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CURRENT EU LEGAL FRAMEWORK THAT ALLOWS MEMBER STATES TO COOPERATE ACROSS INTERNATIONAL BORDERS AND FACILITATE JUDICIAL PROCEDURES IN CASES RELATED TO HUMAN TRAFFICKING.

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In relation to the next proposed practical cases, it is important to consider the following previous legal information regarding the legislation in the European Union

Practical cases

Maria Rosa Ruiz Ruiz

Maria Rosa Ruiz Ruiz, expert lawyer in trafficking in human beings for the purpose of sexual exploitation. Professor of the Rey Juan Carlos University.

24 - 26 September 2020, On-line Conference

Practical case one



CASE EXAMPLE

CASE EXAMPLE ONE

- https://www.youtube.com/watch?v=XMpPg_arj4U&ab_channel=School-BasedHealthAlliance
Minute 17.11
- https://www.youtube.com/watch?v=44F7AH2nQbs&ab_channel=JillianHecht%28StudentHBHS%29
Minute 6,25

International cooperation

The criminality involved in human trafficking will often require assistance from other jurisdictions. Direct communication between judicial authorities was established under the 2000 Convention on mutual legal assistance in criminal matters.

Authorities should identify whether overseas assistance is required. Direct police to police enquiries should identify relevant sources and assist with information and enquiries. Europol and Eurojust can provide assistance.

International cooperation in investigation and prosecution can be achieved through:

- Mutual Legal Assistance;
- where criminal conduct spans more than one country, consideration of Joint Investigation Teams. Approach country desk officer at Eurojust;
- police to police enquiries.

COE RESPONSE TO COMBATING HUMAN TRAFFICKING

The Convention entered into force on 1 February 2008, following its 10th ratification. Beyond the criminalisation of trafficking and the prosecution of traffickers, the Convention places positive obligations on states to put in place effective measures to prevent human trafficking, to protect the rights of victims of human trafficking, and to engage in international cooperation and cooperation with civil society to these ends.

COE RESPONSE TO COMBATING HUMAN TRAFFICKING

The main added value of the Convention is its human rights perspective and focus on victim protection. Another important aspect of the Convention is the monitoring system set up to supervise the implementation of the obligations contained in it, which consists of two pillars: The Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties.

The Convention is not restricted to Council of European member States. It is currently in force in 46 of the 47 Council of Europe member States, as well as Belarus.

STATE'S OBLIGATIONS

The onus of victims identification is on the State and it is expected to exercise due diligence in its actions to prevent trafficking.

Cross border judicial cooperation and investigation

If the investigation or proceedings are cross-border in nature then it is possible that another State would also have jurisdiction to try an offence.

This Will generally be decided through prosecutorial discussion and based on whichever jurisdiction the crime took place, where the suspect(s) was arrested or where the victims are.

Where a decision cannot be reached, it is referred by the prosecutor to the European Judicial Network.

EUROJUST

European Union Agency for Criminal Justice Cooperation

The strategic project and the discussions addressed evidentiary difficulties encountered in THB cases, difficulties in identifying THB cases and THB victims, the lack of experience or specialised knowledge that might encourage the successful investigation and prosecution of THB cases and the multilateral complex dimension of THB cases

Mutual legal Assistance

► The MLA can be used:

- To request evidence from a witness overseas,
- To obtain banking evidence, computer evidence or criminal records,
- For the restraint and confiscation of proceeds of crime.
- When a live television link is required to enable a witness to give evidence from that country to a court in another jurisdiction
- To request that “ Family Liaison Officer” be permitted to visit a victim or witness abroad.

In seeking mutual legal assistance it is important that Letters of Request or Commission Rogatoire sent from one investigating magistrate to another should be clear, succinct and direct in requesting why evidence is needed, what evidence is required and how it will be used.

Investigation

The European Convention on Human Rights established rights and fundamental freedoms which impose an obligation on each State to investigate suspected breaches and to provide a remedy. The types of crime associated with human trafficking, such as serious violent and sexual crime as well as crimes of economic exploitation and slavery, will almost always constitute a breach of human right as well as a breach of criminal law.

States have an obligation to protect people from human rights violations and effectively investigate human rights abuses.

This obligation particularly applies to the most vulnerable where there are credible claims.

Investigation cooperation between the agencies

Effective law enforcement response depends on the participation of all levels of society, from local communities and non – governmental organisations to migration officials and prosecutors. Initial actions taken in investigation are crucial to the ultimate success of prosecutions. Where investigators know where to look, they can gather evidence and locate victims and perpetrators. Traffickers often use ordinary commercial activities to commit crime; reviewing records can provide valuable evidence.

Art. 27 CoE Convention

Chapter V – Investigation, prosecution and procedural law

Each Party shall ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.

Each Party shall ensure that victims of an offence in the territory of a Party other than the one in which they reside, may make a complaint before the competent authorities of their State of residence. The competent authority to which the complaint is made shall transmit it without delay to the competent authority in the territory in which the offence was committed, to be dealt with in accordance with their internal law.

Investigation and prosecution

Art. 29 CoE Convention

Specialised authorities and coordinating bodies.

Each Party shall adopt measures necessary to ensure that persons or entities are specialised in the fight against trafficking and the protection of victims.

- Each Party shall adopt such measures as may be necessary to ensure coordination of the policies and actions of their government departments and other public agencies against trafficking, through setting up coordination bodies.

- Each Party shall provide or strengthen training for relevant officials in the prevention of and fight against trafficking.

Investigation and prosecution

Art. 9, 2011 EU Trafficking Directive

- Member States shall ensure that investigation into or prosecution of offences is not dependent on reporting or accusation by victim.
- Good practice should be to use all relevant investigative tools and Powers to obtain evidence to prosecute a case without the testimony of the victim.
- Even when the victim is willing to testify, such evidence will corroborate the evidence of the victim and reduce the burden on them.

Identification of victims of trafficking in human beings

Chapter III – Measures to protect and promote the rights of victims, guaranteeing gender equality

Article 10 – Identification of the victims

What does the process of victims identification entail?

It takes time to seek and evaluate different circumstances, according to which a person can be considered to be a victim of trafficking (Explanatory Report to the CoE Convention para. 127).

It is a process that requires the involvement of many actors including public authorities and civil society.

It demands appropriate coordination, exchange of information and cooperation between state institutions and civil society.

It requires a proactive approach in particular with regard to cases involving children and labour exploitation cases.

The identification process is independent of any criminal proceedings against those responsible for the trafficking. A criminal conviction is therefore unnecessary for either starting or completing the identification process (Explanatory Report to the CoE Convention para. 134)

Practical case two



- <https://impakter.com/trafficking-human-beings-global-shaming-crime-eradicate/>
- https://www.youtube.com/watch?v=-021GVUiKgU&ab_channel=DGMigrationandHomeAffairs
- <https://www.courtinnovation.org/HT>
- <https://www.thestar.com/news/gta/2015/12/19/sex-trafficking-cases-hard-to-prove-as-victims-often-recant-out-of-fear-love.html>

Survivors of sex trafficking

Survivors of sex trafficking are usually treated as criminals—who are arrested and prosecuted—rather than victims. But some courts are changing their approach, recognizing that those arrested on prostitution charges are often victims of coercion, violence, and trauma.

While each court is unique, they share a set of common principles including: responding to defendants' trauma, connecting them to services, fostering collaboration across the agencies that support victims, and taking a flexible approach to how success is defined in light of the complex and unique challenges facing these victims.

Art. 23, 2012 EU Victims Directive

Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who Benefit from especial measures identified as a result of an individual assessment may Benefit from the special measures provided for.

Right to protection of
victims with specific
protection needs
during criminal
proceedings

NON- PUNISHMENT PROVISION

Art. 26, CoE Convention the Non-punishment principle:

A trafficked person may come to the attention of the authorities as a result of having been arrested or detected in circumstances involving the commission of an unlawful activity such as a crime or administrative or other offence.

The ordinary response of law enforcement might be to arrest, detain and charge such a person, for the prosecutors to prosecute, the defence lawyer to advise them to plead guilty of offence charged and for the judges to convict and sentence them, often to term of imprisonment.

Where a trafficking victim commits an offence that occurred as a direct result of their trafficking and which they had no choice but to perform Council of European member State are obliged to protect that person from prosecution and penalty.

The Non-punishment under international law: from a principle to a provision

This principle recognises that such individuals are not autonomous actors but have been driven directly by their trafficking circumstances or by their traffickers to commit crimes.

The non-punishment principle includes protection from prosecution and also from conviction. It also includes protection from punishment by way of administrative penalty, detention or imprisonment.

The CoE Convention introduced the first legally binding non-punishment provision. This was followed by the 2011 EU Trafficking Directive.

The Recital to the 2011 EU Trafficking Directive expresses the scope and aim of the non-punishment provision:

“14. Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators”.

The non-punishment provision

The duty not to punish victims of trafficking for unlawful acts committed as a result of their trafficking situation, grounded in international law, must be implemented by State in their domestic practice. All States are obliged to ensure that their domestic law is in conformity with their international obligations, irrespective of the requirements or complexities of their own legal systems.

The **Vienna Convention on the Law of Treaties 1969** provides, art. 27 (in part):

“ A party may not invoke the provisions of its international law as justification for its failure to perform a treaty”

For protection against non – punishment to be effective, legislation to protect trafficked individuals against unlawful punishment for trafficking-dependent crimes should be adopted by States.

The non – punishment provision creates a legal right for victims of trafficking. As such it should be safeguarded in domestic law.

In the event of a conflict between its domestic law and an international obligation, the latter remains binding upon the State.

Therefore, States which are parties to the **CoE Convention** should, in order to act in conformity with that instrument take any necessary steps to ensure that the non-punishment principle is given real and practical effect, as required by Art. 26.

Conformity of domestic law

Difficult and borderline cases

The OSCE Recommendations on the non-punishment provision 2013:

(54).. A victim may also be involved in prohibited conduct that is not a direct consequence of control exerted by traffickers, but is still linked to the trafficking experience. This may happen in situations when a victim escapes the influence of a trafficker, in which case recourse to offending may well be a result of the perceived absence of meaningful alternatives to escape exploitation; hence in such cases the non-punishment principle should apply.

Difficult and borderline cases

(55) Finally, the most difficult situations are those in which a former victim of trafficking has himself/herself been involved in trafficking or exploitation of another individual, a phenomenon described as “a cycle of abuse”. In such situations, traffickers manipulate their victims to turn them into their assistants in the exploitation of others, this is a deliberate strategy to retain control over the remaining victims by placing a former victim in charge and to render them even more afraid of seeking help. In such cases there may not always be evidence that victims were compelled into becoming offenders because of their being trafficked, i.e. that they were coerced into committing the offence or had no other option but to submit to the trafficker by reason of the existence of one or other of the means under the trafficking definition.

In other cases, victims are compelled to be involved in the recruitment of other victims to escape the influence of their traffickers and get free.

Art. 14 par.2 UNTOC (United Nations Convention against Transnational Organized Crime and the Protocols Thereto) requires the State Parties to give priority consideration to returning the confiscated proceeds of crime or property to a requesting State Party so that it can give compensation to victims or return such proceeds of crime or property to their legitimate owners.

Transnational
cooperation on
return and
repatriation of
trafficked
persons

Transnational cooperation on return and repatriation of trafficked persons

EUROPEAN UNION

1. **2011 eu Trafficking Directive. Recital 10.** This Directive is without prejudice to the principle of non-refoulement in accordance with the 1951 Convention relating to the Status of Refugees (Geneva Convention) and is in accordance with Art. 4 and Art. 19.2 of the Charter of Fundamental Rights of the European Union.
2. **Art. 10.6 :** The information referred to n paragraph 5 shall cover, where relevant, information on a reflection and recovery period pursuant to Directive 2004/81/EC, and information on the possibility of granting international protection pursuant to Council Directive 2004/84/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (1) and Concil Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Members States for granting and withdrawing refugee status(2) or pursuant to other international instruments or other similar national rules.

Transnational cooperation on return and repatriation of trafficked persons

EU Return Directive

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

The Return Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country national, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

The Return Directive also states that “where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted”.

Trafficked persons are entitled to the protection of private and family life and the protection of their identity.

Trafficked persons have the right to seek and enjoy asylum and have access to fair and efficient asylum procedure (Art. 40, CoE Convention and Explanatory Report to the CoE Convention).

Under certain circumstances, some victims of trafficking may qualify as refugees in line with Art. 1^a(2) 1951 Convention and may therefore be entitled to international refugee protection.

Right to
international
protection

The trafficked person must have a well-founded fear of being persecuted

This well-founded fear be linked to one or more of the Refugee Convention grounds of persecution i.e. race, religion. Nationality, political opinion or membership of a particular social group

The trafficked person seeking protection has to be outside the country of her or his nationality or former habitual residence.

The trafficked person must be unwilling or unable, owing to the fear of persecution, to avail themselves of the protection of the country on nationality or former habitual residence.

Refugee Convention

*Apparently, the development of a demand reduction policy would be the most effective way to tackle the problem. Trafficking is affected by many social phenomena and global warming which causes migratory movements; therefore, combating trafficking depends on the regulation of other major social issues, such as the rate of immigration, the recognition of minority and labor rights and the reduction of unemployment, as well as the implementation of a global environmental protection policy.

The role of the state should not be limited to addressing human trafficking only as a criminal issue. Criminal law is certainly a useful tool, but it is not enough.

EU Member States and international organizations should address the root causes of the phenomenon, such as the spread of poverty and the lack of opportunities for improving living standards in the victims' countries of origin on the one hand and the social crisis of values and the materialistic trend, which is prevalent in developed societies, on the other. Undoubtedly, human trafficking thrives only where there are customers "ready to buy".

In conclusion, it should be particularly stressed that by promoting and facilitating a legal immigration framework, Europe may combat not only illegal immigration, but also the trafficking in human beings.

Fighting Human Trafficking – The Experience of Greece. Christos D. Nantos, 2016

Criminal law and causes of the trafficking

If you think so, we will create several rooms to work the cases in groups for 20 minutes trying to answer the questions asked in them.

Later we can share them together by sharing the reflections.