Combating new forms of transnational criminality: The European Union against the trafficking of human beings

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ABSTRACT

This article treats the highly complex problem of fighting the modern slave trade, or the trafficking of human beings. Prostitution, forced labour, illegal immigration all come under this category of transnational criminality, as people become commodities bought, sold and discarded. Along the trade routes of yesteryear, many in the Mediterranean region, human cargo crosses borders and jurisdictions. The author analyzes existing legal definitions and describes the role of various institutions, notably the European Union, which should protect the basic human rights of those who have fallen into the hands of contemporary slave traders. On this dark page of contemporary history, he does highlight the progress of political entities and legal procedures while underscoring the tremendous need for more research and cooperation among states.

RÉSUMÉ

Cet article brosse un tableau de la lutte ardue contre le trafic d' hommes, de femmes et d' enfants, communément appelé la traite des esclaves. Un exemple de criminalité transnationale, le trafic d'êtres humains comprend des activités telles que la prostitution, la servitude, l'immigration clandestine. Le long des routes commerciales classiques de la Méditerranée où on traverse des frontières et des territoires juridiques distincts, sont vendus, achetés et laissés pour compte des êtres humains. L'auteur propose une analyse, des définitions juridiques et une description de la fonction de diverses institutions, entre autres, l'Union européenne, qui doit protéger les droits fondamentaux de ceux qui tombent dans le piège tendu par les trafiquants L'auteur s'appuie sur cette page noire de l'histoire contemporaine afin de mettre en lumière les progrès des entités politiques et des procédures juridiques. Mais sans signaler le besoin énorme de plus de recherche et de concertation entre les Etats concernés.

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Introduction – The Context of Contemporary Human Trafficking

To believe that slavery and similar practices have long been eradicated, one would have to be rather unaware of what is currently going on in most parts of the world. Even though today there may not be slaves in the same sense as during the period from ancient times to the early twentieth century, over the past 25 years, the slave trade has resurfaced in the form of trafficking in human beings. The latter has been defined in international law as acts involving the recruitment, transportation, transfer, harbouring or receipt of persons for the principal purpose of being exploited, acts which are materialized through the use of force or threats and/ or other forms of coercion or deception[1].

It derives from this broadly drafted definition that the victim of trafficking has not consented to his recruitment, transportation and transfer and this does separate trafficking from other activities, such as illegal migration. However, even if the victim had consented, this would not have altered the criminal nature of trafficking, since what is of paramount importance is the volition of the trafficker (i.e. the person or persons recruiting, transferring, etc.) to exploit his victims and primarily to exploit their work in a most inhumane manner. In our era, what distinguishes human trafficking from the bygone slave trade is that the former is accepted as constituting a violation of the fundamental rights and freedoms that every individual enjoys. Therein lies the difference: the slave has no rights and, consequently, could not be protected. On the contrary, the victim of trafficking is the bearer of at least a minimum number of fundamental rights and freedoms, whose violation is prohibited under the general rules of international law. Indeed, these liberties and free will must be protected by all states of the international community and, primarily, by the victim's own country and the country or countries to which he was trafficked.

Moreover, what has not changed in this contemporary form of slavery are the routes that traffickers, like old slave traders, take to transport the victims across regions and across continents. Now, as before, the Mediterranean Sea figures prominently among these routes. The rich North–poor South paradigm, so prominent in the Mediterranean basin, remains one of the many factors contributing to the expansion of human trafficking and the alarming proportions reached today. Other such factors include the severe lack of (particularly unskilled) labour in certain economic sectors of the

industrialized world (e.g. agriculture, construction, domestic help), lax border control, a surge in prostitution, pornography and other forms of sexual exploitation, the often crumbling institutions and structures in the countries in which victims are recruited, etc. Overall, however, what appears to be the single most important reason for the strong comeback of situations where human beings are treated as a commodity to be bought, sold and exploited are the huge profits and benefits that traffickers enjoy with the minimum risk of ever being prosecuted, let alone convicted.

Trafficking in persons is a transnational crime *par excellence* in the sense that the trafficker may be a citizen of state A; the victims, recruited in the territory of state C but transferred through the territory of states D and E, may be citizens of state B, and they were finally received in state F, where they were exploited and forcibly made to offer their services. Whether this reason or the complexity of the crime (participation, aiding and abetting in an organized crime fashion) the fact remains that very infrequently are those involved in trafficking caught and successfully prosecuted. It could thus be considered a relatively "safe" crime for those perpetrating it, while guaranteeing huge proceeds and profits. In terms of economic analysis, trafficking in human beings is a crime worth the investment.

The Involvement of the European Union

The European Union[2] had to come to terms with the issue of human trafficking for a number of different reasons. First, a good share of trafficking victims end up in the territory of the member-states, where they are exploited by being employed in brothels, crop fields, and construction sites, to name but a few examples. Their conditions often amount to forced labour. Second, it was European states that banned slave trade already in the early 1800s but mainly after the 1880s; therefore, a strong attitude against such acts runs through the EU[3]. Third, considering that Europe as a whole is motivated by Christian beliefs, it would be expected that human trafficking would be deemed as an unacceptable practice that must be eliminated. Fourth, often victims of trafficking are wrongly portrayed by the media as unwanted economic migrants, or even worse as second-category persons. This perspective requires corrective action. Especially in regions with large unemployment figures, to describe trafficking victims solely in

terms of taking the jobs of the locals and "stealing" their scarce employment opportunities would have catastrophic consequences on the way they will be handled. Moreover, such an approach obscures the fact that the victims' human rights have been not only violated but negated.

Unfortunately the media tends to confuse issues. This is particularly the case when dealing with human trafficking and economic migration. Whereas the latter is a manifestation of the intent and purpose of an individual to immigrate and he has consented even before setting out; the former is characterized not only by a complete lack of consent but also by the use of threat, coercion or even violence. Theoretically, transnational human trafficking results in the victims' migration (i.e., they leave their country with the purpose of going to another, where they shall not become recipients of services); however, trafficking cannot be equated with migration, because these are two different things.

The Lack of an Express Legal Basis Allowing the EU to Be Directly Involved

Since globally trafficking in persons has been treated as a criminal offence and a most heinous one[4], it was to be expected that before long the European Union would take preventive and suppressive measures to regulate the issue. However, this would require overcoming the following obstacle: Member-states have never endowed the Community with express competencies and powers in the area of criminal law, so the Community cannot by itself establish that certain acts constitute criminal offences and, subsequently, oblige Member-states to incorporate them in their internal legal orders and provide for criminal sanctions to be imposed on convicted persons. The consequences of this lack of competence became obvious in the late 1980s and early 1990s when the European Commission, responding to international and regional developments, proposed the introduction of certain offences into domestic criminal legislation. These offences concerned criminal behaviour that was either unknown in most member-states or was partially covered by existing but often irrelevant statutes. Arguably, the first example of such criminal behaviour was the draft proposal for a directive harmonizing insider dealing across the Community[5]. However, the best example remains the draft proposal on prevention of using the financial system for the purpose of money laundering[6].

The situation changed dramatically with the Treaty on European Union (the Treaty of Maastricht), which was adopted in 1992. It envisaged, *inter alia*, common action among the member-states in the fields of police and judicial cooperation in criminal matters (the so-called Third Pillar). Specific mention should be made to Article 29 of the EU Treaty, as amended by the Treaty of Amsterdam of 1997. It stipulates that the Union has the objective to provide European citizens with a high level of safety. This would be achieved primarily by preventing and combating organised crime, which includes terrorism, trafficking in persons and offences against children, illicit drug and arms trafficking, corruption and fraud. Moreover, the process of materialization of said objective involves, among others, the approximation of criminal rules in the member-states, which in essence means establishing minimum rules on the constitutive elements of criminal acts as well as on the penalties to be imposed[7]. The obvious advantage of this approach is that a criminal offence would be treated in a uniform fashion in all member-states and consequently prevent any deviations among the different national legal systems, which could be easily exploited by those determined to breach the law.

The stated aim in Article 31(e) of the EU Treaty, namely the approximation of the member-states' domestic rules, has been the main tool used by the European Community since its establishment in 1957 to achieve economic integration; i.e., to create a common market or (what was later referred to) an internal market[8]. Naturally, the question arises whether the approximation envisaged in the First Pillar[9] and in the Third Pillar is one and the same or whether there are differences between them. The answer lies in Article 34(2) (b) of the EU Treaty, which stipulates that: "[The Council acting unanimously on the initiative of any member-state or of the Commission] may adopt *framework decisions* for the purpose of the approximation of the laws and regulations of the member-states. Framework decisions shall be binding upon the member-states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall *not entail direct effect.*" (Italics added)

Given that in the First Pillar the approximation is achieved through regulations, which always have direct effect, and directives, which, subject to certain conditions, could have direct effect and consequently they could be invoked by individuals before national courts in order to uphold or to defend their position[10], their principal difference with framework directives

would appear to be the latter's lack of direct effect.

Naturally, the issue here is for the EU to adopt measures that are legally binding in relation to all member-states, in other words measures that dictate a specific behaviour to member-states without the latter being able to avoid following the course of action already adopted by the Union. It follows that the issue is not simply the espousal of non-binding rules, whose wording may be impressive but without any clout whatsoever. For example, the third paragraph of Article 5 of the *Charter of Fundamental Rights* of the Union, which was adopted in Nice in December 2000, expressly prohibits trafficking in human beings. However, as the Charter is a political document akin to a Declaration, it is deprived of any compulsory element[11]. Of course member-states may choose to give effect to such non binding instrument. If this were to happen, it would be entirely because the member-state in question so wanted.

Creating an EU Framework against Human Trafficking and Exploitation

1. Council Framework Decision 2002/629/JHA

In the context of the aforementioned Third Pillar, the first specific instrument to address trafficking in persons was Joint Action 97/154/JHA. It was adopted by the Council of Ministers on 24 February 1997 and concerned action fighting two interrelated but (it must be emphasized) not identical issues: trafficking in human beings and sexual exploitation of children[12]. Although this instrument did alarm member-states to the challenges posed by human traffickers and the measures that had to be taken to address the problem successfully, it did not manage to deal with the situation by promoting the two fundamental driving forces of European integration: harmonization of member-states' legislation and cooperation among competent national authorities.

For more than five years, no further substantial action was taken. Then two separate instruments were adopted, both founded on the aforementioned Article 34(2) (b) of the EU Treaty and whose provisions replaced the 1997 Joint Action. The first was the Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings[13]. The second was the Council Framework Decision 2004/68/JHA of 22 December 2003 on

combating the sexual exploitation of children and child pornography[14]. The latter Framework Decision shall not be discussed here.

As pointed out in the Preamble of Framework Decision 2002/629/JHA, it was inadequate to address this serious criminal offence by means of action taken by each member-state separately. On the contrary, what was required was "a comprehensive approach in which the definition of constituent elements of criminal law common to all Member-states, including effective, proportionate and dissuasive sanctions, forms an integral part". This Framework Decision should not be read on its own but should be understood as an instrument that offers added value in the fight against organised criminality and, to that extent, it complements the relevant EU activities[15]. Moreover it acts in furtherance of the criminal law provisions contained in Article 5 of the aforementioned UN Protocol on Trafficking.

In view of the above observations, the Framework Decision does not create the offence of trafficking in human beings *per se*. Article 1(1) dictates that member-states must make this offence punishable in their respective legal orders and it then goes on to give the definition of its constituent elements. For the purpose of analysis, the definition could be broken down into three parts. The first part states that acts shall be criminalized, if certain behaviour, which is set out in the second part, has taken place and if such acts have been perpetrated for the furtherance of the specific purposes envisaged in the third part. In particular, the criminalized acts are the following: recruitment, transportation, removal, harbouring, and subsequent reception of a person, including exchange or transfer of control over such person. In terms of criminal behaviour, this relates to force, threat or coercion; fraud or deceit; abuse of authority or of vulnerability; and achieving through payments the consent of a person having control over another person.

Finally, the purposes for which the above acts are considered criminal offences are the exploitation of trafficked persons' labour and services (including forced labour and practices similar to slavery or servitude) and their sexual exploitation (including prostitution and pornography). Article 1(2) of the Framework Decision expressly stipulates that the victims' consent to exploitation, irrespective of whether it was intended or actual, "shall be irrelevant where any of the means set forth in paragraph 1 have been used".

This provision could be given two readings. The first is that even if the

victim had actually consented to being trafficked (a most unusual proposition but theoretically possible if this appears to be the only way to a better future), this does not cancel the criminal nature of the trafficking acts perpetrated and does not bar prosecution. The second reading is that the Decision itself deprives the victims of the right to express freely and without any obstacles volition and consent to be exploited. In other words, the Decision results in a situation where the absolute freedom of a person is restricted, presumably because this would appear to be in the individual's best interests. Still, the question remains: if and to what extent is it possible to limit the unlimited right of people to determine their future and fate. Note this is effectively supranational legislation.

Article 3 of the Framework Decision deals with the member-states' obligation to stipulate in their domestic legal orders that trafficking offences (as well as aiding, abetting, and attempting the same) are punishable by what is described as "effective, proportionate and dissuasive criminal penalties which may entail extradition". Although the latter stipulation is probably a gross generalization by the drafters since extradition could not be regarded as a criminal penalty but only as an act in the context of mutual legal assistance proceedings, the grave nature of trafficking offences necessitates and dictates that only the harshest punishment shall be inflicted; i.e., confinement in a penitentiary for a long period of time or even for life, if the trafficking offences perpetrated resulted in the death of the victims.

The only indication in the Framework Decision as regards the penalties' severity points to that conclusion. In the second paragraph of Article 3, member-states are told that in the following four cases the maximum term of imprisonment to be imposed must be a minimum of eight years. First, when the trafficking offence has deliberately or by gross negligence endangered the victims' life. Second, the offence was perpetrated against a victim who was "particularly vulnerable", a term which according to Article 3(3) refers primarily to children, who were trafficked for the purpose of exploitation of prostitution or other forms of sexual exploitation. Third, when the offence was perpetrated by use of excessive violence or has caused serious harm to the victim. Fourth, when the offence was carried out in the context of a criminal organisation, who were as defined in the aforementioned Joint Action 98/733/JHA.

Articles 4 and 5 of the Framework Decision deal with the issue of the

liability of legal persons for trafficking offences and the sanctions to be imposed. This is a rather sensitive issue, since not all member-states' domestic legal orders recognize that a legal entity in itself could be held criminally responsible for committing offences. For this reason Article 4 refers generally to "liability of legal persons" and not specifically to "criminal liability"[16]. As a legal person cannot by itself commit offences, Article 4(1) requires member-states to ensure that legal persons could be held liable for trafficking offences committed for their benefit by any individual who acts either in his individual capacity or as part of the legal entity's organs and enjoys a commanding position within such legal entity. This commanding position is demonstrated by the fact that he has been endowed with the power to represent the legal entity or with the authority to make decisions on its behalf and/or to exercise control within it. Pursuant to the second paragraph of Article 4, it is clear that the Framework Decision is not only concerned with criminal acts committed for the benefit of a legal person but also with instances of omission. As a result, legal entities could be held liable where the lack of supervision or control, which the individuals described in paragraph 1 had the obligation to show, resulted in the commission of trafficking offences for the benefit of such legal entity by its employees.

The liability that legal entities bear is separate and distinct from any responsibility that rests with third individuals who committed the trafficking offences. It follows that if a natural person has been prosecuted for human trafficking, he could not invoke the fact that a legal entity has already been prosecuted for the same offences so as to have the criminal proceedings brought against him annulled. In other words, the legal personality of a legal entity is deemed to be unconnected with the individual perpetrating trafficking offences for its benefit. Regarding the sanctions to be imposed on legal persons convicted of trafficking offences, Article 5 of the Framework Decision envisages three different types: criminal fines, non-criminal fines and administrative sanctions. The latter could take any of the following forms: excluding the convicted legal entity from entitlement to public benefits or aid[17]; temporarily or permanently disqualifying the entity from practising commercial activities; placing it under judicial supervision; ordering its judicial winding-up; and, finally, temporary or permanent closure of those establishments that were used for committing the offences.

These broad administrative sanctions would be applied only if they had

already been envisaged in the member-states' internal legal orders. For it would be rather improbable to expect a member-state to create new administrative sanctions that would apply only to legal entities convicted of trafficking offences. It should, however, be accepted that the content of the above sanctions could be modified without impairing their result and objective. For example, instead of ordering that something be wound up, domestic legislation could stipulate that the operating licence be revoked.

Another crucial issue addressed by the Framework Decision is how far the jurisdiction of member-states extends. Article 6(1) provides for very broad jurisdiction, including extraterritorial jurisdiction. Thus, member-states shall prosecute suspects in the following instances: when the offence was committed wholly or partly within their territory; when the offender has their nationality; and when the offence was perpetrated for the benefit of a legal entity incorporated in their territory. Arguably, Article 6(1) does not expressly cover a number of other instances allowing Member-states to establish jurisdiction. Two examples suffice here: first, when the trafficking offences were committed outside their territory, irrespective of whether perpetrated in another member-state or in a third country, in which case the legal foundation would probably be the principle of universal jurisdiction; second, when the victims had the nationality of the member-state in question, irrespective of the place where the offence took place and irrespective of the alleged perpetrator's nationality.

As far as the first instance is concerned, Article 6(2) stipulates that it would be up to the individual member-states to determine whether they would apply the above in a general fashion or only in specific circumstances. However, on the latter instance, which is based on the so-called passive personality principle[18], the Framework Convention says nothing. Arguably, there is nothing to prevent those member-states subscribing to this principle to establish their jurisdiction over offences committed against their nationals and irrespective of the place where perpetrated[19].

The fact that more than one member-state may have jurisdiction to prosecute and try alleged traffickers could potentially lead to cases of impunity. In other words, there might be instances where no country, each for different reasons, proceeds with prosecution. In provision of this situation, Article 6(3) stipulates that if a member-state does not extradite its nationals, who have been accused of committing trafficking offences outside

its territory, the state is under the duty to establish its jurisdiction over them (which practically means to arrest them) and, pursuant to the relevant criminal legislation, to prosecute them if appropriate. Yet, the fact that more than one member-state could exercise authority over the same alleged trafficker and in relation to the same offence, does raise questions related to the principles of double criminality and *non bis in idem*. It is submitted that these questions would be settled according to the domestic law of the member-states involved and must reflect applicable international human rights norms[20].

Pursuant to Article 10 of the Freedom Decision, member-states were given two years from its adoption; i.e. until 1 August 2004, to take the necessary measures to comply and transmit to the Council of Ministers and the Commission the text of the provisions transposing into domestic law the obligations assumed under the Decision. For its part, the Council agreed to evaluate the extent of member-states' compliance with the Decision by 1 August 2005 at the latest. Until today, the long-awaited evaluation process has not commenced but it is expected to be completed before the end of 2006.

2. Council Resolutions of October 2003

The next instrument that the EU Council adopted to promote its anti-human trafficking program was the Resolution of 20 October 2003 on initiatives to combat trafficking in human beings, in particular women[21]. Since resolutions do not have a legally binding effect and cannot oblige member-states to take predetermined action, they do not require a specific legal basis on which to found the Union's competence in the field(s) covered. Interestingly enough, unlike other relevant EU instruments, the Resolution's Preamble cites a considerable number of applicable worldwide instruments showing convincingly the interaction between the regional and international aspects of trafficking.

More specifically, the Resolution refers to: (a) two Council of Europe recommendations, namely Recommendation No. R(2000)11 on action against trafficking in human beings for the purpose of sexual exploitation adopted by the Committee of Ministers and Recommendation 1545 (2002) concerning campaigns against trafficking in women adopted by the

Parliamentary Assembly; (b) Article 6 of the UN Convention on the Elimination of All Forms of Discrimination against Women (1979), which obligates contracting parties to take all appropriate measures to suppress all forms of traffic in women as well as the exploitation of women prostitution; (c) Articles 34 and 35 of the UN Convention on the Rights of the Child (1989), by virtue of which contracting parties have respectively undertaken the obligation to protect children from all forms of sexual exploitation and "take all necessary national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form"; and (d) the Recommended Guidelines and Principles on Human Rights and Human Trafficking, which were issued by the UN High Commissioner for Human Rights in 2002 and whose central point is that the human rights of victims should be the focus of efforts to prevent and combat trafficking.

Moreover, the Council Resolution touches upon sensitive issues that other international instruments usually avoid addressing, e.g. the root causes of human trafficking. In illustrative fashion, the Resolution then enumerates: gender inequalities, unemployment, poverty and all forms of exploitation. Arguably these are socio-economic grounds concerning the personal circumstances of both the victims and perpetrators. However, they fail to acknowledge other causes which have to do with the conditions prevailing in the countries themselves where victims are recruited or are otherwise made to succumb to trafficking and/or are received for exploitation. Such things as wide-scale corruption and bribery, collapse of basic state functions, systematic violation of fundamental human rights, ineffective judicial systems, the existence of an extensive black market spring to mind immediately. Given that the Europe of 15 receives trafficking victims for exploitation, it would have been somewhat relevant if the Resolution did refer to the roots of trafficking in the Member-states.

The Resolution calls upon member-states to take specific action to address trafficking in persons. The major points are that member-states should (a) ratify and implement the aforementioned UN Protocol; (b) be fully committed in pursuing at national, European and international level their anti-trafficking activities; (c) underline their commitment to fighting trafficking by increasing awareness and intensifying cross-border and international cooperation in the fields of prevention, victim protection and

assistance with the aim of achieving tangible results; and (d) support and protect victims pursuant to national law so as to facilitate the safe return to the countries of origin or to receive adequate protection in their host countries and to finance these actions through the so-called structural funds and other Community programs.

It is commendable that the Resolution acknowledges the crucial role that cross-border and international cooperation plays in combating human trafficking. However, this kind of cooperation can be neither made compulsory nor taken for granted. On the other hand, to be effective the Resolution requires the active participation of all countries (irrespective of member-state status) in whose territory any trafficking offence takes place. In other words, the country or countries where the victims have been recruited, through which they have been transported and transferred, where they have been harboured (if different) and where they were ultimately ended up for the purpose of being exploited. To this long list of countries, one might have to add the country or countries from which the whole trafficking operation was headquartered, or executed and financed. Assuming that member-states feature as countries where trafficking victims are received for exploitation (possibly before being removed to another member-state where they shall be also exploited), this means that the third countries in whose territory the other offences have been perpetrated must first be prepared to recognize that such offences are carried out on their territory and then agree on the specifics of the cooperation to be negotiated with the member-states.

Of course, the successful conclusion of such cooperative efforts must be based on the principle of equality among states and respect for sovereignty, while taking seriously into account the conditions of the third countries. This type of cooperation must be devised in a way that would not place them in a "no win" situation.

In the context of the Euro-Mediterranean Partnership, the EU acknowledged this reality from the outset. As a result, in the work program annexed to the Barcelona Declaration of November 1995, it was agreed that officials from participating states would meet periodically to discuss measures to improve cooperation among competent national authorities in order to combat, *inter alia*, organized crime, including smuggling. According to this program, these meetings would be arranged "with due

regard for the need for a differentiated approach that takes into account the diversity of the situation in each country"[22].

Often the countries of North Africa participating in the Euro-Mediterranean partnership become transit areas for victims of trafficking. Indeed, their geographical proximity to the southern member-states make them natural gateways. A recent European Commission policy document has considered traffic in human beings as one of the structural causes that led to an area of insecurity extending from Sudan to Cape Horn and encompassing the Central African Republic, northern Uganda and eastern Congo[23]. The document claims that 89% of African countries are affected by the flows of human trafficking either as source, transit and/ or destination points[24]. Considering that there are currently 54 independent states in that continent, a staggering number of 48 countries appears to be involved somehow in trafficking activities.

The question that crosses one's mind: *how could the EU deal with all these countries and devise schemes for combating trafficking in an effective manner and ultimately eradicating it?* The simple answer: *it cannot.* As argued in the Commission document, *"[…] enormous progress [concerning among others] trafficking of human beings has been made in the cooperation and coordination between the EU and its North African partners in particular. Such work remains a high priority, and is clearly recognised as such in the Barcelona process in the European Neighbourhood Policy Action Plans*"[25]. Even assuming that the collaboration with the four North African partners–Algeria, Egypt, Morocco and Tunisia – has already borne fruit, there are more than 40 other African states that must also be covered.

Where Do We Go from Here?

A week after the *EU Strategy for Africa* was published, the European Commission brought out another policy document endeavouring to strengthen the Union's and its member-states' commitment to prevent and fight against trafficking in persons and to the protection, support and rehabilitation of victims[26]. This document is the culmination of a number of previous EU wide activities, including the Hague Programme on strengthening the area of freedom, security and justice, created by the

eponymous European Council in November 2004[27], and the Expert Group on Trafficking in Human Beings, which was established by the Commission in 2003[28] and presented its Report and recommendations on 22 December 2004[29]. The new document comprises six components which, according to the Commission, encapsulate all the parameters of trafficking in persons: (1) protection of the human rights of victims, which is referred to as being of fundamental concern; (2) organised crime; (3) illegal migration; (4) existence of specific population groups (women and children) meriting particular attention; (5) requirement of collection reliable data; and (6) coordination and cooperation structures that must be pursued at different levels and with different partners.

The first component is rather disappointing in that it lacks specific proposals for measures to protect the victims' human rights, something the aforementioned Council of Europe Convention does[30]. On the contrary, one comes across oft repeated generalizations of the past[31]. Undoubtedly, the implementation of specialized methods to protect victims' rights costs a lot of money. In the present economic climate, the population of member-states may very well consider funds thus spent a waste. They may feel that funds should be put to better use by supporting other causes that benefit themselves and their families directly. It is a well known fact that the enjoyment of fundamental freedoms by all, natives and foreigners alike, is a costly business for governments. But if the EU member-states wish to have the moral upper ground and to show the world that they are the champions of everybody's human rights, they must protect and assist *bona fide* victims of human trafficking, cater to their personal and psychological welfare and be prepared to spend substantial amounts to make these policies effective.

On the other hand, the drafters of the document should be commended for raising the often neglected issue that neither the EU nor the member-states have access to trustworthy data on human trafficking, even though this is a necessity. Indeed, it would appear to be a futile exercise to devise an anti-trafficking policy covering 25 countries when even the magnitude of the issue to be regulated remains unclear. Reading through the proposals contained in the document, it is obvious that gathering reliable data is anything but an easy task. One could even question the accuracy of figures emanating from the US State Department, which has estimated that globally almost two-thirds of the victims are trafficked intra-regionally in East Asia

and the Pacific (some 260,000 to 280,000 on an annual basis) and in Europe and Eurasia (some 170,000 to 210,000)[32], or from the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, which claims that 700,000 people a year fall victim to trafficking worldwide. It will take time before the appropriate EU authorities would be able to base policy measures on precise figures and up-to-date data.

Very recently, the former Council of Europe Commissioner on Human Rights wrote: "I call on the member-states of the European Union to address the sorry question of human trafficking at European level in order to make the fight against transnational networks more effective"[33]. Taken at face value, such pronouncements would indicate that nothing much has already been done. However, this conclusion would be incorrect because a great deal has already been done. Yet if we compared human trafficking with other manifestations of organized crime and how they have been handled (drugs trafficking, money laundering), it would probably seem that trafficking in persons remains a hazy and elusive offence. So far trafficking humans has escaped being challenged by a coherent regulative framework, capable of prosecuting and punishing those responsible and offering an acceptable measure of protection to the victims.

NOTES

1. See Article 3 of the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children" supplementing the *Convention against Transnational Organized Crime,* which was adopted under United Nations' auspices in November 2000. The Protocol entered into force on 25 December 2003 and has currently been ratified by some 100 states, including EU 15 Member-states. Note that although the European Community signed the Protocol in 2000, it has not yet been ratified due to disagreements over the extent of its competence *vis-à-vis* the provisions of the Protocol.

2. In the present article, the terms European Community and European Union are used interchangeably.

3. Suffice to mention the following instruments: the Treaty between France and Britain of May 1814 whereby the two countries resolved to cooperate in the suppression of the traffic in slaves; the solemn declaration adopted at the Congress of Vienna in June 1815; the General Act of the Berlin Conference of 1885 on

Central Africa; the General Act of the Brussels Conference of 2 July 1890 on the African Slave Trade; the International Agreement for the Suppression of the White Slave Traffic of 1904; and the namesake Convention of 1910.

4. In terms of international instruments, see Article 3 of the "UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children", and Article 4 of the "Convention on Action against Trafficking in Human Beings", which was adopted by the Council of Europe on May 16, 2005, *Council of Europe Treaty Series* No. 197. Even though the Convention has not yet come into effect (currently, it has been signed by 26 states (Greece did so on November 172005), but has received no ratifications). It is the most elaborate international document on the issue. Generally, see K. Magliveras, "Regional Aspects of the Fight against Trafficking in Human Beings: The Council of Europe's Convention" [2005] *Hellenic Review of European Law – International Edition* (forthcoming).

5. See COM (87) 111 final, O.J. 1987 C 153/8. It was finally adopted as Council Directive 89/592 of November 13, 1989, O.J. 1989 L 334/30.

6. See COM(90) 106 final, O.J. 1990 C 106, 28.4.1990, p. 6, as amended in COM(90) 593 final, O.J. 1990 C 319, 19.12.1990, p. 9. It was finally adopted as Council Directive 91/308 of June 10 1991, O.J. 1991 L 166/77. See K. Magliveras, "Banks, Money Laundering and the European Community" in J. Norton and G. Walker (eds), *Banks: Fraud and Crime*, Second Edition, Lloyds of London Press, 2000, pp. 173, 178-179.

7. See Article 31(e) of the EU Treaty.

8. Note that according to the third indent of Article 1 of the EU Treaty, the European Union was founded on the European Community, which constitutes the so-called First Pillar.

9. See Articles 94 – 97 of the EC Treaty.

10. Note that the principle of direct effect did not feature in the original Treaty establishing the European Community of 1957 or in any of its amendments. It is a typical example of judge-made law, where the European Court of Justice conceived the principle in the early 1960s and has developed it ever since as a means of promoting the then infant Community law, ensuring that it would not be "suffocated" by the internal legal systems of the Member-states and making clear that Community law stands higher than national law. Generally, see Case 26/62, *Van Gend en Loos*, [1963] *ECR* 1; Case 6/64, *Costa v ENEL*, [1964] *ECR* 585; Case 43/75, *Defrenne v Sabena*, [1976] ECR 455; Case 152/84, *Marschall v Southampton*

and South West Hampshire Area Health Authority [1986] *ECR* 723; Case 41/74, *Van Duyn v Home Office* [1974] *ECR* 1337, etc.

11. The situation will change dramatically when the Treaty Establishing a Constitution for Europe (2004) enters into force, since the Charter has been inserted as the Second Part of the Treaty; see Article II-65(3).

12. O.J. L 63, 4.3.1997, p.2.

13. O.J. L 203, 1.8.2002, p. 1.

14. O.J. L 13, 20.1.2004, p. 44.

15. See in particular Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organization in the member-states of the European Union, O.J. L 351, 29.12.1998, p.1; Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime, O.J. L 333, 9.12.1998, p. 1, as amended by Framework Decision 2001/500/JHA, O.J. L 182, 5.7.2001, p.1; and Council Joint Action 96/700/JHA of 29 November 1996 establishing an incentive and exchange program for persons responsible for combating trade in human beings and sexual exploitation of children (STOP), O.J. L 322, 12.12.1996, p. 7.

16. For the position of English law, where the concept of corporate criminal liability already present in the 19th century was given fresh impetus in the 1990s, see C. Wells, *Corporations and criminal Responsibility*, Oxford University Press, 1993; A. Ashworth, *Principles of Criminal Law*, Second Edition, Oxford University Law, 1996, pp. 111-118.

17. Although not expressly stipulated in Article 5, it should be accepted that the legal entity in question should also be barred from receiving EU aid disbursed under the so-called structural funds including the European Social Fund and the Cohesion Fund.

18 Recently, this principle found express recognition in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal and in the Separate Opinion of President Guillaume in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment of 14 February 2002, [2002] *International Court of Justice Reports* 3, at paras 47 and 16, respectively.

19. See, for example, Article 7 of the Greek Criminal Code. The position of the German *Strafgesetzbuch* is more explicit, since in Article 6(3), which is titled "Auslandstaten gegen international geschuetzte Rechtsgueter" (Acts committed abroad against internationally protected legal rights), trafficking in human beings is

one of the instances where German criminal law shall always apply.

20. See, inter alia, Article 4 of the Seventh Protocol to the European Human Rights Convention (1984); Article 14(7) of the *International Covenant of Civil and Political Rights* (1966); and Article II-110 of the Treaty Establishing a Constitution for Europe incorporating Article 50 of the *Charter of Fundamental Rights of the Union*.

21. O.J. C 260, 29.10.2003, p. 4.

22. See Barcelona Declaration Adopted at the Euro-Mediterranean Conference (27 and 28 November 1995), Annex – Work Programme, IV. Partnership in Social Cultural and Human Affairs: Developing Human Recourses, Promoting understanding Between Cultures and Exchanges between Civil Societies, Terrorism, Drug Trafficking and Organised Crime.

23. See Commission of the European Communities, Communication to the Council, the European Parliament and the European Economic and Social Commission – *EU Strategy for Africa: Towards a Euro-African pact to accelerate Africa's development*, COM(2005) 489 final, 12 October 2005, pp. 11-12.

24. Ibid.

25. Ibid, p. 34. On the European Neighbourhood Policy, see the ENP Strategy Paper contained in COM (2004) 373 final.

26. Commission of the European Communities, Communication to the European Parliament and the Council, *Fighting trafficking in human beings – an integrated approach and proposals for an action plan*, COM(2005) 514 final, 18 October 2005.

27. O.J. C 53, 3.3.2005, p.1. The Programme's objective is to develop a plan for common standards, best practices and mechanisms to thwart and fight human trafficking and to enhance the war against illegal immigration.

28. Commision Decision 2003/209/EC of 25 March 2003 setting up a consultative group to be known as the "Experts Group on Trafficking in Human Beings" O.J. L 79, 26.3.2003, p. 25; for the Group's reconstitution, see O.J. C 205, 30.8.2003, p. 3.

29. See http://europa.eu.int/comm/justice_home/doc_centre/crime/trafficking/doc/ report_ expert_ group_ 1204_ en.pdf.

30. See Articles 10-15.

31. Cf. *Commission Communication of 9 December 1998 to the Council and the European Parliament proposing further action in the fights against trafficking in women*, COM(98) 726 final.

32. See Global Commission on International Migration, *Report on Migration in an Interconnected World: New Directions for Action*, October 2005, p. 39, text in www.gcim.org.

33. See Report by Mr. Alvero Gil-Robles, Commissioner for Human Rights, on the Effective Respect for Human Rights in France Following his Visit from 5 to 21 September 2005, CommDH(2006)2, 15 February 2006.