ANALYSIS OF LEGAL FRAMEWORKS

SURROUNDING THE SEXUAL EXPLOITATION OF CHILDREN

Journal Series No. 5

ANALYSIS OF LEGAL FRAMEWORKS
SURROUNDING THE SEXUAL EXPLOITATION OF CHILDREN

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January 2013

This publication was produced with the financial assistance of the Oak Foundation, the Swedish International Development Cooperation Agency (SIDA) and Irish Aid. The views expressed herein are solely those of the authors. The support received from the above-mentioned donors does not constitute endorsement of the opinions expressed.

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PREFACE

As the ECPAT International 2nd Edition Country Monitoring Reports on the status of action against commercial sexual exploitation of children (CSEC) have shown, governments have generally continued to make progress in strengthening national legislation to combat CSEC. However, the greatest weaknesses and gaps continue to lie in the implementation and effective enforcement of the new laws which can result in a weakened protection framework for children, lack of redress for the victims and impunity for the perpetrators.

In order to support the development and implementation of effective legislation, it is important that all relevant stakeholders have a clear understanding and strengthened capacity of the international legal instruments so that they can better collaborate for the best interests of the child. The articles in this Journal aim to clearly define the basic legal provisions that best define and prohibit the child prostitution, child pornography and trafficking of children for sexual purposes and through academic articles and case study examples, promote the necessary steps to move from legal reform to legal accountability.

The first article was originally written for presentation at *the Second International Conference on Human Rights and Peace and Conflict in Southeast Asia, in Jakarta, Indonesia in October 2012*. As increasingly more countries move towards legalising prostitution, this paper examines the links of legalised prostitution with sex trafficking in women and children. Whilst the empirical evidence on this issue is somewhat sparse, there appears to be some verifiable justification to confirm that two contradictory effects occur as a result of legalisation of prostitution: a switch away from trafficking in women and girls but also a resultant increase in trafficking and sexual exploitation. The paper concludes that in countries where selling sex has been decriminalised but buying sex is illegal (such as Sweden and Norway), research and data has suggested that prostitution has significantly declined and, with it, trafficking in women and girls.

The second article examines good practice implementation within an anti-child trafficking framework that focuses on three interconnected prongs: defining child trafficking, fully criminalising the range of conduct involved in the commission of child trafficking and providing the full range of legal, financial, and psychosocial support for victims in order to ensure their recovery and reintegration. Interestingly, the analysis of implementation is provided in examples from anti-trafficking law in the USA, a country that has been both heralded and criticised globally for its unique approach to trafficking issues.

Child pornography, or child sexual abuse materials probably remains the most poorly legislated aspect of the commercial sexual exploitation of children globally. Definitional gaps about what constitutes child pornography and failure to attach criminal consequences to each element in the chain from production to possession of child pornography is helping to fuel the escalation of child pornography cases. The third article in this Journal addresses two of the definitional challenges that exist in many national legal frameworks. Firstly, the various definitions of a "child" used in different jurisdictions presents an obstacle to effectively criminalise the multiple forms of child pornography. Secondly, there is an established difference between pornography involving real children, and those involving fabricated representations of children. The final Journal article looks at legal precedent that has dealt with the balance between the right to freedom of expression in the case of blocking and filtering of child pornography. The paper notes that speech and expression rights themselves are not absolute and the right to protect citizens against child pornography trumps the right to unfettered freedom of expression.

It is hoped that this second legal framework publication in the current ECPAT Journal Series will serve as a useful guide in supporting advocacy for legal reform by providing good practice examples of implementation at the national level from various countries around the world.

Does the legalization of prostitution increase the sex trafficking of women and children?

By Mark Capaldi[1]

Note: *This paper was originally presented at the Second International Conference on Human Rights and Peace and Conflict in Southeast Asia, 17-18th October 2012, Jakarta, Indonesia and will subsequently be published in the Conference Report produced by The Southeast Asian Human Rights Studies Network (SEAHRN).*

Introduction

The problem of human trafficking is fundamentally a socioeconomic issue of supply and demand that fuels a criminal global trade in women and children. The lack of reliable data over the scale and scope of human trafficking for sexual purposes has led many to argue that the demand for sexual services through legalised prostitution has a causal relationship that leads to conditions for sex trafficking of women and children to flourish (Outshoorn, 2005; Farley et al., 2009; Hayes-Smith and Shekarkar, 2010; Abel, 2010). Others disagree arguing that the legalisation of prostitution improves the working conditions and makes it safer for the women who voluntarily choose to engage in commercial sex, resulting in the trafficking of women and girls being less attractive (Bureau of the Dutch National Rapporteur on Trafficking 2005; Limoncelli, 2009; EMPOWER Foundation, 2012).

The aim of this article is to explore and examine any links between the legalisation of prostitution and sex trafficking. Such links could be correlative, causal or spurious, but as an exploratory paper this article will consider the various arguments in favour and against legalisation of prostitution in relation to its impact on trafficking and the sexual exploitation of women and girls. Whilst the empirical evidence surrounding this issue is somewhat unreliable and inconclusive, there appears to be some verifiable justification to confirm that two contradictory effects occur as a result of legalisation of prostitution: a switch away from trafficking in women and girls but also a resultant increase in trafficking and sexual exploitation.

Although the final outcome or conclusion of this paper may not be definitive in clear, unambiguous support for any specific legal regime to deal with prostitution, this paper will address issues critical to child sexual exploitation within the commercial sex sector (and within the context of the legalisation/decriminalisation argument). The paper will conclude by finding that slacker prostitution laws within a country make it more likely that trafficking in women and children will increase. However, in countries where selling sex has been decriminalised but buying sex is illegal (such as Sweden and Norway), research and data has suggested that prostitution has significantly declined and, with it, trafficking in women and girls.

1. Mark Capaldi has worked directly with child-led organizations on issues such as street children and working children, and has also implemented projects on children in conflict with the law and on violence and abuse against children. Much of this work has been in South and East Asia, with Concern Worldwide, PACT Inc. and Save the Children UK and currently with ECPAT International. Since June 2011, he has started a Doctorate programme.

What are the debates around legalising prostitution relevant to sex trafficking?

The wider social debate around prostitution generally sees the dichotomy of the 'leftist liberalist groups' who see prostitution as legitimate work and are in favour of decriminalisation (in light of the woman's right to choose) and the 'right wing conservatists' and abolitionists who see prostitution as a form of violence against women and thus favour strict criminal prohibitions. A more academic discourse, however, could categorise the arguments about prostitution into three categories and will be adopted for this paper: philosophical, empirical and political (Dempsey, 2011).

Philosophically, the liberal approach sees a prostitute (also referred to as a *sex worker*) as a 'sovereign and independent human being able to decide freely whether to work in the sex industry or not' (Skimmaneck, 2009). Liberalists argue that the criminalisation of what is essentially a free exchange of labour, in fact, contributes to the stigmatisation and violence experienced by these women (West and Austrin, 2005). The concept of prostitution being a free contractual exchange between equals is hotly refuted by many opposed to decriminalisation as an illusion rooted in a lack of social awareness of sexual slavery and trafficking (Somswadi, 2004; Raymond, 2004; O'Connor and Healy, 2006). Although liberals and prohibitionists are in full agreement as to the criminality of human or child trafficking that takes place in all regions of the world, for the women 'voluntarily' involved in prostitution, many feminists and human rights activists argue that it can hardly be an issue of women enjoying rights over their own bodies, but rather see consent to violation as an act of oppression (O'Connor and Healy, 2006; Farley et al., 2009). Women who engage in selling sex, they believe, have few rights to reject the male sexual demands and abuse they are subjected to in the inherently unsafe, exploitative and dangerous environment of prostitution. However, this can feed into the core argument of those in support of legalised prostitution, as many argue that legalisation will decrease the harm and vulnerability that these women face, thus reducing the level of criminality that is generally associated with the commercial sex sector (Scoular, 2010; EMPOWER Foundation, 2012). The harm reduction aspect of legalising prostitution is empirical, however, and thus needs to be analysed through a more evidence based lens.

Empirical research regarding prostitution has generally been problematic with regard to the question of whether there can be genuine consent, largely due to conceptual difficulties with designating the significance of a subject's own beliefs about whether she exercised free will or was coerced (Farley et al., 2009; Dempsey, 2011; Cho et al., 2011). Empirical research has been much more successful in quantifying the other harm aspects of either legalised or prohibited prostitution. The health and gynaecological complications of all forms of prostitution have been well researched (Pheterson, 1996; WHO, 1998 and 2002; Farley, 2004; Waltman, 2011). Research carried out by Farley et al. (2009) of 854 individuals engaged in prostitution in nine countries (Canada, Colombia, Germany, Mexico, South Africa, Thailand, Turkey, United States and Zambia) did not find a statistically significant correlation between health related problems and the legal status of prostitution. Poverty, age of entry and time spent in prostitution were the overriding factors, with 24% of the whole sample reporting reproductive health illnesses alone.

However, it is the levels of sexual violence and physical assault that are the most prevalent health concerns in both legal and illegal prostitution. Raymond, et al. (2002) found that 80% of women in prostitution in Indonesia, the Philippines, Thailand, Venezuela and the United States suffered violence-related injuries, whilst of the 854 respondents in 9 countries in Farley et al. (2009), 71% experienced physical assaults (such as beatings, biting, slashing with knives, cigarette burns) and 62% reported rapes. Farley et al. (2009) asked women and children in prostitution in Colombia,

Germany, Mexico, South Africa and Zambia whether they thought that legalising prostitution could make them safer from violence, coercion and abuse; 46% percent felt that they would be no better off, with 59% of the German respondents saying that they did not feel that legalisation of prostitution in their country had made them any safer.[2] The lack of change in harm and victimisation following legalisation of prostitution is generally believed to be due to the continuing social prejudice faced by these women (Farley, 2004; Abel, 2010).

It is well established that prostitution, whether legal or not, is inherently dangerous, as the women and girls involved are regularly victimised through violence and abuse. However, decriminalisation of prostitution should furnish victims with legal redress against violent offenders, as fear of arrest for prostitution charges is one key reason why those involved in prostitution do not otherwise report sexual assault, even for those who are victims of trafficking or child sexual exploitation (Sullivan, 2007; Annitto, 2011). Whilst considerable challenges still remain in guaranteeing that women and children involved in prostitution attain equal treatment before the law in all parts of the world, for those working in a legal environment the evidence based data of a number of countries does suggest that victims are more likely to report sexual assault and other crimes should they occur (Brents and Hausbeck, 2005; Woodward, 2005; Sullivan, 2007).

Finally, the political analysis of prostitution rests primarily on the status of sex workers' employment and civil rights. The old controversies again appear, with some emphasising the professional skills and boundaries that those in prostitution delineate (West and Astrin, 2005; EMPOWER Foundation, 2012) whilst others question the legitimacy of a career where the only ideal qualification is to be young and attractive (Kelly and Regan, 2000). Furthermore, where legalisation does not forbid those under 18 engaging in prostitution, the age of consent in those countries can mean that children as young as 14 or 16 years of age can legally work in prostitution (Mossman, 2007; Gillespie, 2007; Annitto, 2011). Working conditions can differ significantly in the various settings of prostitution (e.g. street work, brothels, escort agencies, massage parlours, clubs, private apartments etc.), with those working illegally (trafficked victims or children) generally found in contexts that are more difficult to control and regulate. Though legalisation is meant to bring regulatory standards and better working conditions (Weitzer, 2009), in some cases sex workers report little improvement or a reluctance to register for benefits, as they don't want to create a permanent record of being a prostitute (Brents and Hausbeck, 2000; Hughes, 2004; West and Astrin, 2005). However, legalisation can limit corruption, exploitative pay and improve police relations, which, given time, has been shown to have a positive effect on the ability to seek legal redress, be awarded protection as trafficking victims and, in some cases, access compensation for exploitation or social welfare benefits (Schimannek, 2009).[3]

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2. Other empirical studies have shown comparable results: 50% of 100 prostitutes in different research in the Washington DC area of the US expressed the same view (Valera et al., 2001) and a survey of 772 sex workers in New Zealand showed little change in the harms experienced post decriminalisation compared to previously (Abel, 2010).

3. Indeed, legalisation has led to government commitments that should enable sex workers to form a union or get health insurance and retirement benefits, that are in part, generated from taxes. The commercial sex sector apparently accounts for 5% of the Netherlands national GDP (Raymond, 2003) and the German government expected to get millions of Euros in tax revenue when they legalised prostitution (Hughes, 2004). Instead, taxes have not been paid and lawmakers have looked for ways to increase collection of taxes from those involved in prostitution – effectively putting the government into a 'traditional role of pimp' as coined by Hughes (2004).

Legal prostitution and the links to trafficking and child sexual exploitation

Efforts to validate the claim that legalised prostitution leads to increased trafficking in women and girls are hindered by unreliable estimates concerning the scale and scope of the trafficking problem. The practice of ascertaining the size and nature of trafficking and/or prostitution is fraught due to the different definitions of what and who should be counted; scarcity of reliable data due to the illegal and illicit nature of trafficking and prostitution; and the lack of disaggregated data which generally finds women and children grouped together. Calculations of the number of children involved in prostitution vary greatly as this is a vulnerable and generally hidden group that is particularly difficult to reach (Dottridge, 2008; Annitto, 2011).[4]

Legal and policy definitions are also problematic. There is not always clear differentiation between smuggling, trafficking and irregular migration (O'Brien, 2011). The US State Department for example, promotes the official US Government position that "prostitution is inherently harmful and dehumanizing and fuels trafficking in persons" (US State Department, 2007). As such, the description 'trafficking victim' is often given to individuals or groups who themselves would not accept that category (O'Brien, 2011; EMPOWER Foundation, 2012). Significantly though, the international legal framework around trafficking in the form of the UN Trafficking Protocol, clearly states that as far as children (anyone under the age of 18, regardless of national law) are concerned, coercion or force does not need to have occurred to define a child as a victim of trafficking. ILO Convention 182 also prohibits the involvement of any child (below 18 years of age) in any of the worst forms of child labour which should make involving children involved in prostitution illegal by international law. Unfortunately though, the domestic legislation of some countries has been complicated by the lower age of consent in some national legislation (Annitto, 2011).

As such, this paper must therefore limit its analysis to empirical evidence on the question of whether illegal prostitution and trafficking increases once prostitution is legalised and to the presence of children in the *illegal* commercial sex sector even where state legislation decriminalises prostitution in part or fully. There are very few quantitative studies based on hard data that have tried to answer this question. Jakobsson and Kotsadam (2010), in a study of 31 European countries, did find an increase in human trafficking following the legalisation of prostitution. Cho et al., (2012), in an analysis spanning 150 countries, also found that states with legalised prostitution have a statistically appreciably larger rate of human trafficking inflows. Even where confirmed cases of trafficking dropped after legalisation of prostitution (such as in Germany in 2001 and 2005) it was suspected that this was mainly due to the limitations on police access to brothels imposed by the new legislation, which inhibited police capacity to detect trafficking crimes, rather than a real decrease in trafficking (Schimannek, 2009).

Undeniably, the extent of prostitution grows notably once it is legalised due to the simple economics of increasing demand and supply (Crast, 2010; Cho et al., 2012). Similarly, when prostitution is legalised, the illegal industry also expands (Crast, 2010; Jakobsson and Kotsadam, 2010; Cho et al., 2012). Some hypothesise that the extra costs (e.g. licenses, tax) and regulations forced on legal brothels encourage some brothel owners to operate outside of the law or for customers of prostitution to

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4. Notably, some countries have raised the legal age to be engaged in prostitution higher than 18 years. For example, in Turkey and Austria, the age that youth can legally enter prostitution is 19 years of age (Mossman, 2007).

seek cheaper options from the more vulnerable involved in the commercial sex sector (Weitzer, 2009). Legalised prostitution drives a pull factor in catalyzing trafficking where the domestic supply of women cannot meet the demand; so there is a greater dependency on women brought in from abroad. In Germany, 75% of women involved in prostitution supposedly come from other countries, with a similar high level reported for the Netherlands (O'Brien, 2011). However, Cho et al. (2011) found a 'substitution effect away from illegally trafficked persons to legally residing sex workers', although the exact magnitude was not possible to determine. Importantly, however, they concluded that the scale effect of an increase in human trafficking was more dominant than the substitution effect.

Does this scale increase in human trafficking also bring a similar rise in the number of children involved in prostitution in these countries? Circumstantial analysis would suggest it does as the vast majority of children involved in prostitution are adolescents who engage in commercial sex within mainstream prostitution sectors (O'Connell Davidson, 2004). Even where prostitution is legal, adolescents can obtain false documentation to secure employment. As such, there is no clear and fixed line between adult and child prostitution (O'Connell Davidson, 2004; ECPAT International, 2011a and 2012). Some evidence-based field data does exist to back-up this claim. From the nine-country study carried out by Farley et al. (2004), 47% of respondents were under 18 years of age when they first entered prostitution (with 63% reporting childhood sexual abuse and exploitation).

Is there a legal approach that can protect the rights of all those engaged in prostitution?

Despite a number of governments in various countries changing their legal framework to manage prostitution over the last two decades, little consensus exists as to the most effective legislative response and planned changes to law have usually been met with fierce and divisive debate. Furthermore, there appears to be little in common among the assorted legislative directions and variations that different countries have attempted, making analytical comparison particularly challenging.[5] Different countries (and states within federal systems) have all struggled with how best to regulate different forms of prostitution and to control the criminal engagement within the industry, problems that are exacerbated by a lack of coherence and consistency in enforcement throughout states (Hindle and Barnett, 2005). Assessing academically the impact of the legislative approaches to prostitution reform is also a challenge due to minimal empirical research and the questionable validity of existing reports and their sources (Mossman, 2007). Nevertheless, in most territories where legalisation of prostitution has occurred, one of the key regulatory objectives virtually always present is to eliminate child prostitution and exploitation. Furthermore, changes in criminal law related to prostitution have often been accompanied by the strengthening of national legislation with regard to human trafficking (Hindle and Barnett, 2005; Crast, 2010). However, as already stated, illegal prostitution has been found to flourish within legalised systems, and where regulation is poor or difficult to implement (such as with street-

5. In general, five different approaches to prostitution are found: (i) Prohibition which seeks to criminalise all aspects of prostitution; (ii) Decriminalisation which implies the repeal of prostitution-related criminal law; (iii) Legalisation which refers to the regulation of prostitution through legislation; (iv) Abolition which tolerates prostitution provided it does not infringe on public safety and order; and (v) Neo-abolition which sees prostitution as a violation of human rights but calls for the decriminalistion of prostitutes (who are seen as victims) but the criminalization of procurers and customers.

based commercial sex) organised crime remains a significant concern (see Elaine Mossman's 2007 detailed analysis of 14 countries from across the world). For a country like the Netherlands, which takes a very liberal approach to prostitution, human trafficking and sexual exploitation of children (already considered to be at very high levels) has not necessarily decreased but has moved to locations with less oversight (Bindel and Kelly, 2004; ECPAT International, 2006b). In Singapore, illegal sex work outside of designated legal red light districts is significant, and there is evidence of children being trafficked for sexual purposes through official channels for migrant workers (ECPAT International, 2010).

To consider a different approach, the exceptionality of the Swedish model has provoked significant interest, as it was the first country to decriminalise the selling of sex but criminalise purchasing or procuring. This approach is based upon the very clear Swedish policy principle that prostitution is violence against women and a form of gender inequality (Swedish Government Office, 1998). Swedish law is also built upon the principle that, to combat sex trafficking of women and children, the state must also reduce the demand for prostitution (Waltman, 2011). There is significant evidence to suggest that this approach has led to a notable reduction in the number trafficked and involved in prostitution in the country. In 1995, the Swedish government estimated that there were up to 3,000 women involved in prostitution (SOU 1995 cited in Waltman, 2011). In 2008, this figured had dropped to approximately 600 (Holmstrom, 2011) - one tenth of the number of sex workers in Denmark (where prostitution is legal), a country with half the population of Sweden (Waltman, 2011).

Activist Petra Ostergren has been widely quoted as being opposed to Sweden's approach, claiming that the number of sex workers has not decreased but has simply gone underground (Ostergren, 2007; Weitzer, 2009; Scoular, 2010). However, her study methods have been questioned (Waltman, 2011), and telephone interceptions of international traffickers and pimps by the National Criminal Investigation Department have reportedly confirmed that Sweden is avoided by criminal networks due to the lack of economic return, as fear of arrest appears to deter potential customers (NCID, 2002; SOU 2010 cited in Waltman, 2011; Ekberg, 2004). Nevertheless, NGOs such as ECPAT Sweden and the Committee on the Rights of the Child have all expressed concern at the lack of relevant statistical data pertaining to children, including data on child victims of sexual exploitation and trafficking (ECPAT International, 2011b). Whatever the actual efficacy of the Swedish law, it is undeniable that the reduction in prostitution and trafficking numbers is significant when compared to Sweden's neighbours for the same years. As such, in 2009, Norway followed the example of Sweden. Since the adoption of the Norwegian law, street prostitution has declined (Strom, 2009) and a longitudinal survey by Jakobsson and Kotsadam (2010) shows an overall decrease in the quantity of prostitution; thereby they surmise that the lucrative nature of trafficking to Norway should also have diminished.

Conclusion

Both sides arguing for legalisation or criminalisation of prostitution have compelling moral arguments, but the use of inaccurate or unreliable data as the basis for legal reform on either side of the debate makes it difficult to form clear, reliable conclusions. Quoted estimates of persons engaged in prostitution or of trafficking victims tend to take on a life of their own, despite the lack of a credible evidence base to support them.

The abolitionist and prohibitionists have used numbers and statistics that lack veracity, and their definitions of trafficked populations have also been criticised for being obscure. Legalisation appears to provide more choice and opportunity to consent for the sex worker. However, this can be countered by arguing that prostitution in itself is disempowering (an abolitionist philosophical stance). The clearest defence of legalisation is that it offers avenues for recourse to justice – as long as the proposed model of legalisation treats even the most vulnerable and marginalised as a rights-holder rather than a criminal.

Another point to consider, stepping beyond the 'morality' analysis, is that, as prostitution is hardly an ideal, those who engage in this activity often have no other viable option (especially those experiencing coercion or force). States could therefore opt to reduce the demand for sex work by criminalising the purchase of sex. The readings accessed for this paper that discuss Sweden all regard it as a strong model for reducing the demand for prostitution and therefore exploitation and trafficking (by criminalising the purchaser) – however one criticism of this model is that it still disempowers women (i.e. the sex worker) by treating them as victims rather than agents fully capable of choosing their own line of work and controlling their own bodies.

However, there will always be sexual exploitation (of women and children), regardless of whether a country has legalisation or criminalisation policies in place. The evidence based research identified thus far has shown that legalisation of prostitution increases the scale of illegal prostitution in a country and that the amount of sex trafficking of women and children therefore rises. The limited but empirical data available (Farley et al., 2009; Jakobsson and Kotsadam, 2010; Cho et al., 2011) all point to the finding that the trafficking of women and children for commercial sexual exploitation is least prevalent in countries where prostitution is illegal and the law enforced accordingly. In answer to this paper's title and opening question, the trafficking of women and children does appear to increase in countries where prostitution is legalised (albeit not necessarily proportionally to the increase in prostitution numbers as a whole). As such, the only middle ground in the debate as to how to legislate prostitution appears to be criminalising the demand side (buyers, pimps, traffickers) and decriminalising adult sex work/prostitution. In this way, those who are engaged in prostitution have room for recourse to justice whilst improved law enforcement (without the problems caused by heavy regulation) could mitigate against further exploitation and hopefully decrease trafficking of women and children.

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Defining and Institutionalising Legal Support for Child Victims of Trafficking: With the specific example of the USA

Jake Lucchi[1]

Introduction

Over the last 15 years child trafficking has become a prominent focus of international media attention. Though sensationalised coverage is often problematic, one positive effect has been that such attention has helped mobilise the public and policymakers to take action to address this crime as complex as it is damaging. Though this strong focus on trafficking has sometimes worked to ignore or deprioritise other equally damaging manifestations of commercial sexual exploitation of children (CSEC), it has also ushered in unprecedented progress with regard to updating and harmonising legal frameworks. Many countries have now passed laws that meet international minimum standards under the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ("Trafficking Protocol"); however, enforcement of these laws remains insufficient in most jurisdictions.

A good practice anti-trafficking framework must focus on three interconnected prongs: defining child trafficking, fully criminalising the range of conduct involved in the commission of child trafficking and providing the full range of legal, financial, and psychosocial support for victims in order to ensure their recovery and reintegration. Unfortunately, attention is often disproportionately focused on prong two, likely as a result of the Trafficking Protocol's association with a Treaty focused on combating organised crime. The way each of these issues is handled can have a major impact on the level of protection and support offered to trafficking victims; however, prongs one and three often receive insufficient attention. After considering some limitations with the Trafficking Protocol and their impact on the international anti-trafficking movement, this paper will analyse a few key issues in prongs one and three,[2] illustrated by country examples. Though several countries will be referenced, this article's analysis will be primarily anchored in examples from anti-trafficking law in the USA, a country that has been both heralded and criticised globally for its unique approach to trafficking issues.

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2. To avoid repetition with another recent ECPAT Journal (Lucchi, 2012) that discussed in detail key criminal provisions related to CSEC, this paper will not devote much attention to prong two.

Before proceeding, however, it is worth pausing to offer one caveat. There are especially high monetary and human costs involved with enforcing a good practice legal and policy regime to combat trafficking and fully support victims. As a result, the positive examples of provision of support to trafficking victims highlighted in this article come primarily from wealthy countries, with little attention devoted to recent efforts by developing countries. Though a number of developing countries have passed strong laws, especially with regard to the first prong mentioned above (criminalising relevant conduct), unfortunately many of these provisions are not implemented. This phenomenon of a relatively strong law passed yet unenforced is partially a result of the high costs mentioned above, but it is also a function of weak domestic institutions, poor coordination, corruption and law enforcement malfeasance. However, overcoming these general "lack of good governance" problems, which affect a wide range of human rights and child protection issues, is notoriously challenging, and countries should be praised for progress with regard to laying foundational legal and policy frameworks, even if these frameworks have not yet translated into sufficient progress.

One prime example of this phenomenon in the trafficking arena is Thailand, which passed an impressive new anti-trafficking statute in 2008 that meets most key good practice criteria with regard to criminal offences, defining trafficking, as well as protecting and supporting victims. However, provision of support to trafficking victims in accordance with the law is not yet adequate (ECPAT International, 2011a). Cambodia has also made important legal improvements in the anti-trafficking arena, but its progress with regard to implementation is even slower than Thailand's (ECPAT International, 2011b)

Limitations of the Trafficking Protocol

The Trafficking Protocol extends from and supplements United Nations Convention against Transnational Organized Crime and thus frames human trafficking issues as significantly interlinked with international organised crime. Though it may seem strange to have such a key human rights issue addressed by a treaty focused on organised crime and drugs, this legal channel was spearheaded by several states concerned that a purely human rights approach would provide insufficient legal tools for addressing the organised crime elements that were intimately tied to the proliferation of global trafficking (Gallagher, 2001: 981-83). Furthermore, even commentators initially sceptical of this approach as insufficiently attentive to the human rights elements at the core of human trafficking issues have eventually come to acknowledge the great benefits created by attaching the Trafficking Protocol to a treaty that creates such expansive channels of law enforcement coordination and collaboration across borders. Were trafficking to be treated through separate human rights channels, these law enforcement cooperation techniques guaranteed by the Treaty on Organized Crime likely would not have been applied in the trafficking context. (Gallagher, 2001: 988) Though child trafficking was not a major focus of negotiations of the Protocol, there was one major submission by several UN bodies to the Ad-hoc Committee to ensure the special rights of children are guaranteed in the new protocol. (United Nations High Commissioner for Human Rights, et.al, 2000)

However, these positive aspects are focused primarily on the enforcement of criminal sanctions against trafficking with less attention devoted to care and support for victims. In fact, though the Trafficking Protocol is quite strong with regard to criminal elements, its stipulations with regard to victim support are quite weak. Though the Protocol does protect privacy and the right to receive information and participate in court proceedings "in appropriate cases," the only requirements with regard to victim support services are that states "consider" providing such services in the form of housing, counselling, medical services, or educational/vocational development. (Trafficking Protocol, 2000:

Article 6) Thus, the Trafficking Protocol imposes little sense of urgency for states to make progress in this regard.

Furthermore, unlike the CRC and OPSC, the Trafficking Protocol includes no monitoring or reporting mechanisms to ensure states are meeting their minimum obligations under the treaty, which serves as a great barrier to using the document as a tool for countries to promote one another to push for greater implementation of the relevant measures (Edwards, 2007: 52). Thus, the key international monitoring and evaluation mechanism for action against human trafficking has become the system of a single state based on its own criteria rather than a representative international body using internationally agreed criteria (Chuang, 2006). The state in question is our primary case study for this article, the USA, whose annual Trafficking in Persons (TIP) report is a key international barometer used and discussed widely by NGOs and governments (Hendrix, 2010). The TIP report is mired by a lack of citation to sources or clear criteria for ranking countries into its "tier system," and many critics argue that these rankings and their resulting sanctions may be based on the US's political relationship and economic agenda with a particular country more than actual changes in the country's trafficking efforts (Cleveland, 2001).

However, the TIP report is also an important source of data and provides an extremely useful check on individual country progress. Furthermore, threat of Tier 3 sanctions has been valuable in pressuring countries to do more to protect children from trafficking.[3] Thus, on balance, the TIP Report is a beneficial effort legally mandated by the Trafficking Victims Protection Act.

Definitions of human trafficking and their impact on victim support

The identification of victims eligible for support depends intimately on the scope and specificity of a country's trafficking definition. The Trafficking Protocol does provide guidance on this issue, defining trafficking as "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." However, this definition does not explicitly address the question of whether movement is a necessary element of trafficking, a key issue to settle in order to establish regimes for prevention, protection, and victim support services.

Most regimes, either formally or in practice, appear to consider movement to be a necessary element of the definition of trafficking, and this is also common among key transnational actors, such as the International Organization for Migration (IOM) (IOM, "The Nature of Human Trafficking). The Global Alliance Against Trafficking in Women, the International Human Rights Law Group and the Foundation Against Trafficking in Women as well as several NGOs around the world have adopted the following definition:

> "All acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harbouring of

3. Based on the author's field experience and that of other colleagues, the threat of Tier 3 status serves as a powerful motivator to reconsider anti-trafficking efforts in at least some countries. Some commentators, however, have argued that this regime has limited impact (Hendrix, 2010).

> a person involving the use of deception, coercion (including the use of threat of force, or the abuse of authority) or debt bondage for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery-like condition, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage.”
>
> (IOM, 2003)

US law considers “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age” to be one of the “severe” forms of human trafficking. For these purposes, sex trafficking is defined as the recruitment, harboring, transportation, provision, obtaining, or maintaining of a person for the purpose of a commercial sex act (William Wilberforce TVPA Reauthorization Act, 2008).

While this definition is compliant with the Trafficking Protocol, using terminology that mostly maps neatly onto the terminology of the Trafficking Protocol (substituting “provision” for “transfer” and “obtaining” for “receipt”), the USA’s particular interpretation of these provisions and the addition of the “maintaining” offence departs from the most common practice by not holding movement to be a necessary element of trafficking (Clawson, 2009). Instead, the USA understands trafficking to be a process leading to sexual or labour exploitation, regardless of whether a person is moved from one place to another. While there are other countries that do not hold movement to be an essential element of a trafficking offence (such as the Netherlands), others recognise that there are unique factors involved in transporting persons from one place to another for the purpose of exploitation (UK Sexual Offence Act of 2003, sections 57-59).

Somewhat surprisingly, however, the issue of movement has received little attention in discourse surrounding the definition of trafficking, which tends to focus more on issues of consent and what qualifies as exploitation (Gallagher, 2001: 984-86). Furthermore, current critiques of the US’s definition and approach to trafficking often entirely fail to mention the issue, (Gallagher, 2007) and it also receives no treatment in official guidance from United Nations Office on Drugs and Crime (UNODC), the UN agency with lead responsibility for addressing trafficking issues (UNODC, 2009).

But what is the importance of the movement issue? Failing to stipulate movement as an essential element in trafficking may lead to a collapsing of various forms of exploitation into a “one size fits all” strategy not conducive to specific interventions targeted at each manifestation. The needs of children who have been moved out of their home communities in order to be exploited are very different from those who have been exploited within their home communities. Furthermore, the methods needed to prevent these activities will also likely be quite different. Finally, collecting distinct manifestations under the umbrella of trafficking may lead to a failure to disaggregate data and lower levels of awareness of the distinctive elements involved in forms of CSEC that do not involve movement.

On the other hand, the various manifestations of CSEC are interlinked. Many children are trafficked for child prostitution or pornography, which may involve travelling child sex offenders as clients or facilitators. Designing one category of criminal offences that encompass all of these interlinking forms of CSEC may facilitate the development of a holistic system of prevention and protection that provides a more integrated response to the various manifestations. Such systems may be achieved by designating one common coordinating body for the administration of all CSEC cases and developing clearer channels of authority

for how differing viewpoints should be weighed. Because of the increased international attention to child trafficking, in many countries there are specific National Plans of Action, systems of case management, and coordinating bodies focused specifically on human trafficking. However, these plans and institutions often do not address other manifestations of CSEC as highlighted in a number of ECPAT International country monitoring reports such as Thailand, South Korea, Czech Republic and to a certain extent, Albania (ECPAT International, 2011a; ECPAT International, 2011f; ECPAT International, 2011g; ECPAT International, 2012b).

Furthermore, in legal or political contexts where particular protective mechanisms are only available for trafficking victims or children at risk of trafficking, widening the definition of trafficking to include exploitation not involving movement may be necessary in order to ensure children are designated as victims and receive the support they need. In fact, the US's definition of trafficking may have arisen as a response to the challenges of legislating in the American context. Because of limitations in the jurisdiction of the federal government, there may be some kinds of CSEC offences that would be difficult for the federal government to address (such as child prostitution), in light of powers reserved to the states. Thus, incorporating all forms of CSEC into the federal definition of trafficking facilitates the pursuit of a comprehensive, uniform federal law enforcement regime rather than a piecemeal, state-by-state response. As a result, the US interpretation of trafficking may be as much a response to the particular legal context operative within the country rather than a principled choice that the US would advocate for other countries.

Protecting victims by punishing offenders

Though the Trafficking Protocol represents significant progress with regard to clarifying some trafficking enforcement procedures, many challenges with regard to identifying victims and convicting perpetrators remain. Thus, before moving to victim support services, it is useful to consider one key background condition—ensuring those who have perpetrated such heinous crimes against them are consistently and expeditiously held accountable by the criminal justice system. Quite often, proving the necessary elements of a trafficking offence in order to convict the perpetrator is exceedingly difficult, because of challenges in proving that the perpetrator was acting with the requisite criminal intent and used the requisite criminal means.

Though the Trafficking Protocol and most countries with updated anti-trafficking laws do not require the use of the deceptive or coercive means outlined in the Trafficking Protocol in cases of trafficking involving *child victims*, such provisions are often difficult to enforce in practice because of burden of proof challenges. For example, in some jurisdictions, if a prosecutor is unable to prove that the defendant knew the child victim was underage, the defendant may be able to escape conviction or even prosecution. Acknowledging these sort of difficulties, in the most recent amendments to the Trafficking Victims Protection Act (TVPA) contained in the 2008 William Wilberforce Reauthorization Act, the USA has made key clarifications to these burden of proof issues that serve as a good practice model. New provisions hold that in circumstances "in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harboured, transported, provided, obtained or maintained,[4] the Government need not prove that the defendant knew that the person had not attained the age of 18 years." The provisions that criminalise receiving any benefit from the trafficking of a child were also amended such that even persons who did not know they were benefiting can be penalised if they recklessly disregarded the fact that the benefit may have come from the trafficking of a child. Finally, to allow law enforcement to intervene with regard to traffickers who planned the trafficking of children yet did not carry

4. This "maintaining" offence was a new introduction in the 2008 amendments, which serves as an important addition to the range of facilitating offences included in US anti-trafficking law.

out their plan to fruition, the 2008 amendments added conspiracy offences that can be utilised regardless of whether a trafficking offence actually takes place. (Section 1593A of US Code) Other provisions in Section 222, which amends Section 1591 of US Code, hold that enhanced punishments can be applied not only to those who use force, threats, fraud or coercion in the process of trafficking a minor, but also to those who recklessly disregard the fact that these means have been used by others. Though the use of such means is not required to establish criminality when a victim is under 18, these factors are relevant with regard to assigning the maximum penalty (typically up to life imprisonment). Finally, the amendments require forfeiture of all property intended or used in the commission or facilitation of violations, or property obtained as a result of such violation (section 1594 of US Code). This is important to ensure that perpetrators do not receive any unjust gain from their activities.

Guaranteeing adequate support to trafficking victims

Because trafficking victims have a unique set of needs, clear legal support on issues such as immigration, employment, protection, and recovery and reintegration should be the key focal areas for good practice laws, in addition to fully capturing and enforcing the range of criminal offences for all those who contribute to the trafficking of children. The following section will explain some of these key criteria and illustrate how many of them have been achieved in the flurry of legal focus on human trafficking in the USA over the past 12 years.

Child trafficking victims, especially those who have been trafficked across national borders, face unique challenges, including questionable immigration status, lack of community support systems, lack of understanding of language and culture within the destination context, uncertainty with regard to return to their homes, physical and emotional trauma, and lack of access to educational or employment opportunities that would allow them to build lives in the destination context. Six key criteria that should be legally guaranteed in order to address these unique needs:

- Access to civil remedies for victims against their traffickers
- Temporary visas, including work permits for older youth who may wish to work, regardless of participation in criminal proceedings
- Safe, sensitive repatriation
- Physical and mental healthcare
- Protection from intimidation by traffickers
- Immunity from criminal liability for offences committed as a result of being trafficked

US law vs. policy

Many countries have made progress with regard to these measures, but one of the reasons this section focuses attention on the USA, a country with both strengths and weaknesses in the anti-trafficking realm, is that the USA has managed to incorporate these support mechanisms into national legislation rather than merely the policy of a particular agency or ministry, as is the case with most countries. In most regimes, these provisions are addressed in the policy of a particular Ministry or Agency that has been designated with the relevant authority. While policy is a viable option, leaving such integral issues captured only in a policy that may be less authoritative as well as shift with changes in political leadership is less desirable than guaranteeing them in a clear and specific law that will likely better guide the conduct of relevant officials as well as remain operative in cases of new leadership.[5]

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5. For further development of this point, see Lucchi, 2012: Chapter III.

Following several high profile cases in the 1990s (Hendrix, 2010) and years of increasing awareness of the USA's role in human trafficking and acknowledgement that earlier legal tools were insufficient to provide a complete response to the problem, the Trafficking Victims Protection Act (TVPA) was first passed in 2000. (de Baca, 2010) The TVPA provides broad recognition of the challenges faced by trafficking victims and the perverse law enforcement responses that often serve to treat victims as criminals and allow traffickers to escape criminal liability:

Section 102:

(17) Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves.

(18) Additionally, adequate services and facilities do not exist to meet victims' needs regarding health care, housing, education, and legal assistance, which safely reintegrate trafficking victims into their home countries.

(19) Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.

(20) Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

The US TVPA guarantees that trafficking victims will be able to access a range of social services, to the same extent as those already guaranteed to refugees, without regard to their immigration status. This applies to all victims under the age of 18 (Section 107(b)1(C)). It also guarantees protection for victims and their families and support while in custody, forbidding imprisonment, and providing for medical care, and guaranteeing privacy of personal information, access to information about legal rights and translation services.

Mandatory restitution and access to civil remedies in the US

US law orders mandatory restitution (Section 112 TVPA, US Code Section 1593). This provision requires that when a defendant is convicted of human trafficking, the judge or jury must order the defendant to pay restitution to cover all the costs borne by the victim, including actual or fair value of labour, as well as:

(A) medical services relating to physical, psychiatric, or psychological care;
(B) physical and occupational therapy or rehabilitation;
(C) necessary transportation, temporary housing, and child care expenses;
(D) lost income;
(E) attorneys' fees, as well as other costs incurred; and
(F) any other losses suffered by the victim as a proximate result of the offense (US Code Section 2259)

While provision (F) is vague and could cover less direct forms of harm related to loss of esteem, reputation, or other forms of moral damage, this is not explicitly addressed in the law. As these harms can sometimes be just as prominent as other less direct forms of harm, it is important to guarantee victims compensation for these harms as well, and a few countries have done so. A similar provision in Mexico, for example, covers all the elements of US law in this area in addition to providing for compensation for moral damages suffered by the victim (Law to Prevent and Sanction Trafficking in Persons, 2007: Article 9).

Furthermore, these mandatory restitution provisions still must be pursued through a criminal trial that is led by a public prosecutor, and, if the prosecutor does not pursue this provision aggressively, the victim may be left insufficiently compensated (Kim, 2004). The victim has no power to take the lead in demanding the full use of this provision.

To help overcome difficulties in implementing these measures and give victims further power to seek redress directly[6] against perpetrators, the 2008 Reauthorization Act created a civil remedy for victims that allows them to sue not only the perpetrators of the crime, but also against anyone who "knowingly benefits" from trafficking. Although this civil claim is based on the defendant's violation of criminal statutes, even if the defendant was never charged in criminal court, a defendant may still bring such a civil action and receive an independent determination of liability by the civil court. This provision serves as an important vehicle for ensuring victims have full rights to redress their grievances and are likely preferable to mandatory restitution in criminal court (Kim, 2009). Furthermore, civil suits can result in damages for physical and psychological injuries as well as punitive damages that serve to punish the offender for his or her criminal conduct (Rieger, 2007). Finally, the burden of proof is typically lower in civil cases, giving victims greater likelihood of receiving some compensation (Kim, 2004). Creating much larger financial disincentives for engaging in trafficking may be an especially effective deterrent (Rieger, 2007). Despite the strength of this new provision, it is unfortunately rarely used in practice, and as of mid-2011 there had been no civil suits filed by sex trafficking victims that had reached judgment (Sangalis, 2011).

To assist victims, they must be identified first

In order to ensure victims are properly identified and supported, the 2008 Reauthorization Act adds provisions focused on minimum standards to include: providing training to law enforcement and immigration officials on victim identification and how to address trafficking victims using methods sensitive to their needs (TVPA, 2008: Sec 106). It also establishes a coordinated, integrated database (Sec 108) with elevated standards for analysis and uniformity, responding to emerging issues, adding specific requirements to train law enforcement and immigration officials on juvenile issues and enhanced support for child victims, performing research on gaps in delivery of victim services and issuing reports. (Sec 212) Finally, the Act requires the establishment of prevention mechanisms, including economic alternatives, to provide persons vulnerable to or victimised by trafficking with viable life opportunities (Sec 106).

However, it is important to note that, though the US has taken the impressive step of guaranteeing these processes in national legislation, recent research has found that there are still major gaps with regard to enforcement. The officers charged with screening children crossing the border between the US and Mexico come from the Department of Homeland Security's Customs and Border Protection unit, whose primary responsibility

6. For a further discussion of how this model serves to empower victims, see Kim, 2009.

is protecting the US from foreign threats. These officers receive little training or tools for working with trafficked children or child-friendly interview techniques. As a result, children are typically deported back to Mexico immediately rather than properly evaluated and supported as required by the TVPA (NGO Appleseed, 2011).

Additionally, the United States continues to require victims to cooperate with law enforcement in most cases in order to receive access to temporary visas to remain in the USA (Chacón, 2006). This is particularly problematic because trafficking victims are often still contending with the harmful physical and psychological harm caused by perpetrators, (Sangalis, 2011) which can render participation, especially as a witness, (Free the Slaves, 2005) in a complex and often draining legal process a great burden. This emphasis on prosecution can serve as a major barrier to adequately supporting victims (Kim, 2004). However, this requirement is still in place in the vast majority of places around the world. However, a few countries have made progress on this issue.

European good practice

Article 18 of the 1998 Italian Immigration Law provides victims of trafficking who are aliens a special residency period for a six-month period, regardless of their ability or willingness to give evidence as a witness in legal proceedings (Consolidation Act, 1998). The purpose of this is to give them the opportunity to escape from the violence and from the influence of the criminal organization and to participate in an assistance and social integration programme. The temporary residence permit allows access to assistance services, education or employment. The residence permit is valid for six months and can be renewed for one year, or for a longer period, if required. Italy grants protection to victims independently of their readiness to testify (ECPAT International, 2011h). The Netherlands and Norway have similar provisions (ECPAT International, 2011c; 2011e).

Italy also fills another prominent gap left in US law. Though the TVPA in its most recent iterations grants significant support for victims, it does not provide any form of guaranteed housing, one of the most urgent needs of many trafficking victims. Italy is one of the few countries to have guaranteed such housing for victims, establishing 'a special aid programme granting on a temporary basis suitable accommodation, food and healthcare' to trafficking victims. This protection programme grants victims of trafficking appropriate accommodation in locations that are kept secret, in order to protect them from threats by criminal organizations (Cartabia, 2008).

Conclusion

Though there has been great progress in combating child trafficking over the last 15 years, many of these positive developments have been in the realm of criminal law enforcement. This is likely partially the result of the fact that the major international treaty addressing trafficking issues is attached to a treaty related to organized crime. While criminal law enforcement is obviously a key priority, identifying, protecting, and supporting victims of trafficking must be equally prioritised. Unfortunately, these issues often receive insufficient attention. This paper has analysed and illustrated a few key issues in the realm of victim protection and support, including defining trafficking, institutionalising support mechanisms, and including a comprehensive set of provisions. The USA has developed a unique regime in all of these areas and has thus served as a useful illustration, though other countries provide superior models with regard to specific provisions. The analysis provided in this article will hopefully serve as a useful tool to clarify key considerations that should be taken into account by those interested in improving the situation.

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Addressing the gaps in the legal framework surrounding child pornography

By Raine Boonlong[1]

Introduction

Child pornography constitutes a form of child abuse because it degrades and exploits children, whom we consider amongst the most vulnerable members of society. Nevertheless, the criminalisation of child pornography is a relatively new phenomenon, with laws countering child pornography coming into existence in first world countries such as England, Canada and the United States of America only in the late 1970s. The law in most countries recognise that children should be protected from commercial sexual activities because they are too young to properly give consent, and this protection applies to their participation in pornography (Subgroup Against the Sexual Exploitation of Children, 2005: 62).

The number of child pornography cases appear to be escalating, partly due to the advancement of communication technology contributing to the a growth in the creation, distribution and possession of child pornographic material, but also because of increased efforts by law enforcement agencies in prosecuting and drawing attention to the proliferation of child pornography (Gillespie, 2010: 19-20).

However, the criminalisation of child pornography remains wrought with difficulties because of several factors, two of which will be addressed in this paper. Firstly, the various definitions of a "child" used in different jurisdictions presents an obstacle to effectively criminalise the multiple forms of child pornography. Secondly, there is an established difference between pornography involving real children, and those involving fabricated representations of children. The tension underlying this difference is whether or not fabricated representations of child pornography ought to be criminalised. This paper will argue that all exploitative material involving children, whether or not it depicts real children or fabricated images of children, is harmful to a child's well-being, and should be criminalised.

The problem of varying definitions of a "child"

The definition of who is a "child" is problematic in terms of issues surrounding child pornography, primarily because it differs from jurisdiction to jurisdiction. This inconsistency in definitions is expressly condoned by Article 1 of the United Nations Convention on the Rights of the Child, which defines a child as a "human being below the age of 18 years *unless under the law applicable to the child, majority is attained earlier*". This means that for some

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jurisdictions, a "child" may be someone over the age of 18, and for other jurisdictions, a "child" may be someone under the age of 15 as prescribed by law.

From a legal standpoint, it is important to have a uniform definition as to what a "child" means for the purpose of law enforcement operations against child pornography. Without a harmonised definition as to what persons are to be considered children, there will be a lack of consistency as to what content or material could be regarded as child pornography on a global level. This hinders the possibility of an effective response to the issue of child pornography with regard to legal enforcement and implementation.

Alisdair Gillespie, in his journal article entitled "Legal definitions of child pornography" identifies two primary methods of defining a child for the purposes of child pornography, either through biological means, or by age-specification. Under the method of defining a child through biological means, puberty has been suggested as a possible, but controversial, marking stage as to the end of childhood. However, Gillespie recognises that the onset of puberty varies significantly, depending on race and body mass index, not to mention that the age of puberty is shown to be decreasing in developed countries. Furthermore, a person being biologically capable for reproduction does not indicate that he or she is also ready for sexual contact (Gillespie, 2010: 20-21). The second more widely-accepted method of age-specification involves prescribing a certain age, and persons falling under this age are to be considered as "children". This method has proven to be arbitrary because there is still no appropriate basis for choosing a certain age over another, and the prescribed age may also not reflect a person's maturity or readiness for sexual contact. Nevertheless, key international instruments such as the Convention on the Rights of the Child and the European Council Framework Decision and the Council of Europe Convention on Cybercrime set the age of a child at 18 years (Gillespie, 2010: 21-22).

Should fabricated representations of child pornography be criminalised?

With the rise of communications technology in the mid-1990s, in particular the explosive use of the Internet, social concern in relation to the issue of child pornography has peaked. The Internet, as a form of technology comprising a global and borderless nature, presents challenges for criminal law, which is traditionally linked to the regulating of activities within a nation state, and is restrained by territorial limitations (McIntyre, 2010: 209).The Internet allows for easy access to child pornography, with the comfort of partial anonymity and decreased risk of detection, thus providing a favourable environment conducive to the creation, distribution and possession of sexually exploitative material involving children across borders(Akdeniz, 2008: 2).

The advancement in modern technology has also brought about the proliferation of fabricated images of child pornography, which refers to "fantasy visual representations of child pornography in the form of, for example, computer-generated images, cartoons or drawings" (Ost, 2010: 231). Fabricated images of child pornography are to be distinguished from real child pornography because in the former category, actual children are not featured, whereas in the latter category, real and recognisable children are used. Suzanne Ost in her article "*Criminalising fabricated images of child pornography: a matter of harm or morality*" asserts that fabricated images of child pornography, where no real child has been abused, should not be criminalised (Ost, 2010). The author bases her conviction on the basis of the harm principle, by contending that in relation to fabricated child pornography, no direct harm is committed to a real child. Since no real child was sexually abused, and no real child's identity is at stake, fabricated child pornography, she argues, does not cause harm to children, and hence there exists no validation for restraining liberty (including the right to privacy and freedom of expression) through criminalisation (Ost, 2010: 240-1).

This paper begs to differ from Ost's contention, and argues that fabricated images of child pornography should be criminalised, based precisely on the principles of harm and morality. The right to privacy and freedom of expression, although constituting core liberties, are not absolute rights and must be weighed against other rights, in particular the right of the child not to be exploited. Fabricated child pornography should be criminalised due to the *potential harm* that the creation, distribution and possession of such images may produce to children as a whole. Even without the existence of direct harm that is imposed upon a real child through the act of sexual abuse in 'real' child pornography, the possibility of potential harm to children caused by imaginary fabricated images should be sufficient to justify criminalisation of such images, considering the special status of children as a vulnerable group who are in need of protection from sexual abuse and exploitation. Fabricated child pornography has the ability to promote detrimental behaviours and attitudes towards children, because allowing the possession of such materials implies an approval of the objectification of children as sexual objects, which may embolden persons with a yearning to view or commit actual child sexual abuse to do so. There also exists the argument that fabricated child pornography may be used to groom children, in order to "normalise" sexual activity and encourage them to participate in sexual activity (Akdeniz, 2008: 5). Fabricated child pornography should thus be criminalised in order to serve as a preventive warning against child sexual abuse in reality.

In light of technological developments, it is becoming increasingly difficult to distinguish between real and fabricated child pornography. Persons distributing or possessing fabricated child pornography may be under the assumption that the material depicts child pornography of real children; allowing such forms of fabricated child pornography only goes to re-assert a social toleration of the sexual abuse and exploitation of children.

Another argument supporting the criminalisation of fabricated child pornography is based on the grounds that the message depicted by child pornography, whether fabricated or not, is one condoning the exploitation of children, therefore corrupting society's moral values. Clearly, a large majority of members of the public foster negative sentiments against fabricated child pornography. Most people find child pornography offensive; independent of whether or not a real child was involved in the production of such material. Criminalising fabricated child pornography should be regarded as a legitimate aim of legislation, because it would serve to reflect the moral perceptions of society (Eneman et al., 2009: 8).

Moreover, the criminalisation of fabricated child pornography has been endorsed by international law, such as in the European Union's Framework Decision on combating the sexual exploitation of children and child pornography, the Council of Europe's Cybercrime Convention, and the United Nations' Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. All three documents include fabricated representation of children engaged in sexual conduct within the definition of child pornography (Akdeniz, 2008: 11).

It should also be noted that the ambiguous definition of a child further complicates the issue of fabricated of child pornography, because since no real child is involved, the age of the imaginary child cannot be ascertained. Hence, criminalisation of the material would otherwise have to be based on the arbitrary biological method of determining whether or not the fabricated child has 'attained' puberty or physical sexual development which is clearly fraught with legal hurdles.

Conclusion

This paper has highlighted two issues of contestation surrounding child pornography, namely, the definition of a "child", and the criminalisation of fabricated child pornography. The variations of the definition of a child across jurisdictions pose as a challenge to the formation of a meaningful legal response to address child pornography on a global level. The emergence of advanced technology has aggravated the problem of child pornography by enabling widespread circulation of such content, and the creation of fabricated child pornography. This paper argued that even though fabricated child pornography does not involve the abuse or exploitation of a real child, it should still be criminalised because firstly, fabricated child pornography gives rise to the possibility of potential harm to children as a whole, and secondly, that it strongly opposes the moral values of society.

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Balancing the right to freedom of expression in the case of child pornography: Legal precedent

By Ashley Feasley [1]

Introduction

Many positive elements of global connectivity and modern human rights protection are associated with the surge of internet usage throughout the world. The internet has been instrumental in the organisation and mobilisation of several recent human rights movements such as the Arab Spring in Egypt (Zhou, 2011; Howard, 2010) and has also enabled greater awareness-raising and communication regarding human rights abuses throughout the world. While the internet has galvanised improvements in regards to international human rights protection and promotion, a negative externality stemming from the rise of the internet is the increased availability of child pornography worldwide. The increase in global accessibility of child pornography on the web is due in large part to the accessible and free-floating structure of the internet and the growing sophistication of internet technology, ease of use, affordability and mobility of the devices (Wortley 2012). Addressing and combating the abundance of child pornography available on the internet is a complicated legal issue for states, third party groups such as internet service providers (ISPs), and human rights advocates. While it is accepted that states' have a responsibility in protecting their children and other citizens against child pornography, state-sponsored measures to protect citizens from such abuse materials have led to criticisms from some civil and political rights activists who claim that states' efforts to protect against child pornography have also impacted negatively on other aspects of freedom of expression and speech in the process and put undue burdens on third parties to regulate speech and expression, such as ISPs (Livingstone, 2009). It is not that most of these critics support child pornography but rather object to intense regulation which may be overzealously used or abused which could then infringe on other facets of freedom of expression and privacy protection (Lucchi, 2012). However, it is necessary to note that speech and expression rights themselves are not absolute and the right to protect citizens against child pornography trumps the right to unfettered freedom of expression.

The aim of this article is to note the balance between the rights involving child protection in regards to the internet and freedom of expression and speech rights, and to examine states' respective efforts to eradicate child pornography from the Internet. To this end, this paper will examine: (1) the criminalisation of child

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pornography in relation to expression/speech rights in certain jurisdictions; (2) the methods that have been used to stop access to child pornography on the internet –namely the filtering or blocking websites, required notice by certain groups such as ISPs and removal of websites; and (3) certain jurisdictions efforts to restrict child pornography dissemination via the web and their respective outcomes/successes.

1) Criminalising child pornography

Child pornography is not a legally protected form of speech or form of expression in most nations. Certain jurisdictions have had laws in place from before the advent of the Internet that do not recognise child pornography as a legitimate form of expression. For example, in the United States, free speech rights do not apply to images of actual children (under 18 years of age) engaging in pornography under the First Amendment of the United States Constitution. (*New York v. Ferber* 458 U.S. 747 (1982). The Supreme Court in *Ferber* held that the state has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor," accordingly, the child pornography distribution network must be closed" in order to control the production of child pornography. Id. at 759. The holding from *New York v. Ferber* is still good law, but the Supreme Court narrowed the definition of child pornography in 2002 to include only images of real children and not simulated images of children in Ashcroft v. ACLU, 535 U.S. 564 (2002).

In *R. v. Sharpe*, the Canadian Supreme Court examined the right to possess child pornography as a form of expression and held that the Criminal Code was not overly broad in criminalising the possession of child pornography. In *R. v. Sharpe*, a Canadian citizen travelled back from Amsterdam with a disc that had child pornography materials. The court at the lower level framed the issue as to whether Section 163.1(4) of the Canadian Criminal Code was too broad and criminalised possession of an unjustifiable range of material. The lower court upheld that section 163.1(4) was a violation of the freedom of expression, which was codified in section 2(b) of the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada reversed the lower court's decision and upheld the child pornography provisions of the Criminal Code of Canada as a valid limitation of the right to freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms.

The European Court of Human Rights (ECHR) addressed the issue of child pornography and the right to freedom of expression in the case, *Karttunen v. Finland*, Application no. 1685/10, (2011). In *Karttunen v. Finland*, the ECHR found that the Finnish courts did not violate Karttunen's right to freedom of expression as an artist, (granted under Article 10 of the European Convention of Human Rights, "Convention"), when she was convicted by the Helsinki District Court of possessing and distributing sexually obscene pictures depicting children in her work. Karttunen exhibited her work the "Virgin- Whore Church" which included hundreds of photos of child pornography downloaded from the internet in an art gallery in Helsinki. Karttunen claimed that she included the pictures in her work in an attempt to encourage discussion and raise awareness of the easy accessibility of child pornography. Karttunen was found guilty of possessing and distributing sexually obscene pictures depicting children. The Helsinki District Court found that while under Article 10 of the Convention, everyone had the right to freedom of expression, that right was curtailed when the exercise of the right constituted a crime. The Finnish courts balanced freedom of expression with the protection, morals, and rights of others, and found that Karttunen's freedom of expression did not justify the possession and public display of child pornography. A "necessity in a democratic society" to protect the speech and expression of citizens required the Court

to determine whether the interference with the right to expression corresponded to a "pressing social need" and whether (1) it was proportionate to the legitimate aim pursued and (2) the reasons given by the national authorities were relevant and sufficient. The ECHR upheld the Finnish court's decision to find Karttunen guilty; however she was not sanctioned for her crime.

2) Different methods employed by governments to eliminate child pornography

In *Karttunen*, the ECHR stated that national authorities are to be given autonomy in assessing the means for controlling child pornography within their jurisdiction (*Karttunen v. Finland, 2011*). States have employed a variety of techniques to prevent access to child pornography, such as blocking and filtering of certain websites, reporting requirements for ISPs and removal of illegal content from websites. Blocking and filtering are the main methods used to address illegal content hosted outside the country's jurisdiction. Blocking and filtering makes it technically impossible – or at least very difficult – to access pornographic content that is deemed illegal in that country's context, by filtering Internet users' data connections and blocking their access to the illegal content (Lievens, 2012). Blocking of web pages is not the ultimate solution to stop the distribution of child pornography, but as child pornography dissemination is profit-driven, making access more difficult also makes child pornography a less profitable business (Lievens, 2012). Blocking as a crime-fighting measure generates concerns from some human rights advocates who claim that blocking should not be undertaken solely by private ISPs but should involve law enforcement and the information that is to be blocked should be specific to ensure that the information blocked is not overly broad and extends beyond the original intent (which in turn has raised some concerns over transparency and censorship application in certain states).

Removal of content involves intervention at the illegal content provider's side of the transaction (Lievens, 2012). This approach requires that the content is no longer on a computer system that is connected to or "part of" the Internet (Lievens, 2012). ISPs are often the groups which remove the content hosted on websites and also are increasingly integral in identifying illegal child pornography websites and also illicit child pornography users. While some of these actions may be covered by industry self-regulation, there has been some international moves to make ISPs legally responsible for site content. ISPs' legal responsibilities to report child pornography vary among jurisdictions. For example, in the United States, ISPs are legally required to report known illegal activity on their sites, but they are not required to actively search for such sites (Wortley, 2012). Child protection advocates have argued that ISPs' legal responsibilities should be strengthened to require a more proactive role in blocking and also removing illegal sites (Wortley, 2012). Increasing ISPs participation, particularly by requiring the preservation of good records of user IP logging, caller ID, transaction logging, and better user identification has been employed in certain jurisdictions.

A) Canadian ISP reporting legislation

Canada has attempted to use ISP reporting requirements as a means to combat online child pornography. Canadian Bill C-22, which became law in December 2011, under the name "Act Respecting the Mandatory Reporting of Internet Child Pornography by Persons Who Provide an Internet Service," ("the Act") was created to fight Internet child pornography by requiring ISPs and other individuals providing Internet services, to report any incident of child pornography. The Act includes provisions requiring that if an ISP is advised of an Internet address where child pornography

may be available, the person must report that address to the organisation designated by the regulations (Section 2.) Additionally, there is a section that provides that if a person has reasonable grounds to believe that the Internet services operated by that person are being used to transmit child pornography, the person must notify the police (Section 3) as well as preserve the computer data. (Section 4). Lastly, there is a requirement that the ISP must preserve all computer data related to the notification that is in their possession or control for 21 days- without a warrant or judicial oversight.

While the Act represents a positive step for Canada in combatting online child pornography, a poorly worded bill proposed in February 2012 (which did not pass), the "Protecting Children from Internet Predators Act" (Bill C-30) aimed to have granted the Canadian government powers to monitor and track Canadians in real-time, require service providers to log information about their customers and turn it over if requested, all without needing a warrant (Bill C-30 2012). However, Bill C-30 did not mention children, or internet predators, other than in its title leading to concerns of the possible downsides of enforcing overly strict regulations on ISPs which could extend risks to privacy and free expression on issues not related to child pornography.

(B) EU- Blockage and Removal- Who is blocking and is it effective?

The EU is in the vanguard of legal protectionary measures against online child pornography. Many EU Member States are currently attempting to follow the EU Directive 2011/92/EU- On Combating Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Article 25(1) states that EU Member States have an obligation to remove web pages containing child pornography hosted in their territory and to endeavour to obtain the removal of such content hosted outside of their territory. Article 25(2) states that EU Member States may attempt to block the access to these sites in general (EU Directive 2011/92/EU Article 25). The requirements set forth in the Directive are quite detailed and are proving difficult for some EU Member States and respective ISPs within the EU community to achieve (Lievens 2012). While the blocking requirement set forth by the EU Directive is seen by many as an improvement in the effort to eliminate child pornography, the issue of who will block content and how effective the blocking will be, is still largely controversial among the Member States and European ISPs. In early 2011, before the passage of the latest EU Directive, European ISPs were openly challenging the efficacy of blocking and also of their respective Member State policies regarding child pornography elimination. The European Internet Services Providers Association (EuroISPA) publicly stated that the EU's attempts to get Member States to block pornography at the ISP level would do little to stop the problem and that to make the Directive most effective; emphasis should be placed on swift take-down of child sexual abuse material (Dunn, 2011). Critics have pointed out that blocking, currently used by all large ISPs in the UK from a list of child pornography websites maintained by the Internet Watch Foundation (IWF), can be circumvented by paedophiles in a number of ways, including undocumented websites, FTP servers and P2P networks. (Dunn, 2011) While the Directive attempts to provide some meaningful policy articulation on combatting online child pornography for the EU, it falls short in clarifying which method will best achieve the goal and also accordingly fails comply with the ECHR standard requiring interference with the right to expression only in necessary situations (Kartunen, 2011).

(3) Best practices- New Zealand

In contrast to the EU Member States, New Zealand offers a positive and aspirational example of effective child pornography blocking regime which includes industry and government cooperation and is narrowly-tailored in its approach and respectful of privacy and expression rights. The New Zealand Government Department of Internal Affairs has a well-established and effective Censorship Compliance Unit experienced in detection and prosecution of offenders. Furthermore, the Online Child Exploitation Across New Zealand (OCEANZ) Police Unit works to identify child sexual offenders through website patrolling,[2] while also identifying and protecting potential victims and coordinating international operations. (ECPAT International, 2012) All of these government initiatives work to support the Department of Internal Affairs' Digital Child Exploitation Filtering System (DCEFS), which was launched in 2010.

DCEFS was introduced to block websites hosting known child sexual abuse images. DCEFS has been successful and has evolved since 2010, as currently its efforts are now focused on increased ISP participation and private sector support. The Department of Internal Affairs has a Code of Practice, (which is updated regularly) for the operation of the website filtering system to prevent access to websites containing images of child sexual abuse. (Taiwhenua, 2012). The Code of Practice provides assurance that only website pages containing images of child sexual abuse will be filtered and the privacy of ISP customers is maintained (Taiwhenua, 2012). While DCEFS is still not mandatory and available only on a voluntary basis, it has widely been adopted: currently seven of New Zealand's largest ISPs have voluntarily been using DCEFS, accounting for over 95% of online traffic, and, as of August 2011, approximately 9.7 million attempts to access filtered sites had been blocked (Darnton cited in ECPAT International, 2012).

Conclusion

In conclusion, freedom of expression and speech is not absolute and must always be balanced with the protection and rights of others (for example in the context of slander, libel, sedition, copy-right, etc.). As such, in the case of protecting children from child pornography, three salient points remain: (1) States' laws need to be broad enough to be flexible to pursue and criminalise all forms of child pornography within the modern telecommunications context. (2) Regardless of the method of prevention used, the success of a state's individual anti-child pornography internet laws have rested on whether the law was specifically tailored to combat child pornography and also simultaneously protect other aspects of freedom of expression and speech. (3) ISPs are not government but they are necessary stakeholders in the dialogue involving child protection and free speech. Accordingly, they should not take on role of government but should provide support to states.

2. Note: This type of covert operations has legal ramifications across jurisdictions and is a matter of controversy in many contexts.

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