

# **COUNTERACTING HUMAN TRAFFICKING: PROTECTING THE VICTIMS OF TRAFFICKING**

**Joanna Apap, Peter Cullen and Felicita Medved<sup>1</sup>**

## Summary

Centre for European Studies (CEPS)

The purpose of this paper is to point out the necessity to address trafficking in human beings in a larger context of migration. The development of an overall European Union concept relating to migration in Europe is being mapped out by the European Commission, which sees the handling of migration issues in the context of the political objectives of European integration and in particular the establishment of an "Area of Freedom, Security and Justice" in the EU (COM 2000, 0757 final). The Commission is not, however, in a position autonomously to shape the legislative agenda on migration as, notwithstanding the Treaty changes introduced at Amsterdam, the Member States remain in the driving seat and their initiatives have tended to concentrate on reacting to immediate migration "pressures" rather than on building an overall strategy. Legal basis questions are beginning to arise when criminal law measures are contemplated in relation to the combating of trafficking. The very need for the approximation of laws, though foreseen in the Treaty on European Union, is questioned by some states, and - especially in the context of such a sensitive issue as migration - national legal approaches can be difficult to reconcile. Consensus within the Council on legislative measures is not easily achieved.

There are, however, many practical and political pressures on the EU to agree at least a minimum of co-ordination of policies and to improve practical cross-border co-operation between border control and immigration authorities. On the very real and pressing level of human rights protection, tragedies involving the death of migrants in transit must be avoided. The protection of human rights cannot be left to Charter declarations. On a more political/policy level, Tampere has created certain expectations, which must be fulfilled if credibility in EU institutions is not once again to falter. The regulation of the free movement of persons across the EU's external border following enlargement has become a significant issue in accession negotiations: trafficking in persons via candidate countries constitutes one of the "security concerns" making the immediate opening of borders with existing Member States unlikely.

To be effective, EU action must be based on clearly established concepts and one of the arguments of this paper is that the elaboration of such concepts is still shaky where trafficking in persons is concerned. So, this presentation will begin with an assessment of the problem: there will be an initial theoretical and empirical assessment of trafficking, with the emphasis on clarification of concepts and the struggle for definition. This assessment will also encompass a review of current theoretical perspectives and research on trafficking in the context of migration, including reference to some preliminary research findings by CEPS will then briefly analyse certain key legislative developments at European level, including recent Third Pillar initiatives, with reference to: the content of the instruments concerned; their categorisation as criminal law instruments or as migration control instruments; their relationship to First Pillar measures; and their contribution to the creation of an Area

---

<sup>1</sup> *Dr Joanna Apap is research fellow and director of the Justice and Home Affairs Programme at the Centre of European Policy Studies in Brussels. Mr. Peter Cullen is Head of the Justice and Home Affairs Section at the Academy of European Law in Trier. Ms. Felicita Medved is researcher at CEIFO, Stockholm University. Peter Cullen and Felicita Medved are also members of the CEPS JHA academic network.*

of Freedom, Security and Justice. Finally, the EU's policy options will be reviewed in light of post-Tampere realities.

# **COUNTERACTING HUMAN TRAFFICKING: PROTECTING THE VICTIMS OF TRAFFICKING**

**Joanna Apap, Peter Cullen and Felicita Medved  
Centre for European Policy Studies**

## **Introduction**

Trafficking in human beings is a very sensitive issue as it is at the very intersection of contemporary anxieties concerning the global political economy, population growth, gender and ethnic stratification, transnational (organised) crime and human rights abuses and the in/ability of states, groups of states and international agencies to control any of these effectively. The purpose of this paper is to address human trafficking in the larger context of migration, especially since the debate about whether trafficking should be considered a form of migration, particularly irregular/illegal migration, influences the formulation of legal instruments and countervailing measures and what protection can be provided to victims of trafficking. The analysis in this paper is based on the results of a previous CEPS study carried out by Felicita Medved and Peter Cullen.

The development of an overall European Union concept relating to migration and asylum in Europe is being mapped out by the European Commission<sup>2</sup> in the context of the political objectives of the European Union, in particular the establishment of the Union as an “Area of Freedom, Security and Justice”. The creation of this “area” has become an objective of European integration, alongside other integration objectives such as the creation of the internal market, establishment of a common currency and setting up of a common foreign and security policy.<sup>3</sup>

There are also many pressing practical reasons for the European Union to act: its policies of open internal borders are being tested both by criminal groups and by “illegal” migrants who wish to leave poverty or persecution behind them. The impending widening of the Area of Freedom, Security and Justice through enlargement of the European Union has sharpened the pace of policy developments. Human rights considerations make it pressing that risks to life and limb of trafficked persons - as indeed of all migrants, whether legal or illegal - be

---

<sup>2</sup> See COM (2000) 757 final, Brussels, 22 November 2000; COM (2000) 755 final, Brussels, 22 November 2000 and COM (2001) 672 final, Brussels, 15 November 2001.

<sup>3</sup> Cf. Monar's contribution to this volume and Medved, F. 2000.

avoided. Article 5 of the Charter of Fundamental Rights of the European Union requires that trafficking in persons be prohibited.

Accurate statistical evidence in this field, is hard to get, however, available figures suggest that, over the last years, there has been a decrease of regular immigration, whereas the number of illegal immigrants has steadily risen in the same period. The Seville European Council of 21 and 22 June 2002 set illegal immigration at the top of the agenda and concluded to further speed up measures to combat illegal immigration, adoption of legislation in the area, integration of immigration policy into the Union's relations with third countries and gradually introduce coordinated, integrated management of EU's external borders (Presidency conclusions Seville, 21 and 22 June 2002). Trafficking has also become a human rights issue and it is no longer just a matter of fighting transnational crime. As research and various investigations have shown, it is essential that when contemplating the possibility of effective countermeasures to human trafficking, to determine the difference between human trafficking and illegal immigration. As a matter of fact, where illegal migration begins and ends is a matter for each sovereign state to define. The spectrum is very wide. Illegal migrants either entered a country in violation of that country's laws or have violated a condition for legal stay (e.g. by overstaying a tourist visa, or by not leaving upon the rejection of an asylum application). The illegal border crossing can happen independently or can be facilitated by others: this support is increasingly organised, to the extent that smuggling of migrants becomes a remunerative activity for in/direct financial gain. In cases where coercive, abusive or exploitative elements are included migrants often become victims of traffickers. The definitions of trafficking and smuggling have been clarified within the framework of the United Nations Convention against Transnational Organised Crime and its two accompanying protocols. Trafficking may occur within the country. Thereby it is important to establish what is a human rights issue and which is a migration one. It is also important to note that though the boundaries between volunteer/non-volunteer migrations are becoming blurred, migration *per se* is not a crime.

Action to combat trafficking and smuggling in human beings must be based on clearly established concepts. So far the formulation of such concepts is still vague, thus making the achievement of a common legislative approach, at national, international and supranational levels very difficult. Research on trafficking is only beginning but is urgently needed particularly since the entry into force of the framework decision on combating trafficking in

human beings which entered into force on 1<sup>st</sup> August 2002. Its implementation by all member states is foreseen, according to Article 11 of the same document, by 1<sup>st</sup> August 2004. A comparative analysis of the current practices and understanding of the issue in the member states and the candidate ones is essential to maximise its effectiveness and to foresee any potential problems before this deadline.

The first part of this paper addresses the recent policy developments to combat trafficking and protecting the victims (I). The second section contains an assessment of issues and a clarification of concepts (II). The discussion of trafficking in human beings by governmental, inter-governmental and non-governmental organisations, the media and popular opinion, is running ahead of theoretical understandings and factual evidence: the chapter therefore also encompasses a review of current theoretical perspectives and research on trafficking in the context of migration (III). Certain key legal developments within the European Union are briefly analysed in section (IV) and finally, the policy options and approaches to protecting victims of trafficking are reviewed (Conclusions and Recommendations).

## **I. Policy Developments to Combat Trafficking and Protecting the victims**

Human trafficking is not as new a phenomenon as it may appear to be; trade in men, women and children - bought and sold into slavery or slavery-like status such as debt bondage and serfdom, forced or compulsory labour - has been going on for centuries. International efforts to counteract human trafficking dates back to the nineteenth century and are a continuation of longer-established action towards the abolition of slavery. Nevertheless, the number of individuals trafficked in recent years is substantial. Trafficking occurs within countries and across state boundaries, sometimes over extremely long distances, highlighting the link between the growing irregularity of ever more globalised, accelerated and feminised international migration, and transnational crime. As of the year 2000, there were an estimated 150 million international migrants, of these some 30 million illegal immigrants. The United Nations estimates that 4 million women were trafficked throughout the world.<sup>4</sup> The IOM estimates that five hundred thousand women were “trafficked” into Western Europe.<sup>5</sup>

---

<sup>4</sup> *United Nations Economic and Social Council, February 2000, p. 24.*

<sup>5</sup> *Ibid.*

However elusive precise numbers are, there is little disagreement concerning the actual growth and further growth potential of the trafficking industry. On the one hand, the availability of migrants as “goods of trafficking” is regarded as almost unlimited. “Push conditions” are seen as dominant: the weak economies, population growth, poverty, high unemployment and the internal strife of the “source countries” can be pointed to in this regard. On the other hand, there is the assumption that trafficking is becoming better organised, given the enormous profit potential for the traffickers in the ‘denationalisation’ of economies in the age of globalisation, the stringent controls of entry and the traditionally low risk of prosecution.<sup>6</sup>

The trafficking industry ranges from smaller rings to complex organised criminal enterprises,<sup>7</sup> typically in a scheme requiring a chain of actors covering differing stages of the process. It is the fastest growing and third largest source of profits for organised criminal enterprises behind only drugs and firearms.<sup>8</sup> The reach of industry and the breadth of exploitation are extensive. The exploitative nature of the treatment of the victims of trafficking often amounts to a new form of slavery. In contrast to unlimited profits realised by traffickers, the cost to the victim, the victim’s family and community are immeasurable, and long-term. As many recent incidents have shown, trafficked migrants face real risk of death in the most horrible conditions.

Like a labour market in any other context, trafficking in human beings involves traditional demand and supply. Yet, it is a labour market taken to an extreme: the traffickers obtain such all-encompassing control over their victims that they are converted into commodities. By means of unlawful coercion and/or exploitation, the trafficker wields sufficient bargaining power over the victim to restrain her or him from escaping the illicit labour or sexual market, which the trafficker supplies.

The policy reaction to trafficking is linked with the overall response of Western countries to the new migration order. In the European Union, the initial policy of openness suggested by the early Schengen initiatives of the mid-1980s was quickly replaced after the fall of the Berlin Wall in 1989 by more restrictive policies: this change is reflected in the transformation

---

6 See e.g. Hughes, D. M., 2001, p. 9; United Nations Economic and Social Council, 2000, p. 6.

7 O’Neill R. A, 1999, p. iii.

8 Savona, E., 1998 and forthcoming; Schloenhardt, A., 1999.

of the Schengen idea from a commercially-oriented scheme to end border controls to a system of immigration control and monitoring.<sup>9</sup> Thus, in the early 1990s, the phenomenon of trafficking was not treated separately from the overall migration policy approach to intensify controls and repress illegal immigration. States began to fortify their defences by enacting new laws and implementing new strategies to control the effects of migration, particularly unlawful immigration. Within the prevailing restrictive immigration atmosphere, immigration was first perceived as a ‘crisis’ with its key dimension of ‘migration pressure’ in the early 1990s.<sup>10</sup> The steep increases in asylum applications in Germany and other parts of Europe created social tensions, stirring latent racism in several Member States of the European Union and in some candidate states. Political parties tended to exploit the immigration theme, advocating mainly repressive approaches.<sup>11</sup>

Anti-trafficking policies have put an emphasis on organised and transnational crime and harsher penalties for perpetrators of human trafficking crimes. Transnational organised crime is seen as the dark side of globalisation, threatening and damaging democracy and the economic basis of societies, weakening institutions and confidence in the rule of law.<sup>12</sup> On the one hand, transnational organised crime, like legitimate transnational corporations and financial institutions, responded to the opportunities opened by the increasing shift of power from nation-states to economic markets.<sup>13</sup> On the other hand, the immigration and criminal policies and laws of states may foster the market of the trafficking industry. Traffickers use the immigration policies of states to obtain control over their victims by placing them in a vulnerable immigration status. In many countries victims are prosecuted for violating

---

9 Cf. E. Guild, 2001.

10 It should be noted that it is the potential of a crisis rather than a crisis per se that came to be defined among experts and policy makers. The term ‘migration pressure’ refers to potential as opposed to existing flows of people, in relation to the absorptive capacity of regions of destination (Cf. Straubhaar, T., 1993). After the mass exodus expected following both the end of Cold War and the economic and political degradation in the countries of origin of migration failed to transpire, the term came to be widely used to refer to the potentiality of the crisis rather than its existing manifestations. The fear underlying this phrase is well underlined in the UNCTAD and IOM document: “The growing concern over international migration in industrial countries not only stems from the rising scale and changing characteristics of contemporary migratory movement, but also from demographic, economic and political forces that could unleash far greater migration movements in future years” (UNCTAD & IOM, 1996, p. 15.) The term has also been criticised for being an expression of a political threat rather than an analytical tool (e.g. Tapinos, G. P., 1992). In economic terminology, however, terms like demand, supply and pressure are rather common (see Fisher, P. A. et al., 1997).

11 There is a discussion of the political reactions to increased post-Cold War movements of persons in Europe in Bade, K.J., 2000, pp. 390–39.

12 See e.g. Statement made at the Birmingham G8 Summit in Birmingham, UK, 16 May 1998; Communiqué of the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime, Moscow, 19-20 October 1999; Collinson, S., 1999.

immigration/aliens law (e.g. for undocumented entry and presence in the territory even though their entry was obtained by force, deception or coercion) and/or criminal law (e.g. for sex offences).<sup>14</sup> In addition they usually have no effective legal recourse against their abductors either in their home country or in the country to which they were trafficked. Traffickers may also be aided in their work by public opinion within the state. Today it is very often the case that the phenomenon of international migration is associated with a number of negative connotations, increasingly tied to perceptions of abuse of asylum systems, lack of border controls, threat to national security and international stability, as such contributing to the expansion of trafficking and smuggling. In many countries sex industry workers are stigmatised, undocumented individuals are viewed as criminals, and as convenient scapegoats for the community's ills, including unemployment, budget deficits, crime and declining education systems. Racism and xenophobia can further fuel the hostility.<sup>15</sup>

The response to trafficking has been to increase the policing of borders, and to adopt legislation criminalising acts of trafficking - and even, in some cases, all forms of assistance to migrants travelling without documents. However, if immigration and criminal laws exclude victims of trafficking from the protection of the state and fail adequately to protect them or deny them the civil rights accorded to citizens and legal immigrants - as was the case in the USA until recently<sup>16</sup> - these very laws permit traffickers to control their imported victims to the extent that victims have no viable alternative than to remain within the confines defined by the trafficker.

Due to these reasons, this has become a particularly important area of the activity of the European Union in the field of criminal co-operation. There has been increased emphasis at the EU level on border controls as being central to security in particular after the terrorist attacks of 11th September in the USA.

---

13 *Ohmae, K., 1995.*

14 *See United Nations Economic and Social Council, 2000, pp. 22 and 28.*

15 *Ibid, p. 16.*

16 *The Victims of Trafficking and Violence Protection Act of 2000 liberalises immigration policy and decriminalises the victims, redefining them as lawfully present and endowing them with the civil rights that the State parcels out to all lawful immigrants, in addition to creating new criminal laws to combat traffickers and increasing criminal penalties against them. See on this Friedman, B. and J. Stumpf, 2001.*

In the Commission's recent Communication on a Common Policy on Illegal Immigration (COM(2001)672 Final) the Commission proposes that "it has to be assessed, whether there is a continuing need to harmonise further the rules on smuggling in human beings. The minimum result should be that there is a binding framework for the prosecution of facilitators of illegal entries or their instigators and accomplices. This should include not only common definitions and basic requirements for the maximum sentence but also new minimum sanctions for the crimes concerned." (para 4.7.1).

In the same Communication, the Commission stresses that "there should be a reflection on future, more harmonised regulations with regard to carrier liability in an in-depth discussion among all interested parties. To this end trilateral talks will be held between member states, the transport industry and the Commission." (para 4.7.5). This is an area in which the EU is committed to further action. This has been apparent since the entry into force of the Amsterdam Treaty.

Furthermore, the European Commission on 10th April 2002 published a Green paper COM(2002)175 final on 'A Community return policy on illegal residents' in the European union following the recommendation of the Laeken European Council.

The European Council on 14 and 15 December in Laeken asked the Council in its Conclusion No. 40 – inter alia - to develop an action plan on the basis of the Commission's Communication on a Common Policy on Illegal Immigration of 15 November 2001. Consequently the Council adopted, on 28 February 2002, a comprehensive action plan to combat illegal immigration and trafficking of human beings in the European Union. This plan contains also a section on readmission and return policy, in which this policy area is identified as an integral and vital component in the fight against illegal immigration. The Council action plan asks for progress on the issues of transit and readmission, the identification of illegal residents, and the issue of travel documents for return purposes and common standards for return procedures.

In the 1999 Tampere Council's Conclusions, it was stressed in paragraph 48 that "Without prejudice to the broader areas envisaged in the Treaty of Amsterdam and in the Vienna Action Plan, the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first

instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting) drugs, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, (high tech crime and environmental crime)". Within the policy fields of Justice and Home Affairs governed by the forms of intergovernmental cooperation established by the Maastricht Treaty on European Union, anti-trafficking measures first concentrated on the fight against trafficking in women and children and later on trafficking in all human beings for purposes of economic and sexual exploitation.<sup>17</sup> In December 2000, a few days after the Palermo Convention was opened for signature, the European Commission produced a proposal for a *Council Framework Decision on combating trafficking in human beings*. This was a measure based on the provisions of Title VI of the Treaty on European Union as revised by the Amsterdam Treaty. The objective of the Framework Decision, which we will examine in more detail in section IV, is the criminalisation of trafficking in persons according to an agreed definition and the introduction in the Member States of certain sanctions of a minimum severity.<sup>18</sup> The approximation of trafficking laws is also part of a strategy of "the widest possible judicial co-operation" (see preamble). The Framework Decision is binding on Member States, and require them to modify their legislation and/or penal codes in order to comply with its provisions by 1<sup>st</sup> August 2004. This legislative instrument is to be seen in the context of the implementation of the Amsterdam Treaty, the Vienna Action Plan on the implementation of the Treaty's provisions on the "Area of Freedom, Security and Justice," and the October 1999 Tampere European Council Conclusions.<sup>19</sup> In its introduction it is stated that the Framework Decision should be seen as complementary to "the important initiatives presented by the French Presidency on facilitation of illegal entry, stay and residence".<sup>20</sup>

---

17 See European Commission, Directorate-General Justice and Home Affairs, *First meeting of the EU Forum on prevention of organised crime: Discussion paper on trafficking in human beings*, 2001.

18 COM(2000) 854 final /2, 2001/0024 (CNS), 2001/0025 (CNS) Brussels, 21/12/2000.

19 COM(2000) 854 final /2, p.1; See also Action Plan, 1998, Part I, B, 11 and Presidency Conclusions Tampere European Council, October 1999.

20 The French initiatives referred to are: first, a draft Directive defining the facilitation of unauthorised entry, movement and residence, and second, a draft Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence. The purpose of the draft Directive is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of the Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, in order to prevent that offence. See the reference to these measures in the press release relating to the 2350th Justice and Home Affairs Council, which met in Brussels on 28-29 May 2001. Political agreement was reached on these measures in September 2001 but their formal adoption was still pending at the end of 2001, the delay being occasioned by procedural necessities.

The common actions in the areas of policing and judicial cooperation in criminal matters are covered by Articles 30 & 31 TEU and Article 34 TEU. Since the entry into force of the Amsterdam Treaty there have been more than 28 adopted measures, including common positions, decisions and conventions. A Directive on carriers sanctions has been adopted to supplement Article 26 of the Schengen Implementing Agreement and further action is signalled by the Commission in the Communication on this topic. Also very relevant to the issue of trafficking in persons are: Decision 2001/513 on the Stop II programme on sexual exploitation and trafficking in persons (OJ 2001 L 186/7) and the Council Framework Decision on the standing of victims in criminal proceedings (OJ 2001 L 82/1). The second is very important for the effectiveness of any sanctions which may be placed on illegal entry and trafficking in human beings. The STOP II programme will now be succeeded by the Agis programme (2002-2007).

Of the proposed measures agreed by the Council last year, two are directly related to the questions: the French initiative on strengthening the penal framework to prevent the facilitation of illegal entry and residence (OJ 2000 C 253/6) upon which political agreement was reached at the JHA Mixed Council Committee on 28/29 May 2001; and the Council framework decision on trafficking in human beings (OJ L 203, 01/08/2002).

The issue of criminal penalties for carriers, illegal entry and residence and trafficking in human beings are very important areas for the European Union. They will also be a testing ground in criminal law coordination.

Thus, at the highest level of generalisation, trafficking in human beings is essentially a reflection of a failure in policy.<sup>21</sup> The trafficker, in a sense, helps to make the labour market more efficient by facilitating the movement of labour from where it is to be found to where it is needed. This transfer does not need to be in the best interests of the state of destination. Therefore, there is a continuous tension between the trafficking business and the state-controlled business of immigration control.

At global level, trafficking has been addressed by United Nations instruments, notably the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and

*Children, supplementing the United Nations Convention against Transnational Organized Crime.* This was adopted by the United Nations on 15 November 2000. Together with the *Protocol against Smuggling of Migrants by Land, Air and Sea*, it is intended to provide a framework for international cooperation against organised crime and to encourage Member States to legislate for implementation of the framework, with an emphasis on victim protection.<sup>22</sup> Since 1993, the various institutions of the European Union have also been engaged in a range of activities developing an approach towards the fight against trafficking in human beings. The European Union's policy approach has differed from that of the United Nations (or the United States, for that matter), following a more control (repressive) orientation, which has concentrated, on creating heavier penalties for traffickers. Compared to the other European Union institutions, the European Parliament approached the issue less from a control perspective, stressing more the need for protection of victims. It has condemned trafficking in several resolutions and commissioned reports on trafficking.<sup>23</sup>

The United Nations High Commissioner for Human Rights (UNHCHR) and the United Nations High Commissioner for Refugees (UNHCR) have expressed concern that the EU approach differs from the United Nations Protocol on Trafficking and in particular fails to link the two instruments sufficiently to one another. It has also been argued that several aspects of the proposed Framework Decision, in particular those dealing with protection of victims and witnesses, fell considerably short of established international standards.<sup>24</sup> In its discussion paper on prevention of trafficking in human beings published after the First Meeting of the EU Forum on the prevention of organised crime of 17 –18 May 2001, the European Commission indicated that it was “currently preparing a proposal for a legislative instrument on temporary permits of stay for victims that are prepared to cooperate to fight against their exploiters”. In fact, it decided first to prepare a discussion document on this

---

21 *Skeldon, R., 2000, p.12.*

22 *The convention and protocols were opened for signature at a conference in Palermo, Italy, from 12 to 15 December 2000. 124 of the UN's 189 member nations signed. Eighty signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and 70 signed the Protocol Against the Smuggling of Migrants by Land, Sea and Air. The provisions will enter into force after 40 states have ratified them.*

23 *See inter alia, European Parliament, 2001.*

24 *The lack of reference to even basic protective measures for victims and witnesses of trafficking, as well as the omission of a saving clause concerning asylum-seekers and refugees, may create an impression that such protection is both unimportant and optional in the fight against trafficking. See Observations by the UNHCHR, 2001.*

subject: this was published on 23 October 2001.<sup>25</sup> If the proposals of the document for enhanced protection of victims were implemented by legislation, then some, if not all of the international concerns mentioned, above may be met.

## **II. Trafficking, smuggling and victims: defining issues and a clarification of concepts**

Opinion about the concept and the definition of trafficking in human beings varies. The divergent approaches to dealing with trafficking according to the manner in which terms are used have been pointed out by several organisations.<sup>26</sup> In its preparation of the proposal of a framework decision (which entered into force on 1<sup>st</sup> August 2002), the Commission of the European Communities<sup>27</sup> specifically considered that the absence of commonly adopted definitions, incriminations and sanctions in the EU Member States' penal legislation was the main reason why the implementation of the EU's Joint Action of 24 February 1997<sup>28</sup> concerning action to combat trafficking in human beings and the sexual exploitation of children failed to achieve its objectives. In a broader sense the European Parliament also called for clear definitions.<sup>29</sup>

In the debate about the definition of trafficking several questions have arisen: first, there has been considerable confusion between trafficking and smuggling; second, there has been the question whether trafficking should be considered a form of illegal migration; thirdly, there is the general problem of separating legal from illegal migration. In general terms, "trafficking" implies an illicit trade in goods, such as drugs, arms or stolen goods such as works of art. Besides illegality, trade, profit and crime, coercion, deception, violence and exploitation are all associated with the concept of trafficking in humans. The main victims of trafficking are women and children. Therefore, the phrase "especially women and children" is frequently added, in order to underline the links between trafficking and sexual exploitation,

---

25 *Discussion Paper: Short-term Permit to stay granted to Victims of Trafficking or Smuggling who cooperate in the fight against smugglers and traffickers, Brussels 23 October 2001 (A/2/IGE D (2001)).*

26 *See e.g. Report of the Budapest Group, 1996, discussed in Vermeulen, G, forthcoming.*

27 *See COM(2000) 854 final /2.*

28 *See Official Journal, L 63, 4.3.1997, pp. 2-6.*

29 *Legislative proposal for a Council framework decision on combating trafficking in human beings (COM(2000) 854 – C5-0042/2001 – 2001/0024(CNS), in European Parliament, 2001, Justification of Amendment 15.*

pornography and paedophilia.<sup>30</sup> “Trafficking in persons” was at first defined with reference to prostitution.<sup>31</sup>

The international conventions of the first part of the twentieth century already provided specific definitions of “white slave traffic” “traffic in women and children”, “slavery” and “forced labour”.<sup>32</sup> Renewed debate over the precise definition of the concept of “trafficking” started, however, in the second half of the 1990s. More clearly than in the past, this debate has been linked to international migration, together with a discussion of the concepts of “illegal”, “irregular”, “unauthorised”, “undocumented” or “clandestine” migration, “smuggling” and “organised crime”, to name but a few notions which are intimately associated with “trafficking”. In addition to this confused and complicated situation, blurring the notion of ‘trafficking’ itself (described by Ronald Skeldon as a “definitional and conceptual morass”<sup>33</sup>) - a range of different terms has been used by different governments, agencies and other organisations and individual researchers or groups of researchers.<sup>34</sup>

Over the last year or so, states participating in various regional and global agreements and action plans have moved nearer to a consensus on the definition of these concepts. Specifically, there has been a growing insistence on a dichotomy between the concepts of trafficking and smuggling. Some organisations, International Organisation for Migration (IOM) for example, viewed the distinction more in theoretical than in practical terms. It defined trafficking as “the illicit engagement (through recruitment, kidnapping, or other means) and movement of a person within or across international borders, during which process the trafficker(s) obtains economic or other profit by means of deception, coercion and/or other forms of exploitation under conditions that violate fundamental human rights.” Smuggling in the migration context is defined as “the facilitation of illegal border crossing, often (but not necessarily) for financial gain.” Smuggling, in contrast with trafficking, “does

---

30 As in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations A/RES/55/25, General Assembly , 8 January 2001.

31 See the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (commented upon in Vermeulen, G., *op. cit.*).

32 Morrison, J., 2000, p. 9.

33 Skeldon, R. 2000, p. 8.

34 See e.g. IOM, 1999; IOM/TCC/ICMPD, 1999; Meese, J. et al., 1998.

not require an element of exploitation or violation of human rights.”<sup>35</sup> Others, such as the Budapest Group, Europol and Interpol also began to draw a distinction between the concepts of trafficking and smuggling. In those assessments, both were however deemed illegal and connected with organised crime or other types of crime as well.<sup>36</sup>

At the global level, this process of differentiation is best demonstrated by the work of the Vienna process during 1999,<sup>37</sup> which led to two protocols, supplementing the Palermo Convention on transnational organised crime. These protocols carefully distinguish between the terms “trafficking in persons” and “smuggling of migrants”.<sup>38</sup> Thus:

*“Trafficking in persons” shall mean 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.”*<sup>39</sup>

whereas

*“Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”*<sup>40</sup>

The difference between the phrases “in persons” and “of migrants” is one of movement. Trafficking can also take place within the borders of a state. The main elements differentiating trafficking from smuggling are, according to these definitions, the presence in the former case but not the latter of coercive, abusive or exploitative elements. It is these elements, which must be proved by the prosecution in trying someone for trafficking. Characterising trafficking in persons the UN Protocol specifies:

---

35 Also: Smuggling is the service provided by intermediaries who organise illegal crossing of international borders. See Glossary in van Krieken, P. J. (ed.), 2001.

36 See ICMPD, 1999.

37 Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime established by UN General Assembly resolution 53/111 of 9 December 1998. See UN General Assembly, AC/254/4/Add.3/Rev.4 and AC.254/4/Add.1/Rev.3.

38 UN General Assembly, A/RES/55/25.

39 Protocol to Prevent, Suppress and Punish Trafficking, Article 3 (a), the first part.

40 Protocol against Smuggling in Migrants by Land, Air and Sea, Article 3 (a).

*“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.”*<sup>41</sup>

At the EU level, the process of defining trafficking and smuggling has been taking place within the area of intergovernmental co-operation in criminal matters, though there is some cross-over of policy formulation between this “Third Pillar” area and the new Community provisions on migration introduced by the Amsterdam Treaty. As already indicated, in December 2000, a few days after the Palermo Convention was opened for signature, the European Commission produced a proposal for a Council Framework Decision on combating trafficking in human beings.<sup>42</sup> The Commission expressed the view that the existence of the two UN protocols “highlights the complexity of different forms of *criminal movements of people* that are operated by international criminal organisations”.<sup>43</sup> The difference between ‘smuggling’ and ‘trafficking’ is made on the basis of crime: in the wording of the Commission, “smuggling of migrants could be said to constitute a crime against the state” and “trafficking in human beings [to] constitute a crime against a person;” the former “often involves a mutual interest between the smuggler and the smuggled” and the latter “involves an exploitative purpose.”<sup>44</sup> Thus, with the objective of ensuring comprehensive coverage of criminal conduct; the offences of trafficking are defined, not focusing on cross-border movement, but on the distinctive exploitative purposes of trafficking, for both labour and sexual exploitation.<sup>45</sup> It is explained that the definition of trafficking contained in the proposed offences reflects the key elements of the UN Protocol’s definition. However, sharing most of the views of the UNHCHR, the European Parliament proposes the amendment of the definition of “trafficking in human beings” actually to incorporate completely the UN protocol’s definition.<sup>46</sup>

The Commission sees the facilitation of unauthorised entry, movement and residence as related to smuggling of migrants. The European Parliament regards the distinction between ‘trafficking’ and ‘smuggling’ as artificial but at the same time it agrees with the Commission that “in the interests of clarity, the two phenomena must be addressed by separate legal

---

41 *Protocol to Prevent, Suppress and Punish Trafficking, Article 3 (a), the second part.*

42 *COM(2000) 854 final /2, 2001/0024 (CNS), 2001/0025 (CNS) Brussels, 21/12/2000.*

43 *Ibid., Explanatory memorandum, p. 8, emphasis mine.*

44 *Ibid.*

45 *Ibid., Articles 1 and 2.*

instruments.”<sup>47</sup> Furthermore, the European Parliament proposes that further distinctions must be drawn between trafficking, smuggling and “non-profit facilitation of unauthorised entry.”

As a matter of official EU policy, ‘trafficking’ is now associated largely with the concept and purpose of exploitation, accompanied by human rights violations. ‘Smuggling’ implies the simple facilitation of the illegal crossing of a border – usually for some financial or material gain (although such a gain would not be a necessary condition for proving the offence under the proposed EU measure).

Although this general distinction has now been made, the understanding is by no means universal and it may be difficult to apply in practice (e.g. for prosecutors). Even if a distinction is made between ‘smuggling’ as a migration issue and ‘trafficking’ as a human rights issue, in most recent migration studies trafficking tends to describe movements of persons against their will, and smuggling refers to voluntary movement. In this sense we get two types of migrants: trafficked and smuggled. However, trafficking may sometimes involve an element of what has come to be defined as smuggling, particularly when it uses the same routes, forged documentation and organisational networks as the smugglers. Most trafficked persons will share the wishes of smuggled persons to be moved, though they will not anticipate the exploitation to follow or the human rights breaches, which accompany their removal. Equally those who agree directly to be smuggled, will frequently have little idea of the degree and nature of exploitation which could await them. Some empirical studies, conducted in different parts of the world, have shown that the distinction between smuggling, trafficking and other forms of population movements has become blurred. Skeldon, with a perspective from Asia, shows that violence, coercion and exploitation are as much an integral part of smuggling as they are of trafficking. The acknowledgment, e.g. by the European Parliament, that smuggling does not necessarily preclude exploitation and suffering, reflects an awareness of the many contradictions raised by the issues of trafficking and smuggling. There is need for a wider understanding of the human rights abuses sustaining both the trafficking and smuggling processes. A human rights analysis should concentrate on the abuse of rights of both smuggled and trafficked persons taking into account the representations of

---

<sup>46</sup> Together with a few linguistic changes, only the term ‘trafficking in persons’ is changed to ‘trafficking in human beings’. See *European Parliament, 2001*.

<sup>47</sup> *Ibid.*, Amendment 6.

human rights organisations. Questions relating to refugee protection and the right to seek and enjoy asylum arise here.<sup>48</sup>

It seems appropriate to view smuggling and trafficking as part of a continuum. Adam Graycar suggests that smuggling is clearly concerned with the manner in which a person enters a country, and with the involvement of third parties who assist them to achieve entry. Trafficking is a more complicated concept, in that it requires consideration not only of the manner in which a migrant entered the country but also their working conditions and treatment after entry and whether the migrant consented to the irregular entry and/or these working conditions. It is frequently difficult to establish whether there were elements of deception and/or coercion, and whether these were sufficient to elevate the situation from one of voluntary undocumented migration to trafficking.<sup>49</sup>

In addition, a clear separation between smuggling, trafficking and other forms of supposedly legal migration may be more apparent than real. Legal channels, for example for labour and settler migration, can be manipulated in order to gain entry to particular countries at particular times and can be arranged through the medium of brokers, usually in both countries. Trafficking might also be involved in other forms of apparently legal migration such as the movement of children for adoption and women as brides.<sup>50</sup>

Thus, if a consensus has been emerging at the level of policy formulation relating to the definition of trafficking in human beings, several questions of interpretation and application arise from the definition. These questions include: Who exactly must be regarded as a “victim” and what exactly is being “criminalised”? The answer is not always clear. When the subject of “trafficking versus smuggling” is placed within the broader concept of migration, and researched more deeply, it may be possible to improve concepts and terminology. One should not forget that the above-mentioned frameworks besides promoting cooperation among states, recommend implementation at the national level, with the aim being to prevent and combat trafficking in human beings and smuggling of human cargo and to protect and

---

48                    *See among others Morrison, 2000; Caritas Europa, 2001.*

49                    *Graycar, A., 2000.*

50                    *See European Parliament, 2001, Amendment 16.*

assist the victims of trafficking. But the frameworks do not purport to regulate migration policy or migration flow, recognising that migration in itself is not a crime.<sup>51</sup>

When contemplating the possibility of effective countermeasures to human trafficking, a key question arises over the differentiation of human trafficking from illegal migration. International conventions and specific national laws specifically proscribe human trafficking. Illegal migration is also by definition proscribed. But while the former is universally condemned, some governments have often unofficially tolerated the latter. Therefore, it is proper to wonder if there is continuity between human trafficking and illegal migration. Can one isolate unauthorised migration and employment from human trafficking? Is the difference between routine unauthorised employment of aliens and enslavement of foreign workers a difference in degree or in kind? Is it possible to condone illegal migration on the one hand and to condemn human trafficking on the other? Is it possible to dismiss the state's capacity to regulate international migration and simultaneously to call for more effective countermeasures against the crime of human trafficking?

Although understanding of illegal migration dynamics is fragmentary, there are ample reasons to suspect that the efforts to curb and punish illegal entry and illegal employment of migrants have created incentives for criminals to organise illegal entry and employment, which results in greater victimisation of migrants, including human trafficking. In general, perverse effects of efforts to prevent unlawful migration have been anticipated, but states strive nevertheless to make their public policies credible and authoritative.<sup>52</sup> However, it is scarcely self-evident, for instance, at what level measures to curb illegal migration foster human trafficking. There is a gradation between smuggling and illegal employment of foreigners that is considered less harmful than trafficking and enslavement of immigrants. Illegal migration tends to weaken or erode legitimate immigration networks, which makes patterns of tacit approval of illegal migration deplorable. Legitimate immigration systems protect immigrants best because they confer democratic legitimacy upon immigrant settlement and because immigration policy then occurs within the rule of law. It is very clear that effective human trafficking countermeasures

---

51 *Cf. Palermo, Press Release L/T74359 15 December 2000.*

52 *The spectre of foreign terrorist threats is consistently mentioned as a significant part of border deterrence strategies of the 1990s, in USA already from the 1993 World Trade Center bombing. According to one interpretation, it was desirable for the United States's security interests that raising physical and financial costs of clandestine crossing would diminish the chaos of small-scale mom-and-*

will require the elaboration of a comprehensive approach to regulation of international migration - this has so far proved elusive. New policy initiatives from the Commission (at least) do however emphasise this need for comprehensiveness in implementation of the Tampere agenda, with a balanced approach to illegal immigration being called for.<sup>53</sup>

Among the difficulties in this area of criminal law is the identification of who is the appropriate subject of criminal sanctions and who is a victim deserving protection. The same person who maybe the victim of a trafficker may, at the same time be also considered as the subject of criminal sanctions for irregular entry. As became clear in the debate in Greece on the new immigration law, if criminal law requires the immediate expulsion of persons irregularly on the territory, it is unlikely that there will be any chance of a successful prosecution of the perpetrators of trafficking as those able to give evidence against them will already be outside the jurisdiction of the tribunal. One of the many difficulties in the field is the degree of complicity between the trafficker and the victim. Culpability of one or the other depends on the distinction which is made between their respective responsibilities. The willingness or otherwise of the authorities to grant protection to victims depends to a substantial degree on the extent to which those authorities accept that the victims are indeed such and not accomplices of the traffickers. Little is known about the comparative situation as regards this critical aspect of the implementation of EU rules in the national law in different Member States.

Against this background, a variety of issues arise regarding national implementation and its consequences for the EU rules:

- (1) The interests of various commercial enterprises have become increasingly engaged as the cost of carrying out their lawful activities becomes more and more unpredictable when they may charged with criminal offences of trafficking because persons have stowed away on their vehicles. This is primarily a problem for the transport industry. Very often public opinion is sympathetic with the person charged, who is seen as the unwitting lorry driver who has been unfairly held responsible for some irregular

---

*pop operations along the border in favour of the larger, full-time enterprises, so that migrants would be funnelled through (monitored) criminal syndicates. See Kyle D. and J. Dale, 2001.*

<sup>53</sup> See *European Commission Communication on a common policy on illegal immigration, 15 November 2001 and European Commission discussion document on a short-term permit for victims of trafficking, 2001.*

migrants hiding in his van. But equally, public opinion demands serious culpability as was the case in respect of the driver of the truck in which the Chinese migrants died in Dover, or that the leaders of the criminal gangs are brought to justice.

- (2) Challenges to the use of criminal laws against trafficking in human beings on human rights grounds before the courts: An example of this type of challenge occurred in the UK in 1993 in the case of *Naillie* [1993] EC 674, House of Lords. Mr Naillie had helped some people (in fact family members) reach the UK with forged documents. They applied for asylum when they arrived. He was charged with the offence of assisting illegal entry. The court held that the offence could not apply to him because the individuals whom he assisted had sought asylum. This case highlighted the difficulty of determining responsibility of the trafficker and the victims in the light of human rights standards. If the victims apply for asylum to what extent do the courts in the Member States tolerate criminal charges against those who assisted their arrival? The issue arises not only in asylum cases but in other circumstances as well, for instance where children are brought for adoption in the Member States, or ill persons assisted to arrive and seek medical treatment (an issue currently under discussion in more than one Member State). These issues of legal challenges and the position of the court can either strengthen or weaken the legal legitimacy of the legislation on trafficking.
  
- (3) Challenges to the political legitimacy of criminal laws on trafficking: the legitimacy of criminal laws on trafficking depend on the acceptance by society of the fact that the persons who are convicted according to these laws are indeed responsible for harming the public good. Where a sufficient degree of social legitimacy is not attained for a legislative act those responsible for its introduction suffer a loss of authority and status. This issue arises not infrequently in the field of trafficking. On the one hand the public is outraged by the deaths of victims in the process of being trafficked, but on the other hand when those who are charged with the criminal offence of trafficking are unwitting lorry drivers or holiday makers a public outcry against the authorities is likely. For example, there have been press reports of cases (in France) where the use of criminal sanctions against individuals such as in the case of a British woman leaving France in the boot of whose car an irregular Sri Lankan was found has led to outrage in the public opinion.

### III. Review of current theoretical perspectives and research

There is also an obvious need for an improved theoretical understanding in which trafficking can be placed. The traditional explanatory theoretical frameworks of migration were conceived at a time when the world was very different. In recent years both the types and geographical patterns of international migration have altered greatly, warranting re-examination and re-evaluation of migration analysis. In addition, the conceptual and definitional uncertainties concerning the issues of trafficking in human beings referred to above challenge the traditional migration theories in a number of ways: they blur the boundaries between legality and illegality and between forced and voluntary movements.<sup>54</sup> A clearer theoretical framework is also needed to understand the degree of choice available to the migrant in the new migration order, notably where to move or to work. For the state, the new patterns of migration call for new forms of regulation, but these must respect more developed jurisprudence of courts and supranational as well as national legal norms. The geographical pattern of migration flows may be affected by regulatory definitions as well as influencing them.

Theoretical approaches towards trafficking/smuggling that are currently emerging are partially overlapping, primarily the economic and criminal justice policy discourses. According to the first discourse, migration can be conceptualised as global economic activity, in which trafficking is an intermediary business system facilitating international population movement. A hypothetical model of trafficking networks as business organisations based on reported events was proposed<sup>55</sup> and applied in the IOM studies on Poland, Hungary and Ukraine.<sup>56</sup> The extension of this “business model” suggested that trafficking should be viewed as a consequence of the “commodification” of migration, as a result of which organisations are able to profit from people’s mobility. Such commodification is a feature of global transnational migration in which there are roles for diverse institutions, of which

---

54 *Salt, J. 2000.*

55 *Salt J. and J. Stein, 1997; Salt, 2000.*

56 *Okólski, M., 1998; Juhász J.: 1999; Klinchenko et al., 1999.*

traffickers comprise one set.<sup>57</sup> However, further research is needed to see which features of this business are shared with legitimate businesses, how it is structured and how franchises, cooperation, take-overs and security work.

The market development of trafficking also needs to be further examined. ICMPD, for example, assumes that European integration and enlargement-related transition processes present new market opportunities.<sup>58</sup> Furthermore, “flexibilisation” of employment in the service sector across Europe has provided many opportunities for illegal working, into which traffickers can tap. These factors, combined with the marginalisation of certain groups in society as a result of rising unemployment in parts of Central and Eastern Europe, have led to the suggestion that a “re-feudalization” of the service sector is occurring.<sup>59</sup> A similar idea, which compares trafficking with the concept of slavery and involuntary servitude, has also been analysed against the background characterised by the growth of hidden sectors within European economies.<sup>60</sup>

The second development is to view both trafficking and smuggling as transnational organised crime.<sup>61</sup> Defining what exactly organised crime is has proved to be an extremely difficult task, not least in the EU.<sup>62</sup> The major goal of organised crime is to maximise economic gain and profit.<sup>63</sup> For organised crime to be successful there has to be an illegal market, the existence of which is directly related to the regulatory choices made by legislative authorities.<sup>64</sup>

The relationship between trafficking and organised crime, is, however, anything but straightforward. According to Salt, EUROPOL has evidence to substantiate a link based on the following factors: uniform transport arrangements are made for different nationalities; travel over great distances implies the existence of organisation on a considerable scale; travel in groups requires organisation; large amounts of money change hands; routes are changed

---

57 *Kyle D. J. and Z. Liang, 1998, as in Salt, 2000.*

58 *ICMPD, 1999.*

59 *Omelaniuk, I. 1998, in Salt, 2000.*

60 *Ruggiero, V., 1997.*

61 *According to the United Nations Convention against Transnational Organized Crime (Article 2 (a)) “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.*

62 *See European Commission, SEC(2001) 433.*

63 *See e.g. Ruggiero et al., 1998.*

quickly and easily when necessary, which implies a high level of organisation; immediate legal assistance is available when things go wrong; there is swift reaction to countermeasures taken by the authorities.

Despite these indicators, the degree to which trafficking, as a whole is a part of or synonymous with large-scale organised crime remains a matter of debate. Trafficking can be organised and complex, operating over long periods of time using sophisticated arrangements. The organisational structure that supports trafficking may be involved simultaneously in multiple criminal activities. There is a sort of vertical interdependence among the crimes committed by traffickers and an interdependence which is the outcome of specialisation, so that the more the traffickers are organised and stable, the more they tend to adopt methods which facilitate their trafficking operations by giving them the appearance of legality.<sup>65</sup> It would be incorrect however to assume that all trafficking is controlled by transnational organised crime. Conceptualising differences between migrant-exporting schemes and slave-importing operations, Kyle and Dale for example argue that there is much evidence that most smugglers participate in “crime that is organised” but not in “organised crime”.<sup>66</sup>

There is a growing body of knowledge about the involvement of organised crime in smuggling and trafficking - concerning the traffickers themselves, the amount of trafficking, smuggling routes, the nationalities trafficked, and also the characteristics of the people trafficked. But this knowledge does not reveal much direct information about the human rights abuses caused by trafficking. Some researchers see trafficking and smuggling as a response to humanitarian requirements. Here, attention is drawn to the importance of non-economic push factors. The point is made that asylum-seekers and economic migrants should not be regarded as interchangeable homogeneous “commodities”.<sup>67</sup> Trafficking and smuggling are also seen as the response and unintended consequence of restrictive policies: new policy initiatives on both trafficking and asylum force refugees to use illegal means of entry, whereby their vulnerability increases.<sup>68</sup> Others argue that placing trafficking firmly within the bounds of criminality, and thus illegality, makes it difficult to distinguish between those elements of migration regulation which are associated with trafficking but which

---

64 *Schloenhardt, A., 1999.*

65 *Ruggiero, 1997.; Skeldon, 2000.; Okólski, 1999; Savona, 1998.*

66 *Kyle and Dale, 2001; Cf. Finkenauer, J. O., 2001.*

67 *Juhász, J., 1999.*

involve the conferral of a quasi-legitimate status on the migrant and those cases where the status of migrant drifts in and out of legality during the process as a whole.<sup>69</sup> A few rare studies focus on human rights abuses after migrants reach their destination.<sup>70</sup> Trafficking in women for the purposes of sexual exploitation, and the law enforcement responses to this form of trafficking, have also been addressed. Liz Kelly and Linda Regan have estimated the number of women trafficked into conditions of sexual slavery in the UK and looked at the ways in which they are trafficked and the responses of all relevant agencies in tackling and preventing such trafficking. The study presents a range of recommendations to police, immigration services, local and central governments and many other organisations with a potential impact on this activity. A co-ordinated partnership response is suggested as likely to be the most effective in reducing the scale and cost of this criminal activity.<sup>71</sup>

In sum, theoretical developments and empirical studies in the field of trafficking are evolving, but more in-depth study and work is required. Trafficking is an area of primary importance for law enforcement agencies and researchers alike, given its consequences: the hazards faced by trafficked human beings and infringement of their human rights; crime; the destabilisation of relationships among states, and the huge profits available to the organised criminal groups involved. The failure of anti-trafficking and anti-smuggling efforts may in part be due to insufficient guidance from empirical research. In the USA, most law enforcement strategies have been built on the assumption that large criminal organisations are behind most smuggling/trafficking operations, even though there have been few successful prosecutions by US federal agencies and little real impact on smuggling and trafficking activities. The same could be said for Europe. Until now only a few studies have been undertaken in the Member States of the European Union in comparison with other world regions, such as Asia. More work has apparently been done in the candidate states than in the European Union.<sup>72</sup> There are few, if any, statistics of a comparative nature on prosecutions of traffickers, which might allow the impact of legislation on law enforcement to be assessed across different states.

---

68                    *See e.g. Koser, K, 2000. Koser, 2001, Morrison, 2000.*

69                    *IOM, 2000.*

70                    *See e.g. Chin, 1997, quoted in Graycar, 2000.*

71                    *Kelly, L. and L. Regan, 2000.*

72                    *Ceifo, Stockholm University, is undertaking a comparative study in five selected EU countries in the framework of research on The Changing Boundaries of the European Migration Order: The Geography of Illegal Migration and Asylum-Seeking.*

## IV. Key European Union Legal Developments

European Union policy to combat trafficking is seen by the institutions as part of the Union's overall strategy to combat organised crime, so here one can indeed draw out the second theoretical strand referred to in the previous section. As we will see, however, a major problem of the Union is to implement any kind of common criminal law policy in the absence of formal legal competence over criminal law matters. Only with the entry into force of the Amsterdam Treaty in 1999 did the Union acquire certain rights of direct legislative intervention in the criminal law of the Member States, and then only to a limited degree.

Trafficking in persons is referred to in Article 29 of the Treaty on European Union as a type of criminal activity in respect of which the Union is called upon to undertake preventive and repressive measures: such measures may comprise co-operation between law enforcement agencies and judicial authorities as well as the "approximation, where necessary of rules on criminal matters in the Member States". The scope of such approximation is, however, strictly limited in accordance with the terms of Article 31 (e) of the Treaty which empowers the Union only, in the context of common action on judicial co-operation in criminal matters, progressively to adopt "measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking." The limits of this provision are currently being tested in the context of the European Commission's strategy to combat various forms of cross-border organised crime. To the repressive side of this strategy belong efforts to secure a common prohibition and sanctioning of crimes including drug trafficking, corruption, environmental crime, racism and xenophobia as well as trafficking in persons.

That trafficking in persons is viewed, as a matter of legal policy, as a form of serious organised crime becomes evident if one looks at the Union's strategic paper on organised crime published in May 2000.<sup>73</sup> Recommendation 7 of this document confirms the Treaty goal of adopting instruments with a view to approximating the legislation of Member States: such instruments should take into account "minimum standards of the constituent elements of offences and penalties." Trafficking in persons, particularly exploitation of women, and

---

<sup>73</sup> Council of the European Union and European Commission, *The Prevention and Control of Organised Crime: A European Strategy for the Beginning of the New Millennium*, Official Journal, C 124, 23.05.2001.

sexual exploitation of children, is listed as a matter for regulation. The level of penalties sought is not mentioned nor prescribed in this strategic document but at Tampere in 1999 the European Council called for “severe sanctions” against persons involved in trafficking in human beings and the economic exploitation of migrants. It was at Tampere that the Union committed itself to putting forward, by the end of 2000, on the basis of a Commission proposal, certain legislation to achieve this objective. This is the policy background to the Framework Decision already discussed. Framework Decisions are the European Union legislative measures envisaged by Article 34 of the Treaty on European Union as the appropriate vehicle for approximating national criminal laws of the Member States.<sup>74</sup> In its proposal for legislation, the Commission justifies the use of the Framework Decision on the basis that it “will reinforce a common approach of the European Union in this area and fill gaps in existing legislation.”

Before the Union could turn itself to the question of penalties for trafficking in persons, it of course had first to address the principal question of substantive criminal law, namely whether the Member States had an offence of trafficking in the first place. Arguably, you can only “approximate” what is already there; in any case, it was clear that Union policy implied the introduction or extension of criminal law offences by Member States which had to date left trafficking either unregulated or under-regulated. In this regard, it is pertinent to refer to some of the studies and reports conducted into the extent to which European countries have laws against, and punish, trafficking.

In the context of Congress’ enactment in the United States of the Victims of Trafficking and Violence Protection Act of 2000, the US Department of State, proceeding from its understanding of the US legislation as “standard-setting”, examined in a wide-ranging report how the rest of the world addressed trafficking.<sup>75</sup> Various countries in Europe fell under scrutiny as to whether they met the US’ “minimum standards for the elimination of trafficking.” These minimum standards are applied by the report to new legislative or law enforcement initiatives and are assessed according to a number of criteria, including whether the national legislation enhances pre-existing penalties against traffickers, whether it affords

---

<sup>74</sup> As to the legal effects of such measures, Article 34 (2) (b) 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.”

new protection to victims (including the making available of certain benefits and services to victims of severe forms of trafficking) and whether or not “Cabinet-level” federal interagency task forces are established to investigate and prosecute trafficking.<sup>76</sup>

The US State Department report criticises inter alia Greece for failing to meet some of these standards, alleging that the Greek Government or criminal justice authorities had failed to acknowledge trafficking as a problem, had not addressed severe forms of trafficking by legislation and had rarely brought trafficking cases to trial (and where they had done so, sentences had been light). It is clear, however, that Greece has not been the only “offender”: the action taken at United Nations level in the form of the Protocol against Trafficking in Persons bears out the need for all countries to make a much greater effort to penalise and punish traffickers – and to protect victims. With regard to the latter point, the Protocol serves not only to encourage states to adopt practical measures to protect the human rights of victims and their special needs but to consider giving them some residence status “in appropriate cases”. The Protocol also emphasises that anti-trafficking legislation must not interfere with the application of rights accorded to states of persons under international law (“including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein”).

Among other studies on European anti-trafficking laws, one can highlight a background paper of the Organisation for Security and Co-operation in Europe (OSCE) of September 1999.<sup>77</sup> The OSCE paper addresses in some detail the inadequacies of national legislation regarding trafficking, pointing the finger at both countries of destination and countries of origin (“source countries”). With regard to source countries and certain European states of destination, the following shortcomings are listed:

- lack of specific anti-trafficking laws;

---

75 USA State Department Trafficking in Persons Report, July 2001 (*Victims of Trafficking and Violence Protection Act 2000*).

76 The “federal” aspect clearly reflects the US domestic situation but this coordination approach is clearly relevant to the discussion of task forces led or assisted by Europol - and perhaps in future by Eurojust.

77 Organisation for Security and Cooperation in Europe Review Conference, September 1999, ODIHR Background Paper, 1999/3 (<http://www.osce.org/odihr/documents/background/trafficking/>)

- narrow scope of and low penalties associated with statutes used to prosecute traffickers: these statutes often focused solely on prostitution or sexual exploitation and failed to encompass trafficking for forms of forced labour or slavery-like practices;
- absence of or failure to apply specialised law enforcement techniques to anti-trafficking operations (e.g. wire tapping, undercover techniques, seizure and forfeiture laws – these methods are typical means of tackling modern organised crime);
- narrow interpretation of existing statutes, e.g. requirement of actual force or restraint in respect of trafficked persons.

More generally, the OSCE report argues that trafficking has been regarded as a low priority offence or law enforcement priority in most destination countries. There is alleged to be a lack of political will arising from “unspoken biases, confusion and disbelief over the issue”. The other side of the coin is that in most destination countries action is first taken against the trafficked persons, not the traffickers themselves: persons caught residing or also working illegally in the country face immediate deportation. This, explains the report, in turn defeats the objective of going after the criminals who had instigated the trafficking: “The strict immigration policies and procedures relating to deportation of illegal migrants or workers work at cross-purposes with efforts to prosecute trafficking crimes and to protect the human rights of the victims.”

This approach adds credence to our view that policy towards trafficking remains very much rooted in security concerns about uncontrolled immigration. The European Commission’s initiatives are only tentatively beginning to adopt a more holistic approach. The main motivation of the Framework Decision is to secure a common minimum level of incrimination and sanctions. This could not be achieved by the weak legal instrument of the “Joint Action”, which was devised by the Maastricht Treaty on European Union but quickly jettisoned as a toothless instrument by the Amsterdam Treaty, once it became clear that the “Third Pillar” of the European Union would indeed entail a certain amount of law-making, and not only intergovernmental co-operation between officials and ministers, resulting in non-binding texts.<sup>78</sup> In its provisions regarding criminalisation of trafficking, the Framework Decision, upon which entered into force on 1<sup>st</sup> August 2002<sup>79</sup>, may be said to adhere to the approach of

---

78 *Cullen, 2000.*

79 *Council framework decision of 19 July 2002 on combating trafficking in human beings, 1.8.2002 L 203/1 Official Journal of the European Communities*

the United Nations Protocol, whose “key elements”, as the Commission puts it in its explanatory memorandum, are contained in the definitions one finds of trafficking for the purposes of labour exploitation and of sexual exploitation.<sup>80</sup> Each of these definitions attempts both to cover the whole chain of trafficking events and to delineate the exploitative elements.

Most of the difficulties in negotiation of the Framework Decision against trafficking centred around the issue of approximation of penalties.<sup>81</sup> The solution finally adopted has been to distinguish, first of all, between less serious offences of trafficking and aggravated offences, for which a minimum maximum sentence of eight years imprisonment must be prescribed (maximum penalty that is not less than 8 years). The aggravating circumstances will “kick in” where the offence has endangered the life of the victim, has involved other particularly inhuman or degrading treatment or where the offence has been committed as an activity of a criminal organisation as defined in other EU instruments. One cannot obviously speak of “harmonisation” of penalties when referring to the “minimum maximum penalty” solution. The European Union is simply not empowered by the Treaties to prescribe particular criminal sanctions so the Commission approach, eventually endorsed with some reservations by the Council, probably represents as far as one can go at present in approximation under the Treaty on European Union. Nevertheless, one should not underestimate the symbolic and practical significance of the agreement reached on criminalisation of trafficking according to a common definition and of the agreement to punish severely serious trafficking offences.

When discussing instruments enacted under Title VI of the European Union – the so-called “Third Pillar” of the Union – one must give some attention to the widely discussed weaknesses of that legal regime from the point of view of democratic scrutiny and legal

---

<sup>80</sup> *Sexual exploitation of children and child pornography are to be sanctioned by a separate instrument, proposed at the same time as the anti-trafficking measure..*

<sup>81</sup> *For evidence of this, see the confidential report, published by the Council presidency on 21 May 2001, on the proposed Framework Decision, which refers to the obstacles in the way of approximation of laws on penalties arising from the different legal traditions of Member States and from their different sentencing systems: “when proposals for new EU legislation is put forward and discussed, the definition of the offences and the proposed level of sanctions needs to be assessed in relation to national legislations. It must also be born in mind that the sentencing systems vary – for instance some Member States do not have minimum penalties –and the time effectively served can be very different, depending on early release, probation etc. So the variation of the national systems has to be taken into account and it should be kept in mind that the systems are not likely to be harmonised in this short and medium term. Therefore certain flexibility in relation to the consistency of the national systems is needed.” [Authors’ note: the grammatical and speaking mistakes in this*

control. These are complaints which have resurfaced recently in the context of the elaboration of European Union measures to combat terrorism in the new security situation post-September 11 2001. European Union Framework Decisions establishing a European Arrest Warrant and defining action against terrorism were launched in the wake of the attacks on the United States.<sup>82</sup> The European Parliament is of course not empowered with rights of “co-decision” in Third Pillar questions, thus limiting its role in respect of Framework Decisions to that of a football manager shouting instructions from the sidelines to his players (the Council) who may or may not be inclined to listen. National parliamentary control is dependent upon the effectiveness of scrutiny procedures and upon the efficiency of communication and transmission of documents from governments, and can all too often operate either in isolation from Brussels-based decision-making or far too slowly to be able to influence the European dimension.<sup>83</sup>

With regard to the question of legal control, it is important to mention that Article 31 of the Treaty on European Union prevents the Framework Decision from the possibility of its taking direct effect. This reduces the possibilities for the national courts to control application by national authorities. Any rights conferred on individuals under Framework Decisions can therefore be enforced only by other legal devices, possibly including the principle of state liability. This would have to be decided by the European Court of Justice, whose jurisdiction over Third Pillar matters is however much more limited than its Community law jurisdiction.

One must also bear in mind here that the Commission may not enforce the implementation of Framework Decisions as that is a power it possesses only with regard to Community legislation. “First Pillar” or Community law instruments offer both greater possibilities for protection of the individual and more scope for effective implementation.<sup>84</sup> This contrast will be seen when the European Union measures concerning facilitation of unauthorised entry, movement and residence (i.e. “smuggling” of persons) enter into force. These measures are to

---

quotation are contained in the original text: Council of the European Union Document 8599/1/01 REV 1 LIMITE DROIPEN 43 MIGR 41, Brussels, 21 May 2001].

82 See the two Proposals for Framework Decisions on combating terrorism and on the European Arrest Warrant and the surrender procedure between Member States, respectively: COM (2001)521 final, Brussels 19.9.2001 and Com (2001) 522 final 2, Brussels 25.9.2001.

83 Cf. Kerse, 2000.

84 See generally on the legal distinction between Community and Union activities Usher, J.A, 1998.

be partly based, as we have seen, on a Directive, i.e. an instrument of Community law.<sup>85</sup> Therefore, at least as far as the offence of facilitation is concerned, one could rely directly on Community law, including fundamental rights, in an appeal against conviction before the national courts (who could also refer to the European Court of Justice). By contrast, it is by no means clear that, in the case of a conviction for trafficking under legislation implementing the Framework Decision, the same level of judicial protection would be available. It is well known that the European Convention on Human Rights is applied quite differently across the Union, so one could not be sure that equal protection of persons could be ensured with respect either to suspected traffickers or their victims.

In summing up this aspect of the Framework Decision one can therefore again conclude that repressive elements against would-be traffickers outweigh the protective dimension of victims.

## **Conclusions and Recommendations**

The new dynamic of migration flows, closely related to profound geo-economic and geo-political changes and new forms of migration management, is having a great impact on the whole of Europe. At the beginning of the twenty-first century, with fertility rates declining and the resulting slow-down of labour supply, in the context of increased labour demand - notably for the highly-skilled and in some cases for unskilled labour - a new migration order is emerging. This new order has its roots in the profound changes that have taken place in migration since the 1970s, changes in intensity and quality, involving new directions and new regions (especially new regions of destination). This order is characterised by two apparently paradoxical features: greater restrictions on the movement of people on the one hand and the promotion of a more liberal order on the other. It appears paradoxical because, while the principles of liberalism proclaim the moral right of individuals to move freely and the economic efficiency of the free flow of means of production, including labour, there are important restrictions on the movement of people, based mostly on security arguments. Beyond convergence on policy regulating the entry and circulation of persons, the new

---

85

*Refer to footnote 152.*

European order is defining closed spaces of mobility and fixity.<sup>86</sup> The growing trend towards managing migration policies at regional (and global) levels should be perceived as a process whereby various interests struggle to define the categories of migration and codify the realm of permissible versus the realm of illegal movement of people.

The current policy of the European Union is to ensure that all EU Member States illegalise smuggling and trafficking in humans in a broadly comparable way. New policy initiatives, which are mainly oriented towards short-term cures through increased border checks at external borders and more punitive measures against carriers and traffickers in the context of transnational organised crime, may make trafficking harder but it is questionable whether they are a) properly balanced with protection of fundamental human rights of the victims, including the right to asylum and b) with preventive policies and actions. Thus, much of existing policy-making is part of the problem and not the solution.

A comprehensive approach to counteract trafficking in human beings should develop simultaneously at global and European levels. Management of migration flows as it evolves in the cross-pillar EU approach has limited itself largely to defensive control.<sup>87</sup> Human trafficking is, however, a global phenomenon and ought to be treated as such. A global migration regime comparable to the international refugee regime might help in this direction.

Any comprehensive approach that tackles trafficking and smuggling requires legal and safe migration opportunities as well as necessary enforcement measures. A diversified set of policies should be used, with closer attention paid to the “long path characteristic” of the phenomenon of “illegal migration”. Crime control policies can be implemented only when the behaviour becomes illegal, and this is usually in the last part of the “circuit”, the one most difficult to control and disrupt. Besides crime control policies, protective and preventive measures should be more carefully developed, specifically:

---

<sup>86</sup> The word “area” is significant in implying not only a certain unification of laws and policies within the EU regarding justice and home affairs, but also to use Harvey’s term a “spatial fix” of mobility. The French term *espace* and German *Raum* are equally, if not more, evocative of the idea of a certain closed policy and legal space.

<sup>87</sup> Cf. Medved, F. 2000.

1. **An understanding of the Phenomenon of trafficking, smuggling and who are the victims** in particular, there is the need for instruments and structures for in-depth analysis of different categories and patterns of illegal immigration

2. **The compliance with International Obligations and Human Rights** in order to conduct the fight against illegal immigration in a sensible way and to strike a balance between

- (i) The right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those in need of international protection. In particular, obligations to protect arising from the Geneva Convention on Refugees (Articles 33 and 31), and the European Convention on Human Rights (Art. 3).
- (ii) A degree of refugee protection compatible with a system of efficient countermeasures against irregular migratory flows.
- (iii) Finally, whatever the measures designed to fight illegal immigration, the necessity to respect the specific needs of potentially vulnerable groups like minors and women.

In this respect, according to the Commission, the possibilities of offering rapid access to protection should be explored. These could include, for instance, a wider use of Member States discretion in allowing asylum applications to be lodged from abroad. Otherwise, the procedure could be quickened by processing the requests of protection in the region of origin, facilitating at the same time the arrival of refugees on the territory of the Member States by resettlement schemes.<sup>88</sup>

3. **An actor-in-the-Chain Approach** as an element of an efficient management of migration flows in order to monitor and influence irregular movements from the countries and regions of origins via the transit countries to the destination countries, as well as within the external borders of the EU. Therefore, the fight against illegal immigration requires the mobilisation of a number of external policy aspects, designed for all actors in the chain, as well as continuing participation in other international forums, such as UNHCR or IOM (see below)

4. **The prevention of Illegal Immigration** is another crucial element of a common policy on illegal immigration. From this point of view, the best model to balance repression and prevention seems to be the multidisciplinary approach put forward by the Commission in May

2001 at The European Forum on prevention of organised crime. In the latter, attention to the prevention has been devoted to the specific field of trafficking in human beings.

One issue that is usually overlooked is the necessity to improve the dissemination of information regarding legal migration. For example when a revision of the quotas of legal immigrants takes place, e.g. for demographic reasons, or because the relevant country needs to recruit highly skilled workers who are not available within its territory, this information would have to be widely publicised. The information system could be based on an open co-ordinating method with plural-annual guidelines issued.

**5. The Enforcement of Existing Rules** under the Maastricht regime and Schengen and their monitoring (see below)

**6. Adequate Sanctions for Criminal Activities**, which are connected with irregular migration flows, especially trafficking and smuggling in human beings. The UN Convention against Transnational Organised Crime and its two accompanying protocols on trafficking in persons and smuggling of migrants<sup>89</sup> should be ratified and their provisions implemented in a co-ordinated manner at EU level. In September 2001 the JHA Council reached political agreement on a Framework Decision on combating trafficking in human beings,<sup>90</sup> this should contribute to the facilitation of law enforcement and judicial co-operation in criminal matters. It also provides for common sanctions starting with a term of not less than eight years' imprisonment if the offence has been committed in specifically defined circumstances. The proposal for a Framework Decision on smuggling of migrants with a view to harmonise the Member States penal legislation and to ensure as soon as possible the implementation at national level, was politically agreed at the Council in May 2001. Furthermore, common standards are important for dealing with illegal employment, the liability of carriers and regulations on illegal entry and residence. Besides criminal punishment, the cost of illegal immigration should be raised by a number of measures with financial impact on traffickers and smugglers, but also on employers of illegal residents.

In February 2002 Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who co-operate with the competent authorities was issued as announced.<sup>91</sup> It is clearly intended as an instrument to combat illegal immigration whereby the concept of "victim of action to

---

<sup>88</sup> Cf. *Communication towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, COM (2000) 755 final.

<sup>89</sup> Cf. *UN Doc. A/55/383 of 2 November 2000 and COM (2000) 760 final*

<sup>90</sup> Cf. *COM (2000) 854 final*.

facilitate illegal immigration" has a very specific meaning of persons who have suffered harm. Although the residence permit itself offers de facto "protection" against deportation (it gives access to the labour market, education and vocational training, greater access to medical care, it includes an integration programme with a view to settling or returning to the country of origin), it is not a measure specifically aimed at the protection of victims nor of witnesses.<sup>92</sup>

Furthermore, the Commission communication outlines measures and co-operation for the Action plan, which can be divided into external (such as further harmonisation of visa policy, pre-frontier measures, border management, readmission agreements) and internal measures (such as Aliens and Criminal Law, sanctions concerning smuggling and trafficking, illegal employment and financial advantages from illegal immigration). It also provides the supportive infrastructure and instruments for operational co-operation and co-ordination.

#### **7. Protection and assistance to the victims should comprise:**

- Provision of protection and compensation for victims of trafficking;
- Action to secure the cooperation of victims in investigations against their exploiters;<sup>93</sup>
- Repatriation of victims should be carried out in a humane manner and in consultation with countries of origin; and
- Procedures affecting victims must respect obligations under the 1951 Geneva Convention and the European Convention on Human Rights. The reservations about the EU Framework Decision expressed by the UNHCHR and UNHCR and other organisations concerned with victim protection should be further examined.

Thus, **in the medium term** the creation of a single technical support agency could be envisaged for:

- (i) information gathering, exchange, analysis and dissemination (European Migration Observatory, Early Warning System (EWS)),

---

<sup>91</sup> Brussels, 11.02.2002, COM(2002) 71 final 2002/0043 (CNS).

<sup>92</sup> See also the framework decision of 15 March 2001 on the status of victims in criminal proceedings, OJ L 82, 22 March 2001, p. 1; and the Council Resolution of 23 November 1995 on the protection of witnesses in the framework of the fight against international organised crime, OJ C 327, 7 December 1995, p. 5.

<sup>93</sup> Cf. Speech by Antonio Vitorino, Conference on the Fight against the Channels of Illegal Immigration, Paris, 20 July 2000; cf. European Commission Discussion paper-on short-term permits to stay, 2001.

- (ii) systems management (SIS, Eurodac, European Visa Identification System), with regard to migration management in general
- (iii) the operational concept of European Border Guard (via co-ordination of administrative co-operation such as training and curriculum in police school (CEPOL) and /or European Border Guard School, co-ordination and planning of operational co-operation)
- (iv) The advanced role of Europol, in the detection and dismantlement of criminal networks in the fight against illegal immigration. Europol should be given more operative powers in legally binding manner (cf. conclusions of the EU Police Chiefs Operational Task Force in March 2001)
- (v) the European judicial network and Eurojust

## References

Action Plan of the Council and the Commission submitted to the Vienna European Council, 13844/98, Brussels, 11 December 1998.

Bade, K.J., 2000: *Europa in Bewegung: Migration vom späten 18 Jahrhundert bis zur Gegenwart*, published C.H. Beck, München.

Caritas Europa: Fair Treatment for Asylum Seekers, Caritas Europa position paper on key standards for the reception of asylum seekers and for asylum procedures, February 2001.

Collinson, S., 1999: *Globalisation and the dynamics of international migration: the implications of the refugee regime*, New Issues in Refugee Research, Working Paper No.1, UNHCR, Centre for Documentation and Research, Geneva.

*Communiqué* of the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime, Moscow, 19-20 October 1999.

Cullen, P. 2000, "The Third Pillar: Criminal Law Aspects of 'Convention Law'", in Usher, J. (ed.) *The State of the European Union: Structure, Enlargement and Economic Union*, Longman: Harlow.

*Council framework decision* of 19 July 2002 on combating trafficking in human beings, 1.8.2002 L 203/1 Official Journal of the European Communities.

European Commission, Communication from the Commission to the Council and the European Parliament on a community immigration policy, Brussels, 22 November 2000, COM (2000) 757 final.

European Commission, Communication from the Commission to the Council and the European Parliament Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, Brussels, 22. 11. 2000.

European Commission, Communication from the Commission to the Council and the European Parliament Combating trafficking in human beings and combating the sexual exploitation of children and child pornography, COM(2000) 854 final /2, 2001/0024 (CNS), 2001/0025 (CNS) Brussels, 21/12/2000.

European Commission, Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, COM (2001) 672 final, Brussels, 15.11.2001.

European Commission, Directorate-General Justice and Home Affairs, First meeting of the EU Forum on prevention of organised Crime: *Discussion paper on prevention of trafficking in human beings*, Brussels 17-18 May 2001.

European Commission, 2001, Directorate-General Justice and Home Affairs, Discussion paper-on short-term permit to stay granted to victims of trafficking or smuggling who cooperate in the fight against smugglers and traffickers, 23 October (document A/2/IGE D (2001)).

European Commission staff working paper: Joint report from Commission services and EUROPOL “Towards a European strategy to prevent organised crime” Brussels, 13.03.2001, SEC(2001) 433.

European Parliament, 2001, Session document A5-0183/2001 FINAL, Report on the proposal for a Council framework decision on combating trafficking in human beings, 30 May.

Finkenauer, J. O., 2001: Russian Transnational Organized Crime and Human Trafficking, in David Kyle and Rey Koslowski (eds.) 2001: *Global Human Smuggling: comparative perspectives*, Baltimore: The Johns Hopkins University Press. pp. 166-186.

Fisher, P. A., Martin, R. and Straubhaar. T.,: Should I Stay or Should I Go?, in Hammar, T., Brochmann, G., Tamas, K. and Faist, T. (eds.) *International Migration, Immobility and Development*, Oxford, New York: Berg, 1997, pp. 49-90.

Friedman, B., Stumpf, J.: *Speaking a New Language: Immigration and Civil Rights in a Global Economy*. Paper presented at the ISA Research Committee on the Sociology of Migration conference “Migration Between States and Markets”, Liège, May 17-19, 2001.

Graycar, A.: *Human Smuggling*. Paper presented at the Centre for Criminology, The University of Hong Kong, 19 February 2000.

Guild, E.: 2001, *Moving the Borders of Europe*, Inaugural Lecture, University of Nijmegen.

Hughes, D. M.: The “Natasha” Trade - Transnational Sex Trafficking, *National Institute of Justice Journal*, January 2001.

International Centre for Immigration Policy and Development (ICMPD), Secretariat of the Budapest Group: *The Relationship between organised crime and trafficking in aliens*, Vienna, June 1999.

International Organisation for Migration (IOM): *International migration instruments and institutions current status and identified gaps*. Discussion paper. International Symposium on Migration Berne, 14- 15 June 2001.

International Organisation for Migration (IOM): *The role of legal systems in the combat against human trafficking*, Statement of the International Organisation for Migration (IOM) in the International Seminar on Trafficking and Sexual Exploitation of Women, Porto, 6-7 December 1999.

IOM/TCC/ICMPD: *Migrant Trafficking and Human Smuggling in Europe*, Geneva 2000.

Juhász J.: *Human Smuggling and the Trafficking of Migrants in Hungary*, IOM, Geneva, 1999.

Kelly, L., Regan, L.: *Stopping Traffic: Exploring the extent of, and responses to, trafficking in women for sexual exploitation in the UK*, Police Research Series Paper 125, 2000.

Kerse, C. "Parliamentary Scrutiny of the Third Pillar", *European Public Law*, 2000, pp. 81-101.

Koser, K.: Asylum Policies, Trafficking and Vulnerability, *International Migration*, Vol. 38(3) SI 1/2000. *International Migration*, Vol. 38(3) SI 1/2000, pp. 91- 106.

Koser, K, 2001: The Smuggling of Asylum Seekers into Western Europe: Contradictions, Conundrums, and Dilemmas, in David Kyle and Rey Koslowski (eds.): *Global Human Smuggling: comparative perspectives*, Baltimore: The Johns Hopkins University Press. pp. 58- 73.

Kyle, D., Dale, J., 2001: Smuggling the State Back In: Agents of Human Smuggling Reconsidered, in David Kyle and Rey Koslowski (eds.) 2001: *Global Human Smuggling: comparative perspectives*, Baltimore: The Johns Hopkins University Press. pp. 29-57.

Medved, F., 2000: Politika migracij in azila v transgresiji Evropske unije, (Migration and Asylum policy in the transgression of the European Union) *Razprave in gradivo* (Treatises and Documents) 36/37, Ljubljana: Institute for Ethnic Studies, pp. 207-226.

Meese, J., K Van Impe, and S. Vanheste: *Multidisciplinary Research on the Phenomenon of Trafficking in Human Beings from an International and National Perspective: A Pilot Study with Poland and Hungary*, University of Ghent Research Group Drug Policy, Criminal Policy, International Crime, Ghent, 1998.

Morrison, J., July 2000: *The trafficking and smuggling of refugees: the end game in European asylum policy?* Pre-publication Edition, UNCHR.

Observations by the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees on the Proposal for an EU Council Framework Decision on Combating Trafficking in Human Beings. 27 June 2001

*Official Journal of the European Communities* C 364, 18.12. 2001.

*Official Journal of the European Communities* L 063, 4. 3. 1997.

Ohmae, K., 1995: *The End of the Nation State: The Rise of Regional Economies*, Harper Collins: London.

Okólski, M.: *Migrant Trafficking in Poland: Actors, Mechanisms and Combating*, preliminary results of the IOM/ISS 1998 study. Final report presented to ICMPD, Vienna, 1999.

O'Neill R. A.: *International Trafficking in Women to the United States: A contemporary Manifestation of Slavery and Organized Crime*, Central Intelligence Agency, November 1999.

Organisation for Security and Cooperation in Europe Review Conference, September 1999, ODIHR Background Paper, 1999/3

(<http://www.osce.org/odihr/documents/background/trafficking/>)

OSCE, Final Report, Supplementary Human Dimensions Meeting on Trafficking in Human Beings, Vienna, 19 June 2000.

Palermo, Press Release L/T74359 15 December 2000.

Presidency Conclusions Tampere European Council 15 and 16 October 1999

Proposal for a Council Framework Decision on combating trafficking in human beings, COM(2000) 854 final /2, 2001/0024 (CNS), 2001/0025 (CNS).

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations A/RES/55/25, General Assembly, 8 January 2001.

Report of the Budapest Group prepared by Belgium and Poland with the support of IGC for the Meeting of the Expert Group of the Budapest Group: Anti-Trafficking Model Legislation, Ljubljana, 13-14 June 1996.

Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 23 November 1999, UN General Assembly, AC/254/4/Add.3/Rev.4.

Revised draft Protocol against Smuggling in Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime, 23 November 1999, UN General Assembly, AC.254/4/Add.1/Rev.3.

Ruggiero, V.: Trafficking in human beings: slaves in contemporary Europe. *International Journal of the Sociology of Law*, Vol. 25, 1997, pp. 231-244.

Salt, J., 2000: Trafficking and Human Smuggling: A European Perspective. *International Migration*, Vol. 38(3) SI 1/2000, pp. 31-54.

Salt, J., Stein, J.: Migration as a business: the case of trafficking, *International Migration*, Vol. 35 (4), 1997, pp. 467-494.

Ruggiero *et al.* (1998) [eds.] *The New European Criminology*, Routledge: London.

Savona, E. U.: *Illicit trafficking in arms, nuclear material, people and motor vehicles, the most important things we have learnt and priorities for future study and research* paper prepared for the "meeting of leading academic experts within the framework of multidisciplinary group on organised crime" Brussels, Belgium, 18th - 19th May 1998.

Savona, E.: Trends and Causes of Cross-Border (Organised) Crime in Europe, forthcoming in Vol 33 of *Schriftenreihe of Academy of European Law*, Trier.

Schloenhardt, A.: *Organised Crime and the Business of Migrant Trafficking: An Economic Analysis*, Australian Institute of Criminology, AIC Occasional Seminar, Canberra, 10 November 1999.

Skeldon, R.: Trafficking: A perspective from Asia. *International Migration*, Vol. 38 (1), SI 1/2000, pp. 7-30.

Statement made at the Birmingham G8 Summit in Birmingham, UK, 16 May 1998.

Straubhaar, T.: Migration Pressure, *International Migration*, Vol.31, 1993, pp. 5-41.

UNCTAD & IOM: *Foreign Direct Investment. Trade, Aid and Migration*. Current Studies Series A no. 29, United Nations, Geneva 1996.

United Nations Economic and Social Council, February 2000: *Integration of the Human Rights of Women and the Gender Perspective*.

Usher, J.A, 1998: EC Institutions and Legislation, Harlow, Longman

Tapinos, G. P.: Migratory Pressure: An Expression of Concern or an Analytical Concept? in Tapinos, G. P. and Keely, C.B., *Migration and Population: Two Views on International Migration*, Working Paper of the World Employment Programme Research, ILO, May 1992.

UN General Assembly, A/RES/55/25.

USA State Department Trafficking in Persons Report, July 2001 (Victims of Trafficking and Violence Protection Act 2000).

Vermeulen, G. forthcoming, 2002 "International Trafficking in Women and Children", General Report to International Association of Penal Law conference of 2001.

Victims of Trafficking and Violence Protection Act of 2000 (144 STAT. 1464, Public Law 106 –386, 106th Congress)

van Krieken, P. J. (ed.), 2001: *The Migration Acquis Handbook*. The Hague: T.M.C. Asser Press.

Vitorino, A: Speech at the Conference on the Fight against the Channels of Illegal Immigration, Paris, 20 July 2000.

Finally, it will be argued, to seek global management for orderly movements of people, is justifiable. Controlling illegal immigration is among the most challenging policy topics facing EU and there are no easy answers to this complex and conflicting issue. Illegal immigration must be controlled to a credible degree for many reasons including maintaining support for asylum policies and 'newly opened' legal immigration as well as integration of lawfully resident immigrants, but addressing illegal immigration requires more than recent and prospective initiatives propose. Therefore, the challenge of the EU is to dedicate itself to long term active solving of migration problems. This could start by:

- (i) taking a hard look at the real economic, social and human implications of 'illegal' migration rather than concentrating on constant tightening of external border and other control measures. Securitisation and criminalisation of migration are perhaps tempting in responding to the domestic political problem, but cannot solve the larger immigration and refugee problems and can easily compromise basic principles of justice;
- (ii) focusing on "international migration as the missing link between globalisation and development" (Rubens Ricupero, United Nations Conference on Trade and Development (UNCTAD), IOM, 2001) and on
- (iii) migration as the "missing regime" in a new world order, particularly if the European Union is to have, as declared in Laeken, a leading role to play in a new world order and the governance of globalisation.

