

The Appropriate Legal Responses to the Issue of Demand: A Comparative Legal Analysis

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Thank you for inviting me to participate in this important conference that addresses a very important issue and that is the demand in sex trafficking.

I am here to speak on one aspect of the problem of demand and that is the appropriate legal response to the demand of sex trafficking.

I think it is appropriate to start with the international legal response to the problem of demand since only a few days ago the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, has become law.

We needed under Art 17 (4) “instruments of ratification” for the protocol to enter into force.

Now we have 42 countries that ratified the protocol:

- Denmark was the last to ratify on September 30th
- On September 26th Belize, Lao, Poland and Rwanda ratified the protocol.

And Art 9 (5) of the Protocol addresses the issue of demand as an issue of prevention. The Art 9 (5) states that “States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters of exploitation of persons, especially women and children, that leads to trafficking.”

So, the protocol talks about:

- Legislative measures
- Educational measures
- Social measures
- Cultural measures

And the protocol makes a link between demand and trafficking.

Let me talk about some of the legislative measures which countries may take to discourage the demand.

Some legal systems do not go after the customer. Prostitution in these countries is legal. The act of prostitution itself is ok. Only prostitution related activities constitute a crime and if the act of prostitution does not constitute a crime, why punish the customer who is obtaining a service, which is legal in nature. Sex in consideration for

money is acceptable.

Other legal systems penalize both the women in prostitution and the customer. That is the Islamic law approach in Muslim countries such as Saudi Arabia, Iran, Pakistan, Yemen, Mauritania, Jordan, Bahrain, Sudan, Tunisia, Malaysia, Brunei, and the United Arab Emirates, where the customer who buys sexual service from a woman in prostitution is considered to be committing adultery and that is a crime under Islamic law which punishes the adulterer and the adulteress.

A third approach is taken by the law of Sweden - that is the January 1st 1999 law that makes buying casual sexual services a crime. The Swedish Act "prohibiting Purchase of Sexual Services" provides that "a person who obtains casual sexual relations in exchange for payment shall be sentenced unless the act is punishable under the Swedish Penal Code - for the purchase of sexual services to a fine or imprisonment for at most six months." Attempts to purchase sexual services are punishable under chapter 23 of the Penal Code."

Buying sex is a crime but selling sex is not.

- In 1999 94 cases were reported under this law:
- 10 resulted in conviction;
- and in 2000 92 cases were tried under this law:
- 29 resulted in conviction
- and in 2001 86 cases were prosecuted, 38 resulted in conviction

In few legal systems, knowledge of trafficking makes the customer liable. This approach is adopted by Art 41-A of the Criminal Code of Macedonia which provides that:

"The one that uses or enables another person's usage of sexual service from the person for whom he knows are victims of human trafficking will be punished with from 6 months up to 5 years imprisonment." The new legislation of Croatia of May 2003 follows the Macedonian model in criminalizing the act to the customer if he has knowledge that the person in prostitution has been trafficked.

When the customer is a tourist engaging in sex with a child, child sex-tourism must be recognized as a crime. And, the Protect Act which was signed by President Bush this last April and which he made reference to in his latest speech to the United Nations, prohibits travel of United States citizens and residents who travel abroad to engage in illicit sexual activity with a child.

The Protect Act makes the proof of the crime easier. It is no longer required to prove intent to have sex with a child abroad.

It also enhances the penalty - 30 years. It was only 15 years under the 1994 Child Sexual Abuse Prevention Act.

On the day following President Bush's speech, Michael Lewis Clark, a 69-year old retired US army sergeant, was charged with sex tourism in one of the first indictments under the new law. Clark was indicted by a Seattle grand jury on 2 counts of traveling via foreign commerce to Cambodia to engage in illicit sexual conduct with a minor. He paid 2 young homeless boys, aged 10 and 13, \$2 each to

have sex with him.

Working with 2 NGOs to gain a prosecution of Clark, Cambodian and US Customs officials will bring witnesses from Cambodia to the United States if the case goes to trial. Clark is unlikely to be offered a deal as the US Attorney General, John Ashcroft, has discouraged plea-bargaining throughout the country.

When the customer is associated with the United States Military a different approach must be taken. According to the Military Extraterritorial Jurisdiction Act of 2000, criminal jurisdiction is established for “acts committed by persons employed by or accompanying military forces outside the United States, including civilian employees of the Department of Defense and its contractors, if such acts would carry prison sentences of over one year within the United States.”

This is an extraterritorial application of the law but you have a problem when you have peacekeeping...

There are currently 13 UN peacekeeping missions operating around the world. Rule 4 of the UN General Assembly Code of Conduct of 1993 says that UN Peacekeepers should “not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children”.

However, in the case of Bosnia the demand for prostitution has risen significantly with the arrival of UN peacekeepers. Until the mid-1990s the sex-slave industry barely existed in Bosnia, but after the signing of the Dayton Accord in 1995, and with the arrival of approximately 50,000 male peacekeepers, a sex-trade market has been created.

Women from Belarus, Moldova, Ukraine, Romania, Hungary and Albania have been lured to Bosnia by offers of legal work, but are enslaved in brothels.

UN peacekeepers are under the exclusive criminal jurisdiction of their own national authorities and have immunity from local prosecution. It is up to the UN Board of Inquiry to find reasonable grounds for a charge of serious misconduct with a recommendation that the peacekeeper be repatriated for subsequent disciplinary action in his native country.

Of only 24 officers repatriated to their countries for misconduct, none have been prosecuted for violating Rule 4 of the UN General Assembly Code of Conduct.

When the customer is looking for a bride this is non-commercial sex. In the event that non-commercial sex involves abuse, it should be considered an illicit activity, especially in cases of forced marriages, arranged marriages, early marriages, temporary marriages, marriages for the purpose of child bearing and mail-order brides. Mail-order brides may be classified as trafficking for the purpose of labor or a case of sex trafficking. Section 652 of the United States Illegal Immigration Reform and Immigrant Responsibility Act of 1996 imposes upon the matchmaking organizations an obligation to inform the prospective bride "upon recruitment, such immigration and naturalization information as the Immigration and Naturalization

Service deems appropriate, in the recruit's native language, including information regarding conditional permanent residence status and the battered spouse waiver under such status, permanent resident status, marriage fraud penalties, the unregulated nature of the business engaged in by such organizations, and the study required under subsection (c)."

But this is not enough. Matchmaking organizations should be criminally liable for illicit activities related to trafficking and the customer who abuses his bride must also be punished.

The internet provides an additional source for demand in the sex industry. The internet has become a tool to aid international sex syndicates, who deceive women from different countries and who are then enslaved.

The internet may also be used by sex "tourists". Foreigners may make arrangements from their homes to engage in prostitution after they arrive in countries such as Thailand.

Internet sites offer to help men find a bride, offering to obtain a bride from Russia, for example, in exchange for cash.

Airlines should become involved in the campaign to educate sex tourists through the use of educational information broadcast during flights to countries where sex tourism has become popularized.

The TVPA, although it does not explicitly cover sex tourism, makes the point, in Section 105 (d) (5), that one of the main tasks of the Interagency Task Force to Monitor and Combat Trafficking is to:

"Examine the role of the international 'sex tourism' industry in the trafficking of persons and in the sexual exploitation of women and children around the world."

However the new amendment to the TVPA, under H.R. 2620, provides that:

"(e) COMBATING INTERNATIONAL SEX TOURISM- (1) DEVELOPMENT AND DISSEMINATION OF MATERIALS- The President, pursuant to such regulations as may be prescribed, shall (A) require that airlines organized under the laws of the United States and other airlines operating in the United States develop and disseminate materials alerting travelers that sex tourism (as defined in section 2423(c-e) of title 18, United States Code) is illegal, will be prosecuted, and presents dangers to those involved, and (B) encourage such airlines to work with nongovernmental organizations in developing these materials. Such materials may include, for example, brochures, public service announcements, and billboards."

Unfortunately, the 2003 TIP Report does not consider the issue of demand.

As I stated in my testimony before the House Committee on International Relations on June 25, 2003, the TIP Report addresses the issue of demand by making explicit references to the law of Sweden stating that "the Government...passed a pioneering

law that criminalizes the purchase rather than the sale of sex..." The TIP Report also makes reference to the Islamic law approach to the issue of demand explicitly stating that in Saudi Arabia "Islamic law prohibits sexual relationships outside the context of marriage and provides for strict penalties if the law is breached." The TIP Report rightly criticizes the application of Islamic law in Pakistan when it states "If rape or forced prostitution cases are prosecuted under the Islamic law-oriented Hudood ordinances, victims are reluctant to testify since, the woman's testimony is tantamount to an admission of adultery if prosecutors conclude that her testimony does not meet the burden of proof." This application is inconsistent with the Qur'anic legislation, which states that women should not be forced into prostitution and if they are compelled they should not be punished because they have been forced into prostitution [Holy Qu'ran, Surah 24:33].

In a statement I submitted for the hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002, I stated that although the TVPA does not require that the TIP Report takes into consideration "the extent of trafficking" but only "the extent to which the country is a country of origin, transit, or destination for severe forms of trafficking". Warning about the harm of prostitution must be addressed in any program warning against the danger of trafficking.

It is not clear to what extent the 2003 TIP Report takes into consideration the issue of demand in placing countries in certain tiers. Only the countries of Ghana, Lithuania, Morocco and the United Arab Emirates out of the 26 countries placed on Tier 1 outlaw prostitution. The other 22 countries legalize, decriminalize, or tolerate prostitution.

This approach is inconsistent with the TVPA, which explicitly distinguishes between sex trafficking and labor trafficking and does not consider sex as a form of labor. A review of this approach is imperative in light of the Trafficking in Persons National Security Directive of February 2003, which explicitly states that "Prostitution and related activities, which are inherently harmful and dehumanizing, contribute to the phenomenon of trafficking in persons..."

What does this mean?

1. Prostitution must be defined as a "commercial sex act" but not as "commercial sex work".
2. It is not enough that the law considers illegal the behavior of the customer of sexual services. The behavior of the customer who obtains sexual services, the functional equivalent of the law must also recognize such behavior as unacceptable. By "functional equivalent of the law" I mean the traditions, the customs, the acceptable behavior of the people. The legal systems that "tolerate" or "accommodate" or "normalize" the behavior of the customer must reconsider its policies, change the law, and enforce the law accordingly.
3. The liability of the legal person, as opposed to the national person, must be established. It is not enough to go after the customer.

· We have so do something about the advertisement agency on the internet that

advertises sex for sale.

- We also have to address the issue of mail order brides as a trafficking issue and go after the matchmaking organization.

- We also have to maximize our legal approach to stripping, massage parlors, escort services and the like. It is not enough to follow that tort-nuisance approach, as we should make these operators of entertainment sex liable for involvement in trafficking whether for sex or labor. But we have to be careful not to define any of these activities as labor. Again sex for sale and entertainment sex should not be defined as labour. There is a moral nuisance issue, which must be addressed, but there is also a criminal liability issue.