# AWARENESS-RAISING OF JUDICIAL AUTHORITIES CONCERNING TRAFFICKING IN HUMAN BEINGS

## The European Legal Framework

## to Fight Trafficking in Human Beings

## 2005

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# 1. INTRODUCTION

*This report aims to give an overview of the current instruments and developments in the fight against trafficking in human beings (THB) within Europe. Recently, some new challenges have come to light regarding the fight against trafficking. The first challenge can be found in the enlargement of the European Union with ten central and eastern European countries. THB has a serious impact in these countries, since it concerns countries of destination, transit and origin. Furthermore the new Constitutional Treaty for the EU constitutes another development which might enhance criminal co-operation within the EU and consequently tackles THB. Finally one can notice the increase of attention for victims which is reflected in the human rights approach of some of the (proposed) instruments. This approach puts its main focus on the human rights of trafficked persons, in addition to border measures and the focus on the prosecution of those suspected of THB, which were so far the main concerns of the countries involved. This report takes the view that a breach of human rights is inherent to the crime of THB. On the basis of several international provisions (for instance Article 6 CEDAW, Article 8 ICCPR, Article 4 ECHR) states are obliged to undertake appropriate measures in order to provide the protection foreseen in these provisions.

This report is divided in two main parts. The first part (sections 2, 3, and 4) concern the (legal) provisions on fighting THB of three important organisations in Europe namely the European Union (EU), the Council of Europe (CoE) and the Organisation for Security and Co-operation in Europe (OSCE). In the second part (sections 5,6, and 7) the provisions on criminal co-operation relevant for fighting THB adopted within the EU and the CoE are discussed and evaluated. Aware of the fact that a vast number of non-binding instruments on THB has been adopted within the EU, the CoE, and the OSCE this report will mainly deal with the legally binding instruments.[1] However, some attention will be paid to the Report of the Experts Group on Trafficking in Human Beings, since the European Commission will issue a Communication regarding trafficking in human beings in the first half of 2005 based on this report.
Section 7 of this report analyses the problems in the field of criminal co-operation that may be an obstacle to an efficient prosecution of those suspected of trafficking in human beings within the EU. Consequently it addresses THB from a criminal law perspective and covers THB with a transnational character (which is the majority of the trafficking cases). After the identification of the problems, the establishment of a Joint Investigation Team as a possible instrument to deal with these problems is discussed on the basis of an initiative to set up such a team to fight THB from and through Bulgaria, before the final conclusion will be made.

* Special thanks goes to Marleen Havens, assistant at the European and International law Department of the University of Tilburg, for helping me with the writing of this report.
[1] A complete picture of policy and legal instruments on fighting THB and criminal co-operation within the EU, the CoE, and the OSCE can be found in: *C. Rijken*, Trafficking in Persons, Prosecution From a European Perspective, T.M.C. Asser Press, Den Haag, 2003, pp. 91-152.

# 2. PRESENT LEGAL PROVISIONS ON TRAFFICKING IN HUMAN BEINGS WITHIN THE EU

Despite the fact that many documents on trafficking in persons are adopted within the EU, only few of them are binding. Those legal provisions relevant for fighting THB within the EU will be discussed below.

## 2.1 The Council Framework Decision on Combating Trafficking in Human Beings

This framework decision was set up in reply to the failure of full implementation of the Joint Action of February 1997.[2] According to the Commission, the main reason for this failure was the absence of commonly adopted definitions, incriminations, and sanctions in the Member States.

The harmonisation of the definition of trafficking in persons within the EU was achieved in July 2002. In December 2000 the Commission made a proposal for a Framework Decision on Combating Trafficking in Human Beings. The original proposal distinguished between trafficking in human beings for the purpose of labour exploitation and trafficking in human beings for the purpose of sexual exploitation. However, following comments on this distinction, these two articles were merged, resulting in the following definition in the final Council Framework Decision.[3]

> Each Member State shall take the necessary measures to ensure that the following acts are punishable:
>
> the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:
>
> (a) use is made of coercion, force or threat, including abduction, or
> (b) use is made of deceit or fraud, or
> (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
> (d) payments or benefits are given or received to achieve the consent of a person having control over another person
>
> for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

[2] OJ L 63, 4.3.1997, pp. 2-6.
[3] Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, OJ L 203, 1.8.2002, pp. 1-4.

As stated in the preamble and as follows from the formulation of this article, the Trafficking Protocol to the United Nations Convention on Transnational Organised Crime[4] was the guiding text for the establishment of the framework decision. Unlike the Trafficking Protocol, it is not necessary for the framework decision that the crime is transnational in nature and is committed by an organised crime group. The border crossing as such is not a requirement in the definition. This means that also trafficking within a country or within the EU is included in this framework decision. The decision was published on 1 August 2002 and became fully operational on 1 August 2004 as by then the Member States had to have taken the necessary measures to comply with the decision.[5]

In the original text of the proposal, paragraph (d) of Articles 1 and 2 adopted an open phrase with regard to the term abuse: it stated 'there is another form of abuse'. This means a broad interpretation of the term 'abuse' and consequently a broad application of the term 'coercion', including those coercive acts that are not common practice at the moment but may become so in the future. It is regrettable that such an open phrase has not been adopted in the final text of the framework decision.

Furthermore, the term 'exploitation' in the Trafficking Protocol must be understood more comprehensively than in the framework decision, where exploitation is limited, in short, to labour exploitation and sexual exploitation. For instance, exploitation through the removal of organs is not included in the framework decision.

As we will see below, a framework decision is legally binding although it lacks direct effect in the Member States. Because this instrument is legally binding, this particular framework decision may become an authoritative instrument to combat trafficking in persons at the European level.

Articles 4 and 5 regulate the liability of and sanctions on legal persons. This is the first time that legal persons are addressed explicitly with regard to trafficking in persons. The explanatory memorandum does not indicate whether or not this is done to meet an increased involvement of legal persons. Article 6 reflects the current leading principles in international law to establish jurisdiction. Besides the territoriality principle, the active nationality principle, in which the nationality of the offender is decisive in the granting of jurisdiction, is explicitly mentioned.

The definition of the framework decision is largely based on the Trafficking Protocol to the UNCTOC. However, the protection of and assistance to the victims is dealt with in detail in the Trafficking Protocol but is almost completely absent in the framework decision.[6] The framework decision only provides 'adequate legal protection and standing in judicial proceedings' although the proposals suggested some guarantees for the victims. This is a missed opportunity and has

[4] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention against Transnational Organised Crime, GA Res. 55/25, annex II 55 UN GAOR Supp. (no. 49) at 60, UN Doc. A/45/49 (Vol. 1) (2001).
[5] Article 10 of the Council Framework Decision on Combating Trafficking in Human Beings.
[6] Compare Chapter II Trafficking Protocol and Article 7 Framework Decision.

met with comment at the UN level.[7] The critics stated that 'aspects dealing with protection of victims and witnesses fall considerably short of established international standards'. Furthermore, it is regrettable that no reference was included on the prevention of trafficking by diminishing the root causes of trafficking such as poverty, unemployment, and gender discrimination.

Article 9 in the first draft of the proposal contained a provision on co-operation between Member States, which included a recommendation to use the existing applicable instruments. This article was simply skipped in the final text, which is highly regrettable, especially in view of the necessity for intensified co-operation. Unfortunately, no new provisions were proposed in this regard, except a provision on jurisdiction and prosecution. The role of Europol, which was included in earlier drafts of the framework decision, was also omitted.

Thus, the measures to be taken to prevent trafficking, to assist victims, and to cooperate with third countries, etc., are not dealt with or only vaguely referred to in the framework decision, which must, in my view, be considered as a missed opportunity. The possible reason could be that states may perhaps be more inclined to adopt this framework decision when they retain the authority to tackle these issues as they see fit.

## 2.2 Council Directive 2004/81 on residence permit[8]

Since the Treaty of Amsterdam, visas, asylum, immigration, and other issues related to the free movement of persons have moved from the third to the first pillar. The provisions on visas, asylum, immigration, and other related areas of free movement of persons are communautarised in Title IV of the EC Treaty. It is clear that Article 61, paragraphs a and b, and Article 63 open the way for a European immigration law.[9] The main aim of this title is the abolition of all internal border controls and to shift these controls to the external borders. In this sense, migration law is connected to trafficking in human beings and it must be admitted that the free movement of persons can be counterproductive in the fight against trafficking in persons: it may be to the advantage of the traffickers that the persons being trafficked do not need to fulfil formalities when moving to another EU country once they have entered the EU. Therefore, it is deemed necessary to conduct certain provisions on the EU level in this area. The Council Directive on the residence permit, mentioned above is one of them. This directive is based on Article 63 point 3 and consequently the instrument of a directive was chosen rather than of one of the third pillar instruments.

According to Article 1, the purpose of this directive is to define the conditions for granting residence permits of limited duration to third-country nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration. This means that the aim of the directive is twofold: on the one hand, to obtain the co-operation of victims of

[7] *United Nations High Commissioner for Human Rights*, Observations by the UNHCHR and the UNHCR on the Proposal for a EU Council Framework Decision on Combating Trafficking in Human Beings.
[8] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L261, 6.8.2004, p. 19.
[9] *R. Barents*, Het Verdrag van Amsterdam in werking, Europese Monografieën 62, Kluwer, Deventer, 1999, pp. 349-375.

trafficking and illegal immigration for criminal procedures and to provide assistance to these victims by granting a residence permit, on the other.

The directive includes provisions specifically drafted for the protection of victims. The most important is of course the introduction of a temporary residence permit for victims who cooperate with the judicial authorities in criminal matters. Witnesses who are not (yet) victims of the crime of trafficking seem to have been forgotten. The protection that can be obtained under this directive is rather elaborate, apparently based on Article 6 of the Trafficking Protocol to the UNCTOC; it includes social, financial, legal, psychological, and medical aid. According to point 16 of the preamble and Article 11, victims are allowed to work and to receive education as soon as an application for a temporary residence permit has been submitted. The third-country nationals concerned shall be granted access to special programmes set up for reintegration, either in the country of origin or the country of residence and to their recovery of a normal social life (Article 12). According to Article 6 of the directive, a reflection period must be granted to the victims allowing them to recover and escape the influence of the perpetrators and to consider whether they want to cooperate with the competent authorities. During this period, it is not allowed to expel the victim from the country. It is to be welcomed that, in the directive, trafficking in human beings is seen as a separate crime and not necessarily as part of illegal immigration. In many earlier EU documents, the crime of trafficking was considered as being part of illegal immigration, impeding the adoption of effective measures for trafficking.

The main comment on this directive is that it is aimed at third-country nationals, so nationals of other EU Member States cannot invoke this proposed directive. After the accession of ten Central and Eastern European countries to the EU on 1 May 2004, many countries that are source countries of trafficking became part of the EU. Consequently, the victims who are nationals of these states are left empty handed as they do no longer belong to a third county. Furthermore, it seems that nationals who are staying in one of the EU states on a valid permit fall outside the scope of this directive as well. Besides, when victims do cooperate, they can only be granted a temporary residence permit for a minimum of 6 months. This means that the victim will ultimately have to leave the country (Article 13) unless the Member State has adopted national legislation allowing the victim to stay. This is not a very attractive perspective for the victim if she does not want to return to her home country and a reason for victims not to file a complaint. Therefore, under certain conditions, a permanent residence permit should be considered for such victims. A last comment is that the directive only concerns victims and is not applicable for witnesses.

## 2.3 Report of the Experts Group on Trafficking in Human Beings 22 December 2004

On 25 March 2003, the European Commission set up a consultative group, to be known as the Experts Group on Trafficking in Human Beings[10]. The main assignment of this Experts Group was to provide the commission a report with concrete proposals on the implementation of the recommendations of the Brussels Declaration on Preventing and Combating Trafficking in Human Beings. This report was submitted on 22 December 2004 and as a result the European

[10] OJ L 79, 26.03.2003

Commission has planned to issue a Communication regarding trafficking in human beings in the first half of 2005 which has not been done so far.
Below the main recommendations of the report will be dealt with.

*a. Definition Trafficking*
The Experts Group first of all focus on the definition of trafficking. They state that the focus should be on the exploitation of victims rather than or in addition to the transport phase of the trafficking. The emphasis on the movement of the trafficking induces the risk of confusion with smuggling and illegal migration and causes difficulties in the prosecution of trafficking. The exploitation must be seen as the core of the human rights violation in trafficking cases which must be fought.
It urges all EU Member States to ratify and implement the UN Trafficking Protocol. Finally, the Experts Group recommends that all forms of trafficking will be criminalized, regardless of the crossing of borders and/or the involvement of organised crime.

*b. Human Rights Approach*
The Experts Group states that a human rights approach should be integrated as a normative framework in the further development of policies and measures against trafficking[11]. In other words, the European Commission and the Member States have to consider the human rights impact when preparing and adopting anti-trafficking measures, furthermore they have to establish mechanisms to monitor the human rights impact during the implementation of such measures.
Taking in mind the human rights approach, the present imbalance between the attention paid to crime control strategies and provisions of adequate remedies to trafficked persons, is also the subject of concern. Therefore the Experts Group urges the Commission to take the initiative for the adoption of a legally binding EU instrument covering the standing of trafficked persons in order to protect the human rights of trafficked persons. This instrument should lay down minimum standards of treatment to which all trafficked persons are entitled and ensure that trafficked persons are provided with access to adequate and appropriate remedies, independent of their capacity or willingness to cooperate in criminal proceedings or to give evidence.[12] Especially this latter provision is rather new as in the Council Directive on Residence Permit discussed above as well as in most provisions on witness protection on the national levels the testimony of victims is conditional to protection for witnesses.[13] Such an instrument should include provisions on the treatment of a trafficked person as a victim of crime, the rights to information and advice, the right to privacy, the right to protection, the right to compensation, the development of special court procedures and the establishment of non-confrontational and non-judgmental investigative techniques.[14]

*c. Assistance and protection trafficked persons*
The Experts Group is pleading for more attention to assistance and protection of trafficked persons, both on the EU-level and on the level of national States. Moreover, States are obliged under international human rights law to provide victims of human rights violations with effective

[11] Report Experts Group page 61
[12] Report Experts Group page 61
[13] Italy is the exception to this practice as no conditions are formulated for victims to make use of the protection program.
[14] Report Experts Group pages 112-113

remedies.[15] These remedies include assistance, protection and compensation, regardless of their willingness or capacity to testify against their traffickers[16]. The Experts Group further specify the basic social assistance that trafficked persons should be entitled to which includes a safe accommodation, health care, counseling, legal assistance, education, training and employment opportunities[17].

An additional problem relating to anti-trafficking strategies is the identification of trafficked persons. Trafficked persons are reluctant to identification because they fear violent retaliation by traffickers against themselves or family members at home. On the other hand, trafficked persons do not want to reveal their status or experiences to State authorities since they fear arrest and deportation because of their illegal status[18]. To overcome these problems the Experts Group proposes that all involved actors, including government actors, law enforcement, NGOs, local social welfare organizations, labour unions, labour inspections and other labour related agencies will be trained in the identification and besides this a system of referral should be developed[19].

Another aspect of assistance to trafficked persons is the granting of a reflection period followed by a residence permit. The Experts Group proposes the adaptation and implementation of the Council Directive on the residence permit issued to third-country nationals[20].
Furthermore the Experts Group proposes similar protection measures to family members of trafficked persons. It is stated that family members should be entitled to temporary or permanent residence on the same conditions as the trafficked person, if there are substantial reasons to believe that family members are at risk in the home country[21].

The victims of trafficking need particular protection in the light of potential retaliation or intimidation before, during or after criminal proceedings. The challenge is to find ways to obtain testimonies from trafficked persons while at the same time ensuring their safety and without exposing them to further risks.

Aside from these proposals the Experts Group further recommends the development of pro-active, intelligence led investigative techniques without reliance on the testimony of the victims. It is however explicitly stated that “Intelligence led” approaches, should never be used to legitimize a neglect of the necessity for protection and assistance of trafficked persons[22].

In conclusion it can be stated that the Experts Group has given some concrete proposals to combat the Trafficking in Human Beings and clear indications of the focus in this combat. For

[15] States however are reluctant to classify THB as a violation of human rights as this might justify claims against a state from victims of THB. In this authors view this reluctance is indeed grounded but only for those states who are obvious negligent in fighting THB.
[16] Report Experts Group page 101
[17] Report Experts Group page 110
[18] Report Experts Group page 101
[19] Report Experts Group page 104
[20] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L261, 6.8.2004
[21] Report Experts Group page 107
[22] Report Experts Group page 125

the moment, we have to wait for the Commission to issue a communication for the impacts the proposals of the Experts Group will have for the future.

# 3. LEGAL PROVISIONS ON TRAFFICKING IN HUMAN BEINGS WITHIN THE COUNCIL OF EUROPE

The CoE addressed the topic of THB now and then in its discussions but it received the attention of the CoE on a more structural basis at the end of the nineties. In 1997 the CoE adopted in a recommendation to elaborate a convention on trafficking in women and forced prostitution.[23] Although this idea was broadly supported a convention on the subject was established only recently. The final text of the Council of Europe Convention on Action against Trafficking in Human Beings was adopted on 3 May 2005.[24] Initially the aim was to draft a new treaty that was distinct from other (European) instruments. It took the human rights approach as the starting point for the new convention. However, it seems that this track is left during the negotiations as this convention is more a copy of already existing provisions instead of a real new instrument taking human rights as a starting point. The convention shall be discussed hereinafter.

*The Convention on Action against Trafficking in Human Beings*
The Council of Europe's Committee of Ministers mandated the Ad Hoc Committee on Action against Trafficking in Human Beings, which is known as CAHTEH, was instructed to draft a European Convention on Action against Trafficking in Human Beings by December 2004. The specific terms of reference regarding the CAHTEH stressed the special focus on the human rights of the victims of trafficking and the design of a comprehensive framework for the protection and assistance of victims and witnesses, also taking gender equality aspects into consideration, as well as on the effective prevention, investigation, prosecution and on international co-operation.[25]

The draft convention was approved by the CAHTEH at the beginning of December and was subsequently submitted to the Committee of Ministers. Contrary to the human rights approach which was one of the main initial objectives of the convention, many involved NGO's feared the failure to significantly enhance the assistance and protection of trafficked persons currently available under some national or European Union legislation.[26] Their opinion was based amongst other things on the fact that a reflection period *of at least three months* was not

[23] Traffic in Women and Force Prostitution in Council of Europe Member States, Parliamentary Assembly, Recommendation 1325 (1997).
[24] Council of Europe Convention on action against trafficking in human beings, CM(2005)32 Addendum 1 final, 3 May 2005.

[25] Revised specific terms of reference, Adopted by the Committee of Ministers on 14 April 2004, at the 881st meeting of the Ministers' Deputies.

[26] More than 170 non-governmental organizations, from 30 countries have given a statement urging the Council of Europe's Committee of Ministers to strengthen the draft European Convention against Trafficking in Human Beings which was submitted in November 2004. (text of the NGO Joint Statement is contained in appendix 2 of Council of Europe: Recommendations to strengthen the December 2004 Draft European Convention on Action against Trafficking in Human Beings (AI Index: IOR 61/001/2005).

guaranteed in the draft. In the final text a reflection period of at least 30 days is foreseen in Article 13. Although this is a minimum provision it is a very short term. Furthermore, there are no provisions which enable family reunification when a trafficked person is issued a residence permit. In addition to this, NGO's draw successfully attention to the fact that trafficked persons only had access to emergency medical assistance and a provision was included providing necessary medical or other assistance to victims who do not have adequate resources and need such help, (Article 12(3)).

The content of the draft convention is clearly based on other existing international instruments concerning THB and includes provisions on prevention, co-operation, return, investigation and prosecution, assistance of victims etc. However, some novelties, in the convention must be highlighted. Most of these provisions were earlier reflected upon in policy documents of various organisations but so far not included in a legal instrument. Article 6 of the convention for instance, provides for measures to discourage the demand which is seen as one of the main reasons for the existence of THB. Another novelty can be found in Article 5 paragraph 4 which states that appropriate measures, to enable migration to take place legally shall be taken. Furthermore, on several places in the convention it is provided that states shall ensure that the different authorities and organisations collaborate and cooperate with each other. The immediate transmission of reports of victims abroad to the competent authorities of the country where the investigation and prosecution takes place is an example of such a provision. Another codification of a remedy to a problem earlier identified is the provision that no removal shall take place before the identification process as victim of THB has been completed. From Article 27 it can be concluded that the drafters also have struggled with the difficulty that the investigation and prosecution is not to much dependent on the report or accusation made by a victim. However, a real remedy is not foreseen in this article. Another provision that deserves attention here is Article 19 in which states shall consider to criminalize the use of services of a victim of THB. The explanatory text to the convention explicitly states that this provision is not concerned with using the services of a prostitute as such but only if the prostitute is exploited in connection with THB.

After long discussions and negotiations a monitoring mechanism is now included in Chapter VII. According to Article 36 a group of 10 to 15 experts (called GRETA), chosen from the States Parties, shall monitor the implementation of the convention. GRETA has the task to adopt a report and conclusions on each Party's implementation to the Convention. In addition the Committee of the Parties shall be established, composed of the representatives in the Committee of Ministers of the Parties to the Convention and of representatives of Parties non-members of the Council of Europe, which may adopt recommendations, on the basis of the report and conclusions of GRETA. In the explanatory text to this convention reference is made in point 362 to the Rules of Procedure of the Committee of the Parties. These rules should take into account the number of votes cast by the European Community in order to ensure equal participation and to make sure that all parties to the convention will be monitored effectively.
In Article 40(3) the so-called disconnection-clause was adopted stating that members of the EU shall apply Community and European Union rules without prejudice to the object and purpose of the convention. Following the explanatory text the reason for the adoption of this clause is to take account of the institutional structure of the Union in order to indicate that EU Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves. It was reiterated that the Member States of the EU will be bound by the

convention and will apply it like any party to the convention and that they will guarantee the full respect of the provisions in the convention vis-à-vis non-EU parties. Although it is not to be expected in theory this clause could lead to less far-reaching agreements among EU Member States than are adopted under this convention.

With regard to the application of the European Convention on Action against Trafficking in Human Beings one can refer to article 45 of the Convention. This article states that no reservations may be made in respect of any provision of the Convention. Considering the fact that this is a strong claim, many States may consequently be reluctant to ratify this European Convention or adopt more far reaching provisions in the convention.

# 4. EFFORTS OF THE OSCE TO FIGHT TRAFFICKING IN HUMAN BEINGS

Although the OSCE is not entitled in general to adopt legally binding instruments it has addressed the topic of THB from the early nineties and achieved some interesting networks in fighting this crime. Therefore, the picture would not be complete if these efforts were left out of this report.

The OSCE has adopted a background paper and a proposal for an Action Plan and concrete suggestions for OSCE projects and initiatives.[27] The Office of Democratic Institutions and Human Rights (ODIHR) of the OSCE has supported several projects in recent years in the fight against THB, such as training seminars. The ODIHR has furthermore appointed an Adviser on Trafficking Issues to help the OSCE on how to best contribute to the fight against trafficking. The proposed Action Plan 2000 of the ODIHR, based on the background paper, aims to suggest specific actions for the OSCE and its participating states to address THB and to integrate anti-trafficking measures into their activities. In this plan THB is considered one of the most pressing and complex human rights issues in the OSCE region. It furthermore defines the role of the Advisor on Trafficking Issues. The Final Report of the Supplementary Human Dimension Meeting on THB[28] contains detailed provisions on how to implement the Action Plan. Raising awareness, integrating the issue into the activities, strengthening the position of women in general, training law enforcement officers and judicial staff, intensifying co-operation with NGOs, enacting legislation in the participating states to counteract trafficking and legislation on victim protection and prevention, increasing co-operation at the police and judicial levels seem to be the most important recommendations. Furthermore, Ministerial Council decision no. 1 of November 2000, Ministerial Council decision no. 6 of December 2001, and the Porto Ministerial Declaration of 2002 stress the importance of fighting THB and reiterate the recommendations that were made in previous documents of the OSCE. Besides the OSCE has adopted Anti-Trafficking Guidelines that include provisions on awareness and training, monitoring and reporting, and coordination, and suggest concrete actions for fieldworkers.

More recently, the OSCE has adopted the OSCE Action Plan to Combat THB.[29] The aim of this Action Plan is to incorporate best practices and an advanced approach into the anti-trafficking policies, and to facilitate co-operation among participating States, and tasks all OSCE bodies with enhancing participation in anti-trafficking efforts of the international community. Protection in this Action Plan is not limited to the victims and witnesses but must also be available for relatives and other persons close to them. It further suggest an increased role for NGOs to support victims in court hearings and specific training programmes for authorities by specialised units of the OSCE. Awareness-raising in various fields, such as diplomatic and immigration

[27] Organization for Security and Co-operation in Europe, *Trafficking in Human Beings: Implications for the OSCE*, Review conference, September 1999, ODIHR Background Paper and Action Plan 2000 for Activities to Combat Trafficking in Human Beings, OSCE-ODIHR, Warsaw, November 1999.

[28] Supplementary Human Dimension Meeting on Trafficking inhuman Beings, Final Report, OSCE, vienna, 19 June 2000.

[29] Organization for Security and Co-operation in Europe, 462nd Plenary Meeting, Decision No. 557, OSCE Action Plan to Combat THB, 24 July 2003.

services, is explicitly mentioned in the plan. Concrete actions for OSCE Institutions and Bodies must be realised on; data collection and research, addressing root causes of THB (including the demand in countries of destination), awareness-raising, training, protection of children.
Another important effort of the OSCE in combating THB is the establishment of the Special Representative on Combating Trafficking in Human Beings, ms. Helga Konrad. Before she was nominated as special representative she chaired the Task Force on Trafficking in Human Beings, Stability Pact for South Eastern Europe, which was established in September 2000 and closed its office in October 2004, after the adoption of an elaborate report on the issue.
Ms. Helga Konrad was appointed OSCE Special Representative on Combating Trafficking in Human Beings in May 2004. In short her mandate is to assist participating States in implementing OSCE measures on THB, strengthening co-ordination and co-operation within the OSCE, with other organisations and with relevant authorities in the participating States, and awareness raising. In her capacity as special representative she has initiated a close partnership with relevant international actors under the heading of Alliance against Trafficking in Persons which has so far met two times.

# 5. LEGAL INSTRUMENTS ON CRIMINAL CO-OPERATION THAT FACILITATE COMBATING TRAFFICKING IN HUMAN BEINGS IN THE EU

## 5.1 The institutional framework within the EU regards criminal co-operation

With the Treaty of Maastricht, the three-pillar structure of the EU was introduced. The first pillar, the European Community (EC), now consists of two communities, namely the European Economic Community and the European Atomic Energy Community.[30] The second pillar includes the Common Foreign and Security Policy (Title V EU Treaty), and the third pillar concerns Police and Judicial Co-operation in Criminal Matters (former Justice and Home Affairs, Title VI EU Treaty). In contrast to the first pillar, the powers of the institutions, except for the Council, are restricted in the second and third pillars. In the third pillar the Council of the EU as the representative of the Member States is the authoritative organ, and the Commission, the EP, and the European Court of Justice play a subordinate role. This gives the third pillar an intergovernmental rather than a supranational character. The combating of trafficking in human beings falls mainly within the third pillar and therefore its structure will be outlined.

## 5.2 The decision-making process on police and judicial co-operation in criminal matters

When the Single European Act (SEA) was drafted, it was not possible to overcome the problems related to bringing some areas of Justice and Home Affairs under EC heading, such as police co-operation and immigration.[31] A special 'General Declaration' was attached to the SEA to emphasise that the competence concerning these issues should remain with the Member States.[32] This means that the main decision-making organ within the third pillar remains the Council of the EU, the institution representing the Member States. A whole army of experts and officials centralised in COREPER assists the Council in the preparation of its decisions.[33] In the Treaty of Amsterdam, an effort was made to simplify the decision-making structure of the COREPER.[34] Generally, a decision is now prepared and taken in four steps. The Council has to consult the EP in accordance with Article 39 EU Treaty before taking the decisions on the basis of Article 34, with the exception of common positions. In the third pillar, most of the decisions must be adopted unanimously; only measures implementing a decision are taken by qualified majority. The Commission has a shared right of initiative with the Member States.

[30] The Treaty of Maastricht, signed in Maastricht, 7 February 1992, and in force since 1 November 1993, OJ C 224, 31.8.1992.
[31] Single European Act, signed on 28 February 1986, and in force since 1 July 1987, OJ L 169, 29.6.1987.
[32] General Declaration on Articles 13-19 SEA.
[33] The abbreviation COREPER stands for COmité REpresentatives PERmanente.
[34] Signed in Amsterdam, 2 October 1997, and in force since 1 May 1999, OJ C 340, 10.11.1997.

The current instruments that can be adopted in the third pillar can be found in Article 34 EU Treaty. Most instruments in the third pillar after the Treaty of Amsterdam can be legally binding but lack direct effect except for conventions, which can have direct effect. Some of these instruments have striking similarities with some Community law instruments. According to Article 34 paragraph 2 EU Treaty the current instruments within the third pillar are the following.

a. Common positions define 'the approach of the Union to a particular matter'. The Council adopts this instrument acting unanimously. The legal status of this instrument is not clear. Neither the Court nor the European Parliament plays any role in these common positions. Therefore, it is likely that it is more a political instrument than a legally binding one.

b. Framework decisions are similar to the directives of the first pillar, although the framework decision does not have direct effect but is binding as regards the result to be achieved for the Member States. The Member States are free to choose the form and measures used to achieve the result. Framework decisions are adopted for the purpose of approximating the laws and regulations of the Member States on judicial and administrative issues. Framework decisions are taken unanimously, but a qualified majority may adopt implementing measures.

c. Decisions are binding on the Member States but lack direct effect. The decisions are normally supplemented by implementing measures. For decisions, the same procedure must be applied as for framework decisions, which means that the decision is taken unanimously but that implementing measures may be adopted by a qualified majority.

d. Conventions are drafted by the Council and are presented to the Member States for adoption by them. In contrast to the other instruments, conventions have to be ratified by the national parliaments of the Member States. This makes the procedure for adopting conventions time-consuming, inflexible and slow. Measures implementing the convention have to be adopted by two-thirds of the ratifying states.

The Council of the EU uses resolutions, recommendations, declarations, and other instruments to express its political will. None of these instruments are binding upon the Council or the Member States. These instruments are more informal and therefore flexible, which means that they can be adopted and amended rather easily.

## 5.3 Europol[35]

Two institutions within the EU must be considered relevant to fight THB. These are Europol and Eurojust. On 18 July 1995, the Council adopted the Convention on the establishment of Europol (the Europol Convention).[36] On 1 October 1998, the Europol Convention entered into force, which terminated the activities of the European Drug Unit in accordance with Article 45. Europol took up its full activities on 1 July 1999. The tasks of Europol are to facilitate the exchange of information among the Member States; to obtain, collate, and analyse information;

[35] Also *J.W. de Zwaan and A.J. Bultena*, Ruimte van vrijheid, veiligheid en rechtvaardigheid. De samenwerking op het gebied van Justitie en Binnenlandse Zaken in de Europese Unie, Sdu publishers, The Hague, 2002, pp. 268-285.
[36] Convention Based on Article K.3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention), OJ C 316, 27.11.1995, p. 2.

to notify the competent authorities of Member States, without delay, of any investigation within the Member States and to maintain a computerised system for collecting information. Its primary function is to gather and analyse information held by the different national police forces. Therefore, Europol has a Union-wide system for exchanging information. According to Article 2 of the Europol Convention, its aim is 'to improve […] the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved and two or more Member States are affected by the forms of crime in question'. This mandate was extended to trafficking in human beings with the joint action of 16 December 1996.[37]

## 5.4 Eurojust

It was proposed in the Presidency Conclusions in Tampere to set up a European unit for the coordination of judicial co-operation in cases of organised crime.[38] This unit, Eurojust, should be composed of national prosecutors, magistrates, or police officers of equivalent competence. Eurojust should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases. On 19 June 2000, a Council Decision on setting up an Eurojust team was taken[39] and Eurojust was finally established by the Council Decision of 28 February 2002.[40] According to Article 2 of this decision, the task of Eurojust is to provide support for investigations into major criminal offences in respect of which judicial legal assistance may be required for proceedings and into criminal offences against the financial interests of the EU. Trafficking in human beings is explicitly recognised as belonging to this group of crimes. The liaison officers seconded to Eurojust from each Member State are the advisors and coordinators of questions on legal issues concerning their country for the investigating authorities of other Member States, the European Commission, and Europol. In this sense, Eurojust will be equipped with similar facilities as Europol.

## 5.5 The Constitutional Treaty for the EU

On 18 June 2004, the European Council reached agreement on a draft Treaty establishing a Constitution for Europe. This text was consolidated and signed by the European Council during its meeting on 29 October 2004, after it had been amended.[41] This Constitutional Treaty was brought to the Member States for adoption and is due to be ratified by all signatory states by 1 November 2006. After the ratification the three pillar structure and the current decision-making procedure in third pillar issues will be abandoned. The legal instruments that will replace the current ones are law and framework laws.[42] Both will have direct effect.

[37] Joint Action of 16 December 1996 Adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, Extending the Mandate Given to the Europol Drugs Unit, OJ L 342, 31.12.1996, p. 4.
[38] Tampere European Council, 15 and 16 October 1999, Presidency Conclusions.
[39] Initiative of the Federal Republic of Germany with a view to the adoption of a Council Decision on Setting up a Eurojust Team, OJ C 206, 19.7.2000.
[40] Council Decision of 28 February 2002, Setting up Eurojust with a View to Reinforcing the Fight against Serious Crimes, OJ L 63, 6.3.2002.
[41] Treaty Establishing a Constitution for Europe, OJ C 310, 16.12/2004, p. 1-474.
[42] Constitutional Treary Article I-42 paragraph 1(a).

The decisions would in general be made by using the co-decision procedure in which the Council of the EU and the European Parliament jointly take the decisions by majority vote. Only in certain areas will unanimous voting be maintained. In third pillar issues these areas are related to Member States' essential responsibilities, for example, decisions on the creation of Union bodies with operational powers, the harmonisation and approximation of criminal law, and operational co-operation between police authorities.[43] The right of initiative for the Commission in third pillar issues is further extended in the Constitutional Treaty at the expense of the independent right of initiative of the Member States.[44] Furthermore, the powers of the European Court of Justice would be extended in the Constitutional Treaty.[45] Although these provisions are rather innovative and tend to fully communautarise third pillar issues with some exceptions, the competences of Europol and Eurojust remain limited. In Article III-276(3) on Europol, it is explicated that 'any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member States whose territory is concerned.' The tasks of Eurojust as described in the Constitutional Treaty seem to open the door for some form of operational powers. Article III-273(1), under a, states that the tasks of Eurojust may include the initiation of criminal investigations. However, its competence will be limited, as paragraph 2 states that 'in the prosecutions … formal acts of judicial procedure shall be adopted by the competent national officials.'

Following the above, it can be concluded that cautious steps are taken in the communautarisation of police and judicial co-operation in criminal matters. It can be observed that operational powers, to a large extent, are kept on the national levels and have not been transferred to the European level.

## 5.6 New instruments on criminal co-operation within the EU

Beside the two instruments adopted within the EU specifically addressing trafficking in human beings, a number of instruments aiming at the facilitation of criminal co-operation between the Member States of the EU have been adopted. As these instruments are to be used to combat trafficking, they will affect criminal co-operation in THB cases. These relevant instruments are: the Convention on Simplified Extradition Procedure between Member States of the EU,[46] The Convention Relating to Extradition between the Member States of the EU,[47] The European Arrest Warrant (EAW),[48] The European Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union,[49] The Council Framework Decision on Joint

[43] Article III-270(2(d)), Article III-271(1), Article III-274(1) and (4), Article III-275(3), Article III-277, Constitutional Treaty.
[44] Article III-264 Constitutional Treaty.
[45] Article III-365 Constitutional Treaty.
[46] The Convention on Simplified Extradition Procedure between the Member States of the European Union, OJ C 78, 30.3.1995, p. 1.
[47] The Convention Relating to Extradition between the Member States of the European Union, OJ C 313, 23.10.1996, p.11.
[48] Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, 13 June 2002, OJ L 190, 18.7.2002, pp. 1-20. According to Article 32 the EAW became fully operational on 1 January 2004.
[49] Convention Established by the Council in Accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the EU, Brussels, 22 May 2000, 7846/1/00 Rev 1, OJ C 197, 12.7.2000, p. 3.

Investigation Teams,[50] which is actually a copy of the text of Article 13 of the EU Convention on Mutual Assistance, and the Schengen Convention applying the Schengen Agreement.[51] These instruments will be briefly discussed hereinafter.

*Provisions within the EU on Extradition*

a. The Convention on Simplified Extradition Procedure between Member States of the EU.

In more than 30% of the extradition cases the suspect consents to extradition but no suitable legal framework for this category was available. This conventions aims to fill this gap. The principle contained in the convention is that, in case of consent by the suspect and agreement by the competent authority of the requested state, the person is surrendered without a prior request for extradition and without a formal procedure being applied. This convention facilitates and supplements the European Convention on Extradition of the CoE (see below). Two requirement must be fulfilled before the simplified procedure can be applied. Firstly, the consent of the person to be extradited is required in accordance with Articles 6 and 7, and secondly, the requested state has to agree to the application of the simplified procedure in accordance with the rules applicable under national law. Within a period of 10 days after the provisional arrest the requested state must notify the requesting state as to whether the person has consented to extradition. In accordance with Articles 7 and 9 the suspected person can also consent to the renunciation of the principle of speciality. Extradition takes place as soon as possible but at the latest within 20 days after the decision has been taken. If the person is not extradited within this period, he must be released from custody in the requested state. So far the convention has not yet entered into force.

b. The Convention Relating to Extradition between the Member State of the EU

This convention urges substantial changes to the principles of extradition and requires a review of national legislation and sometimes the constitution of Member States. For instance, Article 3 forms an exception to the requirement of double criminality in case of conspiracy or association to commit offences when related to serious crimes as described in the article and when the maximum custodial sentence is at least 12 months. Furthermore, reservations to renounce the double criminality requirement are made possible in paragraphs 3 and 4. Other examples are the refusal of extradition in case of political offence, own nationals, lapse of time or amnesty in the requested state which are no longer allowed. However, reservations to most of the provisions are possible. Re-extradition to a third Member State without the consent of the requested state is made possible in Article 12. Again reservations are possible. Besides, it includes provisions to facilitate a more efficient and speedy communication between authorities involved. However, in this convention the far-reaching revolutionary provisions are undermined by the many possibilities to adopt reservations. So far the convention has not yet entered into force.

c. The European Arrest Warrant

The European Arrest Warrant (EAW) aims at the arrest and extradition of persons within the EU at the request of a judicial authority of one of the Member States with a minimum of formalities. This will be accomplished by direct communication between the judicial authorities and by introducing an absolute time-limit of 90 days between the arrest and the decision to be taken on the extraditon of the person when a person does not consent to extradition (Article 17 EAW). If a

[50] Council Framework Decision on Joint Investigation Teams, 13 June 2002, OJ l162, 20.6.2002, pp. 1-3.
[51] Convention Applying the Schengen Agreement of 14 June 1985, signed on 19 June 1990, in force since March 1995.

person does consent to his extradition, the judicial authority takes a decision witin 10 days after his provisional arrest. The EAW can be applied to the crimes listed in Article 2 paragraph 2 and includes THB. The double criminality requirement for these crimes is abolished. The grounds for mandatory non-execution are limited to the case in which the crime is covered by an amnesty, in the case of a final judgement for the same acts for which the extradition is requested, and in case the requested person cannot be held criminally responsible due to his age under the law of the executing Member State. The grounds for the optional non-execution are included in Article 4. Under certain conditions the speciality principle can be waived.

The EU Conventions on Extradition, discussed above (when they have entered into force), will still play a role under the EAW although the EAW will replace corresponding provisions of the conventions according to Article 31 EAW.

*The European Convention on Mutual Assistance in Criminal Matters between the Member States of the EU and its protocol.*
This convention must be considered as another effort to improve judicial co-operation in criminal matters within the EU. It is linked to the European Convention on Mutual Assistance in Criminal Matters of the CoE (see below), as the latter serves as the mother convention to the EU Convention on Mutual Assistance.
Controlled deliveries (Article 12) may be requested for and according to Article 13 joint investigation teams may be set up, (see below).
Member States may request assistance in undercover operation. Article 10 provides that Member States may also agree on the possibility of hearing an accused person by video conference when the accused person consents. Article 11 provides for the hearing of witnesses and experts by telephone conference when the person involved agree to do so. The convention introduces some form of *forum regit actum.* Judicial or equally competent authorities may make a request for interception, recording and immediate transmission of telecommunications in accordance with the national law of the requesting state. Articles 18 and 19 describe the procedural requirements for such a request and the procedure to be followed. So far this convention has not entered into force yet.

The protocol to the EU Convention on Mutual Assistance which was adopted on 16 October 2001 facilitates the search for and the tracing of bank accounts in other Member States. Double criminality as a ground for refusal remains, but national rules on banking secrecy or the fiscal offence exception are no longer accepted as grounds for refusal.

*The Council Framework Decision on Joint Investigation Teams*
This framework decision on Joint Investigation Teams (JIT) is an exact copy of Article 13 of the EU Convention on Mutual Assistance. A JIT can be established by mutual agreement of the competent authorities of two or more Member States, for a specific purpose and a limited period of time to carry out criminal investigations in one or more of the Member States involved. This can be done when several Member States have initiated investigations by a coordinated investigation will be more efficient because the acts being investigated are linked, or if a state has initiated an investigation but the criminal act clearly has links with other states, which is the case in many trafficking cases. The joint teams will operate in the state setting up the team under the conditions stipulated in paragraph 3 of Article 1. The operation of the team will be carried out in accordance with the national law of the state on whose territory the operation takes place.

Members of the joint team may ask the competent authorities of their state to take investigative measures. This state shall consider these measures as if they were requested as part of a national investigation. If assistance is required from a Member State other than the Member States that set up the joint team or from another third state, the competent authorities of the state of operation make the request to the competent authorities of the other state. Persons other than representatives of the competent authorities of the Member States that set up the joint team can take part in the activities of the team as far as it is in accordance with their national law or the provisions of any legal instrument applicable between them.

*The Schengen Convention applying the Schengen Agreement*
Article 39 of the Schengen Convention applying the Schengen Agreement (the Schengen Convention) concerns mutual assistance and direct information exchange between police services; the prior authorisation of another body is no longer required. Articles 48 to 53 concern mutual assistance in criminal matters and supplement the 1959 European Convention on Mutual Assistance in Criminal Matters and the Benelux Treaty on Extradition and Mutual Assistance. According to Article 53, requests for assistance in general, may be communicated directly between legal authorities. It furthermore includes provisions on extradition. The procedure for trans-frontier observation and hot pursuit is rather complicated as each state is allowed to impose its own conditions on the penetration of its territory by police forces from other Schengen states.

*Conclusion*
In conclusion the main common developments adopted in these instruments that can be traced are the following: Firstly, the principle of double criminality, until now rather authoritative in criminal co-operation, is not strictly upheld in the EAW and in the Convention Relating to Extradition. Secondly, the strength of traditional exceptions to extradition, such as not to extradite own nationals, or not to extradite for political or fiscal offences, is limited. Thirdly, the principle of speciality is no longer fully in use in the EU Conventions on Extradition and the EAW. In addition, some major changes have also been codified in the EU Convention on Mutual Assistance. In general, these changes relate to simplifying the possibility to take operational measures on the territory of another state. This is, for example, the case for the JITs under Article 13 and the possibilities for intercepting service providers in another state as provided in Article 19. Furthermore, new possibilities are created to facilitate the hearing of experts, witnesses, victims, and accused persons by video conference or telephone conference.

When reviewing all these developments, the impression is given that the EU Member States are really willing to improve co-operation in the area of freedom, security, and justice at the cost of their own control over co-operation in criminal matters on their own territory. These developments all facilitate the enforcement of legal instruments on co-operation in criminal matters directly and thus indirectly help the enforcement of the prosecution of transnational trafficking in persons. However, for the moment, it is too early to be too optimistic because, so far, eight Member States have not ratified the two EU Conventions on Extradition under which one of the drafting states namely Italy. Consequently, these conventions have not yet entered into force. The EU Convention on Mutual Assistance has so far only been ratified by eleven Member States. The latter convention shall enter into force when eight of the drafting Member States have ratified it. This means that one more ratification of such a state is required. Furthermore, the

Framework Decision on JITs is not yet (sufficiently) implemented by all the Member States.[52] Besides, states can always make reservations to the most far-reaching provisions in these conventions and thus invalidate the progressive developments discussed here.

[52] Report from the Commission on National Measures taken to Comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, Brussels, 7.1.2005, COM(2005) 858 def.

# 6. LEGAL INSTRUMENTS ON CRIMINAL CO-OPERATIONS THAT FACILITATE COMBATING TRAFFIN HUMAN BEINGS IN THE COUNCIL OF EUROPE

*The European Convention on Extradition*[53]

According to Article 2, double criminality is one of the prerequisites for extradition. The maximum period for detention must in both states be at least one year. When all requirement are fulfilled there is an obligation to extradite as the exceptions to the obligation to extradite are listed exhaustively in the Convention. The main grounds for refusal are, amongst others, political offences, offences under military law, *non bis in idem,* own nationals, and the possibility that the death penalty may be implemented after extradition.

The request is communicated via diplomatic channels and the speciality principle fully applies. This convention can be seen as a minimum standard for extradition.

Two additional protocols were added to the convention, one on the political offence exception and the other on the principle of *non bis in idem.*

*The European Convention on Mutual Assistance in Criminal Matters*[54]

The convention is not limited to the forms of mutual assistance mentioned in it, but covers all forms of mutual legal assistance and letters rogatory. The contracting states undertake to afford the widest measure of mutal assistance. This may be refused in case of political or fiscal offences or if the requested state is of the opinion that assistance will violate its sovereignty, public order, or other essential interests. Letters rogatory and requests for the personal appearance of a person in custody are generally communicated between the Ministries of Justice of the states involved. In urgent cases the letters may be addressed directly to the judicial authorities, as is the case for requests for extracts from, and information relating to, judicial records. However, after the execution of letters rogatory, the Ministry of Justice of the requested state must return rogatory documents to the Ministry of Justice of the requesting state. Requests for mutual assistance other than letters rogatory, such as, requests for investigations preliminary to prosecution made by the public prosecutor and the service of writs, can be communicated directly between the judicial authorities.

In 1978 a first additional protocol was adopted which mainly concerns fiscal offences.

In November 2001 a second additional protocol was adopted which is largely based on instruments on mutual assistance that were adopted within the EU, in particular the EU Convention on Mutual Assistance and the Schengen Convention. This means that provisions on direct communication, video and telephone-conferencing, joint investigative teams, cross-border observations etc. are included in the protocol.

[53] European Convention on Extradition, Paris, 13 December 1957, ETS no. 024.
[54] European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959, ETS no. 030.

*The Convention on the Transfer of Sentenced Persons*[55]
The convention applies only to a punishment or measure, which involves deprivation of liberty. According to Article 2, the sentenced person must be transferred to another state in order to serve the sentence imposed on him. The main aim of this convention is to facilitate the transfer of foreign prisoners to their home countries so that they can serve the sentence there. Absence of language barriers, contacts with relatives, and being subject to their own culture and customs may contribute to rehabilitation. The conditions for the transfer are given in Article 3. The consent of the person concerned is necessary because otherwise the effect of rehabilitation is nil. The sanction may be converted by the administering state if the duration or nature of the sentence is incompatible with the law of the administering state. The punishment may not be aggravated.
An additional protocol to the Convention on the Transfer of Sentenced Persons concerns the transfer of nationals.

*The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*[56]
The convention starts with the definitions of the terms used in this document. The obligation of the participating states is to adopt legislative and other measures necessary to enable the confiscation of instrumentalities and proceeds or property of which the value corresponds to such proceeds. The tracing of property that is liable to confiscation must be facilitated. Legislative and other measures must create the possibility that bank, financial, or commercial records must be made available or can be seized. Bank secrecy may not be invoked to refuse the application of these rules. According to Article 4 paragraph 2, special investigative techniques may be used to facilitate the identification and tracing of proceeds and the gathering of evidence related thereto. The contracting states have to cooperate with each other to the widest extent possible.
A state can make a request for the confiscation of instruments or proceeds from offences to another state. This request has to be ordered by the court of the requesting state or the requested state has to forward it to its own appropriate authorities in order to obtain such an order to confiscate. Refusal to execute the request is allowed if assistance would be a violation of the fundamental principles of the legal system, the sovereignty, security, public order, or other essential interest of the requested state. Furthermore, refusal is allowed if the requested state thinks that the action is not proportional, is in contradiction with the principle of *ne bis in idem*, does not fulfil the requirement of double criminality, or is related to a political or fiscal offence. Article 18(4) lists some additional grounds for refusal. Transmission of requests takes place through the central authorities unless in urgent cases.

*The European Convention on the Transfer of Proceedings in Criminal Matters*[57]
One of the main aims of this convention is to avoid the disadvantages that may arise in case of conflict of jurisdiction. In case of conflict of jurisdiction, the general rule is that the state in which the act was committed should have priority to prosecute the offender. Reasons of rehabilitation of the offender are increasingly important to determine the most appropriate state to claim jurisdiction. The transfer of proceeding can only take place when both states involved have jurisdiction. The prosecution after the transfer takes place in accordance with the criminal

[55] Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983, ETS no. 112.
[56] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 December 1990, ETS no. 141.
[57] European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972, ETS no 073.

law of the state which takes over the proceedings. Reasons by which to refuse a request are listed in Article 11.
In general, communication between the states involved will take place between the Ministries of Justice unless otherwise agreed or in urgent cases, when communication takes place via Interpol. The prosecuting activities already undertaken in the requesting state will have the same value in the requested state after the transfer of proceedings.

*The European Agreement on Travel by Young Persons on Collective Passports between the Member Countries of the Council of Europe*[58]
This agreement facilitates travelling between the contracting states by young persons by initiating the possibility for them to travel on collective documents. Young persons are persons who have not yet reached the age of 21. A person older than 21 years of age has to accompany the group of young persons. This leader retains possession of the collective travel document. The maximum period of stay on a collective travel document is three months. This could provide a possibility for traffickers to use such a collective document when they want to traffic young persons from one country to another.

*The European Convention on the International Validity of Criminal Judgements*[59]
This convention addresses the validity of final decisions delivered by a criminal court of a contracting state. It facilitates the enforcement of a sanction imposed in one of the contracting states in another contracting state, at the request of the sentencing state. Double criminality is required for enforcement by another state. Conditions for sending a request are given in Article 5, while the grounds for refusal are listed in Article 6. The sanctions are to be enforced in accordance with the national law of the requested state. The transfer of the enforcement ends the competence of the requesting state to enforce the sanction itself. Communication of requests will normally take place via the Ministries of Justice unless otherwise agreed. The requested state keeps the requesting state informed about the progress made in the enforcement of the sanction. Before a sanction can be enforced in the requested state, a decision of one of its courts is required. Before such a decision is taken, the sentenced person must be given the opportunity to be heard.

[58] European Agreement on Travel by Young Persons on Collective Passports between the Member Countries of the Council of Europe, Paris, 16 December 1961, ETS no. 037.
[59] European Convention on the International Validity of Criminal Judgements, The Hague, 28 May 1970, ETS no. 070.

# 7. CO-OPERATION PROBLEMS IN THE FIGHT WITH TRAFFICKING IN HUMAN BEINGS IN THE EU

In spite of the many instruments discussed in the previous section THB is still a major problem especially when it has a transnational element. The fight against it needs to be improved. From a criminal law perspective the criminal co-operation between the Member States should be improved as states do not use the instruments efficiently or do not transform them into concrete actions in national law. However before we can identify how this co-operation can be improved we first have to analyse the problems in this area. The problems related to criminal co-operation will be discussed below in order to identify how the co-operation between Member States can be improved.
The co-operation problems specifically related to THB shall be discussed as well.

## 7.1 Evaluation of the current co-operation between the Member States of the EU in criminal matters

When we want to identify the problems in combating trafficking in human beings, we have to identify the problems of criminal co-operation between the Member States of the EU more in general as there is no reason to believe that these problems are different for THB cases. The problems can be divided into substantive, procedural, and organisational problems.

*a. Substantive problems*
Substantive problems are those problems that are related to the content of the different legal systems of the Member States and the interpretation given by the Member States to certain terms used with regard to co-operation in criminal matters.
It can be said that the impact of these problems in general is less serious than is often thought, for example, the principle of double criminality does not frustrate mutual legal assistance so much. As regards to the majority of cases, the crimes for which mutual legal assistance is requested are criminalised in all the Member States. Furthermore, it can be stated that the requirement of double criminality is envisaged with flexibility, in the sense that it is more a requirement of double punishability.[60] In addition to this there is a tendency that this requirement of double criminality is vanishing, which is perceptible in the European Arrest Warrant.

Another problem related to the substantive problems can be found in the execution of requests by applying the national law of the requested state, known as the principle of *locus regit actum*, which causes problems when evidence is used in criminal proceedings. It is rather striking that the court of the requesting state, pursuant to the law of the requesting state, must carry out the examination of the evidence collected in another country. For instance, thorough examination as to whether evidence has been obtained in accordance with the law of the requested state is normally not required and judges are not equipped to carry out this examination. Thus the

[60] Final Report on the First Evaluation Exercise- Mutual Legal Assistance in Criminal Matters, OJ C 216, 1.8.2001. p. 19.

execution of a request takes place in accordance with the law of the requested state while the examination of whether the evidence was legally obtained and can be used in a criminal procedure is examined in accordance with the law of the requesting state[61].

The EU Convention on Mutual Assistance addresses this problem by introducing the execution of the request in accordance with the law of the requesting state as the main principle.[62] It can be observed that there is a tendency to increasingly use this principle of *forum regit actum* but it may cause problems as well as practitioners are generally not familiar with the legal systems of other countries.

Finally, requirements for criminal procedures differ between states, as do the guarantees for witnesses and suspects. Related to these aspects is the lack of confidence between the Member States in each other's legal systems as an obstacle for co-operation in criminal matters. Although it is often assumed that the Member States have confidence in each other's systems, this is not always the case.

*b. Procedural problems*

Procedural problems concern obstacles that are experienced by the Member States when following the procedures for co-operation in criminal matters laid down in the legal instruments. These problems mainly consist of the absence of transparency as regards the channels to be used and whom to contact, often as a result of differences in competences between the relevant authorities of the Member States and a lack of knowledge of each other's systems. Consequently, confusion exists as to what formalities must be fulfilled and which channels must be used. It goes without saying that familiarity with the legal systems of other states is necessary, especially when the principle of *forum regit actum* is applied because then the request must be executed in accordance with foreign law, namely the law of the requesting state.

Furthermore the national systems on mutual legal assistance are generally too long and complicated with too many authorities involved, which gives a serious risk of duplication of efforts and waste of time and money. Although direct communication between competent authorities in the cooperating countries is generally seen as a major advantage for criminal co-operation, it is not commonly used by the practitioners as they are not familiar with the use of this channel. To this end it is explicitly recognised that direct communication can only take place if professional support is available to the competent authorities that will help them to discover to whom the request has to be sent. Besides, they need a network of (personal) contact points in several countries. Earlier initiatives to set up such logistic support have failed. The European Judicial Network[63] can play an important role in establishing such a system.[64]

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[61] J. Koers, *Nederland als verzoekende staat bij de wederzijdse rechtshulp in strafzaken. Achtergronden, grenzen en mogelijkheden,* Wolf Legal Publishers, Nijmegen, 2001, pp. 557-558.

[62] EU Convention on Mutual Legal Assistance, Article 4. G. Vermeulen, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpruimte voor de Lid-Staten?* Maklu, Antwerpen, 1999, pp. 143-148.

[63] For general remarks on the EJN, see J. Koers, *Nederland als verzoekende staat bij de wederzijdse rechtshulp in strafzaken. Achtergronden, grenzen en mogelijkheden,* Wolf Legal Publishers, Nijmegen, 2001, pp. 64-70. C.J.C.F. Fijnaut, Europol en Eurojust, in: *Justitiële Verkenningen,* Volume 27, issue 2, 2001, pp. 11-23.

[64] G. Vermeulen, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpruimte voor de Lid-Staten?* Maklu, Antwerpen, 1999, pp. 482-485. Also J. Koers, *Nederland als*

Finally the effectiveness of mutual legal assistance is also dependent on the relation between the judicial authority and police forces in a country and the way in which the police force is organised. In most of the states, the execution of a request, or a part thereof, is the task of the police. If the division of competence between the judiciary and the police is not clear, if they are not cooperative with each other, or if the police lack resources, problems may occur[65].

*c. Organisational problems*

The organisational problems mainly concern the identification of the competent authorities abroad and practical problems in contacting the authorities involved, either due to the absence of telephone or fax numbers and personal details concerning the competent person, or to language problems. The identification of the competent judicial authorities is important when a request is to be sent directly or when a state wants to know the actual state of affairs with regard to a request that has been previously sent. To this end the requesting state often needs some background information on the system of the requested state in order to be able to identify the competent authority, but this background information is often absent.

As regards to the language problems, two main problems can be identified. In the first place it must be recognised that a vast majority of the authorities involved in mutual legal assistance cannot express themselves properly in legal terms in a language other than their own. Secondly, the need for translations is often a cause of delay and a source of miscommunication.

These practical problems must not be underestimated as they have a major impact on the speed of the process of criminal co-operation.

*d. Lack of resources*

The lack of resources seems to be a great obstacle as well. The lack of resources is often a consequence of a lack of prioritising mutual legal assistance in general and in trafficking cases more specifically. Another cause of the problems with regard to co-operation in criminal matters is the fact that the practitioners involved are not sufficiently and specifically educated and trained in mutual legal assistance. If training in mutual legal assistance is available at all in the education programmes for practitioners, it is not compulsory.

*e. Problems specifically related to THB*

Besides the prosecution problems indicated above, some prosecution problems can be identified, directly related to trafficking cases in which co-operation with other states is required for the prosecution of the traffickers.[66] The most important of these prosecution problems relates to the great dependence on testimonies of victims and witnesses in trafficking cases. The main problem encountered in this regard is the unavailability of victims and witnesses, often due to the fact that immigration officers have expelled them from the country even when the possibility exists to grant a temporary residence status to victims of trafficking. If the victim is not heard by the police or the investigating judge before she is expelled she has to be traced and heard in her home country. Consequently permission for the hearing of the victim or witness must be

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*verzoekende staat bij de wederzijdse rechtshulp in strafzaken. Achtergronden, grenzen en mogelijkheden,* Wolf Legal Publishers, Nijmegen, 2001, pp. 332, 64-70.

[65] *C. Rijken*, Trafficking in Persons, Prosecution from a European Perspective, T.M.C. Asser Press, Den Haag, 2003, pp 183-184

[66] The problems indicated in this article are based on the file study in the Netherlands which is included in*; C. Rijken*, Trafficking in Persons, Prosecution from a European Perspective, T.M.C. Asser Press, Den Haag, 2003, pp. 201-241.

obtained from local authorities, the person must be summoned to the hearing, in some cases taken into detention, and an appointment must be made as to when and where the person will be heard. In general, this process causes serious delays and because of the dependency on the co-operation of the authorities in the country of residence, control over the progress of the criminal proceedings is lost.

A considerable reduction in the problems associated with the prosecution of transnational trafficking in persons can be achieved by closer co-operation between the immigration authorities, the police, and the judiciary.

Another problem related to the dependency on the testimonies of victims is the difficulty in establishing a relationship of mutual trust with the victims. First of all, language problems are an obstacle to gaining this thrust. This is further complicated by the influence that the suspects have on the victims, even when they are accommodated at secret addresses. In other words, victims and witnesses are often controlled by the persons or organisations that have trafficked them, even after their return. These traffickers have contacts to easily find out what witnesses have declared to the police for instance in the country of origin. Subsequently they force victims and witnesses to cease co-operation or to withdraw testimonies.
In addition victims, unaware of the existing protection mechanisms, are reluctant to go to the police because of negative experiences with the police in their home countries and their illegal status. Another major obstacle in the prosecution is the lack of priority and the absence of attention for the phenomenon of trafficking in human beings, which causes serious difficulties and delays with regard to mutual legal assistance in trafficking cases.

Language problems are also a general difficulty in trafficking cases since texts, documents, and conversations have to be translated.
When the traffickers and/or victims speak a very rare language (for instance in the case of trafficking from a certain area of Nigeria) it is hard to find qualified and reliable interpreters which are needed in court, to translate telephone conversations and to communicate with the victims.

As a consequence of all these problems affecting criminal co-operation and therefore the criminal procedures, prosecutors involved in a trafficking case try to avoid criminal co-operation as much as possible as it is too complicated and involves too great a risk of failure. The indictment then is limited to activities that occurred in the Netherlands or to countries within the EU, even if the consequence is that co-offenders go unpunished.

In conclusion, it can be stated that investing in criminal co-operation in general and giving more priority to and creating more awareness of the phenomenon trafficking in human beings will considerably facilitate the prosecution of those suspected of trafficking. The main obstacles with regard to the prosecution of trafficking in persons stem partly from the fact that states continue to hold on to their own criminal law systems and partly from the lack of priority and (financial) resources available to prosecute this crime.

## 7.2 A role for Europol and Eurojust in combating trafficking in human beings

Neither Europol nor Eurojust are endowed with operational power. They are no European institutions on the supranational level but function on behalf of the states. Both are mandated to deal with the crime of trafficking in persons. Eurojust is to facilitate judicial co-operation between the Member States of the EU without the aim of harmonising national laws. Eurojust has to fulfil its tasks through one or more of the national members or acting as a body. It is composed of one national member seconded by each Member State. The competences of the national members are subject to the national law of their Member States and the Member State will define the right of a national member to act in relation to foreign judicial authorities.[67] Europol is built on a similar basis with the addition that, in each Member State, a national unit has been established. For their functioning, Eurojust and Europol are dependent on the co-operation of the national members and the competent authorities in the Member States. In theory Europol and Eurojust could have an important role regards the co-ordination and identification of transnational trafficking cases. However, much will depend on the willingness of states to transmit information to them but the experiences of Europol in this regard are not promising as we will see below. States tend to be reluctant to share operational information because they think that this information is sensitive or confidential and they themselves want to control this information.

## 7.3 The JIT-initiative to fight THB from and through Bulgaria

During the preparations of the Dutch EU-Presidency in the second half of 2004, the idea was raised to use the construct of a JIT to fight THB from and through Bulgaria born out of the following two developments.
i) THB from and through Bulgaria was indicated as a major problem by Europol in several reports and made subject to an Analytical Work File (AWF) at Europol to compile information available in the Member States on this matter. Furthermore, Germany recently experienced an increase in THB from Bulgaria and was a great supporter of focus on this crime.
ii) Joint Investigation Teams were already indicated in the Tampere Conclusions under point 43 as a means to combat THB and had to be set up without delay. Since then the establishment of JITs was encouraged on various occasions. The establishment of JITs was elaborated in Article 13 of the EU Convention on Mutual Assistance and its text was copied in a Framework Decision on Joint Investigation Teams referred to above.

These two developments were brought together under the umbrella of the Dutch EU-Presidency.[68] However, before a JIT could be established a suitable case had to be identified. In order to facilitate this identification a Joint Intelligence Group (JIG) was set up in parallel to the AWF. The composition of the JIG was almost identical to that of the Analysis Group of the AWF at Europol. It was not clear whether the meetings that were held to discuss information flows were meetings of the Analysis Group, the JIG or combined meetings. Furthermore, a Steering Group (SG) was set up in order to co-ordinate the whole process with representatives of

[67] Council Decision on Setting up Eurojust, Article 9.
[68] The author is appointed as the research leader of the Scientific Research JIT that runs parallel to this project research to monitor and analyse it. The publication of this research is expected later this year.

the four participating States (Belgium, Germany, the Netherlands and United Kingdom), Europol, Eurojust and Bulgaria. Initially the SG met every month and later every two months. In parallel to this JIT initiative, Europol had already established an Action Plan Bulgaria and an Action Plan Bulgaria Working Group to fight THB from Bulgaria. From the onset the relations between the two initiatives and between the various groups were not clarified extensively running the risk of duplication and conflicts of interests.

The SG formally took up its tasks in September 2003. It was expected that within a short period of time the AWF and/or the JIG would be able to identify a suitable case for establishing a JIT. However, the transmission of relevant and accurate data to Europol for the AWF was problematic from the start. Some countries (among which the Netherlands) were especially reluctant to provide the information requested to Europol. Until now a suitable case has not been identified.

A second major obstacle arose in September 2004 when it was discovered that Germany did not have the necessary legislation for the establishment of a JIT. Further research on this matter uncovered that in the Netherlands and the UK, EU legislation on JITs was not sufficiently implemented.

As a result, in February 2005 the decision was taken to suspend the activities of the SG until September 2005.

With this example of intensified criminal co-operation beyond national levels it must be concluded that many hurdles have to be overcome before such an instrument can be successful. A reason that the intended aim has not been reached so far could be that in this case a top down approach was chosen. Currently a first operational JIT on drug trafficking is running, choosing the bottom up approach. It remains to be seen whether this approach has more opportunities for success.[69]

[69] The Drugs-JIT is subject to research of the Scientific Research JIT as well and the results of it will be adopted in the publication of the Scientific Research JIT later this year.

# 8. CONCLUSION

As we have seen above, the improvement of the combating of trafficking in human beings must take place on several levels. Both the prosecution of those suspected of trafficking and the execution and implementation of legal instruments (but also of non-binding instruments) must be prioritised and optimised, as well as the protection of victims and witnesses.

To optimise the prosecution of those suspected of trafficking in human beings, the use of instruments for co-operation in criminal matters must be improved. The major obstacles for the use of these instruments were discussed above. It turned out that the procedural and organisational problems rather than substantive problems frustrate criminal co-operation. In the authors' view, with a more efficient use of the current instruments and initiatives a step forward can be made in the prosecution of THB. However, without an increase of the willingness of the Member States this goal will never be achieved.
The main obstacle specifically related to trafficking cases is the unavailability of victims or witnesses as a result of expulsion by the immigration services. The Council Directive on residence permit discussed in section 2.2. in which the victims of the crime of trafficking in persons who cooperate with the competent authorities must be granted a residence permit, protection, and support may be a possibility to reduce this problem.

With regard to co-operation in criminal matters within the EU, two developments can be observed:

- There is intensified co-operation in which the national competences are maintained, although these competences are limited in some regard.
- Cautious steps towards co-operation at a more supranational level, namely, with the institutions of Europol and Eurojust and to some extent the possibility to establish a JIT. Following the practises as regards Europol and Eurojust and the example on the establishment of a JIT described above, it would be too optimistic to expect a more supranational level in this area in the short term.

As long as the Member States choose to follow this dual track it is doubtful whether progress will be made in fighting THB. A considerable step forward can only be made when states have the courage to share competences on a more supranational level. However, as we have seen, even if this approach is chosen many hurdles have to be overcome, often as a consequence of differences in legal systems and practices. The further approximation of law must be seen as an important development which supports the increasingly supranational approach of states. However, the success of this approach will remain largely dependent on the willingness and the courage of states to adequately adopt and execute existing possibilities in criminal co-operation.