

Human Trafficking: Challenges and Opportunities for the 21st Century. Outcomes and Proposals

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Abstract

This contribution represents a synopsis of the discussions held over two days in plenary and groups at the Oñati International Institute for the Sociology of Law. The first group's discussions centred on detailed recommendations for updating the EU Anti-Trafficking Directive with justifications from the expert groups as to the reasons for the changes, including a case study. The second group's discussions focussed on a victim-centred approach to tackling human trafficking, outlining some of the key challenges and opportunities that could inform any changes to a new Anti-Trafficking Directive.

Key words

Human trafficking; recommendations to EU; non-punishment; reduction in imprisonment

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Resumen

Esta contribución representa una sinopsis de los debates que tuvieron lugar durante dos días en la reunión plenaria y en los grupos de trabajo del taller *Human Trafficking: Challenges and Opportunities for the 21st Century*, en Oñati. Los debates del primer grupo giraron en torno a recomendaciones en detalle para actualizar la Directiva Europea contra la Trata de Personas, con justificaciones de los grupos de expertos sobre las razones para las modificaciones, incluyendo un estudio de caso. Los debates del segundo grupo se centraron en un enfoque cercano a las víctimas para abordar la trata de personas, destacando algunos de los desafíos y las oportunidades principales que podrán informar las modificaciones de cara a una nueva Directiva.

Palabras clave

Trata de personas; recomendaciones a la UE; no penalización; reducción de penas de prisión

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1. Introduction

A human trafficking expert workshop took place over a two-day period from 26-27 June 2014 at the Oñati International Institute for the Sociology of Law. Experts from across the globe attended to provide insights into different aspects of human trafficking and how it related to the EU experience. Contributions from Canada (capacity building), California (supply chain), Argentina (policies in action), Spain (forced labour), the Balkans (trafficker interviews), the UK (identification of victims; criminalisation of victims) all brought fresh views from the front line as well as research results that fed into a panel with contributions from the EU Commission Anti-Trafficking Office, the EU Fundamental Rights Agency and the Group of Experts on Action against Trafficking in Human Beings (hereinafter, GRETA). The entire second day was devoted to discussions between participants, divided into two groups to look at the challenges and opportunities for the future. The groups were successful in putting forward recommendations to the EU on two themes: victim protection and possible changes to the EU Anti-Trafficking Directive (2011/36/EU).

The group of experts welcomed the EU Anti-Trafficking Directive. Many of its provisions are excellent, providing a solid legal base for prosecutions, prevention and protection in the field of trafficking in human beings (hereinafter, THB). The victim protection provisions, child victims provisions and criminal law sanctions all move the fight against THB on and are welcomed. There are areas where the group felt further strengthening would assist in helping victims and securing prosecutions. Both sets of proposals should be read in tandem.

2. Group 1: recommendations for changes to the EU Anti-Trafficking Directive in 2016

The first group discussed possible amendments to the EU Anti-Trafficking Directive in 2016. The proposals focused on current challenges and opportunities under the broad umbrella of the partnership model. The proposals include new wording for a further Directive in line with the EU Strategy and its aims of increasing prosecutions, protection and prevention.

Article 7. Seizure and confiscation

Member States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in Articles 2 and 3.

The seizure and confiscation of assets and instrumentalities is welcomed but can and should go further than what is currently in the Directive in order to fulfil the aim of increasing prosecutions of traffickers. Further training for criminal justice actors is essential.

Proposal 1: Delete “are entitled to” and replace by “shall freeze and seize”.

Proposal 2: The power to freeze assets should also be included. The confiscation and freezing of assets must be done at the start of the investigation and prosecution process. Otherwise assets are dissipated and can no longer be traced.

Proposal 3: In order to assist in this process, a full inventory of assets and instrumentalities must be undertaken at the start of the investigation (original list of assets). This list can then be compared to what the end of the prosecutory process uncovers (final list of assets). Discrepancies can then easily be logged.

Article 8. Non-prosecution or non-application of penalties to the victim

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

The non-punishment principle must be fully adhered to (see Piotrowicz and Sorrentino 2013). This includes, at a minimum, non-punishment for an indefinite period, no requirement or coercion into helping with the investigation or trial of a suspected trafficker; secondary victimisation through, for example, remaining in custody, even if on bail; no other charges being brought (for example, false documents, growing cannabis).

Proposal 1: Delete “are entitled”, replace with “shall”. Delete “basic principles”.

Proposal 2: Include no secondary victimisation clauses into other articles of the Directive, rather than only in preamble. This could be included into victim-centred articles, especially for children. For instance, Article 9 (1) (below) replacing “may” with “shall”.

2.1. Case study: The need to reduce the period of imprisonment for those remanded in custody whilst their status as a potential victim of trafficking is being established within the UK

Research carried out in the female prison estate by Hales and Gelsthorpe in 2010 - 2011 demonstrated that even where an NRM (National Referral Mechanism) referral was made for a woman charged with a criminal offence, which resulted in a positive Conclusive Grounds decision, the average period in custody and/or in immigration detention was 128 days.¹

Evidence from a third sector organisation currently working within the prison estate indicates that that this is still the case with victims in custody.¹ The cases that are most dominant are Vietnamese nationals arrested in relation to cannabis production. Although an NRM referral is made either by the police at point of arrest or by another first responder during early stages of imprisonment, these victims of trafficking remain in custody for a minimum of 3 months.

Reasons for this delay are:

- The Crown Prosecution will not grant bail once a Reasonable Grounds (RG) decision has been made. The standard policy is to await the Conclusive Grounds (CG) Decision;
- Lengthy delays in the process of liaison between the Courts, the UK Human Trafficking Centre and the Crown Prosecution Service;
- The decisions to grant bail or drop charges are made in the context of a court hearing and the scheduling of such hearing with the provision of appropriate interpreters, ensuring they are heard in front of the same crown court judge, causes further delays.

For better compliance with the EU Directive recommendations and in order to comply with the non-punishment principle it is recommended:

- Tighter scheduling guidelines for RG and CG decisions and for these to be conveyed to the Crown Prosecution Service.
- Automatic bail once a RG decision has been made to ensure effective victim support within the reflection and recovery period.
- Court hearings for such potential victims to be prioritised.

Liz Hales 03/07/14

Article 9. Investigation and prosecution

1. Member States shall ensure that investigation into or prosecution of offences referred to in Articles 2 and 3 is not dependent on reporting or accusation by a victim and that criminal proceedings may continue even if the victim has withdrawn his or her statement.

2. Member States shall take the necessary measures to enable, where the nature of the act calls for it, the prosecution of an offence referred to in Articles 2 and 3 for a sufficient period of time after the victim has reached the age of majority.

3. Member States shall take the necessary measures to ensure that persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3 are trained accordingly.

4. Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases are available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3.

Any new Directive would require a definition of legal cooperation and practical protocol in order to set the minimum standards for investigatory tools across borders. For instance, wire-tapping, money paid to informants, similar to techniques and tools used in the investigations of the drug trade. These techniques and tools should not be confined to investigations concerning child victims of trafficking. This must include technological advances, including smart phones and the Internet.

Proposal 1: Special investigative techniques (SITs) need to be put in place and on a legal footing that apply across the EU.

Proposal 2: Delete “may” replace by “shall” in Article 9 (1).

Article 12. Protection of victims of trafficking in human beings in criminal investigation and proceedings

Member States shall ensure that victims of trafficking in human beings receive appropriate protection on the basis of an individual risk assessment, inter alia, by having access to witness protection programmes or other similar measures, if appropriate and in accordance with the grounds defined by national law or procedures.

There is a need to define what “access to witness protection programmes or similar measures” according to EU law means for this Directive. Victims and their families are under severe threats of reprisals from traffickers. This needs to be acknowledged in any new Directive in a concrete way.

No *victim-dumping*. Once a victim and their family are repatriated, there is no continued support. Therefore there must be a coordination of repatriation with home country and its authorities. This is also in line with the EU strategy 6.3 on cooperation with police and judicial authorities.

Proposal 1: In countries that do not have a long-term witness protection programme, the Directive should require the setting up of a robust one, with ring-fenced moneys.

Proposal 2: Victims and their families in all EU countries (regardless of where they come from) must have access and be admitted to a *robust* witness protection programme. This must include provisions that enable them to live a *normal* life for 1 to 2 years, including help to get employment and changing identity of witness (Article 28 of the Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe 2005).

Proposal 3: There must be better and sustained coordination of victim and family repatriation between destination country and home.

Article 17. Compensation to victims

Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.

The group noted a major concern: once a victim of trafficking is classified as a criminal (for example, no passport, false documents, conviction for cannabis cultivation) there will be no compensation available. This is a form of re-victimisation,

breaching the spirit of the Directive, the non-punishment principle as well as the UN Convention on Victims of Crime.

Proposal 1: compensation cannot be contingent on non-criminal status of victim of THB.

Proposal 2: Delete “existing” to “effective”. “Effective shall mean, at a minimum demonstrable serious consideration of new, innovative and compensatory schemes for victims of THB in the EU”.

Compensation awarded to the victim of THB is often handed straight to the trafficker in order to avoid retaliation. This is less likely to happen where the compensation order is kept confidentially indefinitely.

Proposal 3: Compensation orders shall remain confidential indefinitely.

Proposal 4: No tax shall be liable in compensation award.

Proposal 5: Compensation should be interpreted widely and include, for example, being hired by a company and or monetary amount.

Article 19. National rapporteurs or equivalent mechanisms

Member States shall take the necessary measures to establish national rapporteurs or equivalent mechanisms. The tasks of such mechanisms shall include the carrying out of assessments of trends in trafficking in human beings, the measuring of results of anti-trafficking actions, including the gathering of statistics in close cooperation with relevant civil society organisations active in this field, and reporting.

Any national rapporteur or other mechanism must be independent with adequate and innovative powers. For instance, proposing amendments to the budget. National coordination mechanisms are also vital at EU level. This single hub can coordinate the partnership model (businesses, NGOs, front line professionals, criminal justice actors working together to end trafficking) with key buy in by governments. This would coordinate effective implementation and coordination of laws of the three Europe's: EU, Council of Europe and national laws on THB, as well as UN level. This will enhance accountability and transparency. Many can undertake the collection of data, but effective and directed data is what is required in this field.

Proposal 1: An effective national rapporteur system must be in place in each of the member states, based on the Netherlands example.

Proposal 2: Insert new article into directive: “EU coordination body must be put in place that has effective partnership working at its heart, taking into account the laws of the different legal jurisdictions”.

Proposal 3: Effective, coordinated and specific data collection.

3. Group 2: recommendations concerning victims of human trafficking

The second group discussed various issues concerning victims of trafficking, in particular the victim centred approach. This included discussion of the lack of recording/use of information relating to the *full* trafficking experience, the need for culturally informed responses and education campaigns as a prevention measure.

3.1. Challenge

Data-gathering should be more informed than being solely for the purpose of prosecution. Information recorded and used (for, say, the purposes of prosecution of traffickers) tends to relate to the experience of the trafficked victim once they are in the destination country, rather than the entire trafficking process from start to finish. This is geared toward securing prosecutions for trafficking offences, but may fail to take account of the full range of offences (e.g. perilous journeys, and rape which takes place *en route* to the destination country). While this information may be collected and/or held by Competent Authorities (such as the UK Human Trafficking

Centre) or other relevant bodies, it is not clear what is done with this information, which could be used to better effect.

3.2. Opportunity

Development of a Register of Experiences. To ensure that the full trafficking experience is recorded – not just that which is useful to the immediate prosecution. This can allow for better understanding of the full trafficking process which feeds into how better to tackle trafficking, as well as improved understanding of the needs of victims and victim behaviour. For example, if solely the experiences of the victim following arrival in the destination country are focused and drawn upon in order to determine potential victimhood, then an important part of the experience of the victim up until the point of entry is ignored – this may adversely affect decisions as to whether an individual is in fact a victim of human trafficking. Furthermore, improved data recording allows us to be better informed about traffickers, and those who are trafficked. The focus should not solely be upon the importance of ‘what has happened *here*’. If, say, rape *en route* to the destination country is reported by a high proportion of victims, then this can and should be investigated. Furthermore, information collected can be used to identify *trends* in trafficking which may aid prosecution of traffickers and identification of victims. Directive 2011/36/EU (see European Parliament and Council of the European Union 2011) refers to the sharing of information (Preamble, para. 5) and the use of National Rapporteurs (Article 19), whom, working with Competent Authorities and other relevant organisations, may be well-placed to make better use of the ‘full’ information of the trafficking experience of putative victims.

3.3. Challenge

Limited choices/opportunities in countries of origin feeding into people becoming trafficked, or becoming traffickers. Education campaigns in countries of origin are focused on ‘how not to get trafficked’ and do not necessarily provide the putative victims and traffickers with information regarding other routes for securing a viable economic future.

3.4. Opportunity

Prevention through investment in education campaigns in countries of origin, targeting potential victims (and potential traffickers). These campaigns would focus on informing the target audience about different life options and choices available in the country of origin – routes for education, employment, development, etc. (i.e. for putative victims, the focus is on enabling rather than *victim blaming*). The aim is to reduce vulnerability through empowerment and provision of information – reduction of vulnerability to trafficking is a key aim of the Directive and EU Strategy 2012 (European Commission 2012). The 2012 strategy refers to the development of “EU-wide guidance on future prevention measures and gender-sensitive information campaigns” [*Idem*, 2.2(3)] by 2015, yet reference to culturally informed local campaigns is omitted. Such campaigns should be culturally informed (i.e. cultural upbringing varies what we see as *acceptable* or *unacceptable* behaviour) and could be developed and delivered by agents in the country of origin. The development of such campaigns could link into foreign aid, and/or Governments could be encouraged to invest in campaigns.

4. Conclusion

In addition to this issue including some of the papers presented at the 2014 meetings in Oñati, this issue also includes a couple of articles from the follow-up meeting in 2016 which was also held at the International Institute for the Sociology of Law. Collectively the articles support the main objectives of the EU Anti-Trafficking Directive but also identify a number of areas and elements that could, and should,

be addressed in order to further strengthen the partnership model and (child) victim protection provisions.

Given the various ongoing reforms and changes in the response mechanisms to the trafficking of persons and the fact that it continues to be a global concern, it is hoped that the third workshop will take place in Oñati in 2019-20. In the interim, the editors of this issue are in the process of co-editing a Major Reference Work (Palgrave Publishing) on human trafficking which as of January 2018 has some 100 entries. We welcome inquiries for new entries.

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