



Trafficking of Human Beings in Kosovo

Presentation by Anna-Christina Winterstein

What is trafficking in Human Being

- The modern form of slavery of the twenty-first century
- In 1999, immediately after the conflict in Kosovo which had led to an increase of transport of material and human resources, the problem of trafficking in human beings became evident.
- The problem of trafficking in human beings (“trafficking”) continues to be a major human rights concern in Kosovo.

The victims

- Mostly from Eastern Europe
- In particular from, Albania, Moldova, Bulgaria, Russia and Ukraine.
- Victims are pushed to migrate as a result of an increased poverty level in their countries of origin and are lured by fake promises of receiving legitimate jobs in areas of the gastronomy or the entertainment industry.
- The average age of the victims was between 20 to 35 years;
- most of them were women
- growing number of very young girls K-Albanians, recruited among the most vulnerable and disadvantaged families.

Legal framework

- Article 139 of the Provisional Criminal Code of Kosovo (PCCK) defines trafficking in persons consisting of three required elements:
 - 1) the recruitment, transportation, transfer, harboring or receipt of persons;
 - 2) by means of 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 giving or receiving of payments or benefits to achieve the consent of a person having control over another person;
 - 3) for the purpose of exploitation. Exploitation is defined as “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The three elements of the crime trafficking

- The act of Trafficking
- The means of Trafficking
- The purpose of trafficking (forms of exploitation)

The act of Trafficking

1. Recruitment means to hire somebody; it does not require that the recruiter has the intention to pay this person. The recruitment can happen abroad as well as in the victim's hometown or village.

The act of Trafficking

2. Transportation means physically moving a person from one location to another. This does not necessarily mean crossing a border/boundary: a person can be also trafficked within Kosovo.

The act of Trafficking

3. Transfer means the act of giving control over a person to another person, who then is “receiving” the trafficking victim. While payment of money may be evidence that trafficking has taken place, it is not a requisite element of the crime of trafficking.

The act of Trafficking

4. Receipt is taking control over a victim of trafficking (typically from someone who has previously “recruited” or “transferred” the victim).

The act of Trafficking

5. Harboring means providing a room or other location for a person, but without receiving him/her as a victim (otherwise, there would be a “receipt”).

The means of Trafficking

- This requirement applies only if the victim of trafficking is an adult
- Article 139 PCCK requires that the perpetrator carry out the “acts” in relation to the victim “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 giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”
- Therefore, the mere transfer, receipt, harboring, recruitment or transportation of a person does not itself entail the crime of trafficking.

The purpose of trafficking (forms of exploitation)

1. Prostitution
2. Other sexual services
3. Forced labour
4. Slavery
5. Servitude
6. Removal of organs.

The purpose of trafficking

- The purpose of exploitation is a *dolus specialis* mental element: in other words, the “acts” and “means” of the perpetrator must *aim* to exploit the victim
- It is not therefore necessary that the perpetrator actually exploits the victim.
- Thus, if the “acts” and the “means” carried out by the perpetrator are committed with a purpose other than that of exploiting the victim, the offence of trafficking has not been committed.

The issue of the victims consent

- An issue in adult trafficking cases may be whether the victim consented to the alleged exploitation
- According to Article 139(8)(1) of the PCCK the consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means set forth in subparagraph (1) of the present paragraph have been used against such victim.”

The issue of the victims consent

- Therefore, if the “consent” is obtained through any of the methods listed in the second element:
 1. Threat
 2. Use of force
 3. Other forms of coercion
 4. Abduction
 5. Fraud
 6. Deception
 7. Abuse of power or of a position of vulnerability (social, physical or psychological condition of the victim)
 8. Giving or receiving of payments or benefits
- then the victim’s consent is irrelevant and not valid

Trafficking of children

- Article 139 of the PCCK makes clear that acts of trafficking of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means
- Thus, when juveniles are recruited, transported, transferred, harboured or received, it is not necessary to prove that the child was deceived, threatened, etc.
- Therefore, the simple recruitment, transport, transfer, harbouring or reception of a child for the purpose of exploitation always fulfils all the elements of the criminal offence of trafficking.

Trafficking of children

- The PCCK is silent regarding consent and child trafficking cases. It can be interpreted as irrelevant because there are only two elements in child trafficking: the “acts” and the purpose of exploitation.
- Whether or not the child “consented” to the exploitation is irrelevant to the legal analysis of whether the offence has been committed.

Difference to facilitating prostitution and smuggling of migrants

- The crime of trafficking can be distinguished from facilitating prostitution and smuggling of migrants in that the latter offences do not require an intent to exploit the victim.

Difference to facilitating prostitution

1. Facilitating prostitution: Article 201(1) of the PCCK
 - Definition: if the perpetrator “knowingly recruit, organize or assist another person or provide premises to another person for the purpose of prostitution.”
 - Article 201(3) of the PCCK punishes everyone who “by use of force, threat of force, or holding another person in a situation of personal or economic dependency compel such person to engage in prostitution.”
 - The crime of facilitating prostitution does not imply the use of the “acts” foreseen in Article 139 PCCK.

Difference to smuggling of migrants

2. Smuggling of migrants: Article 138(7)(1) of the PCCK,
 - Definition: “the procurement, in order to obtain [...] a financial benefit of the illegal entry of a person into Kosovo.” Under the same article, it is illegal to “produce[...], procure[...], provide[...], or possess[...] a fraudulent travel or identity document [...] to enable the smuggling of migrants.” The same provision also makes it an offence to assist someone to illegally enter and remain in Kosovo.
 - The crime of smuggling of migrants does not require that any of the “means” are used.
 - Usually includes always crossing a border

Most important international legal instruments

- United Nations Convention Against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the said, Palermo, 15 November 2000

Most important international legal instruments

- EU Action Plan and to the Assessment Manual on Measuring Responses to Trafficking in Human Beings in the European Union, outcome of EU Commission DG JLS Anti-Trafficking day – October 18, 2007

Most important international legal instruments

- The Council of Europe's Convention on Action against Trafficking in Human Beings (CETS n° 197). Entered into force on 1 February 2008.

Failures in implementing the current legislative framework

1. Failure to understand and to adequately identify the required elements of the offence of Trafficking
2. Failure to to adequately investigate and prosecute trafficking and trafficking related offences
 - Failure to initiate or expand trafficking investigations
 - Failure to prosecute persons who obtain sexual services from trafficking victims
 - Failure to prosecute traffickers for other crimes committed against trafficking
 - victims

Failures in implementing the current legislative framework

Failure in providing the right treatment to the victims of trafficking

- Failure to identify victims of trafficking
- Failure to treat victims as victims of trafficking unless they cooperate
- Illegal prosecution of trafficking victims for prostitution or illegal entry
- Failure to provide defence counsel and/or an authorized representative to trafficking victims
- Failure to inform trafficking victims of their rights
- Inappropriate questioning of trafficking victims

Weaknesses of the Witness Protection measures

4. Failure to protect victims and witnesses in Trafficking

- Lack of legal framework related to protection of witnesses
- Lack of political will related to witness protection
- Failure to protect victims or witnesses of trafficking

Conclusions

- Legislation is in place
- Challenge is the implementation of this legislation
- So good luck and successful work

Recommendations

- New legal framework for witness protection
- Since prostitution is illegal in Kosovo, adopt a law which makes it a criminal offence to obtain sexual services from a prostitute.
- Issue a decision giving clear guidance to the lower courts in Kosovo interpreting Article 139 of the PCCK and what types of factual situations do and do not constitute the offence of trafficking

Recommendations for Judges

- Only issue convictions for trafficking when the prosecution provides evidence establishing all the necessary elements of Article 139 of the PCCK.
- Order witness protection provisions available under the PCCK in trafficking cases, such as physically separating the victim and witnesses from the defendants, use of face or voice distortion, or distance testimony.
- Ensure that all victims of trafficking are represented by a lawyer and/or an authorized representative.
- dismiss criminal charges against trafficking victims for the crimes of illegal border crossing or the minor offences of prostitution or illegal stay

Recommendations for Prosecutors

- Do not prosecute defendants for trafficking in cases where the necessary elements under Article 139 of the PCCK cannot be established.
- If the facts do not support a case of trafficking, consider charging defendants with lesser crimes such as facilitating prostitution or smuggling of migrants.
- Conduct thorough investigations in trafficking cases that do not rely solely on victim testimony.
- Make more frequent use of undercover investigations, wiretapping, covert monitoring of conversations, covert photographic or video surveillance, or interception of communications by a computer network.
- Prosecute all people (including users of sexual services under Article 139(5) of the PCCK) who have committed crimes in the context of the trafficking offence.
- Treat trafficking victims as such, regardless of whether they co-operate or provide information.
- Question victims in a sensitive manner that does not violate their dignity.