Service de la
Politique criminelle

“Not for sale – joining forces against THB” – 17th/18th of February 2014

Issues related to the THB definition : general observations, national example and next steps

J.-F. Minet

Service For Criminal Policy

Chairmanship, Bureau of the Interdepartmental Coordination Platform Against THB

Belgian Ministry of Justice

Jean-francois.minet@just.fgov.be

I would like to thank the organisers of this conference, the Austrian Federal Departments of The Interior and for European and International Affairs, The Swiss Federal Department of Foreign Affairs, The Council of Europe and the OSCE.

I have planned to focus my short talk on the scope of the trafficking in human being definition, some issues raised in the framework of the GRETA’s evaluation and the implementation of the concepts in particular by the use of criminal policy tools. I would like to start with some discussions that have taken place in Belgium around our definition. I will generalize them as I assume the same types of debates may have occurred in our respective countries. However, the adopted solutions may vary.

If we look at the GRETA’s reports already released (published), we can note that the issues or problems generally pointed out concerning the definition of THB are related to the following points (which are quite well known for some of them) :

First of all, some national definitions are drafted slightly broader in comparison to the Council of Europe Convention or other International Instruments. Therefore, while being in compliance with these texts, issues can be raised regarding the scope of these definitions and the behavior they cover.

Secondly, some of the GRETA’s reports stress the importance of clearly mentioning that the victim’s consent to the exploitation is irrelevant once the means of trafficking are present.

GRETA highlights for instance the fact that this recommendation has to be seen as a broad one in regard to the Convention since it must also be considered as a means to facilitate the identification and protection of victims.

Eventually, some reports also issue the scope of the purposes set out in national definitions as they cannot explicitly refer to concepts such as slavery or servitude.

In Belgium, when we had to revise our incrimination of THB by 2005 we wanted to stay attentive to certain recurrent observations returned from practitioners and national evaluations, such as those made by the CEOOR. This had effectively led to a broader definition than those set out in the international instruments. For instance, there is no explicit reference to the slavery notion however there is to the concepts of work or services performed in conditions contrary to human dignity.

I would like to go back for a moment on this question, on the reasons of this choice and what can be said about it in terms of effect.

In 2005, two observations returned quite regularly between the Belgian stakeholders in charge of the fight against THB.

First of all, the victim's profile had changed (evolved). Previously the victims tended more often to come forward themselves after having been exploited but more and more the law enforcement officers were being confronted with victims who, despite having been used in particularly harsh conditions, did not consider themselves as victims. This can be explained by different reasons. For instance, although the conditions of the performed work or the received wages were not consistent with the Belgian rules, these conditions were not fundamentally different from some of those existing in their country or that their wage was in their eyes sufficient as it allowed them to meet the needs of their families at home. To sum up, the use of force or threats appeared to be less frequent in their place more subtle methods more closely linked with the abuse of vulnerability.

As for the abuse of vulnerability precisely which was of course already a constituent element of our previous definition, we had observed some jurisprudential differences (controversies) in the way it was interpreted. For instance, it could happen, without generalizing, that relatively similar facts could be determined by a court once as THB and another time not by another court. The first having considered the abuse of vulnerability as established and the other not, even though the situations presented strong similarities.

These observations have led to the adoption of broad THB definition.

Firstly, it was decided that the exploitation should be the central element of the definition and not the means which have led to it. It was thus decided to set out the trafficking "means" as aggravating circumstances rather than constitutive elements of the offense.

Consequently, in the Belgian Criminal Law, the constitutive elements of the offense are limited to the actions and the purpose of trafficking, not the means. Some other EU countries have also adopted a definition with similar principles.

We can thus effectively consider our definition as broader than those of the international instruments which define THB through an action, a means and a purpose. At that time, it was also argued that exploiting someone in order to make a profit should involve the use of modi-operandi such as at minimum the abuse of vulnerability.

Moreover, and it is a direct consequence of the determination of the means as aggravating circumstances, it was decided to specify in the definition that the victim's consent to her own exploitation is irrelevant. It has been considered as an important criterion to objectivise the THB situation at the moment it is discovered.

In other words, it is not because a potential victim feels that she has not been exploited that there is no need to establish objectively the conditions of her exploitation, quite the contrary.

In addition, by referring to the criminal law, this is the intent of the offender which constitutes the moral element of the offense and not the feeling of the victims. There would be no more predictability in the application of the law by following another principle.

The question has been asked at the national level to know whether or not this extensive definition hasn't led to convictions for THB which wouldn't have occurred if we had strictly followed the international definition. It has been pointed out in the GRETA's report and also for instance in the TIP report's last narrative.

In response to the observation, I would tend to remind you that we have followed the explained logic in order to solve the different issues that had been highlighted regarding the implementation of our previous provision. Generally speaking, we tend to consider that this choice can facilitate the start of an investigation into THB by focusing first on the evidences related to the exploitation and then the other elements such as the abuse of vulnerability or the coercion. The GRETA report has not contradicted this argument.

However, in practice we have to stay qualified (nuanced) as the implementation of the law obviously depends on the level of training of the law enforcement players or other stakeholders in the field.

We also had the opportunity to review a sample of conviction reports (summary of decisions) for the years 2010 and 2011. It appeared from this analysis that certain convictions were determined without referring to an aggravating circumstance. The rate of these decisions was quite low. By examining some of the decisions presenting this specific feature it seems that in these cases, an aggravating circumstance had been determined by

the court at the first level and not at the second level. More precisely, it is still the limits of the concept of abuse of vulnerability which is generally discussed in those decisions.

I would say that the analysis of our definition reveals (shows) advantages and inconveniences but generally speaking and to some extent, it could tend to be more protective for the victims. Now, the most important element to keep in mind is rather the importance of regularly evaluating or receiving feedback from the players in the field in order to set up legal tools which answer their concerns as much as possible.

In order to achieve this goal, different instruments are at our disposal. On the one hand for instance reports elaborated by National Rapporteurs or equivalent mechanisms, on the other hand, magistrates or law enforcement players are obviously a valuable source of information.

In Belgium, the work of the specialised magistrates on THB matters is formalised through a guideline adopted under the responsibility of the Minister of Justice and the Board of General Prosecutors. The directive defines the planning of regular coordination meetings at the local level between the specialised magistrates and the law enforcement agencies. A coordination team has also been set up which is in charge of coordinating the work of the specialised magistrates. Finally, the implementation of the directive is evaluated every year. This document is not public and is drafted on the basis of local reports written down by the specialised magistrates.

The guideline of the Minister and the Board of General Prosecutors dating from 2007 we have initiated this year a reviewing process and several trails seems being interesting to us and can be generalised :

- Developing investigation schemes – the idea would be to include in the directive, standardised investigation schemes in particular regarding the gathering of evidence during a control operation or to determine criteria which should indicate the necessity to resort to special investigative techniques. This schemes could also be organised in function of the way a case is discovered : control operation, soft information, victim statement, …

- Another section could be dedicated to the patrimonial investigation and the different steps that have to be followed. Indeed, if the legal and administrative tools exist, it could be useful to specify in a very practical way how to use it in case of potential THB case ;

- Finally, the evaluation method of the guideline implementation could also be revised in order to facilitate the sharing of knowledge regarding the profile of traffickers and THB trends at the local level.

Other tools, such as information leaflet available for magistrates on-call, who are not specifically specialised in THB, can be useful.

To conclude, I would say that it is important for every state to balance its definition in taking into account the international standards of course but also by including what can be learned by evaluation tools or issues emphasized by players in the field. Moreover, we can also develop complementary tools. Most of the states have for instance developed indicators list and appointed specialised bodies, but we can go further. Standardised investigation schemes or practical tools giving step by step the procedure that should be followed when a patrimonial investigation has to be carried out constitute some example.

Thank you for your attention.