

Council of the Baltic Sea States Task Force against Trafficking in Human Beings

Policy Implications of Future Trends in Trafficking

29 February 2016

“THB in 2016 – Where are we, where have we been and where are we going?”

Prof. Ryszard Piotrowicz

Dept. of Law and Criminology, Aberystwyth University

Member, Council of Europe’s Group of Experts on Action against Trafficking in Human Beings

Introduction

[1] Trafficking in human beings (THB) really became legally prominent with the adoption of the Palermo Protocol in 2000. At that time the focus was very much on THB for sexual exploitation, as can be seen in the full title of the protocol – “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children” – and the definition in Article 3(a): exploitation means, “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”.

[2] Yet THB for labour exploitation is becoming increasingly prominent in some countries. The most recent figures for the UK, for instance, published on 11 February this year by the National Crime Agency, show that the most common exploitation type recorded for potential victims of THB was labour exploitation, including criminal exploitation.¹

Evolution of the Legal regime

[3] Back then, the legal framework was much smaller and there has since been a quite remarkable expansion in the legal regime, much more so than for smuggling of human beings, which is currently gaining more headlines in Europe (even if the mass media regularly confuse THB and SHB).

[4] The EU framework has expanded significantly:

- The 2011 anti-trafficking Directive which itself replaced the Framework Directive

¹ National Crime Agency, National Referral Mechanism Statistics – End of Year Summary 2015, 0244-UKHTC, 11 February 2016.

- The 2004 Residence Permits Directive
- The 2004 Qualification Directive (recast in 2011)
- The 2012 Directive on minimum standards on the rights, support and protection of victims of crime
- The 2009 Directive on minimum standards on sanctions and measures against employers of illegally staying third country nationals.

[5] The Council of Europe has also been very active:

- Council of Europe Convention on Action against Trafficking in Human Beings 2005 – now has 44 ratifications
- Council of Europe Convention on preventing and combating violence against women and domestic violence 2011
- Council of Europe Convention on Action against Trafficking in Human Organs 2014

[6] In 2014 the ILO finally adopted the Protocol to the Forced Labour Convention, which specifically recognises the close links between THB and forced labour. In November last year ASEAN adopted the Convention Against Trafficking in Persons, Especially Women and Children.

[7] In addition to all of these instruments there are so many other measures and studies that have been adopted by various organisations, including UNHCHR, UNODC, OSCE. We have many States adopting Action Plans to address THB. We have so much new domestic legislation, much of it purporting to implement some of the instruments mentioned above. We have a UN Special Rapporteur on Trafficking; an OSCE Special Representative and Coordinator for Combating THB.

[8] We have the annual TIP reports from the US, even if it is not always clear to me where the information comes from. We have the UNODC reports. And of course we have the GRETA reports, which appear to enjoy substantial credibility.

[9] And we have the *Rantsev* case: the case that finally confirmed the application of Article 4 of the ECHR to THB; a case that established clear obligations on the part of States to protect and assist not only victims but potential victims of trafficking.

[10] So there is a lot of law out there; a lot of law that can be used to prosecute perpetrators but also to protect and assist victims.

Diversity of exploitation

[11] Traffickers are in it for the money. Their victims are there to be exploited for financial gain; they just happen to be human beings. I am confident that if traffickers could make more money out of selling bars of chocolate or smuggling fruit then they would do it. But there is a massive market for the services of trafficked people, even if we don't always know that we are consumers. The person who pays to have sex with a woman he knows is being forced to sleep with him is committing rape. But it is not always that straightforward. Do you know how the mango you bought yesterday was produced? If your coat, or running shoes, were produced in Asia, do you know under what conditions the workers made them? Even with the best will in the world it is not always possible to be sure that the food we eat

and the products we buy have been produced honestly. Transparency in production is a major issue and not nearly enough has been done to improve it.

[12] New forms of exploitation are regularly emerging. Some that have become more prominent in the UK recently include:

- Car wash/commercial sex – sleep with a woman while your car is cleaned
- Charity collectors
- Door-to-door selling of kitschy pictures (re-emerging after many years)
- Cuckooing – befriend a vulnerable person, move in and use their house as a base for criminal activities
- Forced criminality
- Benefit fraud
- Identity theft.

[13] But sexual exploitation remains big business in many, if not all, countries. In Malta, which I visited two weeks ago as part of a GRETA delegation for an evaluation visit, they have big problems with massage parlours, apparently mostly owned by Chinese and staffed with women from China and eastern Europe. They also have so-called gentlemen's clubs – for pole dancing and other activities. But the big case there is the Leisure Clothing case, an ongoing prosecution of Chinese, and maybe Northern Korean, workers allegedly trafficked for labour exploitation in a clothing factory on Malta.²

The Human Rights Approach

[14] The most important development for me has been the consistent move towards a human-rights based approach towards THB. This is not just a matter of explicit advocacy of this approach – even a duty to implement it – in many instruments. It is also about shaping attitudes and influencing policy. I want to mention three principal issues here which I consider very important, apart from stressing the significance of what *Rantsev* has to say about THB as a human rights violation.

THB as a Violation of Human rights

[15] THB is not a violation of human rights. On this point I disagree strongly with the formulation in GRETA's reports that consistently refers to THB as a violation of human rights. When someone is murdered it is not, in the absence of State involvement, normally described as a violation of human rights; it is a serious crime perpetrated by one or more persons against another. The same applies to THB. The description of THB as a human rights violation is, in legal terms, a rhetorical device but it is legally incorrect. This has practical ramifications, which are explained below.

[16] This analysis is supported by a recent decision of the Court of Appeal of England and Wales, which addresses the nature and scope of States' obligations under the European

² <http://www.independent.com.mt/articles/2016-02-19/local-news/Leisure-Clothing-case-Vietnamese-worker-asked-to-give-employer-2-days-notice-for-sick-leave-6736153593>

Convention on Human Rights.³ Giving the only judgment, with which his two co-judges concurred, Lord Justice Laws stated (with regard to Article 3 ECHR):

“The rights which the Convention guarantees are enjoyed against the State, and only the State. It is important to recognise that ill-treatment by a non-State agent, however grave, does not of itself constitute a breach of Article 3. This is sometimes glossed over in the language of the cases ... Likewise a killing does not of itself violate Article 2, nor an act of enslavement Article 4, if it is not perpetrated by an agent of the State. But it is surely inherent in the Convention’s purpose that the State is to protect persons within its jurisdiction against such brutalities, whoever inflicts them...”⁴

[17] The prohibition of slavery, forced labour and servitude (and hence THB according to the ECtHR in *Rantsev*), *does* create human rights obligations for States. In particular it creates obligations (broadly termed) of protection and assistance to trafficked persons and potential victims of THB. It may also give rise to international protection obligations (refugee status or subsidiary/complementary protection).

[18] Where the State fails in these duties it may indeed commit a human rights violation **because of its failure to protect the individual**. In other words, the human rights violation is not in the act of THB but the State’s actions or failure to act: the State’s response, as it were. The THB is not committed by the State and hence cannot be a human rights violation. This is precisely the foundation for the ECtHR’s reasoning in *Rantsev*.⁵

[19] This has potentially immense practical significance. Those advocating the human rights of trafficked persons need to know where the State’s obligations actually lie. They should – as GRETA does – be scrutinising the behaviour of the State where the human rights of the victims are concerned. The act of THB is a crime perpetrated by one or more private individuals and the State is not, in the absence of complicity or failure, responsible for that, just as it is not responsible for murder.

[20] The promotion of recognition of, and respect for, the human rights of trafficked persons is best achieved by focussing on the acts and failures of the State – failures to protect and assist, as recognised in *Rantsev*, if positive results in helping trafficked people are to be achieved.

[21] By emphasising where the human rights violations actually happen when THB takes place – when the State fails to act to protect trafficked people and those at risk of being trafficked – we actually do more to highlight States’ obligations and, I suggest, support those who need it by identifying exactly what States should be doing so as to avoid violations of the human rights of the people the Council of Europe Convention is supposed to protect.

³ *The Commissioner of Police of the Metropolis v DSD and NBV; Alio Koraou v The Chief Constable of Greater Manchester Police*, [2015] EWCA Civ 646. Case No: B2/2014/1643, A2/2014/2662 & A2/2014/2731.

⁴ Para 43 (emphasis added).

⁵ *Rantsev v Cyprus and Russia*, Application No. 25965/04, 7 January 2010. See, for instance, paras 284 and 286. See also *Hadijatou Mani Koraou v The Republic of Niger*, ECW/CCJ/JUD/06/08, Economic Community of West African States (ECOWAS), 28 October 2008, para 85.

THB and International protection

[22] It is now recognised in many countries that persons at risk of being trafficked may be entitled to international protection. The UNHCR addressed this in Guidelines published in 2006,⁶ and it is clear that such persons may be entitled to subsidiary, or complementary, protection. The idea that persons who have been trafficked in the past may be part of a particular social group in some countries is a very welcome development from the protection perspective.

Non-punishment

[23] A trafficked person is not a free person. They may be forced to commit offences in the course, or as a consequence, of being trafficked. Most legal systems recognise certain circumstances in which a person will not necessarily be held accountable for what are criminal acts, for instance because of duress or incapacity. There is a clear trend now towards recognising in law that trafficked persons should not be punished for such acts and this is a very welcome development. The precise scope of the rule may not yet be entirely clear but the principle is.⁷

Challenges and Problems

[24] Based on my own experience in evaluating States' compliance with their obligations under the Council of Europe Convention, I see five recurrent challenges and two major current ones. The recurrent challenges are:

- The need for raising awareness, not only in the community at large but amongst all relevant professionals. This needs to be much more systematic.
- Linked to this is the failure to identify trafficked people, which can result in their further victimisation and even criminalisation. It also leads to a failure by the State to provide protection and assistance when it should.

⁶ HCR/GIP/06/07, 7 April 2006, GUIDELINES ON INTERNATIONAL PROTECTION: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked.

7. Council of Europe Convention on Action against Trafficking in Human Beings, Article 26; EU Anti-Trafficking Directive 2011/36/EU, Article 8; ASEAN Convention Against Trafficking in Persons, Especially Women and Children, Article 14(7). See also OSCE, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013): <http://www.osce.org/secretariat/101002>; Ryszard Piotrowicz and Liliana Sorrentino, "Human Trafficking and the Emergence of the Non-Punishment Principle" (2016) *Human Rights Law Review* (forthcoming).

- There needs to be more, and systematic, training of relevant professionals, not only in how to identify trafficked people but also how to respond, both in the immediate term and further down the track.
- Much more needs to be done to ensure that trafficked people are not only entitled to receive compensation (and not just by bringing private actions, which is all but impossible), but that the system to obtain it is accessible to trafficked persons.
- States need to do more to separate the traffickers from their money. More freezing and seizures of assets would be a welcome complement to stiff prison sentences.

[25] The first, and perhaps most urgent, major current challenge in Europe is linked to the smuggling of migrants into Europe. There is little doubt that many of those who are being smuggled are very vulnerable to being exploited and may end up being trafficked, and not only unaccompanied minors. There needs to be greater awareness of this threat.

[26] Second, much more needs to be done to promote awareness and compliance in the private sector, especially through legal measures. Goodwill is just not enough. Companies need to know where their supplies are coming from; and they need to know that when they sub-contract work, that the people who actually do the job are not being exploited.

[27] We have come a long way since 2000. But THB is not going away any time soon because it is just too profitable. There is now plenty of law out there, at national, EU and international level. I think we need greater will to enforce that law effectively so that trafficked people get more help and traffickers get more hell.