

CHAPTER TWENTY-ONE

TRAFFICKING IN PERSONS AND PORNOGRAPHY

1. CRIMINALIZATION IN INTERNATIONAL CRIMINAL LAW

While the system of international criminal law has greatly developed in different fields of criminal law, the system still lacks certain effective provisions for the prohibition of certain activities which are harmful to individuals in general and the social interests of the international community in particular. For example the system of international criminal law has very limited provisions for the prohibition and prevention of obscene activities and publications. The relevant instruments applicable to this international crime are no longer useful in terms of the present epoch.¹ This is because there is still no effective movement(s) for the criminalization of obscene publications in the relevant legislations of states and governments are generally reluctant to adopt legal measures to prohibit any type of obscene publications.² This is for three essential reasons.

¹ These instruments are: 1. Arrangement for the Suppression of the Circulation of Obscene Publications, 4 May 1910. 5 A.J.I.L. (1911), p. 167; 2. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 12 September 1923. Hudson, II International Legislation, p. 1051; 3. Protocol to Amend the Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, concluded at Geneva on 12 September 1923, 1947. 46 U.N.T.S. 169; 4. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, concluded at Geneva on 12 September 1923 and amended by the Protocol signed at Lake Success, New York, on 12 November 1947. 46 U.N.T.S. 201; 5. Protocol amending the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910, 1949. 30 U.N.T.S. 3; 6. Agreement for the Suppression of the Circulation of Obscene Publications of 4 May 1910, amended by the Protocol of 4 May 1949, 1949, 47 U.N.T.S. 159, and 7. Convention on the Rights of the Child, 20 November 1989. Resolution 44/25, Adopted without a vote, Report: A/44/736 and Corr. 1, U.N. Press Release, Department of Public Information, Press Release G.A/7977, 22 January 1990, Resolutions and Decisions Adopted by the General Assembly During the First Part of Its forty-fourth Session from 19 September to 29 December 1989. The 1910 Arrangement and the 1923 Convention regulate the most important provisions applicable to this international crime. Other instruments have only modified or adapted the provisions of the arrangement and the convention to the time.

² The most effective international legislation for the criminalization of the publication of obscene materials is entered into the provisions of Article 1 of the International

Firstly, governments do not see the publication of obscene materials as a threat to their national or international policies and *secondly*, publications of obscene material have become a great source of income for the economies of various countries. *Thirdly*, such a prohibition may not be well-received by the majority of the population of a state and create controversy and other practical problems such as smuggling and increasing the border-line of criminality under the jurisdiction of a state.

Publications of obscene materials become more dangerous to the social structure of the national and international community when one considers that for the accomplishment of these publications many individuals and often families are used, whether by their own consent or through acts of force and slavery. This is especially notable in the countries which have no effective control over their populations and where prostitution and pornography have become an important aspect of their economies. Indeed, the pornography and prostitution of children has become one of the great problems facing various national authorities and the international community has not been successful in eliminating this form of abuse. A notorious example is Thailand and the involvement of some of its younger generations in these activities.

Convention for the Suppression of the Circulation of and Traffic in, Obscene Publications, concluded at Geneva on 12 September 1923 and Amended by the Protocol signed at Lake Success, New York on 12 November 1947. Article 1 reads that:

The High Contracting Parties agree to take all measures to discover, prosecute and punish any person engaged in committing any of the following offences, and accordingly agree that:

It shall be a punishable offence:

- (1) For purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects;
- (2) For the purposes above mentioned to import, convey or export or cause to be imported, conveyed or exported any of the said obscene matters or things, or in any manner whatsoever to put them into circulation;
- (3) To carry on or take part in a business, whether public or private, concerned with any of the said obscene matters or things, or to deal in the said matters or things in any manner whatsoever, or to distribute them or to exhibit them publicly or to make a business of lending them;
- (4) To advertise or make known by any means whatsoever, in view of assisting in the said punishable circulation or traffic, that a Person is engaged in any of the above punishable acts, or to advertise or to make known how or from whom the said obscene matters or things can be procured either directly or indirectly.

However, one cannot disagree with the fact that different measures for the prevention have been used by states. They have taken legislative measures for the prevention and prohibition of certain activities and the provisions of the 1910 Convention relating to the prohibition of the publication of obscene materials were updated by the establishment of the United Nations.³ Nonetheless, the provisions of these legislations are not sufficient in practice and in many regards the criminalization of the given conduct is not effective in the elimination of obscene activities and publications. One can easily obtain obscene publications including various types of pornographic videos in most countries of the world. This has particularly been increased with the development of technique and internet access.

Since the publication, importation and exportation of obscene materials are legally permitted there are no effective international movements for their prohibition. Although some states have provided for punishment in certain extreme cases, the penalties are very light and do not carry out any effective weight in relation to the consequences of such criminal conduct.⁴ A severe punishment would not either be useful for

³ For example the provisions of the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910, as Amended by the Protocol, signed at Lake Success, New York on 4 May 1949 are not seriously accepted in the domestic legislations of states. Article 1 of the Agreement is, in particular, important for the criminalization of the given conduct under the domestic systems of states. It reads that:

Each one of the Contracting Powers undertakes to establish or designate an authority charged with the duty of

1. Centralizing all information which may facilitate the tracing and suppression of acts constituting infringements of their municipal law as to obscene writings, drawings, pictures or articles, and the constitutive elements of which bear an international character.
2. Supplying all information tending to check the importation of publications or articles referred to in the foregoing paragraph and also to ensure or expedite their seizure all within the scope of municipal legislation.
3. Communicating the laws that have already been or may subsequently be enacted in their respective States in regard to the object of the present arrangement.

The Contracting Governments shall mutually make known to one another, through the Secretary-General of the United Nations, the authority established or designated in accordance with the present article.

⁴ For example, under the relevant provisions of the Swedish legislation, even Swedish courts, until recently had the right to sell pornographic videos using children. This occurred up to the end of May 1993. It should be noted however that such videos

the prevention of the crime. Any individual can obtain different types of obscene publications including videos and phonographs and the possession of these is not criminalized, except for those obscene publications which relate to children. Yet, there is a very serious difficulty concerning the age of children and the discovery of the age of children in the pornographic videos is not easy, especially when their producers are unknown. In other words, there is a legal contradiction between the publication of material and the development of trafficking in person. The latter is an international crime that has rapidly been developed in the international arena and has created one of the most serious problems for the world. Women and children of very young ages are the victims of this increasing international crime.

2. PROHIBITIONS IN ISLAMIC INTERNATIONAL CRIMINAL LAW

Contrary to the basic weaknesses in the system of international criminal law, Islamic international criminal law criminalizes the publication of obscene materials and any involvement by a person or persons in acts of prostitution and/or pornography are prosecutable and punishable. Islamic law perceives the effect of published obscene materials from its fundamental social standards and believes that obscene materials are not only against family rights but also against the spiritual interests of human society. Islamic law tackles the issue of the publication of obscene materials on the basis of social structure and the harm which it may cause the social characterization of women and men—as the basic element of family unity. It is due to this theory that Islamic law criminalizes the given conduct and makes its commission a punishable crime. This theory of Islamic law is also applicable in the Islamic system of international criminal law.

The element of Islamic international criminal law which is against the publication of obscene materials and prostitution is based on protecting the dignity and integrity of the human body. This is because

used as evidence were sold under justifiable freedom of information acts, taking into consideration that the provisions of the relevant legislation were against the international obligations of the Swedish state as stated in the 1988 Convention on the Rights of Child. Many persons purchased children pornographic videos from a court, in particular From Stockholm Court, which was involved in the seizure of these obscene materials produced by Swedish citizens in Thailand. The Swedish legislation has however been modified and there are serious provisions concerning the prohibition of pornography of children.

the publication of obscene materials, in Islamic international criminal law, is against the legal and social personality of men and causes insecurity in the family structure. This international crime can therefore be treated under the provisions of Islamic international human rights, protecting females and families from any type of violation including criminal ones. Islamic law examines almost all aspects of a violation in relation to the integrity of family values and its effect on the development, re-development and promotion of family dignity. It is on this basis that Islamic law emphasises the internationalization of its principles and the criminalization of any act which violates the principles of family law in general and the ethical values of international social structure in particular.

One of the chief differences between Islamic international criminal law and the system of international criminal law with respect to the publication of obscene materials is that the given conduct is criminalized by the provisions of Islamic international criminal law while the system of international criminal law opens the door for the non-application of its provisions by permitting its publications. Nevertheless, one has to state that both systems have similar problems concerning the probation of obscene materials. The Islamic system has prohibited its publication and possession, but, all these materials can easily be found within the territories of all Islamic nations. This means that Islamic international criminal law is not effective in the development, prevention and prohibition of the crime either.⁵

⁵ For the effective criminalization of the publication of obscene materials I have suggested that 'Trafficking in obscene publications greatly damages the cultural, educational and ideological development of people in general and the young in particular. It is therefore of fundamental importance that states pay due attention to this international crime which is helping to destroy their cultural morality. It is particularly important to legislate against the open circulation of pornographic videos, which are not only harmful to national morality but are also harmful to the integrity of children, members of both sexes and the family itself. Consequently, it is recommended that the following measures be taken by states:

1. An international legal instrument dealing with all forms of trafficking in obscene publications must be adopted by the international legal community for the purpose of protection of national and international order.
2. States shall, in accordance with an international convention, agree that obscene publications constitute an international crime. They shall also undertake not to employ this category of international crime as a political tool.
3. In order to effectively prevent the publication of obscene materials, states shall undertake legal responsibility for all publications within their territorial jurisdiction.

3. TRAFFICKING IN PERSONS

Trafficking in person constitutes a new area of the system of international criminal law that has received particular attention by the international legal and political community as a whole. But, this does not necessarily mean that the crime is also new, trafficking in persons has been occurring for a long period of time during the history of mankind civilisation, however in different forms, such as slavery, prostitution and mostly trade on women and young girls. In recent times, the United Nations has, indeed, been forced to fight against this heinous crime which breaks most of the principles of international human rights law. Thus, many international criminal conventions have been formulated and ratified by states. These are such as the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others;⁶ the 2000 United Nations Convention against Transnational Organized Crime;⁷ the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;⁸ Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime; Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations

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4. States shall take necessary domestic legal measures in order to enforce the relevant laws for the prohibition of obscene publications, or shall formulate the requisite legislative measures for such purposes.
 5. A lucid definition of what constitutes obscene materials must be agreed upon.
 6. Regional and international cooperation of various kinds must be effected in order to bring about the elimination of traffic in obscene publications.
 7. International and national provisions must not only recognize international trafficking in obscene publications as a crime, but also as a prosecutable and punishable crime.
 8. National and international criminal responsibility must be applied to all those who have engaged in or participated in the trafficking of obscene publications.' Malekian, *International Criminal Law*, vol. II, pp. 416–417.

⁶ Some other earlier conventions are the 1904 International Agreement for the Suppression of the White Slave Traffic, the 1910 International Convention for the Suppression of the White Slave Traffic, the 1921 International Convention for the Suppression of the Traffic in Women and Children and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age.

⁷ General Assembly resolution 55/25 of 15 November 2000.

⁸ G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (vol. I) (2001).

Convention against Transnational Organized Crime and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw. The purposes of all these conventions are prevention, prohibition, elimination, extradition, cooperation, prosecution, jurisdiction and punishment. The intention is to protect and support the victims of these international crimes and also to give particular economic assistance to the victims. According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the term “Trafficking in persons” is defined 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁹

Similarly, the system of Islamic international criminal law has given especial attention to the prevention of trafficking in persons, in particular, slavery, prostitution and the sexual use of women and children. This can be seen within the provisions of the Arab Charter on Human Rights. The Charter aims to protect all kind of trafficking in persons including sexual exploitation of children. It reads that:

1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances.
2. Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.¹⁰

Similarly, the Arab Charter on Human Rights prohibits trafficking in the organs of human beings. It states that:

No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his

⁹ Article 3 (a).

¹⁰ Article 10 of the Charter.

personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances.¹¹

Both systems of international criminal law have intended to define the term “trafficking in person”, but, from different sources. Whilst sources of international criminal law widely differ from the sources of Islamic international criminal law, they have, nevertheless, comparable definitions and purposes. In other words, they aim at the prevention of trafficking in persons, particularly women and children and especially their sexual exploitation. In addition, the inspiration of Islamic law concerning the protection of human beings confirms the provisions of the United Nations Convention and its Protocols. Furthermore, the ratification of the aforementioned documents by Islamic states applies to their legal tendency for the criminalisation of trafficking in persons in an international level.

¹¹ Article 9 of the Charter.