

The transnational crime of human trafficking: taking the Canadian human security approach

by Maria O'Neill

There are a number of jurisdictional approaches can be taken to tackle the crime of trafficking in human beings (THB). From a Eurocentric point of view these are:

- persons, especially women and children, supplementing the United Nations Convention on Transnational Organized Crime 2000 (the THB Protocol);
- the Council of Europe Convention on Action against Trafficking (the Warsaw Convention) 2005;
- or even the UK's Modern Slavery Act 2015.

My current research is taking the EU Directive 2011/36/EU as my frame of analysis. However, in light of Brexit, it is necessary to use the transnational rather than the supranational lens. I will be taking a cross border law enforcement approach to my analysis, building on my research to date.

Within the UK further issues arise, as there is not one legal framework operating, but three. These are:

- the Modern Slavery Act 2015, while it does have some UK wide provisions, is essentially and England and Wales piece of legislation; with
- the Scottish (Human Trafficking and Exploitation (Scotland) Act 2015; and
- the Northern Ireland (Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, authorities having enacted their own legislation in this area where the terminology used is that of human trafficking rather than the England and Wales definition of Modern Slavery.

The core definitions of the crime in all three UK jurisdictions are essentially the same, however these UK definitions (being EU THB+) are different from that adopted at the EU level under Directive 2011/36/EU, thereby giving rise to the term “modern slavery”. The three UK jurisdictions differ on levels of protection afforded to victims, and the approach to the borderline between human trafficking and prostitution. The EU Directive does not go into the issues of the domestic

regulation of prostitution. It is however influenced by the THB Protocol, the Council of Europe laws on and relevant to this area, and ILO provisions.

WHAT IS HUMAN TRAFFICKING?

Human trafficking is not “voluntary” prostitution (as understood by law enforcement officials), human smuggling, traditional slavery, which continues to be illegal, or poor working conditions per se, (which are predominantly addressed by employment law). Human trafficking builds on pre-existing and pre-defined crimes of “slavery”, “servitude”, “forced labour” and “compulsory labour”, and while it overlaps with each of these, it is not an exact match for any of these definitions. Each of these words, used in the EU definition on THB, has a long pedigree in ECtHR and other case law. THB may or may not occur in the context of organised crime, and it may be either a domestic crime or a transnational crime.

It is up to individual states to regulate for domestic crimes of human trafficking, pursuant to their voluntarily assumed European and international human rights obligations. This lack of compulsion on a state to legislate to combat THB is the reason why there is a lot of pressure from international human rights lawyers to try to have the crime formally recognised under international criminal law. This has not happened yet.

Human trafficking is not covered expressly in the European Convention for Human Rights 1953, but that convention has been interpreted to include human trafficking in *Ranste v Cyprus and Russia* (Application no 25965/04 ECtHR). Human trafficking is expressly covered in the EU Charter of Fundamental Rights 2000, at Article 5.3. There are therefore enforceable rights for Council of Europe and EU Member States to make a state properly pass and implement human trafficking laws.

The laws in the UK are directly based on the EU laws – and the EU laws passed to the date of Brexit – which has not happened yet, will be part of UK law in the future, even if the UK does not keep up with any post Brexit EU laws, a matter which still has to be negotiated.

In the EU definition issues have arisen in practice as to what is meant by “transportation” and whether this needs to be across borders. It is clearly recognised generally, and reflected in UK domestic law, that human trafficking need not be across borders, and may in fact involve travel just up and down one street. However, as the EU can only legislate for crimes affecting two or more of its Member States, and is prohibited from becoming involved in internal security issues of individual member states (Art 72 TFEU) or indeed national security issues (Art 73 TFEU – unlikely to arise in the context of human trafficking) then the internal trafficking of human beings within individual Member States is necessarily a matter for those individual member states.

As within the UK, at an EU level the laws on prostitution are quite diverse. Prostitution is not a matter for EU regulation. Forced prostitution, to the extent at least that a law enforcement officer would classify forced prostitution, and the prostitution of minors, under the age of 18, falls under THB. The word prostitution is gender neutral, and while it is true that the majority of victims falling into this category are women and girls, being abused by men, it is important not to allow others, whatever their original or current gender, to fail to benefit from protective measures. There is a need to protect and prosecute all, regardless of gender.

At an EU level a Europol representative reported (at an IALS presentation) recently that 78 per cent of the cases that they handle at Europol are in the area of sexual exploitation, with 12 per cent being in the area of labour exploitation, forced begging being 3 per cent, sham marriage 3 per cent, forced criminality 3 per cent, illegal adoption 1 per cent, and a small amount of benefit fraud. The UK speaker, from the Crown Office, speaking about the UK cases currently being dealt with, said that they are handling more victims of labour exploitation than sexual exploitation, with roughly 50/50 male and female victims (for all types of THB/ modern slavery exploitation) in the UK National Referral Mechanism (NRM). It would appear that the more people look for human trafficking cases, the more they find. Europol is reporting that they are only dealing with the lowest hanging fruit, with limited resources preventing them doing more. However, many cases in the NRM related to human trafficking outside the UK, with which the UK has no jurisdictional connection, or in many cases, any working police relationships for the exchange of information and intelligence. Not all cases in the NRM pertaining to the UK, therefore, are actionable by UK (or even EU) law enforcement.

There is therefore a problem.

How much can UK authorities actually action intelligence received, or recorded in the NRM, an issue which has been raised in the press recently? How much actionable intelligence received can actually be passed on to responsible law enforcement in other countries? How much intelligence received cannot be actionable at all due to state failure/ corruption or lack of interest in other countries?

In addition, if the UK authorities are going to action the intelligence received which have some sort of territorial connection with this country, do they have the necessary resources? Even Europol is complaining about a lack of resources in this area, and they are dealing only with the more serious and organised versions of the crime.

The following key issues therefore arise, and will be central to the development of my research:

- What is transnational criminal law, as opposed to international or domestic criminal law?
- When is human trafficking a transnational crime?
- What is the Canadian human security approach?

These are considered in greater detail below.

WHAT IS TRANSNATIONAL CRIMINAL LAW, AS OPPOSED TO INTERNATIONAL OR DOMESTIC CRIMINAL LAW?

International human rights lawyers have argued much about the current classification of trafficking in human beings as an international crime, and have expressed much dissatisfaction that trafficking in human beings is being treated as “merely” a transnational crime. While international human rights lawyers and lobbyists will not doubt continue to press for further developments in this area, particularly with a view to bringing non-signatories of the UN Protocol on Human Trafficking into the fold, those states which have signed up to the UN Protocol can continue to develop their domestic and transnational laws and practice frameworks to combat this crime, which affects all jurisdictions. As pointed out by Boister (2003), “there is no international crime of drug trafficking”, but that does not prevent willing states from legislating domestically and cooperating transnationally on drug trafficking.

Boister argues that it is possible to distinguish between international criminal law, transnational criminal law and domestic criminal law. He argues that there was less clarity in the difference between international criminal law and transnational criminal law “prior to the conclusion of the Rome Statute” and “the founding of the International Criminal Court” in 1998. He states that the differences between the two legal jurisdictions became clearer after that date. For international criminal law “core crimes” the jurisdiction now rests with the International Criminal Court; however for transnational crimes the authority to penalise derives from “national law and individual criminal liability is entirely in terms of national law.”

National crimes, in contrast, arise from the jurisdiction of the state itself, and do not require an international treaty for their establishment. Whether the definition of human trafficking as set out in the Protocol on Human Trafficking is broad enough to cover all possible forms of exploitation, to include human trafficking and related crimes, will be addressed later in my research, in the context of the UK chapter and the UK’s approach to modern slavery.

While international crimes are of concern to “international society as a whole”, transnational crimes are only of concern to a particular jurisdiction when there is “a direct injury threatened or caused” for that particular state to become involved in the investigation and prosecution of that particular crime. There needs to be some sort of link between the crime and the jurisdiction investigating and prosecuting. These connections are set out, for pursuing organised crime, in Article 3(2) of the Transnational Organised Crime Convention, 2000, to which the Protocol on Trafficking in Human Beings, for better or worse, is attached.

Issues arise as to whether human trafficking actually predominantly occurs in the context of “organised” crime, as defined in the Palermo Convention, or whether it is more likely to be classified as “serious” or “entrepreneurial” crime. Crime is often classified as “serious and organised” in domestic and transnational /EU legislation, with the two terms, “serious” and “organised” being separate legal concepts, while “entrepreneurial” crime is a term often used by law enforcement officers when reflecting on crime as they encounter it in their day to day work. Many serious crimes occur outside the framework of an “organised” crime group, as defined by the Palermo Convention, and need to also be addressed in the context of transnational justice and law enforcement measures. Human trafficking is one such crime. (The EU does not limit THB to organised crime. Europol deals with both serious and organised crime – which affects two or more Member States).

Despite their flaws, the point of the “suppression conventions” like the Palermo Convention and its protocols is to suppress “harmful behaviour by non-state actors”, which Boister (2003) argues “can already ... be said to establish a system of” transnational criminal law. The intention is to “minimise or eliminate the potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment”. They standardise “co-operation among governments” which have otherwise “have few other law enforcement concerns in common”. In addition, “they create an expectation of co-operation that governments challenge at the cost of some international embarrassment”.

For a territorial connection to be established for transnational organised crime, as set out in the 2000 Convention, there needs to be a crime committed in (a) either one or more states, or (b) the crime occurs in one state, but there is a substantial territorial connection with another state, either in the planning, perpetration, subsequent behaviour or effects of that crime. As Rijken (2003) states, it can also result when an organised crime group operates in a number of different jurisdictions. There may or may not be an actual physical crossing of a border. In this era of globalisation, there are many ways in which criminal behaviour in one state can affect or have an impact in another state. It is clear, and is evidenced whenever comprehensive audits are undertaken, that “transnational criminal groups and criminals live and

operate in a borderless world” (Zagaris, 2011).

Boister (2003) has opted for a definition of transnational criminal law that is “the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects”. It is without doubt that transnational criminal law, even when legislated for in “suppression conventions” is incomplete, and “relies on domestic law to flesh out” the details. It assumes that domestic legal systems have “fully developed penal systems” something which in reality, is not always the case. This is something that the politicians and civil servants in those jurisdictions need to work on.

Transnational criminal law, however, is to be distinguished from the extra-territorial (and therefore unilateral) effect of domestic laws on what are otherwise purely national crimes. Sovereignty is closely connected with domestic criminal law. Interstate cooperation arises when the need to properly operate the domestic criminal system requires transnational cooperation.

WHEN IS HUMAN TRAFFICKING A TRANSNATIONAL CRIME?

For its part, trafficking in human beings has been classified as “one of the fastest growing crimes worldwide” with the UNODC saying that it has “reached ‘epidemic proportions’” (Tavakoli, 2009). It is very difficult to put exact figures on human trafficking offenders or criminals. However, the more that law enforcement looks for it, the more they find, with those law enforcement officials (at Europol) who are actively engaged in this area speaking of only “going after the low hanging fruit” due to the volume of the crime vis-a-vis the resources allocated – by governments (in the EU) focused on the issue – to tackle it.

It will not be sufficient for states to just operate within regional integration associations (RIAs) such as the well-developed, and still developing provisions within the EU, but also along the human trafficking chain of jurisdictions, through countries of origin, transit and destination, where ever those chains lead. (In the UK these chains predominantly lead to Romania (EU), Vietnam and Nigeria.)

If the interest is there, then the practice may follow, even if substantial capacity building partnerships have to be entered into between more experienced, and possibly better resourced countries at one end of an often used human trafficking chain, with interested but less resourced or experienced jurisdictions at other points of the chain. Gallagher (2010) reports that there is now a dedicated UN funding mechanism to assist developing countries with economic and technical assistance in this area.

Challenges will necessarily arise in developing transnational law enforcement and prosecution provisions along a human trafficking chain. Differences in the design of a state, its criminal law, rules of evidence, understanding and use of

fundamental/human and due process rights, and the design and operational style of their law enforcement bodies, will need further and detailed examination. These are all challenges that have been encountered within the EU in the development of its Area of Freedom Security and Justice (AFSJ), and in the EU's relationship in this area with the United States. This has resulted in some very high profile culture clashes, leading to detailed case law and subsequent treaties attempting to resolve issues which arise on a regular basis. Problems will arise, but the evidence exists that given the necessary political impetus, these problems can be surmounted.

As stated by Boister (2003), the development of these networks or geographical regional groupings need to "be more transparent and open to greater public participation" than has been the case for the development of the existing organised crime or drug trafficking networks, of which there are many. In this way they will "ensure greater legitimacy" and support from the public.

They "must be produced by an authentic political process" in all relevant jurisdictions "in order to justify the use of state and inter-state authority against individuals" (Zagaris, 2011). There is also a need, for jurisdictions to "develop international enforcement regimes that are balanced and maintain fundamental international human rights." To this may be added, from the EU's experience in developing the Area of Freedom Security and Justice, fundamental (as understood under the EU legal framework) and due process rights, such as the right to a lawyer, the right to translation and interpretation, consular support, etc. The EU's approach to these issues will be examined further in the context of the EU response to this crime in my research.

Key in the development of effective, legitimate and human security focused transnational law enforcement networks to combat, *inter alia*, human trafficking, is the principle of legality, which derives "from the general principles of international law". This applies whether international law arises out of conventions, customs or general principles. The principle requires that an offence involving a transnational crime "should be dealt with in any state that has jurisdiction using the same general principles, procedures and penalties" as for domestic crimes (Boister, 2003). This, as pointed out by Boister, "is not commonly the case". This needs to be government/ diplomat led, with law enforcement support in designing workable structures.

WHAT IS THE CANADIAN HUMAN SECURITY APPROACH?

Generally, but also in the context of human trafficking, there is a need to focus on human beings, in a transnational context, and not just on the concept of "state security", with the UN's Human Development Report calling for a move away "from an exclusive stress on territorial security to a much greater stress on people's security". The right to personal security is seen as

not just protection from "agents of the state" but also "safety against physical assault by private actors" (Donnelly, 2013). The concept of "human security" is emerging to occupy this space.

A human security approach provides that "all lives ought to weigh the same" (de Wilde in den Boer and de Wilde, 2008). The concept of human security was "first coined in the 1994 Human Development Report" of the UN Development Programme, and further developed into a broad ranging policy agenda by the Commission on Human Security (Kaldor, in den Boer and de Wilde, 2008). While human security is "peopled centred" (Human Development Report, 1994) two diverging dominant themes have emerged from this debate; the concept of "freedom from want" championed by Japan, and "freedom from fear", advocated by Canada. While both of these themes feed into the broader trafficking in human beings discourse, my research will follow the "freedom from fear" approach.

For Canada the freedom from fear approach to human security has identified five policy priorities: "protection of civilians, peace support operations, conflict prevention, governance and accountability, and public safety" (Bruggeman in den Boer and de Wilde, 2008). These all form the backdrop to issues relating to human trafficking, in particular the protection of civilians and public safety themes. Human trafficking often arises in the context of failed states or states in conflict, where individuals are no longer benefiting from the protection of their state of origin, or they have become effectively stateless. The challenges of protecting individuals where there is a lack of a state counterpart to interact with are large. Nevertheless there are sufficient numbers of effectively operating states which can cooperate to combat human trafficking along the trafficking supply chain.

The concept of "human security" is closely connected with the concept of "human rights". However it should be noted that "distinctions of nationality are deeply embedded in international human rights regimes", with the right to claim human rights being "only against governments of which they are nationals" or are otherwise resident (Donnelly, 2013). However internationally recognised human rights, to include the right to be free from slavery or slave-like practices, are, as stated by Donnelly, "minimal standards of decency, not luxuries of the West." The concept of "human security" requires that "nation-states can no longer privilege the lives of their own nationals", requiring states to intervene to protect those individuals that come within their sphere of influence, and who are not being adequately protected, whether it is due to war, or in the case of failed or weak states, by their own states (Glasius and Kaldor, 2006).

Human security, while now a very broad concept, includes issues related to transnational crime. In addition, the UN Millennium Declaration of the General Assembly, of 8 September 2000, takes a human security approach, referring, *inter alia*, to the need to "intensify our efforts to fight

transnational crime in all its dimensions, including trafficking as well as smuggling in human beings and money laundering”.

Following the “freedom from fear” analysis, the EU’s Barcelona Report has called for “coordination between intelligence, foreign policy, trade policy, development policy and security policy initiatives” of the EU member states and the EU’s institutions. This was to be done along with “other multilateral actors, including the United Nations, the World Bank, the IMF and regional institutions”, in order to develop an effective human security approach (A Human Security Doctrine for Europe, 2004). Again this is a very broad canvas, with only some of these themes being developed further in my research, with the focus being on the EU supranational legal framework, where any EU law conflicting with national law over rides that national law, and its interaction with global regulatory actors in tackling a number of the issues which arise.

State security (or more recently in the context of counter-terrorism, homeland security) prioritises the state, and the citizens of that state over all other individuals, thereby leaving some individuals without protection. It is those individuals without protection, or without adequate protection, who most often fall victim to human traffickers. It is for this reason that the human security approach is a most appropriate lens with which to examine the issue of the transnational crime of human trafficking. As it is no longer possible to isolate one population from another in the context of globalisation, and its ancillary risks, the human security approach recognises “the interdependence and interlinkages among the world’s people” (Human Security Now, 2003). The human security approach seeks to “forge alliances that can yield much greater force together than alone.”

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