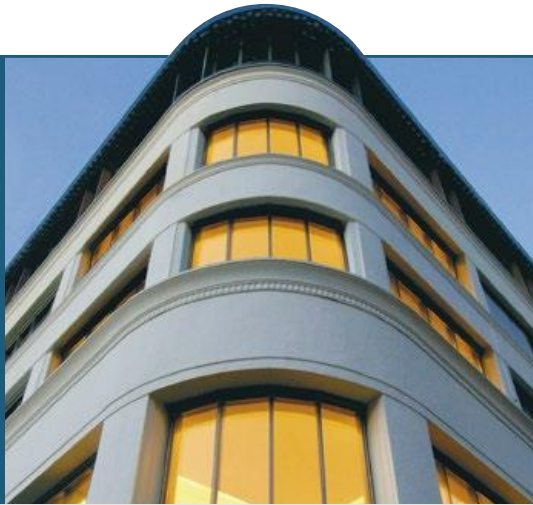


LALIVE



Repression of traffickers: The distinctive traits of the crime of human trafficking under international law

The Judicial Training on Law on Human Trafficking

The Graduate Institute of International and Development Studies & Geneva Academy of International Humanitarian Law and Human Rights

Executive Training for Judges from the Judiciary of Thailand

Maria Vinogradova, LALIVE

Geneva, 31 August 2016

Summary

- Evolution of the human trafficking definition
- General definition under the Trafficking Protocol
- The concept of “exploitation”
- Abuse of a position of vulnerability (APOV) and other “means”
- The issue of consent
- Thailand definition of human trafficking

Evolution of the human trafficking definition

Evolution of the human trafficking definition

– Trafficking / International instruments (1)

- International Agreement for the Suppression of the White Slave Traffic, 1904
- International Convention for the Suppression of the White Slave Traffic, 1910
- International Convention for the Suppression of the Traffic in Women and Children, 1921
- International Convention for the Suppression of Traffic in Women of Full Age, 1933

Evolution of the human trafficking definition – Trafficking / International instruments (2)

- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949
- Convention and protocol on the Elimination of all forms of Discrimination against women (CEDAW), 1979
- Convention and protocol of the Rights of the Child, 1989
- UN Convention against Transnational Organized Crime (Organized Crime Convention) and **Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol)**, 2000

Evolution of the human trafficking definition – Trafficking / Regional instruments

- African Charter and protocols, 1981, 1990, 2005
- Inter-American Convention on International Traffic in Minors, 1994
- Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention), 2005
- EU Trafficking Directive 2011/36/EU
- South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention), 2002

Evolution of the human trafficking definition

– Slavery

- Slavery Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva (Slavery Convention), 1926 & Supplementary Slavery Convention, 1956
- Convention for the Protection of Human Rights and Fundamental Freedoms, 1948
- Rome Statute of the International Criminal Court, 1998
- International Labour Organization Conventions No. 29 of 1930 and No. 105 of 1957 (ILO Conventions)

Evolution of the human trafficking definition

– Case law

- European Court of Human Rights (ECtHR): *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010 (application of Art. 4 ECHR to human trafficking)

General definition under the Trafficking Protocol

Article 3. Use of terms

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;

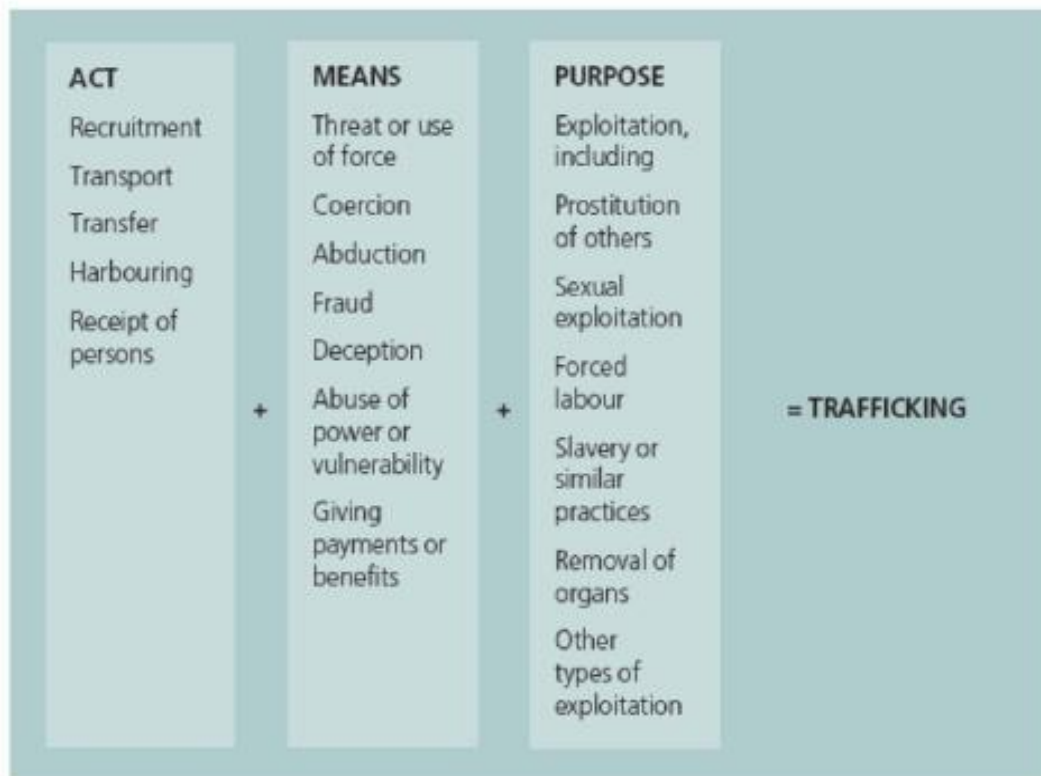
(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(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.

General definition under the Trafficking Protocol

Article 3, para (a) Trafficking Protocol: three constituent elements



Exception:
children

General definition under the Trafficking Protocol

– Distinction with smuggling of migrants

Table 1. Definitions of trafficking in persons and smuggling of migrants

	<i>Trafficking in persons (adults)</i>	<i>Trafficking in persons (children)</i>	<i>Migrant smuggling</i>
Victim's age	Over 18	Below 18	Irrelevant
Mental element	Intention	Intention	Intention
Material element	<ul style="list-style-type: none"> • Act • Means • Exploitative purpose 	<ul style="list-style-type: none"> • Act • Exploitative purpose 	<ul style="list-style-type: none"> • Act: Procurement of illegal entry • Purpose: For financial or other material benefit
Consent of the trafficked or smuggled person	Irrelevant once the means are established	Irrelevant. Means do not need to be established	The smuggled person consents to the smuggling
Transnationality	Not required	Not required	Required
Involvement of an organized crime group	Not required	Not required	Not required

Source: UNODC Anti-human trafficking manual for criminal justice practitioners, Module 1

The concept of “exploitation”

The concept of “exploitation”

- General considerations
 - Weakness or vulnerability / Unfair advantage as a continuum
 - No definition under international law
- Trafficking Protocol
 - *Mens rea* of the offence
 - No definition but list of examples at a minimum

The concept of “exploitation” - Forms cited in the Trafficking Protocol (1)

- Exploitation of the prostitution of others and other forms of sexual exploitation
 - No international definition
 - References in the 1949 Convention for the Suppression of Traffic in persons and Exploitation of the Prostitution of Others; CEDAW; UNODC Model Law; Convention on the Rights of the Child

The concept of “exploitation” - Forms cited in the Trafficking Protocol (2)

- Forced labour or services

*“all work or service which is extracted from any person under **the menace of any penalty** and for which the said person has **not** offered himself **voluntarily**”*

(ILO Convention No 29; Protocol to the ILO Convention No 29; International Covenant on Civil and Political Rights (ICCPR))

The concept of “exploitation” - Forms cited in the Trafficking Protocol (3)

- Slavery or practices similar to slavery
 - Slavery

*“the status or condition of a person over whom any or all of **the powers attaching to the right of ownership** are exercised”*

(Slavery Convention)

- Practices similar to Slavery: Supplementary Slavery Convention
 - Debt Bondage (art. 1(a))
 - Serfdom (art. 1(b))
 - Servile forms of Marriage (art. 1 (c))
 - Sale of children for exploitation (art. 1(d))

The concept of “exploitation” - Forms cited in the Trafficking Protocol (4)

- Servitude
 - No international definition
 - References in the Supplementary Slavery Convention; Universal Declaration of Human Rights; ICCPR etc.
- Removal of organs

The concept of “exploitation” - Additional accepted forms of exploitation

- Begging (EU Trafficking Directive 2011/36/EU)
- Exploitation of criminal activities (EU Trafficking Directive 2011/36/EU)
- Adoption (Travaux préparatoires for the Organized Crime Convention and Protocols; EU Directive 2011/36/EU)

The concept of “exploitation” – National law and practice

- States that closely follow the Trafficking Protocol’s approach of exploitation: Malaysia and United Arab Emirates
- States that generally follow the Trafficking Protocol’s approach but stipulate additional forms of exploitation: Bulgaria, Colombia, Qatar, Egypt, Thailand and Uganda
- States that stipulate fewer forms of exploitation than are provided in the Trafficking Protocol: Brazil and Sweden
- States that take a different approach to exploitation: Australia and Canada

The concept of “exploitation” – Case law

- International Criminal Tribunal for the Former Yugoslavia, Prosecutor V. Kunarac, Vukovic and Kovac, 12 June 2002
- ECtHR: *Siliadin v. France*, Application no 73316/01
- Australia: R v Wei Tang

APOV and other “means”

APOV and other “means”

- No definition in international law
- Only relevant to trafficking in adults
- Other means
 - Threat or use of force (coercion)
 - Abduction, fraud deception
 - Abuse of power or of a position of vulnerability
 - Giving or receiving of payments or benefits to achieve consent of a person having control over another person

APOV and other “means” – APOV concept (1)

- Guidances on the concept:
 - Trafficking Protocol’s Interpretative Note (“*a situation in which the person concerned has no real **and** acceptable alternative but to submit to the abuse involved*”)
 - European Trafficking Convention, Explanatory Report
 - EU Trafficking Directive 2011 /36/EU (“*a situation in which the person concerned has no real **or** acceptable alternative but to submit to the abuse involved*”)
 - UNODC Model Law
 - ILO-EC indicators; ILO Survey Guidelines (for forced labour)

APOV and other “means” – APOV concept (2)

- Vulnerability (as susceptibility to trafficking) vs APOV (as a means of trafficking)
- Factors of vulnerability (e.g. poverty, inequality, discrimination, gender-based violence, gender, minority groups, lack of legal status)
- Relationship APOV with other elements of trafficking definition
- Two evidentiary requirements: proof of the existence of vulnerability and proof of abuse

APOV and other “means” - National law and practice

- States that have included abuse of vulnerability and related “means” within the definition: Egypt, Moldova and the Netherlands
- States that have included only a restricted range of “means” within the definition: Nigeria and USA
- States in which the “means” element is not explicitly included in the definition: Belgium, Canada, Brazil, India, Mexico, Switzerland, United Kingdom of Great Britain and Northern Ireland

APOV and other “means” - Case law

- Netherlands: Supreme Court, 27 October 2009, LJN:B17099408
- Thailand: Minburi Provincial Court, October 2, 2013, Aor 4718/2555
- Switzerland: Decisions of the Swiss Federal Supreme court 6B_1006/2009 of 26 March 2010 and 6B_277 – 2007 of 8 June 2008
- USA: United States v. Farrell, 563 F.3d 364, 374 (8th Cir. 2009), 22 February 2008

The issue of consent

The issue of consent

- Consent is irrelevant if obtained
 - though any of the prohibited means
 - from a child

The issue of consent - Guidances on the concept (1)

- UNODOC
 - Legislative Guide on the Convention and Protocols
 - UNODOC Model Law

The issue of consent - Guidances on the concept (2)

- Regional instruments
 - European Trafficking Convention
 - EU Trafficking Directive 2011/36/EU
 - SAARC Convention
 - Arab Charter on Human Rights
 - Arab Model Law for Combatting Trafficking in Persons

The issue of consent - Guidances on the concept (3)

- Others
 - Statute of the International Criminal Court
 - ILO Conventions

The issue of consent - National law and practice

- States that have included specific reference to consent in their definition of trafficking: Australia, Argentina, Indonesia, the Philippines, Serbia, Spain and Thailand
- States that do not have explicit reference to consent in their definition of trafficking: Belarus, the United Kingdom of Great Britain and Northern Ireland and the USA
- States that have no legislative reference but explicit case law on the role of consent: Norway and Israel

The issue of consent – Case law

- Switzerland: Decisions of the Federal Supreme Court BGE 126 IV 225; BGE 129 IV 81, 6B_81/2010 and 6B_126/2010 of 29 April 2010
- United Kingdom: Regina v. Besmir Ramaj and Hasan Atesogullari Criminal Case [2006] EWCA Crim 448 of 17 February 2006
- Norway: Public Prosecution Authority v Daniel Dundon, Jaeren District Court Case N § . 08-069332MED-Jahre, 4 July 2008

Thailand definition of human trafficking

Anti-Trafficking in Persons Act (B.E. 2551/2008), June 2008

Section 4 In this act

“Exploitation” means seeking benefits from the prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.

“Forced labour or service” means compelling the other person to work or provide service by putting such person in fear of injury to life, body, liberty, reputation or property, of such person or another person, by means of intimidation, use of force, or any other means causing such person to be in a state of being unable to resist.

“Organized Criminal Group” means a structured group of three or more persons, notwithstanding being formed permanently or existing for a period of time, and no need to have formally defined roles for its members, continuity of its membership or a developed structure, acting in concert with the aim of committing one or more offences punishable by a maximum imprisonment of four years upwards or committing any offence stipulated in this Act, with the aim to unlawfully obtain, directly or indirectly, property or any other benefit.

“Child” means any person under eighteen years of age.

Section 6 Whoever, for the purpose of exploitation, does any of the following acts:

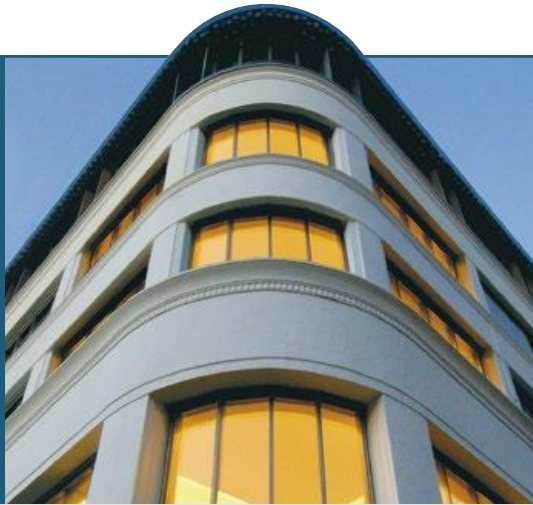
(1) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person, by means of the threat or use of force, abduction, fraud, deception, abuse of power, or of the giving money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control; or

(2) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child;
is guilty of trafficking in persons.

Thailand definition of human trafficking

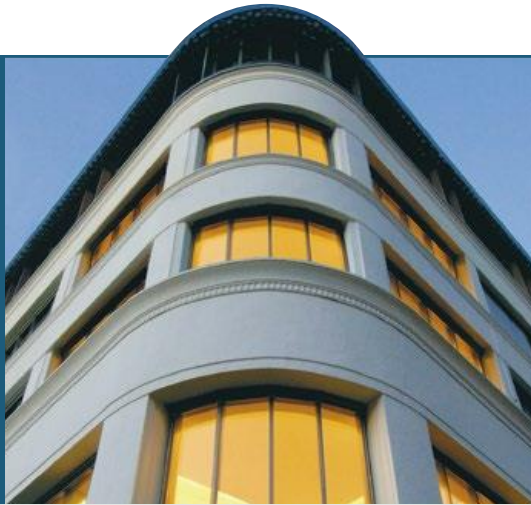
- Application of the “exploitation” concept
 - Additional forms of exploitation
 - Omission of some forms
 - Express inclusion of the means element in some forms
- Inclusion of the provision on consent

LALIVE



Questions?

LALIVE



Thank you

www.lalive.ch

mvinogradova@lalive.ch