficking chain is financial gain, i.e., they are motivated by the prospect of receiving remuneration. Thus, they do not necessarily act with direct intent. Though this at times might be dealt with by means of the rules on complicity, it still makes the trafficking offence complex and difficult to handle for prosecutors and other legal practitioners.

Consent

Consent is irrelevant when any of the improper means has been used or if the victim is a minor. The preparatory works do not elaborate upon the concept of consent or how it is to be interpreted. While some argue that the wording highlights the fact that in instances of trafficking consent is irrelevant, others argue that consent is *only* irrelevant if the perpetrator has undertaken a trade measure *by means of* employing improper means, i.e., this becomes important outside of the trafficking dimension. This presupposes some degree of activity on behalf of the perpetrator and, reversely, passivity on behalf of the victim. It might also suggest that the concepts of agency and consent are sometimes seen as the same thing. Arguably, it is exploitation that should make possible consent irrelevant. These questions are closely connected to the prerequisite of improper means or rather the wording *by means of*. This will be explained in more detail below.

Improper Means

The wording *by means of* suggests the perpetrator must assume an active role in recruitment, transport, etc. This is especially interesting in cases of vulnerability where the perpetrator is to abuse the vulnerable situation of the victim in order to make her agree to recruitment, transport, to provide prostitution services, etc. This might be interpreted as a requirement on the perpetrator to take the initiative, leading to a situation where two women in equally vulnerable situations are treated differently because one of them initiated recruitment or perhaps contemplated prostitution prior to being approached by the perpetrator while the other was recruited on the initiative of the perpetrator. Here, the issue of agency and consent (meaning voluntariness) are of central importance. Improper means are construed in such a way that every form of agency precludes improper means while taking advantage of a vulnerable situation should arguably be enough. The question is how this distinction between the 'coerced innocents' and women who have displayed some level of agency, i.e., most women, is to be justified and what implications it has for victims of this crime. This brings us to the non-legal area.

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Other Important Questions of Both Legal and Non-Legal Nature

Although trafficking has been defined as a modern form of slavery, the current international definition does not reflect this. People living in desperate conditions might view prostitution, forced labour, begging, etc., as an improvement of their conditions. Pathological circumstances such as extreme poverty make people take their chances with traffickers in hope of even the slightest improvement of their living conditions or simply in order to survive. However, due to, *inter alia*, the 'by means of' requirement, this is not necessarily covered by the trafficking definition.

The same logic applies to people who sell their children. Parents do not usually sell their children out of greed or because they are inherently bad people who want to see their offspring exploited but instead do so in hope of securing a better life for the child. In both instances, these people are often blamed for acting actively to change their circumstances. If the victim initiates recruitment or even considers prostitution prior to being approached by the perpetrator, this might be used to her disadvantage in a trial. This is arguably not in accordance with how the mechanisms of trafficking operate. It is also unfair to the victim. It places undue burden on her person and behaviour in the country of origin instead of focusing on the cynical abuse of the vulnerability of another human being, which is arguably at the core of the practice if not the crime of human trafficking. The crime should arguably focus on the abuse irrespective of whether the perpetrator has used the vulnerability in such a way so as to facilitate a trade measure by means of it or merely has exploited an opportunity, i.e., whether he initiated the trade measure or not.

After having summarized the main findings concerning the original source, it is now time to restate and evaluate the central findings concerning the country analyses, starting with Sweden. These sections will illustrate the process of implementation. The cases highlight that despite country-specific challenges of varying severity to the implementation of the original source, certain problems occur in all three countries. As I have already indicated, these problems are attributable to the original source. Thus, all three countries are faced with similar problems. In addition, the country-specific difficulties make a troublesome situation even worse.

Central Findings: Sweden

Introduction

The Swedish case illustrates three main things. Firstly, it indicates how serious the problems attributable to the original source are. Even though the Swedish

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state has been firmly involved in anti-trafficking efforts, the implementation process or rather the transplant is affected by the inadequacies inherent in the original source. Secondly, this illustrates that transplants might fail, and that due notice should be given to the national context when attempting to mend international problems such as trafficking by means of legal harmonization.

Thirdly, the country's anti-trafficking efforts aside, there are still problems concerning the practical application of these efforts. These problems are connected to a lack of awareness and, in some cases, prejudices, and occur mostly on the judicial and operational level.

In the following, the national challenges, which are of both legal and non-legal nature, will be addressed issue by issue and evaluated from legal and non-legal perspectives. Some of these issues are specific to Sweden while others are common among the countries.

Legal Issues

Formal Status of the Palermo Protocol – International Law

The official position of the Swedish state is that international law and the country's international obligations enshrined therein are to be followed and respected on the national level. International law is consequently to be interpreted in conformity with the intentions of its drafters. This also means that national legislation should generally be consistent with Sweden's international obligations.

The definition of trafficking of the Palermo Protocol has been transposed into a criminal provision. In this instance, i.e., where the provision is the result of the implementation of a specific international act, international law might be used to more clearly define the provision in question.[1] This means that the Palermo Protocol and the preparatory works thereto might be taken into consideration when interpreting the national trafficking provision.[2] As has been mentioned above, this would explain why Swedish lawyers are aware of how elements of border crossing and involvement of an organized criminal group as potential prerequisites of national trafficking provisions are to be interpreted, as these questions are explained in the preparatory works to the Palermo documents.

Trafficking Legislation

In this section, relevant findings concerning the trafficking legislation will be discussed. These include the questions of intent, improper means, and influence of the perpetrator on underage victims.

1 P. Asp, "Folkrätten och den svenska straffrätten" in R. Stern, I. Österdahl (eds.), *Folkrätten i svensk rätt*, Malmö, Liber, 2012, p. 70.

2 Ibid, p. 68.

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Intent

The wording *for the purpose of* implies that the perpetrator must act with the direct intent to exploit. Since most links of the trafficking chain act for money, only few individuals can actually be convicted of trafficking as principal perpetrators. This mirrors the wording of the Palermo Protocol. However, the protocol supplies only minimum standards. National legislation can therefore go beyond the obligations expressed therein.

In this context, it should be noted that the Swedish government has turned down a proposal to change the wording *for the purpose of* to *with intent to*, so as to allow all three forms of intent. This development has even been recognized on the international level. Swedish courts are said to repeatedly reject trafficking cases based on an interpretation of the Swedish trafficking provision which requires proof of intent to subject the victim to exploitation at the *outset* of the criminal act.[3]

The development described above should mean that the rules on complicity become increasingly applicable in cases where direct intent with regard to exploitation cannot be proven. However, the 'by means of' requirement, which will be discussed below, has led to a situation where potential cases of trafficking are increasingly qualified as procuring.

Improper Means

An important issue concerns the prerequisites of violence, threat, and deceit and their actual interpretation contra the other forms of improper means. While violence, deceit, etc., in the countries of origin are immensely difficult to prove, prosecutors usually base their cases on the prerequisite of vulnerability. In reality, however, very few cases based on that prerequisite are qualified by courts as trafficking. The circumstances of the victims are rarely seen as serious enough so as to fall under the prerequisite of vulnerability. However, the question is whether vulnerability in itself is not regarded as less serious than physical force or other forms of more 'visible' coercion.

Thus, there is a risk that trafficking in human beings will be reduced to instances where force or deception have been used by the perpetrator, and as these are immensely difficult to prove, a situation that can best be described as a catch-22 arises. This leads to the majority of trafficking cases being qualified as procuring. This development does not mirror reality where most people are forced into trafficking by means of more subtle measures than pure physical force.

3 "Sweden", TIP Report 2012, p. 328.

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In instances of referral to the prerequisite of a vulnerable position of the victim, the prosecutor must prove that the victim in her country of origin was in a severely tough situation of which the perpetrator was aware and duly exploited. In addition, the prosecutor must show that the disposition of the victim was influenced by the perpetrator's use of improper means. This means that women who display some level of agency, e.g., initiate recruitment or even consider prostitution before being approached by the perpetrator, are less likely to be seen as victims of trafficking than the so-called 'coerced innocents'.

Moreover, the victim must not see any other viable option than consenting to being trafficked. The prosecutor must show if the victim had any options other than, e.g., prostitution, and why these were not acceptable to her. In some instances courts have asked why the victim did not use her country's safety net (welfare system) or borrow money from her parents. It is important to note that a social safety net, e.g., various state benefits, seldom means the same in the countries of origin as it does in Sweden. In addition, victims of trafficking often come from the poorest strata of society. Their relatives are therefore usually equally vulnerable and not likely in a position to lend money.

Some of the problems seem to lie in perceptions. A judge, e.g., might venture that if presented with the option of prostituting herself abroad she would not accept it. Perhaps she would rather use the welfare system of her country or borrow money from a relative or friend. In this scenario, the judge looks at the actions and above all circumstances of the victim from her own highly internal perspective. Not only is she a state servant in a fairly non-corrupt country, which puts her in a different social context than the victim, her experience of the state has been an overall positive one. She might associate it with her profession, with generous student loans, housing benefits, state subsidies for those in need, etc. What she is missing is that this is not the case in Moldova, Russia, or even Poland, and the majority of the countries of origin for victims of trafficking. The perceptions of trafficking, exploitation, choices, etc., differ among the countries, especially between the victim (a representative of the poorest of her society) and the judges in the destination countries (well-educated and well-off).

It is important to note that this particular problem to a certain extent mirrors the wording of the Palermo Protocol. The challenge is that the evidence supporting the victim's claim is located in another country. Accessing this evidence usually requires vast resources both in terms of time and money. Also, to some degree, the hands of the judges are bound as they must see to it that it is proven beyond reasonable doubt that the victim's disposition was

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influenced by the perpetrator's use of improper means. Again, there seems to be a problem with the wording *by means of* (*genom*), especially with regard to the difference between choice and agency, as this tends to lead to a situation where agency is seen as having contributed to a situation where the perpetrator has not made the victim agree to a specific measure by means of improper means but 'only' taken advantage of a situation. As has already been noted above, two women might be in equally vulnerable situations where they both lack real choice or alternative options to taking the offer of the perpetrator. If one of them contacts the perpetrator herself or even considers prostitution, this does not necessarily mean that she has a choice, only that she possesses the agency to act. Arguably, her actions might still be influenced by the offer of the perpetrator even if she shows some level of agency. Choice and agency are thus not the same thing.

The way in which the prerequisite is construed (i.e., the fact that the perpetrator must assume an active role while the victim must be fairly passive) puts undue focus on the situation in the country of origin and the past behaviour of the victim. Since most women are autonomous individuals, very few actually qualify under the category of 'coerced innocents', something that might partly explain the low number of trafficking convictions.

To summarize, the problems are connected to the words *by means of* which indicate that the perpetrator must assume an active role as opposed to simply taking advantage of an opportunity. This means that the victim must be passive and that he is not to display agency. Choice and agency are therefore often seen as the same thing. This is partly the result of the wording of the trafficking provision and partly of the difficulties associated with evidence located in another country, the latter also being a problem of its own. To a certain extent, it also illustrates the importance of perception for the practical application of law.

Influence of the Perpetrator on Underage Victims

Another legal issue concerns underage victims and how the prerequisite of age is evaluated in legal proceedings. The wording of the trafficking provision implies that the age of the victim forms an objective prerequisite which means that if a person is under the age of eighteen there is no requirement on the perpetrator for having made use of improper means.

However, in practice, prosecutors must prove a certain degree of influence on behalf of the perpetrator toward the disposition of the victim.

In preparatory works and state policy documents in this specific area, it has been expressed that the degree of influence is to be set rather low. Arguably, this is not always reflected in case law. Swedish prosecutors, along with numerous

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human rights organizations in Sweden, lament this development. The Swedish Ombudsman for Children reports that the history and previous actions of underage victims have been given too prominent a role in court proceedings. Instead of focusing on the actual abuse, the sexuality of girls is put on centre stage. The prejudices concern the previous behaviour of the victim, her life including supposed values, even her school records. Statements such as *in her country she was a good student* or *she had never considered prostitution before* are not only made but afforded significant importance.

What would happen, e.g., in a situation where an underage person initiates recruitment yet is still deceived about the nature of the work? What if she before being approached by the recruiters had considered prostitution as a means of escaping her difficult situation? Would this make her less worthy of protection? Case law indicates that these circumstances would at the very least be to her disadvantage.

Trafficking in a Legal Context

The prerequisites of the Swedish trafficking provision seem to have roughly the same meaning as the prerequisites of the trafficking definition of the Palermo Protocol. Sweden is also familiar with the existence of the preparatory works to the Palermo documents and how to practically use them in order to interpret a legal concept or area in their light. From the very beginning, the Swedish legislator acknowledged the fact that the Palermo Protocol requires states to criminalize all forms of trafficking even if there are no elements of border crossing or an organized criminal group.

In other words, Sweden recognizes the distinction between directly applying international law and interpreting, e.g., specific rules in light of it. In comparison, this is something with which some Polish lawyers seem to struggle. Some voices in Polish doctrine have argued that the Palermo Protocol is not self-executing and that national legislation can therefore not be interpreted in light of it. Although Swedish lawyers would agree that the protocol or rather the rules contained therein are not self-executing there is an understanding that the preparatory works might still be used to shed light on certain central concepts in this specific area. Simply put, compared to the two other countries, Sweden has a longer tradition of not only applying but also creating international law, which seems to increase the country's overall understanding of the specific field.

Non-Legal Issues

In addition to the legal issues described above, there are also non-legal problems. These are recaptured in the following section.

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Sweden's Official Position in Relation to Trafficking

Officially, trafficking is condemned by the Swedish state as the slavery of our times. On the international level, Sweden has long been considered a forerunner where anti-trafficking efforts are concerned. Both the EU framework decision and directive on trafficking were efforts initiated during the Swedish presidency in the EU Council. The country also has legislation criminalizing the purchasing of sex.

At the same time, Sweden's low number of trafficking convictions has not gone unnoticed in the international context. This is mentioned in one of the world's most authoritative reports on trafficking, namely the TIP Report,[4] and is also frequently noted during international conferences on the subject. In addition, the UN Special Rapporteur on Violence against Women has noted that there is a gap between national legislation concerning sexual crimes and its actual application,[5] and the CEDAW committee has expressed concern about the small proportion of reported violent crimes against women that result in prosecution and conviction.[6]

One of the main official statements in this area is that trafficking in human beings is intrinsically linked to prostitution. Consequently, the mandates of most agencies dealing with trafficking pertain to trafficking for sexual exploitation. In a similar vein, the action plan (2008–2010) on trafficking covered only abuse for the purpose of sexual exploitation. The guidelines on how to identify and deal with victims of other forms of trafficking than those carried out for the purpose of sexual exploitation are not in place. However, the Stockholm County Administrative Board has been tasked (mid 2013) with developing such guidelines. In addition, it has been shown that problems on the practical level also concern trafficking for sexual exploitation. Although there are reports advocating better cooperation between relevant authorities and procedures guaranteeing safe returns, there are gaps between these ambitions and the actual practice.

Public Perception

The common perception of trafficking is that it is mostly connected to prostitution or rather sexual exploitation. Most people are aware that those forced into trafficking are victims. There is also quite a strong opinion against prostitution or rather against the purchasing of sexual services. There seems, however, to be

4 "Sweden", TIP Report 2012, p. 328.

5 Y. Ertürk, "Report of the Special Rapporteur on Violence against Women, its Causes and Consequences", *Mission to Sweden*, A/HRC/4/34/Add.3, 6 February 2007.

6 "Concluding Observations of the Committee on the Elimination of Discrimination against Women: Sweden", CEDAW/C/SWE/CO/7.

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a lack of awareness on other forms of trafficking such as begging and forced labour. Generally speaking, some people still might not know that beggars are often exploited by traffickers. This might be due to how trafficking is construed in the media as well as in NGO awareness-raising campaigns and official government policies.

However, this might also be connected to the fact that polls have mostly been about trafficking for sexual exploitation and prostitution. It is possible that knowledge on other forms of trafficking exists but that it has simply not been captured by national polls and the like.

Values Reflected in Judgments and the Practical Application of Anti-Trafficking Efforts

According to the TIP Report on Sweden, prosecutors state that it can be difficult to obtain convictions in otherwise strong trafficking cases when there is insufficient proof of intent to force the victim into exploitation at the outset of the case. Moreover government and NGO representatives claim that the judicial understanding of trafficking is often quite low.[7] Although the development referred to above is partly the result of the wording of the trafficking provision, it is also, to a certain extent, affected by the views and pre-understandings of judges. There has, e.g., been a case where women have not been considered trustworthy because of their vulnerable situations in the country of origin. Cases where victims were beaten, pregnant, locked in, threatened, etc., while in Sweden were not considered trafficking, as focus was put on how the women behaved in the country of origin and the level of agency that the women had displayed.

There are also problems at the operational level. First of all, there are no proper identification procedures for some victims of trafficking. There is no standardized assistance in terms of housing, psychological help, etc., to allow victims of trafficking to recuperate. Victims are only rarely offered the possibility of a reflection period. Police and NGOs have reported that victims were rarely informed of their right to a reflection period.[8]

Instead, victims of trafficking are sometimes deported because they have prostituted themselves, i.e., they are actually blamed for being victims and for being involved in criminal proceedings. This is partly the result of the fact that so many cases of trafficking are qualified as procuring and partly of the circumstance that victims often lie to the police as a result of being intimidated by the traffickers. Moreover, even if it was 'just' about procuring, it seems strange to deport someone based on the fact that they have worked as a prostitute while

7 "Sweden", TIP Report 2012, p. 329.
8 Ibid.

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at the same time viewing domestic prostitutes as vulnerable women who are forced to provide these services. Most importantly, how is the government's statement that prostitution and trafficking are intrinsically linked to one another to be taken seriously if foreign prostitutes, who usually also are victims of trafficking, are deported?

Central Findings: Poland

Introduction

The Polish case illustrates two things. Firstly, some problems are the same as in Sweden. These concern the prerequisites of intent and improper means and are clearly attributable to the original source. Secondly, the Polish situation is further aggravated by the fact that there seems to be less understanding of the original source specifically and of international law in general. Even after the latest amendment of the trafficking provisions, few legal commentaries mention the Palermo Protocol to any significant extent and none of them mentions the preparatory works thereto.

Although there is a lack of knowledge as to how the new prerequisites are to be interpreted, reference is not made to the Palermo documents and preparatory works but to the dictionary definitions of various concepts. In other cases, reference is made to already existent Polish terminology even if there are clear discrepancies between how this terminology and the new prerequisites are to be interpreted. This not only leads to a situation where views on basic components of the trafficking provision, such as the number of victims necessary to qualify an act as trafficking, diverge in the doctrine but also where some practitioners struggle with the practical application of the law.

There are also serious problems with regard to how victims of trafficking are described in the media and perceived by the public.

Legal Issues

Certain legal issues which affect the process of implementation of the original source have been identified. These include the standing of international law in the national legal system, the issue of intent, improper means and consent as well as confusion with respect to the new legal terminology and overlapping provisions.

Formal Status of the Protocol – International Law

Poland is bound by international law, as stated in Article 9 of its Constitution. This forms a requirement on the Polish legislator to draft laws in conformity

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with international obligations.[9] According to Article 87, Section 1 of the Constitution, international treaties are seen as one of the Polish legal sources. As has been indicated in the chapter on Poland, some treaties are directly applicable on the national level while some must first be transformed or transposed into domestic law. If a treaty is self-executing, it is usually directly applicable.

In this context, and with regard to the former trafficking provision, some experts argued that this provision could not be interpreted in light of the Palermo Protocol since the latter is not self-executing. Other lawyers claim that there is a difference between directly applying international law and using a ratified obligation in order to interpret a domestic provision regarding that very obligation. This illustrates a certain lack of knowledge among some scholars concerning not only the Palermo documents but also how international legal instruments might be used, i.e., that international law not only defines the relations between states or provides specific obligations but might also be used as a framework for interpreting specific legal concepts, rules, etc.

This is especially relevant where the application of a rule is not entirely clear as was reportedly the case with the former trafficking provision. In this context it should be noted that before the amendment only one book containing comments on the Criminal Code mentioned the Palermo Protocol, and even today few references are made to the protocol. It should again be mentioned that when prerequisites of the new trafficking provisions are discussed there is confusion as to how these are to be interpreted. Reference is often made to the words' dictionary definitions. Although the Polish definition of trafficking is more or less a verbatim transposition of the trafficking definition of the Palermo Protocol, not one reference is made to the preparatory works thereto with regard to how these words or concepts might be interpreted.

Trafficking Legislation

Intent of the Perpetrator

The words *for the purpose of* suggest that direct intent with regard to exploitation is required. Polish scholars agree that after the 2010 amendment the area of application of the trafficking provision was diminished as the former provision allowed both forms of intent, i.e., direct intent and *dolus eventualis*. This should lead to the same problem as is found in Sweden.[10]

9 D. Dudek, "Prawo konstytucyjne Rzeczypospolitej Polskiej" in T. Guz et al. (eds.), Warszawa, C.H. Beck, 2009, p. 207. See also W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wydanie IV, Kraków, Wydawnictwo Zakamycze, 2002, pp. 20–21.

10 See section on Sweden.

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Improper Means and Consent of the Victim

There is some confusion with regard to the concept of improper means and consent. In one book containing comments on the Criminal Code, it is argued that previous case law is no longer relevant since in many cases the women knew that they would be providing prostitution services. Although this might be true, it does not change the fact that the women were also in vulnerable situations and that this might still have qualified the case as trafficking.

In this context, some have claimed that it is only the presence of improper means *at the initial stage* of the trafficking chain that precludes possible consent and that in theory it is somehow possible to subsequently consent to exploitation. This is also reinforced when studying the comments on the provision on slavery. It is sometimes argued that this provision applies when there is no consent. However, the definition of trafficking, more specifically the presence of improper means and exploitation, also clearly preclude consent or make it legally irrelevant.

Lack of Consensus in the Doctrine and Case Law on Central Concepts of the Act of Trafficking

Both doctrine and case law on the former trafficking provision presented conflicting views concerning a variety of issues ranging from how many victims were considered necessary in order to qualify an offence as trafficking to what trade measures were covered by the provision. Moreover, before the amendment, there were three provisions that could become simultaneously applicable in trafficking cases. The first one concerned forced prostitution abroad. This type of trafficking could only be carried out by means of luring or abducting the victim. The penalty was one to ten years of imprisonment. The second, and more general, provision on trafficking simply criminalized all trade in human beings. It too covered selling someone into prostitution abroad. The penalty was at least three years of imprisonment. The provision did not contain a maximum period for which one could be imprisoned. Finally, there was an article on slavery that was considered to be of a more symbolic nature.

Some of these issues have not been resolved by the new provision. In doctrine, conflicting views concerning the number of victims necessary to qualify an act as trafficking remain. Although the provision on forced prostitution abroad has been removed, confusion still remains concerning the role of the article on slavery. There is also a provision criminalizing forced domestic prostitution. Although the presence of overlapping provisions is neither uncommon nor uniquely Polish, the presence of two, possibly three, similar provisions creates unnecessary confusion. It is preferable not to have overlapping provisions, especially when, in the Polish context, there is confusion with regard to

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how they are to be interpreted. This is one of the reasons why the Swedish provision of distressful situation was removed when the trafficking provision entered into force in 2002. As the penalties of the Polish provisions vary in severity, and there is some confusion in regard to when to apply what provision, for the sake of legal certainty their legal status should be clarified. This might be done by means of removing unnecessary duplications.

The list of trade measures in the trafficking provision has been made exhaustive, all in the name of adjusting the provision to international standards. Nowadays, it is therefore not possible to qualify, e.g., advertising of the services of the trafficking victims as a trade measure, some Polish scholars claim. However, such a requirement is nowhere to be found in the Palermo Protocol.

Some of the problems mentioned here such as the issue of overlapping provisions could possibly have been avoided by consulting the preparatory works to the Palermo Protocol and by devoting more time to the drafting process of the trafficking provision.

Trafficking in a Legal Context

Two important issues affecting the implementation of the original source concern legal terminology and legal tradition. There is a certain lack of understanding with regard to central concepts of the trafficking provision. In addition, legal scholars complain that the definition of trafficking is not consistent with the Polish tradition of law-making. These two challenges are addressed below.

Lack of Understanding of Central Concepts

There is a certain lacuna concerning the understanding and interpretation of some of the prerequisites of the new definition of trafficking. To name but one example, the prerequisite of abduction is also to be found in the Polish provision on abduction. This latter Article, however, criminalizes cases where a child is abducted from one parent by the other parent, etc. It can therefore not be used when interpreting the meaning of abduction within the trafficking provision as this would mean that only children can be abducted, not adults. Although this has been pointed out by the majority of Polish legal scholars, a considerable number routinely refer to the Article as a proper background for interpreting the prerequisite of abduction in the trafficking provision. Here, the legal pre-understanding of things affects the actual interpretation of the trafficking provision. Questions invariably arise as to how this prerequisite is to be interpreted.

The same applies to many other of the prerequisites of the trafficking definition of the Palermo Protocol, e.g., deceit, that were already present in Polish legal terminology before the implementation of the document into Polish law.

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Legal Tradition

The new trafficking provision seems quite unpopular among the legal elite. Some scholars blame the poor drafting procedure, where due notice was supposedly not taken of comments crucial to the quality of the provision. Others claim that the provision is a translation of a definition that is highly casuistic in nature, one clashing with the Polish tradition of synthetic law. Still others blame the international definition of trafficking itself for this unfortunate translation.

As will be shown, some of the problems occurring on the national level in this area are attributable to the Palermo documents. The quality of the Polish legal provision, however, does not (entirely) belong in that category. For one, the legislator should have taken heed of criticism pertaining to the former trafficking provision. Instead, new problems were added. Along the prerequisites of fraud and deceit, e.g., the provision also enumerates three other prerequisites that are actually prerequisites of fraud. If the provision is already considered too long and casuistic, it might have helped to only state fraud as the other prerequisites are already part of its definition, thus avoiding unnecessary duplications. The area of application of the trafficking provision would still be as broad, as the exact prerequisites in question are all part of the definition of fraud, i.e., they are the alternative prerequisites of fraud.

Non-Legal Issues

Poland's Official Position in Relation to Trafficking

It was not that long ago that the state officially identified trafficking as a high-priority issue. Presently, there are action plans on trafficking. However, there are no impartial mechanisms concerning the evaluation and enforcement of these plans as the Ministry of Interior both drafts the plans and overlooks their implementation. At one point, the action plan was not published for a period of time as the Ministry of Interior's focus was required elsewhere.

Compared to Sweden, trafficking is not addressed in equally condemning words and no links to forced prostitution are made. Also, trafficking for sexual exploitation is rarely addressed in terms of gender-related issues or in the overall context of sexual crimes. The state has not addressed the fact that victims of trafficking are sometimes stigmatized by their own communities. This might have been done by means of initiating awareness-raising campaigns or even by addressing the issue in school education.

Instead, the state is arguably partly to blame for perpetuating these prejudices, *inter alia*, by not making rape a publicly prosecuted crime. As has been noted above, this is reportedly done to protect victims from double victimization. However, what it also does is send a message that victims of rape are not

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as worthy of state protection as victims of other crimes and that the state will not contribute to ending the stigmatization of these persons.

According to international evaluations, the Polish government financially supported victim protection mechanisms throughout the country and developed methods to identify victims of sexual exploitation. However, reportedly, no such methods were created concerning victims of trafficking for forced labour. The government also improved its efforts concerning safer returns of foreign victims and initiated plans to offer monetary assistance to certain foreign victims.[11]

In addition, the state arranged anti-trafficking investigative and prosecutorial training to judges, labour inspectors, border guards, and police. Moreover, a witness protection program, the aim of which is to provide some victims of trafficking with shelter, food, medical and psychological care, etc., was launched.[12]

Public Perception

The Polish public's knowledge of trafficking is limited at best and prejudiced at worst. National polls indicate that the individuals who are the most vulnerable to trafficking are also the ones who harbour the worst misconceptions about the crime and its victims. It is not uncommon for these persons to view trafficking victims as criminals or to consider their deportation as an adequate and morally justifiable counter-trafficking measure. The communities that these people usually belong to tend to stigmatize their own members upon finding out about their pasts as prostitutes, trafficking victims, or even as victims of rape.

Simply put, victims of trafficking are to some extent considered to simply carry out the oldest profession in the world. This image is to a certain extent both created and reinforced by the media in which victims of trafficking are sometimes described as merchandise, pieces for export, women suffering from the Pretty Woman Syndrome, etc.

Values Reflected in Judgments, Practical Handling of Trafficking Cases, and Assisting the Victims

The most important finding concerning the practical application of the trafficking provision concerns the fact that a significant portion of convicted trafficking offenders are not sentenced to time in prison. In essence, it is not enough to draft new legislation or even properly apply it if traffickers are then

11 "Poland", TIP 2012, p. 287.

12 Ibid.

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basically exempted from any serious consequences. Although the Ministry of Interior has acknowledged this situation, it has not, to the author's knowledge, delved deeper into the reasons behind this development. Thus, one can only speculate.

First, there is the issue of prejudices. If the women are simply believed to be earning their living in the world's oldest form of work, then there is no reason or moral obligation to punish the people responsible for providing them with the means to do so. Secondly, there is the question of corruption. Poland ranks number 38 out of 177 countries and territories on Transparency International Corruptions Index for the year 2013,[13] with a score of 60.[14] Thirdly, there is the organized crime factor. It might be the case that judges and prosecutors are intimidated by traffickers.

What we can clearly see is that suspended sentences do not mirror the severity of the crime. It should also be added that it results in different treatment as compared to other serious crimes where suspended sentencing is not an option. This alarming development has also been highlighted on the international level. Therefore, the Ministry of Interior should not stop at questioning this development but attempt to find specific causes and initiate necessary reforms. Finally, one should also ask why this is not the case today. Is it due to a lack of financial means or of political will?

Central Findings: Russia

Introduction

The Russian case illustrates two important things. Firstly, just like in the Swedish and Polish cases, certain problems stem from the original source. Secondly, difficulties are not only present at the legislative and judicial levels but also with regard to international law as a concept. In Poland and Sweden there are certain problems with regard to the trafficking provisions and the application thereof. In Russia, however, an additional dimension is present as Russian prosecutors rarely invoke the trafficking provisions in criminal proceedings. The question is to what extent this is the result of a lack of knowledge concerning the new trafficking terminology as opposed to the

13 "Corruption Perceptions Index 2013", Transparency International, http://cpi.transparency.org/cpi2013/results/, (accessed 19 May 2014).

14 A country or territory's score indicates the perceived level of public sector corruption on a scale of zero – one hundred, where zero means that a country is perceived as highly corrupt and one hundred means it is perceived as very clean.

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circumstance that the trafficking provisions were transposed from international law. These and other questions will be discussed in the following sections.

Legal Issues

The most important legal issue is how international law is perceived in Russia. Although the trafficking provisions were the result of both international and internal lobbying processes, after enactment the provisions are reportedly rarely applied. In the following section, these developments will be further discussed, starting with the standing of international law in Russian legislation.

Formal Status of the Protocol – International Law

Article 15, Part 4 of the Russian Constitution defines the status of international law in the Russian legal system. The provision not only states that international treaties are part of the Russian legal system but also that in cases of collision of rules the rules of the international agreement shall prevail over national legislation. A treaty can, however, only become applicable in national court proceedings if certain requirements are met. Naturally, Russia must be party to the treaty and the latter must be legally binding in Russia. The treaty must not only have entered into force but also have been officially published. Finally, it must be self-executing. This means that the treaty must provide clear provisions with corresponding and specific penalties which the ratifying parties are then forced to implement.

Since the Palermo Protocol is not self-executing, a formal transposition was necessary. However, the question is to what, if any, degree the original source affects the application of the Russian trafficking provisions. Since case law in this area is not readily accessible, other factors were taken into consideration. Firstly, there is the issue of how Russia has historically regarded and dealt with international law. The country has a rather peculiar past in this respect. It did not ignore or disregard international law as such but it did, however, not allow it to impact on national legislation and the application thereof. For example, Russia signed the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others but added a disclaimer, the content of which was that the country did not suffer from such problems and that it only signed the instrument to encourage other countries' efforts against prostitution and trafficking. This illustrates the standing of international law at that time, namely that agreements were signed with no real intention of following the obligations enshrined therein. The question is how much this view has actually changed.

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Secondly, there is the issue concerning the low number of cases based on the trafficking provisions. Reportedly, Russian practitioners do not comprehend the legal terminology of the Palermo Protocol and continue to apply the rules on procuring. It therefore seems as if the impact of the Palermo Protocol on the Russian legal system has been rather low. Perhaps the results would have been different if the protocol addressed another area of international law as trafficking is not an issue prioritized by the state.

Trafficking Legislation

Intent

The wording *for the purpose of* implies direct intent with regard to exploitation. In a recent amendment of the trafficking provisions, it was said that buying and selling or otherwise carrying out transactions where people were treated as commodity are to be regarded as trafficking even if there was no purpose of exploitation. Excepting the buying/selling of a person and similar transactions where a person is treated as a commodity, other actions detailed in the trafficking provision require specific purpose. The perpetrator must undertake these actions for the purpose of exploitation. This arguably narrows the area of application of the trafficking provision. This is similar to the situation in Sweden and Poland.

Even though what has been mentioned about the Russian investigative and prosecutorial procedures is true and has an undeniable bearing on this development, the abovementioned difficulty adds another dimension to the discussion. What sets Russia apart from, e.g., Sweden, in this respect is that Russian prosecutors may intentionally decide not to invoke the trafficking legislation that they reportedly still have problems understanding.

This in turn is due to statistical considerations and, by extension, practical reasons of advancement, like the fact that the number of "won" cases might equal promotion. However, the motives behind so doing, as well as the end results, are basically the same as in Sweden and Poland, i.e., difficulties with proving the specific purpose of exploitation and as a direct outcome few convictions based on the trafficking provisions as opposed to the provisions on procuring.

Valuation of Improper Means

While violence or the threat thereof and a position of dependency constitute aggravating circumstances, a perpetrator who has deceived a victim (or several victims) into trafficking might actually walk free. The same is true if the perpetrator has abused the victims' vulnerable situations. This regards the possibility of exemption from criminal responsibility that will be further elaborated on in the following sections.

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It seems as if the Russian trafficking provision differentiates between various types of improper means and that individuals are discriminated against based on whether they were lured or forced. This seems to indicate a certain level of instrumentality concerning both the law and the victims of the crime. It also fails to reflect the true nature of the crime, where most victims are recruited through subtle measures, e.g., by means of abuse of a situation of vulnerability.

Trafficking in a Legal Context

Two specifically Russian challenges in the legal context concern motives behind the trafficking provision and the possibility of exemption from criminal responsibility. These issues illustrate the importance of the setting to which an original source is transplanted. For example, even though an international agreement is ratified, a national margin of appreciation is retained where the legislator can regard issues of relevance to its own legal context and tradition. In addition, the trafficking provision, just like other criminal provisions, operates in a wider legal context. In the Russian case, there are, e.g., rules on reconciliation, exemption from criminal responsibility, etc.

Objectives of the Trafficking Provision

Illegal crossings of the borders of the Russian Federation as well as the forging of documents are considered two of the objects (motives) behind the trafficking provision. In addition, they constitute aggravating circumstances. This is especially interesting in light of the fact that trafficking is generally considered a crime against the individual as opposed to smuggling which is a crime against the state. There is reportedly a tendency to address the problem of trafficking only if it is tied to other problems which form threats against the state, such as irregular migration, terrorism, etc.[15] Arguably, objects such as the freedom, integrity, health, etc., of the individual should form the main motives of the trafficking provision.

What is more, under certain circumstances, a trafficker might be exempted from criminal responsibility. This is true even if she has trafficked more than one person. This will, however, never be possible if the trafficker illegally transports the victim across Russian borders or falsifies the victim's documents. This should be viewed in the specific Russian context where human rights

15 L. Erokhina, "Trafficking in Women in the Russian Far East" in S. Stoecker, L. Shelley (eds.), *Human Traffic and Transnational Crime*, Lanham, Rowman and Littlefield Publishers, 2005, p. 81.

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have traditionally enjoyed less support than concerns pertaining to the wellbeing of the country.

Possibility of Exemption from Criminal Responsibility

The Russian trafficking provision is affected by the legal context where it operates, including the concept of exemption from criminal responsibility. It seems as if in the Russian legal system, criminal prosecution is not always the preferred solution. As has been mentioned above there are, e.g., general rules on reconciliation and exemption from criminal responsibility. Some provisions include specific rules to this effect such as the provision on sexual acts with a minor where the perpetrator might be exempted from criminal responsibility if he agrees to marry the victim.

As has been shown above, exemption from criminal responsibility is also possible in 'normal' cases of trafficking, i.e., in instances where a person is, e.g., deceived or where the perpetrator takes advantage of her vulnerability. This is true even if the perpetrator is responsible for trafficking several victims. If, however, the trafficker has also committed a crime against the state, *inter alia*, by making the victim cross the borders of Russia illegally or by forging or falsifying documents, criminal exemption is not possible.

Thus, apart from the obvious question of whether criminal exemption should even be possible with regard to such grave offenses as trafficking, the Russian provision actually discriminates against certain victims on the grounds of their recruitment and/or subsequent transport.

Non-Legal Issues

Russia's Official Position in Relation to Trafficking

There are basically no official documents concerning trafficking and thus no evaluations of possible state efforts against the practice.[16] As a result of this, international sources have been consulted. According to the TIP Reports, e.g., the government of Russia does not fully comply with the minimum standards for the elimination of trafficking. Although an action plan has reportedly been created, to the author's knowledge, it has not been implemented. The only official writing in this area is a pamphlet published by the Ministry of Internal Affairs. The document does not offer any concrete assistance to potential victims of trafficking. There are no contact points, and not even a telephone number is provided to call in order to get more information. The pamphlet basically states that people should be careful and not trust offers that seem too good to be true. Although thousands of Russians fall victim to trafficking each year,

16 Ibid, p. 80.

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and the crime is said to occur on Russian territory, it seems as if it is not a prioritized issue.

What is interesting here is how the draft law was presented to the *duma* in order to gain the broadest possible acceptance. It was not until the proponents of the law joined forces with representatives of the military that the draft law got the attention of the deputies. Before, it was 'just' a women's right issue. As a result of its alleged links to terrorism, trafficking was securitized as an urgent matter. In addition, parallels were drawn to the history of the Russian military in the Caucasus, namely the frequent kidnappings and subsequent enslavement of Russian soldiers by locals that took place there in the nineteenth century. History was said to be repeating itself, making the time ripe for a criminal provision against trafficking in human beings. As a result of this approach, two provisions were finally agreed upon, one of them specifically outlawing trafficking in human beings for forced labour.

Public Perception

As has been shown, *inter alia*, in the previous section, there have been no national awareness-raising campaigns on trafficking. Many people harbour prejudices against victims of trafficking and do not always comprehend the nature of this crime.[17] Some 35% of the male respondents and almost 32% of the female respondents in a national poll held that trafficked persons were mostly prostitutes hoping to earn more in other countries.[18]

It has been noted that there appears to be stigma attached to the label *trafficking victim*. This often results in double victimization. In a national poll conducted in 2007, 41% of the population held that trafficking victims have themselves to blame. This seems to correspond to the lack of political incentive in this area,[19] as the government reportedly does little to raise public awareness on the crime.[20]

As has been noted above, Russian politicians sometimes depict Westerners as the culprits where trafficking is concerned. According to a national poll, however, less than 14% of Russians believe that to be the true reason behind trafficking in human beings. The trust in the state authorities in this area is very low, as only 2.1% have faith in the ability of the state *duma* in this particular area, while only 2.7% trust the judiciary.[21] As has been noticed above, these

17 Ibid.

18 M. Buckley, "Public Opinion in Russia on the Politics of Human Trafficking", *Europe-Asia Studies,* vol. 61, no. 2, March 2009, p. 221.

19 Ibid.

20 "Russia", TIP Report, 2012, p. 295.

21 M. Buckley, p. 223.

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numbers might partly explain the reluctance of victims from former communist countries to participate in criminal proceedings in the countries of destination and to trust the authorities in these countries.

Values Reflected in Judgments, Practical Handling of Trafficking Cases and Victims

In the case of Russia, a bulk of the internal problems in this area can be attributed to corruption. Through the years, efforts concerning a draft law on trafficking have been halted by the *duma*. When pressure was put on Russia by the international community, not least in the TIP Report where the country was placed on Tier 3 and then Tier 2 Watch List, Russia's politicians and the media responded by blaming the trafficking problem on sexually-deprived Westerners. However, as the pressure increased, President Putin finally signed the draft law in late 2003.

Yet another problem concerns the procedural level, i.e., how a criminal investigation and later a criminal case is handled from beginning to end. Research indicates that a case switches hands an unreasonable amount of times, creating situations where no one can take ownership of it. As promotions are decided partly in proportion to the number of solved cases, practitioners not well versed in the new trafficking articles tend to apply the old provisions on procuring. Another reason seems to be language, as it has been noted that Russian practitioners do not always comprehend the Palermo Protocol's terminology. However, the lingual and legal-technical difficulties can to a certain extent be ascribed to the international definition of trafficking.

People's low level of trust in the criminal system and other state authorities, which seems proportional to the level of corruption in the country, forms an important obstacle in the forming of successful counter-trafficking measures. Tellingly, the organizations specializing in trafficking and human smuggling are sometimes owned by legal entities such as tourism or marriage agencies. The latter are said to advertise women, sometimes as young as ten years old, in a way similar to what one would do with merchandise.[22]

Another problem that to some degree is also present in the other countries concerns prejudices toward women and sexual crimes including trafficking. According to national polls, some Russians believe that victims of trafficking

22 D. Hughes, "The Impact of the Use of New Communications and Information Technologies of Trafficking in Human Beings for Sexual Exploitation. Role of Marriage Agencies in Trafficking in Women and Trafficking in Images of Sexual Exploitation", CoE, 2001, p. 12, http://www.uri.edu/artsci/wms/hughes/agencies_and_images, (accessed 19 May 2014).

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have themselves to blame for their fate while a vast number hold that the women are simply tempted by the prospect of earning more money by carrying out the world's oldest profession. The image of the happy prostitute influences the perception of trafficking.

Discrimination against women is still quite common. Reportedly, even 'normal' job advertisements directed at women sometimes require a specific appearance or 'no hang-up'.[23] Not surprisingly, these prejudices translate into law. In that sense, law might be seen as a perfect mirror of the society in which it operates. The article on rape, e.g., differentiates between various forms of sexual abuse, stating that only vaginal penetration can be considered rape. A person found guilty of sexual acts with a minor can be exempted from criminal responsibility or rather his actions will no longer be viewed as socially dangerous if he marries the victim.

An additional, and more uniquely Russian, problem concerns the treatment of homosexuals. Homosexuality has in Russia long been viewed as an actual disease. Until this day, rape of a male by another male is not considered possible. 'Homosexual sexual acts', as it were, can only be qualified as sexual coercion or abuse. What is worse, the prevalent prejudices and maltreatment of homosexuals seem to be present on all levels of society, reportedly including some of the NGOs working with victims of trafficking.

On a more positive note, international reports indicate that in 2010 the CIS Program to Combat Trafficking for 2011–2013 was signed by then president Medvedev. This program contains specific anti-trafficking measures which if implemented would apply throughout Russia. It also addresses NGO funding and victim protection. However, the Russian government has reportedly made little actual progress in efforts to protect and assist victims of trafficking. There are, e.g., no formal guidelines concerning the identification of trafficking victims or how these persons are to be assisted. There are reportedly no formal legal alternatives to deportation for foreign victims. The government has offered witness protection to victims of trafficking on an ad hoc basis. According to Russian authorities, the majority of foreign victims are not deported. However, neither are they assisted as witnesses in criminal proceedings. In most cases, they were simply released and can choose between going home or staying in Russia to look for employment.[24]

23 D. Hughes, "Trafficking for Sexual Exploitation: The Case of the Russian Federation", IOM, 2002, p. 11.

24 "Russia", TIP Report, 2012, p. 296.

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Conclusions and Suggestions

Introduction

The analyses have indicated that there are country-specific as well as common problems. Generally speaking, three main areas of concern have been identified. Two of them relate to country-specific problems which affect the implementation of the original source. The third area concerns common problems attributable to the original source. The first two areas pertain to the concept of *legal transplants* and *lingual and cultural particularities* while the third concerns the *international definition of trafficking*, i.e., Article 3 of the Palermo Protocol.

Firstly, there are problems inherent in the concept of legal transplants. It has been shown that there is a problem with mending international dilemmas with international legislation. It is one thing to harmonize private law within the EU (and even there some problems might occur) and quite another to facilitate real and sustainable change by means of harmonizing criminal laws. Here, the national setting plays an important role. If there is not enough national will and ability to instigate change, a transplant will simply not solve the situation. In this context, the number of suspended sentences in Poland should be noted as well as the tendency of Russian prosecutors not to invoke the trafficking provisions in criminal proceedings. Secondly, this is usually articulated in and reinforced by language as is primarily illustrated in the chapters on Poland and Russia.

In Poland, there is confusion with regard to the new legal terminology. Sometimes reference is made to the dictionary meaning of the central prerequisites of the trafficking provision. At other times, these are interpreted in light of already existent legislation that does not exactly cover the act in question. This is also visible in the practical application of law, e.g., the case of the woman who sold her infant referred to in the chapter on Poland. In that case, the prosecution arrested people based on accusations that could only (possibly) have been sustained by the former provisions on trafficking.

In Russia, this is illustrated by the propensity in case law to frame or base possible cases of trafficking on the rules on procuring since prosecutors are unsure as to how the new trafficking provisions or the language thereof are to be interpreted.

Nevertheless and thirdly, even if all the country-specific problems remain, the situation is not helped by an inadequate international definition of trafficking. If this definition was clearer, some of the ambiguities concerning intent of the perpetrator, exploitation, etc., might be removed. Consequently, there would be less confusion when applying the rules on the national level.

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This might increase the willingness of practitioners to apply trafficking legislation instead of the rules on procuring. It might also diminish the likeliness of prejudiced judgments as clearer rules would diminish the discretionary power of judges in this particular area. In the following section, the problems common in all three countries are summarized. These are the same as identified in the international context and therefore attributable to the original source. Each description of a problem is complemented by a suggestion toward a possible reform.

Legal Issues

Intent of the Perpetrator and Possible Reforms

The manner in which intent of the perpetrator has been defined in Article 3 of the Palermo Protocol has had practical implications for national legislation. The wording *for the purpose of* implies that direct intent with regard to the exploitation is necessary. In Sweden this has, as has been mentioned above, led to a situation where the majority of the links of the trafficking chain are seen as accomplices and not as principal perpetrators. This development has had far-reaching consequences for the application of the trafficking provision, so much so that this specific part of the trafficking provision is sometimes perceived as a warning example, i.e., as an example of how *not* to frame future legislation. In a recent expert inquiry concerning the drafting of a new law on money laundering, e.g., the experts seem to have taken stock of how the wording *for the purpose of* sometimes hinders an effective application of a relevant provision. It is basically said that although the purpose of the actions of the perpetrator should be crucial when qualifying an act as money laundering it should be enough that the perpetrator has intent in relation to the specific purpose of an accomplice. This is the result of the circumstance that in some cases the person physically responsible for the act will lack the specific purpose, instead acting for the purpose of receiving remuneration.[25]

The argument made by the expert inquiry on how *not* to frame a provision on money laundering is thus also applicable in trafficking cases. This can be compared to a person responsible for recruiting a trafficking victim. In most cases, these people act not for the purpose of exploitation but, just like in the case of money laundering, in order to receive remuneration. This is especially relevant since the ambition has been to criminalize all links of the trafficking chain.

In Russia, potential cases of trafficking are often qualified as procuring. This is partially the result of the intent of the perpetrator being stated as a

25 See SOU 2012:12, pp. 186–187.

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concrete purpose to exploit. Finally, Polish experts note that after the amendment of the trafficking provision in 2010, the only form of intent possible in trafficking cases is direct intent. This has diminished the area of application of the provision, as its predecessor allowed for both forms of intent existent in Polish law.

Here, we clearly see the importance that language plays, especially in the domain of law, where one word can influence a whole document. This is precisely the case with the Palermo Protocol, and the word 'guilty' of this development is *purpose*. As has been shown, this one little word has created a situation where Russian, Polish, and Swedish prosecutors alike must often settle with having possible cases of trafficking qualified as complicity or procuring.

In nearly all instances where Russian[26] trafficking provisions, specifically their application, are criticized, Russian legislators and practitioners are automatically painted as the guilty party. They are either corrupt, ignorant, or both, and perhaps most importantly their criminal provisions are accused of not being the proverbial carbon copies of the Palermo Protocol's definition of trafficking.

In a best case scenario, the Russians are seen as victims of faulty procedural rules and flawed criminal investigations. Nevertheless, and while not ignoring the problem of corruption or possible improvements concerning criminal investigations and the handling of cases, we must also conclude that the situation is, just like in the Swedish and Polish cases, complicated by a not entirely satisfactory international definition of trafficking that the countries have been obligated to incorporate into their national legislations.

Having a specific purpose implies a will, i.e., an intentional act directed toward achieving a specific result. Had the international definition of trafficking instead been worded *with intent to exploit* or *with some form of intent to exploit*[27] other forms of intent would probably be possible, as the concept, depending on jurisdiction, usually covers acts of direct intent as well as indirect intent/intent based on knowledge and *dolus eventualis*/intent based on indifference or probability.

The situation described above might be improved by means of replacing the prerequisite *for the purpose of* with the words *with* (*some form of*) *intent to*. This is quite an uncomplicated change that might make the trafficking definition more effective.

26 This also pertains to many other countries of origin.

27 In some jurisdictions, the concept of intent only covers direct intent. Therefore, it might be of importance to include the words *some form of intent* as this would specify that all forms of intent are possible.

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In the author's opinion the reform of the international definition of trafficking can and should be taken a step further. This will be described in more detail below.

Improper Means, Consent of the Victim, and Possible Reforms

In the international definition of trafficking, improper means have been connected to the trade measures with the words *by means of*. As a direct result of this, questions of whether the victim agreed to being transported or recruited or if she was really in a vulnerable position upon recruitment are central in trafficking cases. The question that needs to be asked is if that is the right way to go about it if one wants to achieve results in terms of effective anti-trafficking legislation.

There is also the question of whether the improper means are mutually equal, e.g., if a vulnerable situation is equal to using force. Although nothing in the Palermo Protocol suggests that we should distinguish between the means, this has arguably sometimes been the case on the national level. In Sweden, the wording of the trafficking provision suggests that the improper means are mutually equal, yet in practice they are sometimes afforded varying importance. As force in the country of origin seems impossible to prove, prosecutors usually invoke the prerequisite of vulnerability. The latter is, however, seldom seen as serious enough so as to qualify an act as trafficking. In addition, Swedish case law focuses on the improper means undertaken by the perpetrator at the initial stage of the trafficking chain, sometimes neglecting or diminishing the value of evidence connected to the actual abuse, i.e., improper means used by the perpetrator while in Sweden.

In Russia, not only the practical application of improper means but also the trafficking provision differentiates among the means, as abusing someone's dependent position and using violence constitute aggravating circumstances while vulnerability and deceit are not even mentioned. As we have seen, this also impacts on the question concerning the possibility of exemption from criminal responsibility.

An important challenge to effective anti-trafficking laws is formed by the words *by means of* which suggest that the perpetrator must take an active part in recruitment, transport, etc. Case law from national courts as well as hospital records illustrate that the victims are often drugged, raped, and beaten into obedience either by the traffickers or by the buyers. Yet, these cases are rarely seen as trafficking but instead as procuring. This is usually connected to the question of evidence and how the women behaved in their countries of origin, i.e., if it can be proven beyond reasonable doubt that it was the actions of the perpetrator that influenced the women's decision to, e.g., prostitute themselves.

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This misconception concerning the agency of victims versus the picture of the coerced innocent is present in the international definition of trafficking and is reinforced on the national level. It places an immense burden on women to be perfect and act perfectly in less than perfect conditions. Why is there such a distinction and who authorized the drafters to make it? Most probably it seemed proper and well-meant at the time of drafting the protocol but it is very far removed from the reality of the victims. Agency to act does not necessarily equal a free choice, and exploitation is still exploitation even if a person's circumstances force her to contemplate prostitution or seek out the help of a recruiter before he has a chance to approach her. One possibility is to shift focus from the victim to the perpetrator and from the country of origin to the country of destination.

Moreover, victims of trafficking are, as has been mentioned above, often reluctant to testify in trials. Increasingly, this leads to a situation where potential cases of trafficking are qualified as procuring. Again, a way of solving this problem might be to focus on the exploitation in the country of destination. It would then be possible to use, or rather acknowledge to a larger extent than what is done today, surveillance reports from the police and testimonies of potential witnesses, not just that offered by the victim. The evidence would then be located in the country where the crime is prosecuted.

Part 1 of the Russian trafficking provision defines human trafficking as the buying and selling of a person as well as other transactions where a person is treated like property. The previous trafficking provision in Poland had a similar wording. Nowadays, improper means are an integral part of the Polish trafficking provision. The same is true for the Swedish provision.

In Sweden, e.g., it has been argued that removing all improper means from the trafficking provision might unduly extend its area of application as well as blur the lines that differentiate trafficking from procuring. Others argue that the element of exploitation would still distinguish trafficking from procuring. However, in my opinion, it is primarily a question of improper means being connected to the initial trade measures (1), the fact that the trade measures are to be undertaken *by means of* improper means (2) as well as the concepts of free consent and agency (3).

Even though trafficking need not be transnational, the international provision is oriented toward the initial trade measures. Firstly, the very name *trafficking* implies some form of movement. National case law has accordingly focused on the initial stages of recruitment. This is especially visible in the Swedish context. At the same time, people already in Sweden, e.g., asylum-seekers and irregular migrants, are also very vulnerable to various forms of abuses such as trafficking. Swedish authorities report that between the years

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2009 and 2011, 461 unaccompanied children seeking asylum in Sweden disappeared from the care of the Board of Migration. Many of these children are assumed to have been trafficked.[28]

Secondly, the words *by means of* imply that the perpetrator must assume a very active role. It is not enough that she simply takes advantage of a vulnerable situation of the victim. If the act is to be qualified as trafficking she must make the victim agree to a certain trade measure by employing improper means. Two women might thus be in equally vulnerable situations even though one of them initiates recruitment and the other is approached by the perpetrator. If the perpetrator is aware of this situation (and it should be noted that traffickers knowingly and deliberately target the vulnerable), the victim is exploited and her situation taken advantage of irrespective of whom initiates recruitment. This is not always true in national case law, as the women referred to above are seen differently because one of them displayed agency (which applies to most women) and the other did not.

Thirdly, this concerns the concepts of agency and free choice. Even if a woman initiates recruitment in order to escape her vulnerable situation she might still lack viable options and therefore be unable to freely consent. She does, however, possess the agency to act (hence the action of initiating recruitment). If a person is in a vulnerable position she might decide to go abroad even if she knows that she would be providing prostitution services and that there is a real risk of trafficking. She is simply in such a desperate state that this alternative, however dangerous, seems worth the risk. In that context, it should therefore not matter if she uses one of her inalienable human rights, i.e., the agency to act, to initiate recruitment or if she is approached by the perpetrator and invited to go, i.e., that the perpetrator recruits her *by means of* taking advantage of her vulnerable situation.

A possible reform that is more extensive than the one concerning the issue of the intent of the perpetrator described above would be to remove the prerequisite *by means of* from the international definition of trafficking. It should be noted that under the current definition there is a possibility of connecting the improper means to the situation in the country of destination and that maybe it might be enough to highlight this in preparatory works and the like. However, in national case law the prerequisite has been connected to the trade measures used at the initial stage of the trafficking chain, most notably recruitment. It therefore seems better to start fresh by somehow replacing the words *by means of* with a wording that indicates that the perpetrator need not initiate

28 I. Åkerman, "Barn utsatta för människohandel – Nationell kartläggning", Rapport 2012:27, Länsstyrelsen i Stockholms Län, p. 17.

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the trade measures, i.e., assume an active role with regard to the victim, and that the victim is allowed to display agency. The reform should also illustrate that agency and consent are not the same thing.

The question that ultimately emerges is whether *trafficking* is an adequate term to capture the crimes discussed in this work. I attempt to answer this question in the following, but first, general conclusions about the legal situation are summarized.

General Conclusions about the Legal Situation

Based on the main findings made in this study, my first suggestion is to replace the wording for *the purpose of* with *intent in some form*. This will allow for other forms of intent than just direct intent with regard to the exploitation. As most actions of the persons involved in the trafficking chain constitute money-driven actions, this would mirror the real nature of the crime.

A second and more extensive suggestion is to remove the wording *by means of* with regard to improper means. As has been shown, discussions concerning possible reforms usually pertain to the prerequisite of improper means, i.e., it is argued that all improper means should be removed from the trafficking provision. Opponents of such reforms argue that this would blur the lines between trafficking and procuring. However, by removing the wording *by means of* we avoid this conflict while making the trafficking provision more effective. This would not only lead to a differentiation between agency and consent but protect all victims by focusing more on, e.g., the actual vulnerable situation of the victim, than on who caused it or how it was abused. This would also move the focus from the original recruitment to the actual abuse in the country of destination, which is beneficial also from the point of view of collecting evidence.

One way of initiating changes in this area would be to reform the wording of the trafficking definition of the Palermo Protocol. This would be the best solution since many countries only have criminalized trafficking as a result of international pressure. Their laws are often modelled on the trafficking provision of the Palermo Protocol. If this definition were improved and made clearer, this might leave less leeway for biased judgments. However, a reform of the international definition of trafficking seems unlikely.

We should thus be realistic about international legal harmonization or legal transplants and their ability to mend international problems. This is especially true concerning crimes like trafficking which have traditionally been afforded low priority by some states. While there might be direct incentives as well as more prestige involved in incorporating EU-law into national legislation, trafficking is clearly not this type of issue.

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While awaiting changes on the international level, we might attempt to address the problem on the national level. In the Polish and Russian cases, the changes were initiated in large part as a response to international pressure. Russia enacted its law due to, among other things, criticism in the TIP Report, while Poland changed its laws as a result of ratifying the Palermo Protocol and the EU framework decision (later directive) on trafficking. In both cases, there was national pressure as well. However, action was taken mostly due to international pressure and prestige.

In Sweden, by comparison, there has been a recurrent debate on how to improve the trafficking provisions. There has been a proposal to replace the words *for the purpose of* with *intent to*. Although it has been argued that this would unduly extend the area of application of the trafficking provision, this is, in my opinion, not true. The area would, however, be extended to make the law more effective. Also, current proposals concerning, e.g., a new law on money laundering, suggest this type of definition, i.e., a wording containing the prerequisite of intent and not purpose.

Another common suggestion in Sweden is to remove all improper means from the trafficking provision. Again, it seems enough to remove the words *by means of* and make it clear that it is enough that the perpetrator, e.g., takes advantage of a vulnerable situation, and that it is not necessary for her to use this situation to make a person agree to, e.g., prostitution, i.e., in practice it should not make any difference if a woman considered prostitution or initiated a trade measure prior to being approached by the perpetrator. If the perpetrator is aware of her condition and exploits the woman, this too should be qualified as trafficking. As most women display some level of agency, e.g., by considering prostitution to escape their difficult situations, such an amendment would be sensitive to the true mechanisms of trafficking thus making the provision more effective.

Re-conceptualization of the Trafficking Offence

The international definition of trafficking has a structure that does not adequately reflect the actual mechanisms of the crime. I am primarily referring to the wording *by means of*, which might suggest that some women who have displayed agency are considered less worthy of state protection than the stereotypical ideal of the coerced innocent. Since most women and situations do not match this description, many potential cases of trafficking are qualified as procuring. Not only do the words *by means of* suggest that a distinction should be made between women who initiate recruitment and women who

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are approached by the trafficker, it also leads to confusion with regard to the concepts of free choice and agency. As some women are in vulnerable situations (as they would starve, their children would not survive without medication etc.), it can be argued that they do not have a free choice. They do, however, possess the agency to act (which is arguably one of the basic human rights, i.e., human autonomy). If someone cynically exploits their hardships, it should not matter if the women have acted on that right (of agency) or if the perpetrator initiated the recruitment.

Even if treated like merchandise, they retain this agency, if not a free choice, and they should not be doubly victimized by states for acting on this right. Again, most victims of trafficking are usually in such desperate situations that additional violence, threats, etc., are not necessary in order to affect their dispositions. On the contrary, they might themselves initiate contact as a means of escaping their situations. This does not mean that they are not enslaved, beaten, or threatened in the countries of destination, but as the improper means are so connected to the initial trade measures, states might fail to see these people as victims of trafficking, something that frequently happens. In other words, focus is at the initial stage of the trafficking chain instead of the abuse in the country of destination.

In addition, the international definition of trafficking is not satisfactory from a legal point of view. It simply places a very heavy burden on both the prosecutor and the victim. While the victim must prove that she has acted as a coerced innocent, e.g., by not displaying any agency or not contemplating prostitution, the prosecutor must indicate direct intent with regard to exploitation as well as a certain level of activity on behalf of the perpetrator. This means that it is often not enough that the perpetrator is aware of the victim's vulnerable situation and that she takes advantage of it but that she must actively make the victim agree to one or several specific measures such as recruitment, prostitution, etc. Consequently, the prosecutor must prove that the victim was in a vulnerable situation, that the perpetrator knew about it, and that it was only the actions of the latter that convinced the victim to agree to a certain trade measure. As the evidence is often located in another country, this task usually proves impossible. This partly explains the low number of trafficking convictions worldwide.

A re-conceptualization of the crime is therefore necessary. An amendment should strive to bring the definition in tune with the mechanisms of the crime as well as to make it more effective, e.g., by focusing more on the actual exploitation than on the initial trade measures. However, it should be noted that the potential success of any provision to a large extent depends on interpretation and legal valuation of the prerequisites of the crime including

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possible prejudices of the practitioners.[29] A new definition of trafficking will therefore not, like some magic wand, instantly transform the situation and eradicate the crime, yet it is arguably a first and important step in the right direction.

While writing this book, I found it interesting that trafficking was repeatedly referred to as a modern form of slavery. This statement was made in scholarly works,[30] case law of the ECtHR,[31] governmental writings,[32] as well as in policy documents of international organizations such as the OSCE, the UN, and the EU Commission.[33]

In view of this statement, is it the best solution to have a provision on *human trafficking*? Since trafficking is considered a modern form of slavery, perhaps it would be better if the provisions on trafficking and slavery could be merged into one (where only one or both terms are used). The suggested provision would then focus on the exploitation of the victim.

Slavery has been defined in Article 1 of the Geneva Convention from 1926. The article reads as follows:

> For the purpose of the present Convention, the following definitions are agreed upon:
>
> (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

29 In this context it should be noted that prejudices are part of human behavior and will always exist. What is crucial is that we are made aware of them so that we can try not to let them influence our decisions.

30 See, e.g., B. Herzfeld, "Slavery and Gender: Women's Double Exploitation", *Gender and Development,* vol. 10, no. 1, 2002, W.P. Nagan, A. de Medeiros, "Old Poison in New Bottles: Trafficking and the Extinction of Respect", *Tulane Journal of International and Comparative Law*, vol. 14, no. 2, 2006, and S.P. Torgoley, "Trafficking and Forced Prostitution: A Manifestation of Modern Slavery", *Tulane Journal of International and Comparative Law*, vol. 14, no. 2, 2006.

31 Case of *Rantsev v. Cyprus and Russia*, (Application no. 25965/04), Judgment Strasbourg, 7 January 2010, Final 10 May 2010.

32 See, e.g., "Against Prostitution and Trafficking for Sexual Purposes", Government Offices of Sweden, 2009, p. 4.

33 See, e.g., "Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten Priorities for the Next Five Years. The Partnership for European Renewal in the Field of Freedom, Security and Justice", [Com (2005) 184 final – Official Journal C 236 of 24.9.2005] and "Global Report on Trafficking in Persons", UNODC and Global Initiative to Fight Human Trafficking (UN.GIFT), February 2009.

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(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

Arguably, the international definition of slavery is also in dire need of some updating. The Geneva Convention, which was signed in 1926, focuses on legal slavery. Today, legal slavery is basically abolished worldwide. The definition contained in the Geneva Convention therefore seems quite obsolete. Scholars note that it is imperative to acknowledge that slavery, like all social and economic practices, is not constant but evolves over time. Thus, a definition that is based on a historical form of slavery might not cover its new forms. The conclusion is that the understanding and definition of slavery must become as dynamic as the practice itself.[34]

The problems concerning the international definition of slavery were illustrated by the ECtHR case *Siliadin v. France*. In that case, an act where a young girl was held in servitude for years was not seen as slavery. The court applied Article 1 of the Geneva Convention and held that the couple did not have de jure ownership of the girl. It should be noted that this judgment has been criticized and that, e.g., the International Criminal Tribunal in another case went in the other direction claiming that de jure ownership is basically impossible today but that there can still be de facto ownership.[35] Nevertheless, it would be preferable to adjust the international definition of slavery to better suit the present situation.

A modern definition of slavery/trafficking should also capture the more subtle forms of the crime. These forms or methods are not only about blunt violence but also more subtle forms of coercion including abusing someone's vulnerable position are possible. A provision on modern slavery/trafficking in human beings might include prerequisites that make clear that the act includes:

i) Some form of coercion, including more subtle forms such as abusing the victim's vulnerability;

34 K. Bales, P.T. Robbins, "'No One Shall Be Held in Slavery or Servitude': A Critical Analysis of International Slavery Agreements and Concepts of Slavery", *Human Rights Review,* January–March 2001, p. 42.

35 *Prosecutor v. Kunarac* (Appeals Chamber) Case No. IT-96-23 and IT-96-23/1-A (12 June 2002).

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ii) Inability to leave the 'service', including subtle methods such as having no viable options;
iii) No or very little advantage for the coerced person, no or little earnings, no improvement of his situation, etc.

Creating such a provision might form one of many possible avenues for future research. In the following section, other possible avenues are addressed.

Possible Avenues for Future Research

'Trafficking is a modern form of slavery'. Such a strong statement carries, or ought to carry, certain implications. According to the abovementioned case law from the ECtHR, Article 4 of the ECHR is applicable in trafficking cases. This Article contains a prohibition of forced labour. If trafficking is seen as a modern form of slavery, Article 3 of the ECHR should arguably also apply. This means that the principle of non-refoulement ought to apply with regard to trafficking victims. The principle forms a prohibition to return persons to their countries of origin if they risk facing persecution, torture, or other forms of degrading treatment there. In addition, this principle is also expressed in, *inter alia*, Article 3 of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment.

We should keep in mind that victims of trafficking already come from marginalized societies, and their experience of being trafficked further perpetuates that situation. In many instances, upon return, they simply get re-trafficked or forced into domestic prostitution. Some of them might even out of pure desperation be willing to act as recruiters. Many victims are punished for having testified in trials against the traffickers. There have even been executions of trafficking victims. These were done to women who had disobeyed the traffickers by, e.g., trying to escape. The executions were carried out in front of other victims in order to deter the latter from similar behaviour. However, is it possible to regard trafficking in human beings as a form of torture? The international definition of torture is contained in Article 1 of the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third

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> person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

According to Section 2 of Article 1, however, this definition is a minimum standard and states are free to create definitions of wider applications:

> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

International humanitarian law differs somewhat from the definition above in that it typically does not require the involvement of a person acting in an official capacity as a condition for an act intended to inflict severe pain or suffering to be defined as torture.[36] Also, it has been stated that in cases where the state fails to prevent torture of its nationals, the provisions above might become applicable.

> Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been

36 "What is the Definition of Torture and Ill-treatment?", International Committee of the Red Cross, http://www.icrc.org/eng/resources/documents/misc/69mjxc.htm, (accessed 19 May 2014).

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> unable or unwilling to provide protection against such harm or threats of harm.[37]

The legal difference between torture and other forms of degrading treatment is connected to the degree of severity of pain or suffering imposed. In addition, torture requires the existence of a specific purpose behind the act, e.g., to punish the other person.

Where cruel or inhuman treatment is concerned, a specific purpose is usually not required, although a significant level of suffering or pain must be inflicted on the victim. In addition, the UNHCR has produced guidelines, the content of which states that gender and sexual orientation should be possible to view as such social groups that enjoy refugee protection.

> There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.[38]

Taking into account the fact that repatriated victims often end up with their oppressors and are punished, e.g., beaten, gang raped, re-trafficked, and sometimes even killed, it seems as if trafficking can fall under the definition of torture. Victims of trafficking might also face other forms of degrading treatment than those enumerated above.

Studies including interviews with former victims of trafficking as well as national polls on the subject indicate that women are often stigmatized because of their pasts as victims of trafficking and other sexual crimes. Such circumstances make it impossible to recover from the trauma. First, the women are victimized by traffickers, and sometimes also by states, and then by their own communities. This should arguably fall under the definition of degrading treatment.

In this context, it is the methods of interpretation that have been regarded problematic, i.e., the inability of some judges to incorporate gender-related reasons in their interpretations of existing grounds for asylum. The definition

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37 "Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees", HCR/GIP/02/01, 7 May 2002, UNHCR, p. 5, http://www.unhcr.org/3d58ddef4.pdf, (accessed 19 May 2014).

38 Ibid, p. 3.

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of a refugee is said to have historically been interpreted with the male adult in mind, i.e., a man that has been subjected to state persecution due to politically oppositional activities.[39] It would be interesting to study the methods of interpretation in cases concerning residence permits for victims of trafficking.

Today, numerous destination countries routinely send back victims of trafficking, sometimes without even taking their statements. In a best case scenario, the victims are offered temporary residence permits in exchange for agreeing to testify against their former oppressors. It might therefore be called into question whether the protection that the victims receive is adequate, especially in relation to the gravity of the crime that has been committed against them.

As of yet, a comprehensive analysis of whether trafficking is practically, i.e., on the national level, treated as a modern form of slavery has not been carried out. It has therefore been possible to identify a lacuna. This also has practical implications for states. Victims of trafficking are often blamed for the low number of convictions. They are said to be reluctant to cooperate with state authorities. Some actually end up defending their oppressors or prove unwilling to take the stand. This has partially been explained by the victims' overall scepticism and sometimes even fear of authorities acquired in their countries of origin. The reality, however, is rarely that simple, and this case is no exception. As has been noted above, victims of trafficking are often stigmatized because of their pasts. This also affects their willingness to testify. It is not that difficult to imagine how a victim of trafficking (who is usually a victim of multiple rapes) feels toward testifying to that. Firstly, she might be hesitant to admit even to herself that she is a victim, and secondly, she might be terrified at the prospect of facing possible exposure after being repatriated. Taking into consideration the strong possibility of being punished upon return by remaining members of the criminal group responsible for trafficking her, her willingness to testify might decrease even more.

Future research might, e.g., look at how victims of trafficking are treated in national court proceedings, in terms of how the exploitation is conceptualized. It might also look at how victims are identified, what kind of assistance and rehabilitation they get pre-trial and thereafter as well as how safe-returns are facilitated. Also, it is interesting to see if and on what grounds victims of trafficking can apply for protection such as permanent residence permits. There are naturally a lot of areas that deserve attention and that still remain under-researched. For example, we know comparatively little about trafficking for purposes other than sexual exploitation.

39 M. Zamacona Aguirre, "Riktlinjer för utredning och bedömning av kvinnors skyddsbehov – Ett fungerande verktyg?", Röda Korset, 2008, p. 21.

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References

Official Documents – Sweden

"Action Plan against Prostitution and Human Trafficking for Sexual Purposes", http://www.government.se/content/1/c6/11/06/29/fcd261a4.pdf (accessed 19 May).

"Action Plan to Combat Prostitution and Human Trafficking for Sexual Purposes", Info Sheet, Ministry of Integration and Gender Equality, Sweden, 2008, http://www.regeringen.se/content/1/c6/11/06/28/c77ec2bb.pdf (accessed 19 May 2014).

"Against Prostitution and Trafficking for Sexual Purposes", Government Offices of Sweden, 2009.

"Avvisning av rumänsk prostituerad kritiseras inte", Justitieombudsmannen Hans-Gunnar Axberger, Beslut, 2001-11-01, Dnr 4468–2011.

Ds 2008:7.

Ds 2003:45.

"Fattigdom och människohandel – En strategi för bekämpning av människohandel genom Sveriges internationella utvecklingssamarbete", Enheten för Global Utveckling, Stockholm, 2003.

"Handlingsplan mot prostitution och människohandel för sexuella ändamål", Regeringens skrivelse 2007/08: 167.

"Human Trafficking and Prostitution from a Swedish Perspective", County Administrative Board of Stockholm and National Task Force against Prostitution and Human Trafficking (NMT), 2011.

Kvinnofridspropositionen 1997/98.

Lagrådet. Yttrande till ändring av brottsbalken, utdrag ur protokoll vid sammanträde 2004-02-13.

Lagrådsremiss "Straffansvaret för människohandel", Stockholm, 2002.

Lyckner, C., "Ett tryggare återvändande för personer utsatta for prostitution och människohandel i Sverige", Rapport 2010:03, Länsstyrelsen i Stockholms län, 2010.

"Människohandel för sexuella ändamål", Lägesrapport 13, RPS rapport 2012.

"Människohandel för sexuella ändamål", Lägesrapport 14, RPS rapport 2014.

"Trafficking in Human Beings for Sexual and Other Purposes", Situation Report 12, RPS Report 2011.

"Människohandel för sexuella och andra ändamål 2009", Lägesrapport 11, RPS rapport 2010:5.

Prop. 2010/11:77.

Prop. 2009/10:152.

Prop. 2004/05:45.

Prop. 2003/04:111.

Prop. 2001/02:124.

Dominika Borg Jansson - 978-90-04-28107-3
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Prop. 2000/01: 85.
Prop. 1997/98:96.
Prop. 1997/98:55.
Prop. 1987/88:120.
Prop. 1983/84:105.
"Prostitution och människohandel för sexuella ändamål. En första uppföljning av regeringens handlingsplan", Brå rapport 2010:5.
RättsPM 2007:2, "Människohandel för sexuella ändamål – möjligheter och svårigheter vid rättstillämpningen", Rapport 2, Utvecklingscentrum Stockholm, 2007.
RättsPM 2006:12, Rapport del 1, Utvecklingscentrum Stockholm, 2006.
RättsPM 2008:11, "Människohandel och koppleri", Utvecklingscentrum Stockholm, 2008.
SOU 2012:12.
SOU 2010:71.
SOU 2010:49.
SOU 2008:41.
SOU 2002:69.
SOU 2002:3.
SOU 2001:14.
SOU 2000:88.
SOU 1996:185.
SOU 1986:14.
SOU 1944:69.
2008-09-29 Remissvar: Betänkandet (SOU 2008:41) Människohandel och barnäktenskap – ett förstärkt straffrättsligt skydd. Dnr: 9.1:0553/08.
2008-09-26 Brottsoffermyndigheten: Yttrande över betänkandet SOU 2008:41 Människohandel och barnäktenskap – ett förstärkt straffrättsligt skydd. Dnr: Ju2008/3706/L5.

Official Documents – Poland

Decision of the Supreme Court from December 19, 2007, *V KK 101707* (KZS 2008, nr 4, poz. 23).
Komisja Kodyfikacyjna Prawa Karnego, KKPK 403/9/05.
Kozłowska, U., "Problematyka Prawna – handel ludźmi w dokumentach międzynarodowych ratyfikowanych przez Polskę", Ministerstwo Spraw Wewnętrznych i Administracji, Warszawa, 2007.
Kozłowska, U., "Analiza statystyk dotyczących zjawiska handlu ludźmi" in *Handel ludźmi w Polsce. Materiały do raportu 2009*, Ministerstwo Spraw Wewnętrznych i Administracji, Warszawa, 2009.
"Krajowy Program Działań na Rzecz Kobiet – drugi etap wdrąźeniowy na lata 2003–2005", Warszawa.

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
via free access

"Krajowy Plan Działań Przeciwko Handlowi Ludźmi Na Lata 2009–2010", Warszawa.
Krasznicki, K., "Handel ludźmi w świetle badań postępowań karnych prowadzonych w latach 1995–2006" in *Handel ludźmi w Polsce. Materiały do raportu*, Ministerstwo Spraw Wewnętrznych i Administracji, Warszawa, 2007.
Uchwała SN z dnia 21 listopada 2001 r., sygn. I KZP 26/01, OSNKW 2002, nr 1–2, poz. 4.
"Sprawozdanie z wykonania Krajowego Planu Działan przeciwko Handlowi Ludźmi na Lata 2009–2010", Zespół do Spraw Zwalczania i Zapobiegania Handlowi Ludźmi, Warszawa, 28 January.
Wróbel, W., "Opinia w sprawie rządowego projektu ustawy o zmianie ustawy – Kodeks karny, ustawy – Przepisy wprowadzające Kodeks karny oraz ustawy – Kodeks postępowania karnego oraz ustawy o Policji (druk sejmowy nr 2387)", http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=2387 (accessed 19 May 2014).

Official Documents – Russia

Federal Law No. 162-FZ "On Amendments and Additions to the Criminal Code of the Russian Federation" passed by the state *duma* on 21 November 2003, entered into force 16 December 2003, Rossijskaya Gazeta 16 December 16-2003, http://legislationline.org/documents/action/popup/id/4188 (accessed 19 May 2014).
Item 1 of the Resolution of the Plenum of the Supreme Court of the Russian Federation from 15 June 2004, No. 11 "About Court Practice on the Crimes Provided by Articles 131 and 132 of the Criminal Code of the Russian Federation", Bulletin of the Supreme Court of the Russian Federation, 2004. No. 8.
"Ostorozhno, torgovlija lijudmii i kak ne stat jeje zhertvoij", MVD Rossii, Moskva, 2012, http://mvd.ru/upload/site1/oper_up/booklet_trafficing_web_1.pdf (accessed 19 May 2014).
Postanovlenie Presidijuma Verchovnovo Suda RF ot 3 oktijabra 2007, *No. 304-P07//SPS*.
"Sudebnaja sistema Rossii. Sostojanije problemy", Tsentr Politicheskikh Tekhnologij. Po zakazu Instituta sovremennogo razvitija, Moskva, 2009.
"V Khabarovskom kraije zaderzhana zhenshchina, pytavshajasja prodat' svoyego maloletnego rebenka", 28 February 2012, http://pda.mvd.ru/news/item/157635/ (accessed 19 May 2014).

Official International Documents

Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten Priorities for the Next Five Years. The Partnership for

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
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European Renewal in the Field of Freedom, Security and Justice [Com (2005)184 final – Official Journal C 236 of 24.9.2005].

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration and who cooperate with the competent authorities.

Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime.

EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

"Fighting Trafficking in Human Beings – An Integrated Approach and Proposals for An Action Plan", http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0514:FIN:EN:PDF (accessed 19 May 2014).

"Global Report on Trafficking in Persons", UNODC and Global Initiative to Fight Human Trafficking (UN.GIFT), February 2009.

"Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, UNHCR, http://www.unhcr.org/3d58ddef4.pdf (accessed 19 May 2014).

"Human Development Report", 2012, UNDP.

"Human Development Report", 2009, UNDP.

1904 International Agreement for the Suppression of the White Slave Traffic.

Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the 2000 United Nations Convention on Transnational Organized Crime.

Opinion No. 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission "On the Decision of the European Court of Human Rights in the case of *Rantsev v. Cyprus and Russia*", 22 June 2010.

Opinion No. 7/2010 of the group of Experts on Trafficking in Human Beings of the European Commission, "Proposal for a European Strategy and Priority Actions on combating and preventing trafficking in human beings (THB) and protecting the rights of trafficked and exploited persons".

Preparatory works to the Palermo documents; A/55/383/Add.1, http://www.unodc.org/unodc/crime_cicp_convention_documents.html (accessed 19 May 2014).

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
via free access

"Recommended Principles and Guidelines on Human Rights and Human Trafficking", Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, E/2002/68/Add.1.
"The EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe", Communication from the Commission to the European Parliament and the Council.
"The Stockholm Programme – An Open and Secure Europe Serving the Citizen", European Council.
The 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.
The 1926 Geneva Convention on Slavery.
United Nations Convention against Transnational Organized Crime.
Vienna Convention on the Law of Treaties.

Jurisprudence – Sweden

Case from 2012-09-21 from the Court of Appeal for Western Sweden, C*ase No. B 2827:12*.
Case from 2012-05-19 from the District Court of Gothenburg, *Case No. B 8184-11*.
Case from 2010-11-18 from the District Court of Stockholm, *Case No. 14880-10*.
Case from 2010-03-29 from the Göta Court of Appeal, *Case No. B 352-10*.
Case from 2006-06-13 from the Göta Court of Appeal, *Case No. B 626-06*.
Case from 2006-04-12 from the District Court of Katrineholm, *Case No. B 133-05*.
Case from 2006-01-11 from the Scania and Blekinge Court of Appeal, *Case No. B 2429-05*.
Case from 2005-09-22 from the District Court of Helsingborg, *Case No. B 1230-05*.
Cases from 2005-06-09 from the Svea Court of Appeal, *Case No. B 2204-05, B 2343-05 and B 3344-05*.
Case from 2005-06-02 from the District Court of Stockholm, *Case No. B 4156-04.*
Case from 2005-02-28 from the District Court of Stockholm, *Case No. B 2698-04*.
Case from 2004-04-29 from the District Court of Huddinge, *Case No. B 3848-03*.
Case from 2003-06-26 from the Svea Court of Appeal, *Case No. B 3065-03*.
Case from 2003-12-18 from the Court of Appeal for Western Sweden, *Case No. B 4388-03*.
Case from 2003-10-15 from the District Court of Gothenburg, *Case No. B 7477-03*.
Case from 2003-04-17 from the District Court of Solna, *Case No. B 2636-02.*
NJA 2011, *s. 563.*
NJA 2008, *s. 482 I.*
NJA 2008, *s. 482 II.*
NJA 2007, *s. 201.*
NJA 2006, *s. 577.*
NJA 1986, *s. 802.*

Dominika Borg Jansson - 978-90-04-28107-3
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NJA 1982, *s. 525.*
RH 2010*:34.*
RH 2008*:84.*
RH 2008*:36.*
RH 2006*:32.*
RH 1999*:4.*
RH 1990*:75.*
RH 1989*:37.*
RH 1983*:104.*
RH 1982*:10.*
RH 1982*:9.*
RH 1981*:87.*

Jurisprudence – Poland

Case from the Supreme Court from 2009-02-05, *II KK 251/08*, LexPolonica nr 208 5016.
Case from the Wrocław Court of Appeals from 2003-02-21, *II AKa 586/02*, OSA 2003.
Case from the Lublin Court of Appeals from 2002-04-29, *II AKa 330/02*.
Case from the Supreme Court from 1997-05-17, *II KKN 171/96*, Orz. Prok. i Prawo 1997, no. 10.

International Jurisprudence

Case of *Rantsev v. Cyprus and Russia* (Application no. 25965/04), Judgment Strasbourg, 7 January 2010, Final 10 May 2010.
Case of *Siliadin v. France* (Application no. 73316/01), Judgment Strasbourg, 26 July 2005.
Case of *Assanidze v. Georgia*, Application no. 71503/01, 8 April 2004.
Case of *Assenov and others v. Bulgaria*, Application no. 90/1997/*874/1086*, 28 October 1998.
Prosecutor v. Kunarac (Appeals Chamber) Case No. IT-96-23 and IT-96-23/1-A (12 June 2002).

Books and Articles

Abramson, K., "Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol", *Harvard International Law Journal*, vol. 44, no. 2, 2003, pp. 473–502.
Agadjanin, A., "Revising Pandora's Gifts: Religious and National Identity in the Post-Soviet Societal Fabric", *Europe-Asia Studies*, vol. 53, no. 3, 2001, pp. 473–488.

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
via free access

Ajani, G., "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe", *American Journal of Comparative Law*, vol. 43, no. 1, 1995, pp. 93–117.

Allain, J., "The Definition of Slavery in International Law", *Howard Law Journal*, vol. 52, 2008–2009, pp. 239–275.

Andersson, T., Cameron, I., Nordback, K., "EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale", *European Business Law Review*, vol. 14, no. 2, 2003, pp. 111–141.

Asp, P., "Uppsåtets nedre gräns – en efterlängtad sequel", *Juridisk Tidskrift*, Nr 2, 2004/05, pp. 385–396.

Asp, P., *Sex och samtycke*, Uppsala, Iustus Förlag, 2010.

Asp, P., Ulväng, M., Jareborg, N., *Kriminalrättens grunder*, Uppsala, Iustus Förlag, 2010.

Asp, P., "Folkrätten och den svenska straffrätten", in Stern, R., Österdahl, I. (eds.), *Folkrätten i svensk rätt*, Malmö, Liber, 2012, pp. 58–73.

Bales, K., Robbins, P.T., "'No One Shall Be Held in Slavery or Servitude': A Critical Analysis of International Slavery Agreements and Concepts of Slavery", *Human Rights Review*, January–March 2001, pp. 18–45.

Bardach, J., Leśnodorski, B., Pietrzak, M., *Historia ustroju i prawa polskiego*, Warszawa, Wydawnictwo Prawnicze LexisNexis, 2005.

Berkowitz, D., Pistor, K., Richard, J.F., "The Transplant Effect", *American Journal of Comparative Law*, vol. 51, 2003, pp. 163–203.

Betti, S., "New Prospects for Inter-state Cooperation in Criminal Matters: The Palermo Convention", *International Criminal Law Review*, 3, 2003, pp. 151–167.

Bojarski, T. (edt.) *Kodeks karny, Komentarz*, Warszawa, LexisNexis, 2012.

Borgeke, M., "Från Franks första formel till likgiltighetsuppsåt – Vad hände med tanken att uppsåtsläran borde reformeras?", *Juridisk Tidskrift*, Nr 2, 2008/09, p. 262.

Borisov, A.B., *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, 6: e izdanie, Moskva, Kniznij Mir, 2012.

Brand, O., "Language as a Barrier to Comparative Law", in Olsen, F., Lorz, A., Stein, D. (eds.), *Translation Issues in Language and Law*, Great Britain, Palgrave Macmillan, 2009, pp. 18–34.

Bruch, E.M., "Models Wanted: The Search for an Effective Response to Human Trafficking", *Stanford Journal of International Law*, vol. 40, no. 1, 2004, pp. 1–46.

Brzezinski, Z., "The Primacy of History and Culture", *Journal of Democracy,* vol. 12, no. 4, October 2001, pp. 20–26.

Buckley, M., "Public Opinion in Russia on the Politics of Human Trafficking", *Europe-Asia Studies*, vol. 61, no. 2, March 2009, pp. 213–248.

Butler, W.E., *Russian Law*, New York, Oxford University Press, 1999.

Cameron, I., "European Union Anti-Terrorist Blacklisting", *Human Rights Law Review*, vol. 3, no. 2, 2003, pp. 225–256.

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
via free access

Chuang, J., "Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts", *Harvard Human Rights Journal*, vol. 11, 1998, pp. 65–107.

Clark, M.A., "Trafficking in Persons: An Issue of Human Security", *Journal of Human Development*, vol. 4, no. 2, 2003, pp. 247–263.

Conley, J.M., O'Barr, W.M., *Just Words. Law, Language and Power*, second edition, Chicago and London, University of Chicago Press, 2005.

Danziger, S., Ward, R., "Language Changes Implicit Associations between Ethnic Groups and Evaluation in Bilinguals", *Psychological Science*, 2010 21: 799, originally published online on 5 May 2010, http://pss.sagepub.com/content/21/6/799.full.pdf+html (accessed 19 May 2014).

Demleitner, N., "Forced Prostitution: Naming an International Offense", *Fordham International Law Journal*, vol. 18, no. 1, 1994, pp. 163–197.

Dudek, D., "Prawo konstytucyjne Rzeczypospolitej Polskiej", in Guz, T., et al. (eds.), *Prawo polskie. Próba syntezy*, Warszawa, C.H. Beck, 2009, pp. 197–256.

Erokhina, L., "Trafficking in Women in the Russian Far East: A Real or an Imaginary Phenomenon?" in Stoecker, S., Shelley, L. (eds.), *Human Traffic and Transnational Crime*, Lanham, Rowman and Littlefield Publishers, 2005, pp. 79–94.

Erokhina, L.D., "The Problem of Trafficking in Women in Social Risk Groups", *Sociological Research*, vol. 46, no. 1, 2007, pp. 6–19.

Ewald, W., "Comparative Jurisprudence (II): The Logic of Legal Transplants", *American Journal of Comparative Law*, vol. 43, 1995, pp. 489–510.

Feinman, C., *Women in the Criminal Justice System*, third edition, Greenwood Publishing Group, 1994.

Feldbrugge, F.J.M., et al. (eds.), *Encyclopaedia of Soviet Law*, second revised edition, Dordrecht, Martinus Nijhoff Publishers, 1985.

Feldbrugge, F., *Russian Law: The End of the Soviet System and the Role of Law*, Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1993.

Feldbrugge, F. (edt.), *Russia, Europe and the Rule of Law*, Leiden, Martinus Nijhoff Publishers, 2007.

Filar, M. (edt.), *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2010.

Fitzpatrick, J., "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking", *Michigan Journal of International Law*, vol. 24, 2002–2003, pp. 1143–1168.

Gallagher, A., "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A preliminary Analysis", *Human Rights Quarterly*, vol. 23, 2001, pp. 975–1004.

Gardocki, L., *Prawo karne*, Warszawa, Wydawnictwo, C.H. Beck, 2009.

Gibson, J.L., Caldeira, G.A., "The Legal Cultures of Europe", *Law and Society Review*, vol. 30, no. 1, 1996, pp. 55–86.

Górniok, O., Bojarski, J., *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2010.

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
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Górowski, W., "Przestępstwo handlu ludźmi (wybrane zagadnienia)", *Państwo i Prawo* 2007, no. 12, pp. 62–74.

Grześkowiak, A., "Polskie prawo karne", in Guz, T., et al. (eds.), *Prawo polskie. Próba syntezy*, Warszawa, C.H. Beck, 2009, pp. 651–689.

Guz, T., Głuchowski, J., Palubska, M. (eds.), *Prawo Polskie. Próba syntezy*, Warszawa, Wydawnictwo, C.H. Beck, 2009.

Heidegger, M., *The Essence of Reason*, translated by Malick, T. Evanston, Northwestern University Press, 1962.

Herzfeld, B., "Slavery and Gender: Women's Double Exploitation", *Gender and Development*, vol. 10, no. 1, 2002, pp. 50–55.

Hernandez-Truyol, B., Larson, J., "Sexual Labour and Human Rights", *Columbia Human Rights Law Review*, vol. 37, winter, 2006, pp. 391–445.

Hobér, K., *Transforming East European Law*, Uppsala, Iustus Förlag, 1997.

Holmqvist, L., et al., *Brottsbalken. En kommentar*, Göteborg, Norstedts Juridik, 2000.

Honey, K., "Putting a Stop to Organ Trafficking and Tourism", *Journal of Clinical Investigation*, vol. 119, no. 3, 2 March 2009.

Hughes, D., "The 'Natasha' Trade: The Transnational Shadow Market of Trafficking in Women", *Journal of International Affairs*, vol. 53, no. 2, 2000, pp. 625–651.

Hughes, D., "The Impact of the Use of New Communications and Information Technologies on Trafficking in Human Beings for Sexual Exploitation. Role of Marriage Agencies in Trafficking in Women and Trafficking in Images of Sexual Exploitation", CoE, 2001, http://www.uri.edu/artsci/wms/hughes/agencies_and_images (accessed 19 May 2014).

Hughes, D., Denisova, T., "The Transnational Political Criminal Nexus of Trafficking in Women from Ukraine", *Trends in Organized Crime*, vol. 6, no. 3–4, 2001, pp. 1–22.

Hutton, C., *Language, Meaning and the Law*, Edinburgh, Edinburgh University Press, 2009.

Jareborg, N., *Straffrättens ansvarslära*, Uppsala, Iustus Förlag, 1994.

Jareborg, N., Friberg, S., *Brotten mot person och förmögenhetsbrotten*, Uppsala, Iustus Förlag, 2010.

Johnson, J.E., "Violence against Women in Russia", in Pridemore, W.A. (edt.), *Ruling Russia. Law, Crime and Justice in a Changing Society*, Lanham, Rowman & Littlefield Publishers, 2005, pp. 147–166.

Jonsson, A., Borg, D., "International Efforts to Combat Human Trafficking", in Shanty, F. (edt.), *Organized Crime: An International Encyclopedia*, ABC-CLIO, Oxford, 2007.

Jordan, A.D., "Human Rights or Wrongs? The Struggle for a Rights-Based Approach to Trafficking in Human Beings", *Gender and Development*, vol. 10, no. 1, March 2002, pp. 28–37.

Kempandoo, K., et al., *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights*, Boulder, CO, Paradigm Publishers, 2005.

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
via free access

Khan-Freund, O., "On Uses and Misuses of Comparative Law", *Modern Law Review*, vol. 37, no. 1, 1974.

Kischel, O., "Legal Culture – Legal Languages", in Olsen, F., Lorz, A., Stein, D. (eds.), *Translation Issues in Language and Law*, Great Britain, Palgrave Macmillan, 2009, pp. 7–17.

Kochanowski, J., "Redukcja odpowiedzialności karnej. Analiza i ocena założeń kodeksu karnego z 1997 na tle innych polskich kodyfikacji karnych", Instytut Prawa Karnego Uniwersytetu Warszawskiego, Warszawa, 2000.

Koryakovtsev, V.V., Pitulko, K.V., *Ugolovnoe pravo. Osobennaja chast*, 2-e izdanie, Lidijer, Moskva, 2010.

Kozłowska-Kalisz, P., *Kodeks karny. Praktyczny komentarz*, Warszawa, Oficyna, 2010.

Kotjoij, S.M., *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii,* Moskva, Wolters Kluwer, 2011.

Krygier, M., "Law as Tradition", *Law and Philosophy*, vol. 5, 1986.

Kudrjavtjev, V.N., *Ugolovnoje Pravo Rossii. Obshchaja chast*, Jurist. Moskva, 2006.

Kulik, M., *Kodeks karny. Praktyczny komentarz*, Warszawa, Oficyna, 2010.

Legrand, P., "European Systems are not Converging", *International and Comparative Law Quarterly*, vol. 45, 1996, pp 52–81.

Legrand, P., "The Impossibility of Legal Transplants", *Maastricht Journal of European and Comparative Law*, 111, 1997, pp. 111–124.

Legrand, P., "What Legal Transplants", in Nelken, D., Feest, J. (eds.), *Adapting Legal Cultures*, Portland, Oregon, Hart Publishing, 2003, pp. 55–69.

Malarek, V., *The Trade in Natashas. Inside the New Global Sex Trade*. New York: Arcade Publishing, 2004.

Malynovska, O., "International Migration in Contemporary Ukraine: Trends and Policy", *Global Migration Perspectives*, no. 14, Global Commission on Migration (GCIM), 2004.

Marochkin, S.Y., "International Law in the Courts of the Russian Federation: Practice of Application", *Chinese Journal of International Law*, no. 2, 2007, pp. 329–344.

Marek, A., *Kodeks Karny. Komentarz*, Warszawa, Dom Wydawniczy ABC, 2004.

Mattar, M.Y., "Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention", *Tulane Journal of International and Comparative Law*, vol. 14, no. 2, Spring 2006, pp. 357–420.

McCarthy, L., "Beyond Corruption. An Assessment of Russian Law Enforcement's Fights against Human Trafficking", *Demokratizatsiya,* 2010, World Affairs Institute.

McClean, D., *Transnational Organized Crime. A Commentary on the UN Convention and its Protocols*, Oxford, Oxford University Press, 2007.

Miller, J.M., "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain The Transplant Process", *American Journal of Comparative Law*, vol. 51, no. 4, 2003.

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
via free access

Mironov, B., *A Social History of Imperial Russia 1700–1900*, vol. 2, Westview Press, 2000.

Mistelis, L.A., "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations", *International Lawyer,* vol. 34, no. 3, 2000, pp. 1055–1069.

Morawska, E., "Trafficking into and from Eastern Europe", in Lee, M. (edt.), *Human Trafficking*, Devon, Willan Publishing, 2007.

Mozgawa, M., *Kodeks karny. Praktyczny komentarz*, Warszawa, Oficyna, 2010.

Nagan, W.P., de Medeiros, A., "Old Poison in New Bottles: Trafficking and the Extinction of Respect", *Tulane Journal of International and Comparative Law*, vol. 14, no. 2, 2006, pp. 255–268.

Nelken, D., "Towards a Sociology of Legal Adaptation", in Nelken, D., Feest, J. (eds.), *Adapting Legal Cultures*. Portland, Oregon, Hart Publishing, 2003, pp. 3–6.

Neumayer, E., Dreher, A., Cho, S.Y., "Does Legalized Prostitution Increase Human Trafficking?", *World Development*, vol. 41, January 2013, pp. 67–82.

Obokota, T., *Trafficking in Human Beings from a Human Rights Perspective. Towards a Holistic Approach,* Leiden, Martinus Nijhoff Publishers, 2006.

Pejovich, S., "Law, Tradition, and the Transition in Eastern Europe", *The Independent Review*, vol. II, no. 2, fall 1997, pp. 243–254.

Pipes, R., "Private Property, Freedom, and the Rule of Law", *Hoover Digest No. 2*, 2001.

Piórkowska-Flieger, J., *Kodeks karny. Komentarz*, Warszawa, LexisNexis, 2012.

Pomarańska-Bielecka, M., "Obraz handlu kobietami w prasie polskiej", in Lasocik, Z. (edt.), *Handel ludźmi. Zapobieganie i ściganie*, Warszawa, Katedra Kryminologii i polityki Kryminalnej IPSiR UW, 2006, pp. 339–348.

Radoniwicz, F., "Przestępstwo handlu ludźmi", *Prokuratura i Prawo*, 2011.

Radtjenko, V.I. (edt.), *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, 2: e izdanie, Moskva, Prospekt, 2010.

Rijken, C., de Volder, E., "The European Union's Struggle to Realize a Human Rights Based-Approach to Trafficking in Human Beings", *Connecticut Journal of International Law*, vol. 25, no. 49, 2009, pp. 49–80.

Shelley, L.I., "Russia's Efforts to Combat Human Trafficking: Efficient Crime Groups versus Irresolute Societies and Uncoordinated States", in Pridemore, W.A. (edt.) *Ruling Russia. Law, Crime and Justice in a Changing Society*, Lanham, Rowman & Littlefield Publishers, 2005.

Skrzydło, W., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wydanie IV. Kraków, Wydawnictwo Zakamycze, 2002.

Solomon, P.H., *Soviet Criminal Justice under Stalin*, Cambridge, Cambridge University Press, 1996.

Surtees, R., "Traffickers and Trafficking in Southern and Eastern Europe", *European Journal of Criminology*, vol. 5, no. 1, January 2008, pp. 39–68.

Szwarczyk, M., *Kodeks karny. Komentarz*, Warszawa, LexisNexis.

Dominika Borg Jansson - 978-90-04-28107-3
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Tadic, F.M., "How Harmonious Can Harmonization Be? A Theoretical Approach Towards Harmonization of (Criminal) Law", in Klip, A., van der Wilt, H. (eds.), *Harmonization and Harmonizing Measures in Criminal Law*, Proceedings of the Colloquium, Amsterdam, 13–14 December 2001, Amsterdam, The Netherlands: Royal Netherlands Academy of Arts and Sciences.

Tjekalin, A.A., *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, 3: e izdanie, Moskva, Jurajit, 2006.

Tjutjaev, A.I., *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii*, Moskva, Infra-M-Kontrakt, 2011.

Torgoley, S.P., "Trafficking and Forced Prostitution: A Manifestation of Modern Slavery", *Tulane Journal of International and Comparative Law*, vol. 14, no. 2, Spring 2006, pp. 554–577.

Vlachová, M., "Trafficking in Human: The Slavery of Our Age", *Quarterly Journal*, 2005, pp. 1–16.

Walker, N., "The Idea of Constitutional Pluralism", *Modern Law Review*, vol. 65, no. 3, 2002, pp. 317–359.

Watson, A., "Legal Change: Sources of Law and Legal Culture", *University of Pennsylvania Law Review*, vol. 131, 1983, pp. 1121–1157.

Watson, A., "From Legal Transplants to Legal Formants", *American Journal of Comparative Law*, vol. 43, 1995, pp. 469–476.

Westerstrand, J., *Mellan mäns händer. Kvinnors rättssubjektivitet, internationell rätt och diskurser om prostitution och trafficking*, Uppsala, Uppsala Universitet, 2008.

Wise, E., "The Transplant of Legal Patterns", *American Journal of Comparative Law*, vol. 38, 1990, pp. 1–22.

Wróbel, W., Zoll, A., *Polskie prawo karne. Część ogólna*, Kraków, Wydawnictwo Znak, 2011.

Zimmerman, C., "The Health of Trafficked Women: A Survey of Women Entering Post-trafficking Services in Europe", *American Journal of Public Health*, vol. 98, no. 1, 2008, pp. 55–59.

Zielińska, E., "Zakaz handlu ludźmi w polskim prawie karnym", in Lasocik, Z. (edt.), *Handel ludźmi. Zapobieganie i ściganie*, Warszawa, Katedra Kyminologii i Polityki Kryminalnej IPSiR UW, 2006.

Zweigert, K., Kötz, H., *An Introduction to Comparative Law*, third edition, Oxford, Clarendon Press, 1998.

Other Sources

"Abuse of a Position of Vulnerability and Other 'Means' within the Definition of Trafficking in Persons", Issue Paper, UNODC, 2013.

Dominika Borg Jansson - 978-90-04-28107-3
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Akandji-Kombe, J.F., "Positive Obligations under the European Convention on Human Rights". *A Guide to the Implementation of the European Convention on Human Rights*, Human Rights Handbooks No. 7.

Akerman, I., "Barn utsatta for manniskohandel – en nationell kartlaggning", Rapport 2012:27, Länsstyrelsen i Stockholms Län.

"Allmänheten om sexuella tjänster", SIFO, 1999.

"Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants", UN, 2012, http://www.unodc.org/documents/human-trafficking/Migrant-Smugling/UNODC_2012_Assessment_Guide_to_the_Criminal_Justice_Response_to_the_Smuggling_of_Migrants-EN.pdf (accessed 19 May 2014).

"Basic Principles of GAATW", http://www.gaatw.org/index.php?option=com_content&view=article&id=94&Itemid=47 (accessed 19 May 2014).

Berkowitz, D., Pistor, K., Richard, F.R., "Economic Development, Legality and the Transplant Effect", CID Working Paper No. 39, March 2000, *Law and Development Paper No. 1,* Centre for International Development at Harvard University.

Buchowska, S., "Poland", in "E-notes Report on the Implementation of Anti-Trafficking Policies and Interventions in the 27 EU Member States (2008–2009)". E-notes, http://www.e-notes-observatory.org/ (accessed 19 May 2014).

"Capital Punishment: Russians Want Return of Death Penalty", 29 March 2012, http://rt.com/news/death-penalty-return-russia-787/ (accessed 19 May 2014).

Carlsson, M., "Alexandra har gett upp hoppet om skadestånd", Dagens Nyheter, 1 March 2013, http://www.dn.se/nyheter/sverige/alexandra-har-gett-upp-hoppet-om-skadestand (accessed 19 May 2014).

Carlsson, M., "Alexandra utvisades – till människohandlarna", Dagens Nyheter, 27 February 2013, http://www.dn.se/nyheter/sverige/alexandra-utvisades--till-människohandlarna (accessed 19 May 2014).

"Chciały kupić niemowlę, nie odpowiedzą za handel ludźmi", Lubelski Kurier, 10 November 2011, http://www.kurierlubelski.pl/artykul/471232,chcialy-kupic-niemowle-nie-odpowiedza-za-handel-ludzmi,id,t.html?cookie=1 (accessed 19 May 2014).

"Concluding Observations of the Committee on the Elimination of Discrimination against Women: Sweden", CEDAW/C/SWE/CO/7.

Corruption Perceptions Index 2013, Transparency International (accessed 19 May 2014).

"Dags att kriminalisera svenskars sexköp utomlands", Dagens Nyheter, 24 November 2012, http://www.dn.se/debatt/dags-att-kriminalisera-svenskars-sexkop-utomlands (accessed 19 May 2014).

Danilenko, G.M., "Implementation of International Law in Russia and Other CIS-states", 1998, http://www.nato.int/acad/fellow/96-98/danilenk.pdf (accessed 19 May 2014).

"Detta gör ECPAT", http://www.ecpat.se/vad-gor-ecpat (accessed 19 May 2014).

Ditmore, M., Wijers, M., "The Negotiations on the UN protocol on Trafficking in Persons", NEMESIS, 2003, no. 4.

Dominika Borg Jansson - 978-90-04-28107-3
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Dodillet, S., "Därför misslyckas trafficking-politiken", Expressen, http://www.expressen.se/debatt/darfor-misslyckas-trafficking-politiken/ (accessed 19 May 2014).

"Drugs and HIV/AIDS in Southeast Asia", UNODC, Regional Project for Reducing HIV Vulnerability from Drug Abuse (AD/RAS/02/G22), 2004.

El-Cherkeh, T., et al., "EU-Enlargement, Migration and Trafficking in Women: The Case of South Eastern Europe", HWWA-Report 247, Hamburgisches Welt-Wirtschafts-Archiv (HWWA), Hamburg Institute of International Economics, 2004.

Ertürk, Y., "Report of the Special Rapporteur on Violence against Women, its Causes and Consequences", *Mission to Sweden*, A/HRC/4/34/Add.3, 6 February 2007.

Ertürk, Y., "Report of the Special Rapporteur on Violence against Women, its Causes and Consequences", *Intersections between Culture and Violence against Women*, A/HCR/4/34, January 2007.

"Fallet nedlagt. Våldtäkt och mänskliga rättigheter i de nordiska länderna", Amnesty International, svenska sektionen, 2008.

"Folkrätt och mänskliga rättigheter", Regeringskansliet, http://www.regeringen.se/sb/d/3303 (accessed 19 May 2014).

"Forced labour now more common than sex traffic", Radio Sweden, 2012, http://sverigesradio.se/sida/artikel.aspx?programid020546artikel=4909826 (accessed 19 May 2014).

"Fortfarande brister i kunskap om prostitution och människohandel", BRÅ, http://www.bra.se/bra/nytt-fran-bra/arkiv/press/2011-11-30-fortfarande-brister-i-kunskapen-om-prostitution-och-manniskohandel.html (accessed 19 May 2014).

Fusu-Plaiasu, G., Ionescu, I., and Iordache, R. (eds.), "FRA Thematic Study on Child Trafficking. Romania", European Union Agency for Fundamental Rights.

"Få offer erbjuds tillfälligt skydd", Dagens Nyheter, 28 February 2013, http://www.dn.se/nyheter/sverige/fa-offer-erbjuds-tillfalligt-skydd (accessed 19 May 2014).

"Guide to the New UN Trafficking Protocol", CAATW, European Women's Lobby, AFEM, p. 3, http://www.catwinternational.org/Content/Images/Article/83/attachment.pdf (accessed 19 May 2014).

"History", CATW, http://www.catwinternational.org/WhoWeAre/History (accessed 19 May 2014).

Hołda, Z., Czyź, E., "FRA Thematic Study on Child Trafficking. Poland", European Union Agency for Fundamental Rights, Warsaw, 22 July 2008.

Holmström, C., "Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduktion" in Holmström, C., Skilbrei, M.L. (eds.), *Prostitution i Norden. Forskningsrapport*, TemaNord 2008:604.

Hughes, D., "Trafficking for Sexual Exploitation: The Case of the Russian Federation", IOM, 2002.

"Human Rights and Trafficking in Persons: A Handbook", GAATW, 2000.

"Human trafficking: organized crime and the multibillion dollar sale of people", UNODC, 19 July 2012, http://www.unodc.org/unodc/en/frontpage/2012/July/human

Dominika Borg Jansson - 978-90-04-28107-3
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-trafficking_-organized-crime-and-the-multibillion-dollar-sale-of-people.html (accessed 19 May 2014).

"ILO Action against Trafficking in Human Beings", ILO, 2008.

"ILO Global Estimate of Forced Labour. Results and Methodology", ILO, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf (accessed 19 May 2014).

Interview with Vaisla, A., Head of Unit 2, Drug Enforcement Bureau for Fight against Trafficking in Human Beings of the Organized Crime Combating Board of Main Criminal Police Board of State Police, Ministry of Interior, Latvia, conducted on 11 May 2005 at 11:30 in Riga, Latvia.

"Is Trafficking in Human Beings Demand Driven?", A Multi-Country Pilot Study, No. 15, *IOM Migration Research Series*, IOM, 2003.

Izdebski, Z., Dec, J., "Criminal Justice Responses to Trafficking in Human Beings in Poland", Institute of Social Pedagogy Counseling and Sexual Education Unit, University of Zielona Góra, coordinated by UNICRI.

"JO skuldbelägger offer för människohandel", Stiftelsen Tryggare Sverige, 3 March 2013, http://www.mynewsdesk.com/se/pressroom/stiftelsen-tryggare-sverige/blog_post/view/jo-skuldbelaegger-offer-foer-maenniskohandel-17633,, (accessed 19 May 2014).

Jordan, A., "The Annotated Guide to the Complete UN Trafficking Protocol", Washington, Global Rights. Partners for Justice, 2002.

"Knowledge Product. Trafficking in Human beings in the European Union", 08 OC Networks in South-East European Sphere O2 Analysis and Knowledge, Europol Public Information, The Hague, 1 September 2011.

Koss-Goryszewska, M., "Same sobie winne? Postrzeganie ofiar handlu ludźmi w polskich mediach", Seminarium w ramach projektu 'Doktoraty dla Mazowsza', Instytut Stosowanych Nauk Społecznych, Uniwersytet Warszawski, 8 September 2011.

Koss-Goryszewska, M., "Wizerunek handlu ludźmi i kobiety-ofiary w prasie polskiej na przykładzie Gazety Wyborczej", Instytut Spraw Publicznych, 2010.

Lagrådet Yttrande till ändring av brottsbalken, utdrag ur protokoll vid sammanträde 2004-02-13.

Lecture titled "The Russian Judicial System in the Perspective of Empirical Sociology of Law" held by Dr. Vadim Volkov at UCRS, Uppsala University on 4 October 2012.

Mattar, M., "Dr. Mohamed Mattar Remarks on the Anti-trafficking Law of the Russian Federation Presented to the State Duma of the Russian Federation", Embassy of the United States in Moscow, 29 November 2004.

"MSWiA o handlu ludźmi w Polsce", Onet.wiadomości, http://wiadomosci.onet.pl/kraj/mswia-o-handlu-ludzmi-w-polsce,1,3737275,wiadomosc.html (accessed 19 May 2014).

"Mänskliga rättigheter i Sverige" Regeringskansliet, http://www.manskligarattigheter.se/dm3/file_archive/071114/b2a8e5d5eaeeac2cb34334ea85d4c51f/ma%C2%A6%C3%AAnskl%20ra%C2%A6%C3%AAtt.pdf (accessed 19 May 2014).

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
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"Mäns våld mot kvinnor", ROKS, http://www.roks.se/mans-vald-mot-kvinnor (accessed 19 May 2014).

Mörner, N., "Sweden", Report on the Implementation of Anti-Trafficking Policies and Interventions in the 27 EU Member States from a Human Rights Perspective (2008 and 2009), European NGOs Observatory on Trafficking, Exploitation and Slavery (E-notes),

"Ni odna Rossiianka ne prodala sebia v rabstvo dobrovolnovo", Pravda, 12 November 2003, http://www.pravda.ru/news/world/12-11-2003/16435-0/ (accessed 19 May 2014).

"Nie chciałam jej sprzedać", Gazeta.pl Lublin, 2011-04-01, http://lublin.gazeta.pl/lublin/1,35640,9359486,_Nie_chcialam_jej_sprzedac___Historia_internetowej.html (accessed 19 May).

"Nytt straffsystem – Idéer och förslag", 1977:7, BRÅ.

"OSCE Special Representative Meets Russian Journalists to Discuss Media's Role in Combating Human Trafficking", OSCE, available at http://www.osce.org/cthb/87679.

Ośrodek Badań Handlu Ludźmi, Katedra Kriminologii i Polityki Kryminalnej, IPSiR UW, http://www.ipsir.uw.edu.pl/informacje_o_instytucie/katedry_i_zaklady/katedra_kryminologii_i_polityki_kryminalnej/osrodek_badan_handlu_ludzmi/publikacje (accessed 19 May 2014).

"Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labour in the Cacao Sector in Cote d'Ivoire and Ghana", Payson Centre for International Development and Technology Transfer, Tulane University, 31 October 2007.

"People Vulnerable to Human Trafficking", UNODC, http://www.unodc.org/unodc/en/hiv-aids/more-about-people-vulnerable-to-human-trafficking.html (accessed 19 May 2014).

"Personer lagförda för brott", Statistik, 2010, 2011, 2012, BRÅ, http://www.bra.se/bra/statistik/420/2011/420La-2011.html (accessed 19 May 2014).

"Polacy o zjawisku handlu kobietami. Komunikat z badań", Centrum badania opinii społecznej, Warszawa, 2005.

"Populistiskt och principlöst", Dagens Nyheter, 26 November 2012, http://www.dn.se/ledare/huvudledare/populistiskt-och-principlost (accessed 19 May 2014).

"Prawa człowieka a handel kobietami i młodymi ludźmi w Europie. Przybornik Edukacyjny", Raport Krajowy Polska, Projekt Daphne.

Presentation by Gert Bogers, Seconded National Expert in the European Commission in DG Home Affairs in the Unit Fight against Organized Crime, specifically working in the area of trafficking in human beings since July 2010 during the Third Annual International Symposium on Preventing Human Trafficking, held on 24 November 2011 in Brussels.

Przeniczna, J., "Handel ludźmi. Prawo i praktyka, zapobieganie i ściganie" in *Taktyka i technika kryminalistyczna – Wczoraj, dziś, jutro*, Poznań, Rzeszów, Materiały z konferencji 2009.

Dominika Borg Jansson - 978-90-04-28107-3
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"Push Factors", Globalization 101, http://www.globalization101.org/push-factors/ (accessed 19 May 2014).

"Putin signs bill barring adoptions of Russian children by Americans", http://www.cbsnews.com/8301-202_162-57561074/putin-signs-bill-barring-adoptions-of-russian-children-by-americans/, CBS, 28 December 2012 (accessed 19 May 2014).

"Race to the Bottom. Exploitation of Migrant Workers Ahead of Russia's 2014 Winter Olympic Games in Sochi", Human Rights Watch, 2014, http://www.hrw.org/sites/default/files/reports/russia0213_ForUpload.pdf (accessed 19 May 2014).

"Regeringen finansierar Östersjösamarebte mot människohandel", http://www.regeringen.se/sb/d/10333/a/114156 (accessed 19 May 2014).

Scharlowski, B., Prata, S., "How Children are Exploited in Europe", International Foundation terre des homes, EU Forum on Prevention of Organized Crime, Brussels, 2004.

Schlyter, K., "Avfolka fängelserna!: tal å auditorium den 5 december 1934", Bilaga: Utdrag ur statsrådsprotokollet.

"Ska det vara lagligt/olagligt att köpa sex i Sverige", SIFO, 2002.

"Slumpen avgör stöd till offer för människohandel", Svenska Dagbladet, 30 March 2004, http://www.svd.se/nyheter/inrikes/slumpen-avgor-stod-till-offer-for-manniskohandel_139362.svd.

"Så drabbas barnen", Rädda Barnen, http://www.raddabarnen.se/vad-vi-gor/vad-vi-gor-i-varlden/krig-och-katastrofer/sa-drabbas-barnen/.

Tiurukova, E.V. and the Institute for Urban Economics for the UN/IOM Working Group on Trafficking in Human Beings, "Human Trafficking in the Russian Federation. Inventory and Analysis of the Current Situation and Responses", Moscow, 2006.

Touzenis, K., "Trafficking in Human Beings. Human rights and Transnational Criminal Law, Developments in Law and Practices", *UNESCO Migration Studies 3*, 2010.

Truong, T., "Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management", UNESCO, 2006.

"The Organization of Human Trafficking. A study of Criminal Involvement in Sex Exploitation in Sweden, Finland and Estonia", Swedish National Council for Crime Prevention, Report 2008:21.

"Trafficking in Children in Romania – Study on the Recruiting Process", General Inspectorate of Romanian Police National Agency against Trafficking in Persons, Twinning Project PHARE R02006/IB/JH 08, 24 November 2009.

"Trafficking in Children in South Eastern Europe: Situation Overview", Stability Pact for South Eastern Europe – Task Force on Trafficking in Human Beings, UNICEF, 2002.

"Trafficking in Human Beings", Eurostat Methodologies and Workingpapers, European Commission, 2013.

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
via free access

"Trafficking in Human Beings", Interpol Fact Sheet, http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Trafficking-in-human-beings (accessed 19 May 2014).

"Trafficking in Human Beings in South-Eastern Europe", UNICEF, UNOHCHR, OSCE, 2004.

"Trafficking in Human Beings. A Guidance Note", UNDP, Europe and the CIS, Bratislava Centre, September 2004.

"Trafficking in Persons. Global Patterns", United Nations Office on Drugs and Crime (UNODC), April 2006.

"Trafficking in Persons: The New Protocol", United Nations Office on Drugs and Crime (UNODC).

"Trafficking of Men – A Trend Less Considered", *IOM Migration Research Series*, no. 36, International Organization for Migration (IOM), 2008.

"Trafficking in Persons to Europe for Sexual Exploitation", UNODC, Chapter extracted from *The Globalization of Crime – A Transnational Organized Crime Threat Assessment Report* (not formally edited), http://www.unodc.org/documents/publications/TiP_Europe_EN_LORES.pdf (accessed 19 May 2014).

"Trafficking är en av de grövsta formerna av våld mot kvinnor", Amnesty International, http://www.amnesty.se/vad-gor-vi/kvinnors-rattigheter/trafficking/ (accessed 19 May 2014).

"Tryggare Sverige arbete mot människohandel", Stiftelsen Tryggare Sverige, 27 February 2013, http://tryggaresverige.org/tryggare-sveriges-arbete-mot-manniskohandel (accessed 19 May 2014).

US State Department Traffikcing in Persons Reports on Poland, Russia and Sweden (2003–2013).

"Utsatta för människohandel har rättigheter – Alexandra borde ha få stöd och hjälp", Stiftelsen Tryggare Sverige, 28 February 2013, http://tryggaresverige.org/utsatta-for-manniskohandel-har-rattigheter-%E2%80%93-alexandra-borde-ha-fa-stod-och-hjalp.

"Victims of Trafficking: Who Are They? A Statistical Profile for the Period of March 2006 – 15 November 2009", IOM, US State Department et al., http://www.no2slavery.ru/files/Statistic_FINAL_424_eng_fin.pdf (accessed 19 May 2014).

"Violence against and Trafficking in Women as Symptoms of Discrimination: The Potential of CEDAW as an Antidote", *Gender and Development Discussion Paper Series*, no. 17, Economic and Social Commission for Asia and the Pacific, December 2005.

"What is the Definition of Torture and Ill-treatment?", International Committee of the Red Cross, http://www.icrc.org/eng/resources/documents/misc/69mjxc.htm (accessed 19 May 2014).

"What Is the National Consulting and Intervention Centre for the Victims of Trafficking? (Krajowe Centrum Interwencyjno-Konsultacyjne dla Ofiar Handlu Ludźmi; KCIK)", KCIK, http://www.kcik.pl/en/index.html (accessed 19 May 2014).

Dominika Borg Jansson - 978-90-04-28107-3
Downloaded from Brill.com04/05/2019 09:10:46AM
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Wieczorek, Ł., "Przestępstwo handlu ludźmi w prawie międzynarodowym i krajowym", Warszawa, Ośrodek Badań Handlu Ludźmi, Uniwersytet Warszawski.

"Wiedza i opinie o handlu kobietami. Komunikat z badań", Centrum badania opinii społecznej, Warszawa, 2001.

Wilczak, J., "Co wiemy o handlu ludźmi. Oszustwem lub siłą", Polityka.pl, 23 March 2010, http://www.polityka.pl/kraj/opinie/1504546,1,co-wiemy-o-handlu-ludzmi.read (accessed 19 May 2014).

"Wyrodna matka sprzedała własne dziecko", Super Express.pl, 15 September 2011, http://www.se.pl/wydarzenia/kronika-kryminalna/dolnoslaskie-wyrodna-matka-sprzedala-wlasne-dziecko_205274.html (accessed 19 May 2014).

Zamacona Aguirre, M., "Riktlinjer för utredning och bedömning av kvinnors skyddsbehov – Ett fungerande verktyg?", Röda Korset, 2008.

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