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## **International Trafficking in Women and Children**

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Trafficking in human beings is an abhorrent and increasingly worrying phenomenon. It is of a structural, rather than of an episodic nature affecting a few individuals, in that it has extensive implications on the social, economic and organisational fabric of societies. The phenomenon is facilitated by globalisation and by modern technologies. Trafficking in human beings not only involves sexual exploitation, but also labour exploitation in conditions akin to slavery. The victims are subjected to violence, rape, battery and extreme cruelty as well as other types of pressure and coercion.<sup>2</sup>

## **I. SCOPE**

### **A. New UN and regional (EU) initiatives**

Both the phenomenon and the fight against trafficking in women and children have gained particular and renewed international attention in the past years. The problem of trafficking in persons has become one of the principal concerns in the context of international law

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<sup>2</sup> EUROPEAN COMMISSION, *Trafficking in women. The misery behind the fantasy: from poverty to sex slavery. A comprehensive European strategy*, URL: [europa.eu.int/comm/justice\\_home/news/8mars\\_en.htm](http://europa.eu.int/comm/justice_home/news/8mars_en.htm), 2.

enforcement policy and cooperation. Both at worldwide and regional<sup>3</sup> level, policy makers have therefore taken new legal initiatives, *inter alia* addressing criminal law issues, to specifically address the problem.

At worldwide level, the adoption in Palermo in December 2000<sup>4</sup> of a UN Convention against Transnational Organized Crime<sup>5</sup> (hereinafter referred to as *UN TOC Convention*), supplemented by two Protocols having direct relevance for the problem of international trafficking in persons, is a remarkable new step in the continuum of legal efforts that have been undertaken during the first half of the 20<sup>th</sup> century,<sup>6</sup> first at the League of Nations and later at UN Level, to tackle the problem of trafficking in human beings. Both Protocols, respectively ‘against the smuggling of migrants’ (hereinafter referred to as *UN Smuggling Protocol*) and ‘to prevent, suppress and punish trafficking in persons, especially women and children’ (hereinafter referred to as *UN Trafficking Protocol*), are of course important points of reference for the purpose of this report. Upon ratification, together with the UN TOC Convention, they are to further strengthen and refine the existing set of international binding rules in the area of international trafficking in human beings.

The same goes for two EU Framework Decisions that, also in December 2000,<sup>7</sup> have been proposed by the European Commission for adoption by the Council during the second half of 2001. Both draft instruments, respectively on ‘combating trafficking in human beings’ (hereinafter referred to as *EU Framework Decision on Trafficking*) and ‘combating the sexual exploitation of children and child pornography’ (hereinafter referred to as *EU Framework Decision on Sexual Exploitation of Children*) mark the dedication of the EU, as a regional cooperation level, to impose *binding* minimum rules upon the EU Member States concerning constituent elements of and sanctions for the crimes concerned.<sup>8</sup> It is anticipated that before

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<sup>3</sup> In the present report, substantial attention is given to the EU as a regional cooperation level. Of course, also other regions, such as Asia and the United States, have recognised and (recently) addressed the problem. As for the US, a Memorandum on Steps to Combat Violence Against Women and the Trafficking of Women and Girls was issued in 1998, directing the Secretary of State, the Attorney General and the President’s Interagency Council on Women to expand their work against violence against women to include work against the trafficking of women. For US research and policy efforts, see *inter alia*: HUGHES, D. ‘The “Natasha” Trade: Transnational Sex Trafficking’, *National Institute of Justice Journal*, January 2001, 9-15; S. ZHANG and K. CHIN, ‘Snakeheads: Chinese Human Trafficking Organizations’, forthcoming in B. DE RUYVER, G. VERMEULEN and T. VANDER BEKEN (ed.).

<sup>4</sup> United Nations Press Release, L/T/4359, 15 December 2000. See also: UNITED NATIONS GENERAL ASSEMBLY, Resolution regarding the High-level Political Signing Conference for the United Nations Convention against Transnational Organized Crime, 28 January 2000, A/RES/54/129.

<sup>5</sup> Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000 and signed in Palermo on 15 December 2000.

<sup>6</sup> *Infra*.

<sup>7</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, Communication from the Commission to the Council and the European Parliament on Combating trafficking in human beings and combating the sexual exploitation of children and child pornography, COM (2000) 854, Brussels, 21 December 2000. See also: COUNCIL OF THE EUROPEAN UNION, 8112/01 DROIPEN 35 MIGR 36, Brussels, 27 April 2001; COUNCIL OF THE EUROPEAN UNION, 8599/1/01 REV 1 DROIPEN 43 MIGR 41, Brussels, 21 May 2001.

<sup>8</sup> Hence, the statement that only at UN level, as opposed to regional cooperation levels, has succeeded in drawing up internationally *binding* legal instruments specifically relating to trafficking in human beings (see: C. BASSIOUNI, *Investigating International Trafficking in Women and Children for Commercial Sexual Exploitation*, The International Human Rights Law Institute, DePaul University, Chicago, 23 March 2001, 3), is very likely to become incorrect quite soon. It may even be anticipated that actual legal (and other) changes will

the end of 2002, the Member States' internal legislation will need to be reviewed in the light of the two Framework Decisions and adapted accordingly.

### **B. 'International' Trafficking**

The notions 'smuggling of persons' and 'trafficking in human beings' are closely related and often used interchangeably in international regulations, as well as in literature. This report, however, takes the position that there is an essential difference between both. The smuggling of persons can almost completely be reduced to an epiphenomenon of the *migration issue*, and almost *per se* presumes that a border is being crossed, so that 'smuggling', intrinsically, has an 'international' dimension. Trafficking in human beings, on the contrary, essentially involves the *exploitation of a person*, i.e. the use of a person against his/her will, with a view to attaining financial or other benefits. Although the phenomenon of 'trafficking', especially seen from a criminological or sociological viewpoint, commonly has an international dimension, the offence of 'trafficking', seen from a criminal law viewpoint, does not necessarily require an 'international dimension as a constituent element of crime. According to most - especially recent - international legal instruments on the matter, trafficking in human beings should be a punishable offence, even when it takes place within the boundaries of a single country (*infra*). Even the recent UN Trafficking Protocol, in restricting its scope in Article 4 to offences that are 'transnational in nature', does not necessarily require that a border has actually been crossed.<sup>9</sup> According to the *travaux préparatoires* to the UN TOC Convention, State Parties must even criminalize the offences meant in the Convention and in the Protocols *independently* of their transnational nature.<sup>10</sup> As a consequence, the option has been taken to address in the present report problems related to trafficking in human beings *irrespective* whether actually a border has been crossed. However, in order to allow for refining discussion on the matter, substantial attention is also given to the interrelated concept of smuggling of persons.

### **C. Trafficking in 'women and children'**

From a criminal law perspective, the fight against trafficking in and smuggling of persons is largely independent from *gender differences*. It cannot be denied, however, that, due to the feminisation of poverty, gender discrimination and a lack of educational and professional opportunities in their countries of origin, especially women are in a position of vulnerability to become victims of trafficking in persons.<sup>11</sup> Nor can it be denied that, more specifically,

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be triggered much quicker within the EU than between the Parties to the UN TOC Convention. The latter needs to be ratified before entering into force, whereas EU Framework Decisions upon adoption by the EU Justice and Home Affairs Council become binding upon the EU Member States as to the result to be achieved in the time limit set for achieving that result, i.e. most probably already by the end of 2002.

<sup>9</sup> For interpreting 'transnational in nature', one should take account of the criteria listed in Article 3, under 2, of the UN TOC Convention. See also on the matter: C. RIJKEN and V. KRONENBERGER, *The United Nations Convention on Transnational Organised Crime and the European Union*, forthcoming, 28-29, where it is mentioned that, during the negotiations on the UN Trafficking Protocol, some delegates were nonetheless of the opinion that trafficking could only concern international trafficking and included the crossing of a border *per se*.

<sup>10</sup> See on the matter: M. HOLLÁN, *International Documents on Trafficking in Persons in the Light of National Criminal Legislation*, paper submitted at the First International Congress of the Young Penalists Section of the International Association of Penal Law, Siracusa, 14-20 June 2001, 6-7.

<sup>11</sup> EUROPEAN COMMISSION, *Trafficking in women. The misery behind the fantasy: from poverty to sex slavery. A comprehensive European strategy*, l.c., 2.

trafficking in women for the purpose of sexual exploitation has increased in recent years in parallel to the development of the sex and prostitution sector.

This report reflects the particular vulnerability of women to be trafficked, but deliberately takes a gender-neutral approach when it comes to criminal law aspects related to the phenomenon of trafficking in human beings. Because of its apparent links with trafficking, specific attention will be given to the (criminal) status of exploiting of a person's *prostitution*.

*Age differences*, on the contrary, have an immediate relevance for criminal law issues, both in terms of aggravating circumstances (when the victim of trafficking is a child) and in terms of constituent elements required (when 'trafficking in persons' would traditionally presuppose a form of deceit, abuse or coercion on behalf of the trafficker, this requirement would probably be waived when the victim is a child).

The particular vulnerability of children is even more emphasised in this report by referring also to the item of child pornography. The reason for this, apart from the growing international (legal) concern about this phenomenon,<sup>12</sup> is the fact that at EU level, for the purpose of this report used as an example of a regional cooperation level, the notions 'trafficking in human beings' and 'child pornography' are closely interlinked. According to the Europol Convention, 'trafficking with a view to sexual exploitation' explicitly includes trafficking with a view to the exploitation of children in pornographic performances or with a view to the production, sale or distribution of child-pornography material (*infra*). According to the EU Framework Decision on Trafficking, 'the purpose of sexual exploitation' is defined as 'the purpose to exploit [the person concerned] in prostitution, or in pornographic performances or in production of pornographic material', even where the person concerned is an adult. Hence, some attention will also be given in this report to the incrimination of child pornography.

## **II. BACKGROUND**

As law, in particular criminal law, is only a means to find answers or solutions for social change or problems, it is essential to only address (criminal) law issues after having studied what the underlying problems or social changes are. In the area of trafficking in human beings, it is important therefore to first get a proper insight into the causes of migration and illegal migration, to clearly delineate the notions 'smuggling' and 'trafficking' in persons, and to also have regard for the consequences of (illegal) migration and trafficking. These issues are therefore being addressed hereafter.

### **A. Causes of migration**

Migration movements have occurred throughout history. They primarily arise from the disparity in wealth between different countries, in particular from the increasing discrepancies between the north and the south, and the east and the west. The lack of social security or the low quality of life experienced in their home country, constitute a strong *push-factor* for people to emigrate. The causes may be political (dictatorship, human rights violations, discrimination of minorities, (civil) wars), socioeconomic (poverty, unemployment, lack of educational opportunities, absence of social insurance, social

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<sup>12</sup> Also the G8 recently expressed concern about child pornography. See the communiqué issued after the summit of G8 Justice and Home Affairs Ministers in Milan, held from 26-27 February 2001: Conference of the G8 Ministers of Justice and Interior, URL: [www.dfait-maeci.gc.ca/forei.../2001/Milan\\_Justice\\_Interior-e.asp](http://www.dfait-maeci.gc.ca/forei.../2001/Milan_Justice_Interior-e.asp).

exclusion) or ecological (natural disasters, pollution). Besides these push-factors in the sending countries, there are also some important *pull-factors* in industrial countries of destination. Among these is the demand for cheap, illicit or undeclared labour force, for instance in the construction and the textile sector. Another important pull-factor is the social insurance or assistance system in many Western countries. Many receiving countries give social security assistance and even financial support to asylum-seekers. This attracts a lot of economic refugees, who apply for asylum, although they know in advance that they do not meet the criteria of the Geneva Convention on Refugees and Exiles.<sup>13</sup>

Despite the continuing difficulties in collecting statistical data in this area, most actors involved in combating trafficking in human beings agree that it is a growing phenomenon. At world level, estimates reach as high as 700,000 women and children being moved across international borders by trafficking rings each year. Some non-governmental organisations estimate the number to be significantly higher, especially if trafficking for the purpose of labour exploitation is included.<sup>14</sup>

The traditional flow between certain developing countries (Northern and Central Africa, Latin America, Asia) and Western destination countries continues. A factor, however, that at least for Europe gives rise to great concern, is the increase in numbers of women and children trafficked into the EU from Central and Eastern European countries or from the Newly Independent States, in the latter case often via the EU candidate Member States.<sup>15</sup>

### **B. Causes of illegal migration**

As a kind of crisis solution, the West has usually reacted to the influx of foreigners by adopting a much *stricter migration policy*. Although this reaction is comprehensible, for lack of any immediate alternative, it has a very obvious unwanted side effect: a *shift from legal to illegal migration*. Often this migration takes the form of *transit migration*: the journey is organised in several stages and it is the final stage, the actual penetration to the West, which is usually undertaken illegally.

### **C. Smuggling & trafficking**

Because illegal migration is a lot harder to organize, as it requests a certain know-how and certain means (such as, for instance, false papers), migrants increasingly need to make an appeal to professional organisations to assist them. These organisations sometimes lend the candidate-migrants the necessary financial means for undertaking the journey and often charge exorbitant fees for their services. Because such migration therefore becomes a very expensive affair for the migrant, it usually is an all-or-nothing venture for him: in order to

<sup>13</sup> N. SIRON, P. VAN BAEVEGHEM, B. DE RUYVER, VANDER BEKEN, T. and VERMEULEN, G. *o.c.*, 63-64.

<sup>14</sup> For additional estimates on women and children trafficked for commercial sexual exploitation, see also: C. BASSIOUNI, *o.c.*, 1.

<sup>15</sup> The worsening of the economic situation in these countries has had a direct effect on the flow of trafficking in women. Estimates of up to 120,000 women and children being trafficked into western Europe each year have been made. The majority of these countries have according to their own law enforcement officials become, to various degrees, both countries of origin, transit as well as countries of destination. The phenomenon of re-trafficking within the EU has also been noted as one new and developing factor. See: EUROPEAN COMMISSION, *Trafficking in women. The misery behind the fantasy: from poverty to sex slavery. A comprehensive European strategy*, l.c., 2-3.

finance the journey, he has to sell all his possessions, in other words, he burns all bridges behind him. Also after the completion of the journey, the migrant often still needs to pay off debts for years to the smuggler. As a result, these people are not easily inclined to give up and they are ready to endure significant hardships in order to achieve their goal. The consequence is also that, in case of expulsion, they often do not have much other choice than to try again, until they succeed. Additionally this evolution results in the fact that migrants increasingly become the victim of abuse by smugglers. Because of their dependent and vulnerable position, they form a very attractive target for these criminals, who are driven exclusively by profit-motives. The smugglers have the migrant financially in their power and they do not hesitate to use physical restraint and psychological violence. *This is how smuggling in persons evolves into trafficking in persons.*

As already pointed out above, both notions are closely related and are often used interchangeably. Still there is an essential difference between both. Whereas the smuggling of persons has an 'international' dimension *per se*, the principal constituent element of the offence of trafficking in human beings is the use of deceit, force or the misuse of vulnerability vis-à-vis the person concerned, with a view to attaining financial or other benefits, *irrespective* of the crossing of any border. Hence, trafficking in human beings may also take place within the boundaries of a single country. As a result, the smuggling of migrants is particularly disadvantageous for the (inter)-national legal order, not for the migrant him/herself, who is a client rather than a victim. On the contrary, the traffic in persons is especially harmful for the trafficked person.<sup>16</sup>

The criterion for determining whether trafficking in migrants or migrant smuggling is involved is the question whether the migrant is to any degree *deprived* of his *freedom of will by the offender* or not.<sup>17</sup> Whereas the traffic in persons presupposes the use of deceit,<sup>18</sup> the abuse of power or the exercise of coercion by the trafficker<sup>19</sup>, this is not true for migrant smuggling. Looking at the transaction between trafficker and migrant as a kind of contract, one could say that human trafficking is characterised by the deliberate violation of this contract by the offender. This can happen at various stages of the transaction. For instance, even though the trafficker has promised to bring the victim to a set place at a certain price, during the trip he might suddenly claim a higher fee, in default of which he will stop the transport of the victim. Or the offender might simply leave the victim in the country of destination without getting him/her the promised job. Also, the victim might be set to work in a completely different job than agreed upon.<sup>20</sup>

Looking more specifically at trafficking in women, the recruitment of the victims takes various forms. Traffickers profit from the fragile social and economic situation of women and lure their victims by promising them large earnings in the West. Accepting such offers could support not only the victims themselves, but also their families. Traffickers approach women by advertising in newspapers for dancers, waitresses, club hostesses etc. or by direct

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<sup>16</sup> N. SIRON, P. VAN BAEVEGHEM, B. DE RUYVER, T. VANDER BEKEN and G. VERMEULEN, *o.c.*, 18.

<sup>17</sup> Contra: HUGHES, D., *l.c.*, 9.

<sup>18</sup> This term does not only refer to the supply of false information, but also to the abuse of the ignorance of the migrant. See: IOM, *IOM's focus on trafficking*, URL: [www.iom.int/iom/policies/trafficking/focus\\_trafficking.html](http://www.iom.int/iom/policies/trafficking/focus_trafficking.html).

<sup>19</sup> In other words, situational restraint does not suffice.

<sup>20</sup> N. SIRON, P. VAN BAEVEGHEM, B. DE RUYVER, T. VANDER BEKEN and G. VERMEULEN, *o.c.*, 19.

recruitment in discotheques and bars. They also lure women through the use of marriage bureaus. It appears that especially young women are vulnerable to this kind of deceit. Often they find themselves ending up in the prostitution business. Sometimes, they actually did expect this beforehand, but they were mistaken as to the circumstances under which they would be living and working. Even if a certain number of the trafficked women know they will work as prostitutes, they do not know that they will often be kept in slavery like conditions being unable to escape from their exploiters. In order to be able to manipulate and exploit their victims, the perpetrators use financial pressure, or physical, psychological or sexual violence. These women also feel trapped because of their situation as illegal immigrants.

Often they are obliged to repay heavy debts consisting of the (fictitious) costs of the documentation and transport, known as debt bondage.<sup>21</sup> The earnings of the victim then have to be handed over entirely or in a large proportion to the perpetrator for paying off this so-called debt. Since the victim cannot dispose of any substantial income, he/she has nowhere to go.<sup>22</sup>

Often, the offenders remove the passports of the victims, and they are subjected to a permanent surveillance, in order to prevent them from asking for help.<sup>23</sup> In addition, because of their illegal presence and labour, the victims risk being arrested and punished, or even being expelled if they were to report the perpetrators.<sup>24</sup> For fear of being arrested and deported or of reprisals towards themselves or their loved ones, the victims are little inclined to make a report, even if they should get the opportunity to do so.<sup>25</sup> Another means to secure the women's cooperation is threatening to harm their relatives in their home country. Or the traffickers may blackmail the woman by taking compromising pictures of her and threatening to send these to her family, neighbors or acquaintances in her country of origin.<sup>26</sup>

Finally, attention should be given to trafficking scenario's in which the victim is substantially misinformed about the risks of the journey. Often, illegal transportation indeed appears to be very dangerous. The migrants are stuffed into boats or trucks without enough oxygen, water or food. They might get ill and sometimes they don't even survive the journey. For instance, smuggled migrants have been found dead because of suffocation in closed containers; from freezing to death in cold stores; or from drowning while illegally crossing rivers or seas.<sup>27</sup> Reference should be made to the tragedy that took place in the summer of 2000 in Dover, in

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<sup>21</sup> P. ALEXANDER, 'Some Ideas Regarding Prostitution and Migration', in M. KLAP, Y. KLERK and J. SMITH (ed.), *Combating Traffic in Persons*, Utrecht, Netherlands Institute of Human Rights, 1995, 105-106.

<sup>22</sup> IOM, *Trafficking and prostitution : the growing exploitation of migrant women from Central and Eastern Europe*, Budapest, MIP IOM, 1995, 22.

<sup>23</sup> E. GIOBBE, *A Comparison of Pimps and Batterers*, 1994, revised 1998, URL: [www.uri.edu/artsci/wms/hughes/-catw/batterer.htm](http://www.uri.edu/artsci/wms/hughes/-catw/batterer.htm).

<sup>24</sup> MERCKX-VAN GOEY and DE T'SERCLAES, Parlementair onderzoek naar een structureel beleid met het oog op de bestrafing en de uitroeiing van de mensenhandel. Verslag namens de onderzoekscommissie (Parliamentary enquiry into a structural policy with a view to punishing and eradicating trafficking in human beings. Report on behalf of the enquiry commission), *Parlementaire Stukken*, Kamer (Parliamentary Documents, Chamber), 1993-1994, No 673/7-91/92, 11.

<sup>25</sup> M. WIJERS, 'Vrouwenhandel en de overheid; de oplossingsstrategieën kritisch bezien' (Trafficking in women and the government: a critical perception on the solution strategies'), in *Justitiële Verkenningen*, Arnhem, Gouda Quint, 1996, 18.

<sup>26</sup> X, *Jaarverslag Payoke vzw* (Annual Report Payoke), Antwerp, 1997, 49.

<sup>27</sup> IOM, *Trafficking of women to countries of the European Union : characteristics, trends and policy issues. Conference on trafficking in Women for Sexual Exploitation*, Vienna, June 1996, 14.

which 58 Chinese migrants lost their lives. This is not an isolated case. According to the International Organisation for Migration (IOM), at least 467 smuggled or trafficked migrants died in 1999 and the first half of 2000 alone.<sup>28</sup>

#### **D. Consequences of (illegal) migration**

As mentioned earlier, uncontrolled migration movements bring along serious problems for the countries involved, i.e. both for the receiving as the sending countries, although the latter may not be that obvious.

Indeed, the countries of origin may consider the emigration of their population partially as an export of the poverty, unemployment and social, ethnic and political tensions they are facing. In addition, the emigrants often send remittances to their relatives in their home country, or they invest money that they have earned abroad in local projects (e.g. starting up a shop). That way, they contribute to the development of their home region.<sup>29</sup> For all these reasons, the governments of the sending countries frequently do not recognize the importance of pursuing a policy that aims at discouraging the emigration-ambitions of their population. Yet, a number of harmful consequences can be indicated for sending countries, including *the loss of human and intellectual potential*. This is caused by the fact that the people who take the plunge of moving to a new and unknown world are usually the most courageous, undertaking, ambitious or critical individuals. Likewise, usually young people are involved. In some countries, especially the skilled people emigrate, which might lead to a real 'brain drain'. It is not imaginary that this will affect the future development of these countries in a negative way.<sup>30</sup>

For the countries of destination, the growing (illegal) migrant community has important economic and social implications. The economic effects are especially situated in the sphere of the *labour market*, where the illegal labour force may compete with the local labour force.<sup>31</sup> As a result, the number of unemployed among the local population increases, which also has financial implications for the legal employees. However, the experiences in Western Europe show that there is usually only a limited direct competition between the local and the illegal labour force, the latter filling in especially those jobs that are unpopular with the local population. Nevertheless, a drawback should be recognised, as such a situation appears to be harmful for the structural and technological reforms and also for the productivity of the national industry: because of the large supply of unskilled illegal workers, the need for technological and structural changes is less tangible, and the competitive position of the receiving country in the international market is threatened.

One of the most striking social problems, entailed by rising levels of illegal immigration, is the *growing presence of (organised) crime* in the countries of destination.<sup>32</sup> Human smuggling and trafficking is particularly interesting for criminal organisations because of the

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<sup>28</sup> IOM, 'Deaths in trafficking/smuggling', *Trafficking in migrants*, Summer 2000, 2.

<sup>29</sup> M. LIBERCIER and H. SCHNEIDER, *Migrants: Partners in Development Cooperation*, Paris, OECD, 1996, 37.

<sup>30</sup> IOM, *Trafficking in Migrants: IOM Policies and Activities*, s.l.n.d., 3.

<sup>31</sup> For more information about the economic consequences of illegal migration, see: B. GHOSH, *Huddled Masses and Uncertain Shores. Insights into Irregular Migration*, The Hague, Kluwer Law International - Martinus Nijhoff Publishers, 1998, 73-88.

<sup>32</sup> IOM, *Trafficking in migrants: IOM policies and activities*, 3.

very high profit and low risk character of these activities. In an increasing number of cases in Western Europe, it has been found that migrant smuggling and trafficking, the trade in drugs, weapons and other illegal commodities, and money laundering go hand in hand.<sup>33</sup> Criminal organisations engage in all of these criminal activities in order to spread risks and maximize profits. For them, migrants are just another commodity.<sup>34</sup> In addition, illegal migration encourages many other illegal activities aimed at enabling this migration, such as theft and forgery of documents and corruption.<sup>35</sup> Finally, the proceeds of the smuggling of migrants are used to finance further illegal practices and, therefore, generate even more criminality.<sup>36</sup>

Since illegal immigration affects the economic integrity of the receiving country and is increasingly connected with criminality, the local population perceiving its own interests to be threatened, is becoming more and more intolerant of foreigners, especially the lower social classes. Some political parties capitalize on these feelings by spreading populist anti-immigration propaganda, through which *social tension, racism and xenophobia* are nourished.<sup>37</sup> A negative side-effect of this is that legal immigrants, originating from the same ethnic groups, often become discredited as well, even those who have been living for a long time in the receiving country.<sup>38</sup>

### **E. Consequences of trafficking**

The consequences of trafficking for the migrant are devastating. Trafficked persons are deprived of every form of liberty, and they are compelled to live in degrading circumstances, as a result of which some of them even die.<sup>39</sup> The consequences are particularly harmful for female victims that have been set to work in prostitution. They are subjected to a systematic physical and psychological abuse. If, eventually, they manage to escape, they are usually sent back to their country of origin, where they might be cast out, if it comes to the knowledge of the local commune that they have been working as a prostitute.<sup>40</sup> Often, it takes years for them to cope with their experiences and their feelings of shame, and some of them are unable to ever build a new life again.<sup>41</sup>

Trafficking in persons entails an infringement of the most fundamental human rights of the victims involved.<sup>42</sup> Several provisions of the Universal Declaration on Human Rights and of

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<sup>33</sup> S. ADAMOLI, A. DI NICOLA, E. SAVONA and P. ZOFFI, *Organized Crime Around the World*, Heuni, Helsinki, 1998, 17.

<sup>34</sup> UNDCP, 'Trafficking in Human Beings', *Update*, January 2000, 9.

<sup>35</sup> IOM, 'Organized Crime moves into migrant trafficking', *Trafficking in Migrants*, June 1996, 1.

<sup>36</sup> B. GHOSH, *o.c.*, 91-92.

<sup>37</sup> *Ibid.*, 92.

<sup>38</sup> *Ibid.*, 93.

<sup>39</sup> M. GRAMEGNA, 'Statement at the EU Conference on Trafficking in Women for Sexual Exploitation', in X, *Report by the European Commission of the Conference on Trafficking in Women*, Vienna, 10-11 June 1996, 28.

<sup>40</sup> *Ibid.*, 28.

<sup>41</sup> IOM, *Trafficking of women to countries of the European Union : characteristics, trends and policy issues*, Paper for the Conference on Trafficking in Women for Sexual Exploitation, Vienna, June 1996, 14.

<sup>42</sup> P. BAEHR, 'General Introduction and Keynote Speech', in M. KLAP, Y. KLERK and J. SMITH (ed.), *Combating Traffic in Persons*, Utrecht, Netherlands Institute for Human Rights, 1995, 5.

the International Covenant on Civil and Political Rights are trampled on.<sup>43</sup> For instance, article 3 of the Universal Declaration on Human Rights and Article 9 of the International Covenant on Civil and Political Rights recognize every person's right to freedom, while respectively Articles 5 and 7 of these treaties forbid the degrading treatment of persons. A number of international conventions provide for a prohibition of slavery and forced labour.<sup>44</sup> The Charter of Fundamental Rights of the EU<sup>45</sup> as endorsed by the European Council of Nice in December 2000, in Article 5, explicitly prohibits slavery, servitude, forced labour and trafficking in human beings. Human trafficking clearly implies a violation of the victim's right to a free choice of labour and profession, and of his/her right to a private life. Women who are set to work in prostitution against their will are deprived of their right to sexual self-determination, and their physical and psychological integrity is violated.<sup>46</sup>

### **III. NEED FOR STRUCTURAL AND INTEGRATED STRATEGIES**

A distinction is hereafter made between structural and short-term, integrated strategies to prevent and combat trafficking in persons.

#### **A. Structural strategies**

##### **1. Development cooperation**

Given the structural character of the causes of uncontrolled migration flows and international trafficking in human beings that these migratory movements entail, a short-term solution to the problem is hardly conceivable. In fact, given the current global developments, one should expect a worsening of the situation during the years to come. Only rationally organised development cooperation<sup>47</sup> and strong political pressure can sort an essential change. It may be obvious that this is a process that takes decades. In the meantime, desperate migrants remain an easy prey for human traffickers.

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<sup>43</sup> See for an exhaustive discussion: B. THOMAS-KORVINUS, 'Vrouwenhandel en mensenrechten' (Trafficking in women and human rights), in X, *Vrouwenhandel. Tussen migrant en handelswaar* (Trafficking in women. Between migrant and merchandise), Amsterdam, Anne Vondeling Foundation, 1988, 40-41.

<sup>44</sup> They are, amongst others, the Slavery Convention of 25 September 1926 (Article 5), ILO Convention No 29 concerning Forced Labour of June 1930, Universal Declaration on Human Rights of 1948 (Article 4), European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Article 4), International Covenant on Civil and Political Rights of 16 December 1966 (Article 8).

<sup>45</sup> *Official Journal of the European Communities*, 18 December 2000, C 364/9.

<sup>46</sup> N. VAN DER VLEUTEN, 'Vrouwenhandel in de jaren tachtig' (Trafficking in women in the eighties), in X, *Vrouwenhandel. Tussen migrant en handelswaar* (Trafficking in women. Between migrant and merchandise), Amsterdam, Anne Vondeling Foundation, 1988, 10.

<sup>47</sup> In some countries, the fight against trafficking in human beings is indeed being dealt with in terms of development cooperation also. In Belgium, for instance, the State Secretariat of Development Cooperation has recently financed a research project on trade in women between the Philippines and Belgium, in which research teams in both countries have each been granted half of the total research budget. For the results of this project (from Belgian side), see: K. VAN IMPE, P. DE SOMERE, M. DELCOUR, B. DE RUYVER and W. VAN EECKHOUTTE, *o.c.*, 269 p..

## **2. Collection and exchange of information**

A necessary condition for effectively combating the phenomenon of trafficking in human beings is getting a better knowledge of the phenomenon. Given the clandestine nature of trafficking, accurate and up-to-date data on the phenomenon are scarce. Although certain figures have been collected by police and NGOs as well as international organisations, it is here again difficult to gather reliable overall figures.<sup>48</sup> Pooling information among countries of origin, transit and destination is a useful first step in filling the information gap.<sup>49</sup>

At UN level, reference can in this context be made to both the UN Trafficking Protocol and the UN Smuggling Protocol. The two Protocols, in Article 10, emphasize the necessity to collect and exchange information.

As for the EU, the establishment in November 1992 of a Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration (CIREFI) has been a very important initiative. Its function is to gather, exchange and disseminate information and to compile documentation about immigration and border-crossings. This information more specifically relates to: authorised and illegal immigration flows (countries of origin, routes, means of transportation); original, false or forged travel documents; control procedures; legislation relating to immigration control procedures and information about immigration policy in general; problems relating to rejected asylum seekers and abuse of asylum procedures; expulsion of illegal third country nationals; carrier liability; statistics, and, last but not least, information on all the channels of migration by which (potential) victims are being traded.

CIREFI works closely together with Europol. At the end of 1999, both organisations even agreed to intensify their cooperation in the field of combating illegal migration.<sup>50</sup>

By Council Resolution of 11 May 1999, a so-called *early warning system* was established, allowing Member States to transmit information on illegal immigration and facilitator networks directly between national central authorities, during the time between CIREFI meetings. To that purpose, a network of contact points in the immigration services of the EU Member States was set up, enabling real-time transmission of urgent, operational information, requiring a rapid response in the recipient country. However, it seems that until now, not enough use has been made of the early warning system.<sup>51</sup>

Exemplary is the active contribution by the EU candidate Member States to both CIREFI and the early warning system.

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<sup>48</sup> EUROPEAN COMMISSION, *Trafficking in women. The misery behind the fantasy: from poverty to sex slavery. A comprehensive European strategy*, l.c., 3.

<sup>49</sup> B. MC KINLEY, 'There are ways to curb the worldwide traffic in migrants', *Trafficking in migrants*, Summer 2000, 1.

<sup>50</sup> COUNCIL OF THE EUROPEAN UNION, Intensifying cooperation between CIREFI and Europol in the field of illegal immigration and related issues, 10918/99, Brussels, 13 September 1999; 10918/1/99, Brussels, 22 October 1999; 10918/2/99 REV 2, Brussels, 22 December 1999.

<sup>51</sup> COUNCIL OF THE EUROPEAN UNION, Early warning and rapid reaction system, Brussels, 9803/00, 28 June 2000; COUNCIL OF THE EUROPEAN UNION, Meeting of experts on the early warning and rapid reaction system, 12229/00, Brussels, 18 October 2000.

### **3. Information to countries of origin and transit**

What can and must be done in a short term in this respect, is *instruction*. Care should be taken in the dissemination of solid information relating to the (lack of) opportunities to immigrate in the West by informative programs, specifically designed for this purpose, so that people do not burn all bridges on the basis of false hope. Similarly it is important to make people aware of the possible consequences of an ill-considered migration, and of the dangers that are connected with making an appeal to smugglers to help them in carrying out this migration. In addition, the media and advertisers should be alerted to the importance of spreading correct, objective information in this respect.

IOM has already made a number of successful efforts in this respect. Information campaigns were implemented in Romania (1992-1996), Albania (1992-95), the Philippines (1997-99), Vietnam (1998-99) and the Ukraine (1998). In November 1999, IOM launched two information campaigns to combat trafficking of women in Bulgaria and in Hungary. Both information campaigns are jointly financed by the European Commission and by the USA, in the context of the Transatlantic Agenda.<sup>52</sup> IOM is also carrying out an information campaign in the Czech Republic.<sup>53</sup> The overall aim of these campaigns is to prevent trafficking in women by raising awareness among potential risk groups. Several channels are used, such as the distribution of posters and leaflets, containing the telephone number of a help line, in public areas, schools, cafés, cinemas, employment agencies, police stations; the broadcasting of television and radio clips, and the display of videos with testimonies of victims in schools. Moreover, specific target groups (media, police, immigration officials, medical and social workers, teachers, ...) are given accurate and current information on the issue of trafficking in women.<sup>54</sup>

Financial support for the creation and development of NGO's active in preventing trafficking in human beings complements efficiently the role of public authorities. As for the EU, a number of well-targeted NGO-based projects towards the Central and Eastern European Countries as well as to the Newly Independent States have been funded.<sup>55</sup>

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<sup>52</sup> X, 'Hungary and Bulgaria: IOM launches information campaigns against sex trafficking', *IOM News*, 1999, No 3, 10.

<sup>53</sup> X, 'Czech Republic: IOM launches information campaign against trafficking in women', *IOM News*, 1999, No 2, 9.

<sup>54</sup> X, 'Information campaigns against trafficking', *Trafficking in Migrants*, December 1999-January 2000, 1-2.

<sup>55</sup> For example, in 1996, the EU funded the NGO 'La Strada' to encourage the prevention of trafficking of women in Central and Eastern Europe, concentrating on the Czech Republic, Poland and Ukraine. Also within the framework of the Transatlantic Agenda, the EU and the US have joined forces in the fight against trafficking in women, and information campaigns were funded for 1999/2000 in Hungary and Bulgaria, implemented by IOM. These initiatives *inter alia* aimed at bringing the problem of trafficking to the attention of the public and the authorities, and to warn women of the dangers of the phenomenon. The PHARE (oriented towards the Central and Eastern European Countries) and TACIS (oriented towards the Newly Independent States) Democracy Programmes have had a major role in the financing of these activities. New information campaigns are being considered in candidate countries as well as other eastern European countries such as neighbouring countries of Russia. In Russia, plans for a campaign are presently being prepared. See: EUROPEAN COMMISSION, *Trafficking in women. The misery behind the fantasy: from poverty to sex slavery. A comprehensive European strategy*, l.c., 7.

Worth mentioning in this context is that also the UN Trafficking Protocol, in Article 9, under 3, also stresses the importance of mass-media information campaigns to countries of origin and transit.

**B. Short term strategies: need for an integrated, multidisciplinary, approach**

In the meantime, the West is basically addressing symptoms. Although it clearly does not impact upon the heart of the problem, this battle cannot be discarded. It essentially involves a *policy of discouraging* potential illegal migrants, as well as towards smugglers and traffickers, by reducing the probable benefits and enhancing the probable costs of respectively illegal migration and migrant smuggling and trafficking. This policy must be conducted on an *international level*: the isolated efforts of one State can merely cause a displacement of the problem to other countries. The strategies to be developed must have a *multidisciplinary character*. Not solely focussed on repression, they need to include a preventive dimension. As explained earlier, a too severe repressive approach could have a reverse effect, driving migrants into the illegal circuit and into the hands of traffickers.

**1. Administrative law**

As it appears, smugglers and traffickers often make use of legal channels, though not in conformity with the spirit of the law. Besides the abuse of the asylum procedure, abuses of the following residence titles do occur: labour licenses for cabaret artists, transit visa, visa for tourists, visa for purposes of family reunion (the phenomenon of marriages or adoptions of convenience), the authorisation of temporary residence for *au-pair* or for study purposes, and the use of special identity cards for technical staff of functionaries in embassies and international organisations. In addition, use is also made of fake documents (e.g. forged visa) or residence titles are obtained through corruption.<sup>56</sup>

Tackling human trafficking therefore presupposes measures on the administrative level. An airtight regulation must prevent abuses and diversions of the immigration legislation of the countries of destination. Not only must violations of the letter of the law be avoided and sanctioned, but also violations of the spirit of the law, this in view of making trafficking in persons less easy and attractive, and, as such, sorting a preventive effect.

More even than in any other area, measures in the area of administrative law must have an international dimension. Important steps on the matter have already been taken on e.g. EU-level.

**2. Labour and social security law**

Some reforms in the field of social law are indispensable as well, aimed primarily at protecting the migrants. First, there should be more control on illegal employment by social inspection services, especially in the prostitution sector.<sup>57</sup>

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<sup>56</sup> B. DE RUYVER and K. VAN IMPE, *The necessity of a multidisciplinary and proactive approach to the phenomenon of human trafficking*, Training on Best Practice in Combating Trafficking in Human Beings, Europol, The Hague, 27-29 September 1999, 14.

<sup>57</sup> In Belgium e.g., a number of protocols of collaboration were concluded to this purpose (in 1993 and 1995) on a local as well as on a federal level. See: Protocol of 30 July 1993, modified by Protocol of 31 March 1995.

Besides, a clearer description of victims' rights is necessary. Most countries still have gaps and difficulties in their labour and social security legislation, making it almost impossible in practice for victims that have been forced into or have been exploited in illegal labour to claim their rights and compensations. As a rule, their employer does not pay the normal social contributions due, while wages are below the level guaranteed in collective labour agreements applicable in the professional sector involved. Victims willing to undertake steps against their employer, will be faced with a heavy burden of proof.<sup>58</sup>

An additional problem arises for victims employed and exploited in the sex industry. In most countries party to the Convention of 21 March 1950 for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others<sup>59</sup> (hereinafter referred to as *UN Trafficking Convention*), prostitution, though in itself not punishable, is not being recognised as a proper profession, and therefore only tolerated in practice. Labour law, as a result, is often not applicable to prostitution. Victims of trafficking in human beings who end up in the sex industry, will then not be able to claim what they are normally entitled to on the basis of an employment contract.<sup>60</sup>

Guaranteeing a better social status for prostitutes (and, as a result, protection against exploitation) implies the regulation and recognition of their profession. However, a decriminalisation of the exploitation of prostitution is incompatible with the prevailing international standards, *in casu* the UN Trafficking Convention,<sup>61</sup> obliging the Contracting Parties to penalize all forms of exploitation of prostitution, regardless of whether the prostitute consents or not (*infra*). In this respect, it is important to note that the new UN Trafficking Protocol only targets the exploitation of another (adult) person's prostitution *against her/his will*.

### **3. Criminal law**

Hereafter, a distinction is made according to the four sections between which the International Association of Penal Law traditionally distinguishes for the purpose of its congress activities. Pass in review: general principles of criminal law (a), substantive criminal law (b), procedural criminal law (c) and international criminal law (d).

#### ***a. General principles***

##### ***i. Ultimate remedy***

Finally, criminal law has a role to play in the suppression of trafficking in persons. Penal measures are particularly attractive because, in principle, they only affect the criminals, and because they may produce a positive effect in a rather short term. However, it should be

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<sup>58</sup> The commencement of employment, the number of hours worked (which is generally higher than the statutory number of working hours), etc. are often hard to prove for lack of evidence. See: B. DE RUYVER and K. VAN IMPE, *o.c.*, 17.

<sup>59</sup> Adopted by the General Assembly of the United Nations on 2 December 1949, *United Nations Treaty Series*, 1951, Vol. 96, No 1342, 271.

<sup>60</sup> In Belgium, for instance, an agreement that infringes upon public order and morality is considered to be null and avoid. *Ibid.*, 18.

<sup>61</sup> *United Nations Treaty Series*, 1951, Vol. 96, No 1342, 271.

stressed that penal law can only serve as an ultimate remedy, and that penal measures can and may by no means form a substitute for structural changes, as referred to above.

## **ii. Liability legal persons**

As legal persons such as for instance travel agencies, commercial carriers or (at least for some countries) brothels may be involved in smuggling or trafficking in persons or in the facilitation or laundering of the proceeds of such offences (*infra*), it seems critically important to also provide that legal persons can be held liable of these offences.

Like the UN Trafficking and Smuggling Protocols, which call for criminal, civil or administrative liability for participation of legal persons in crimes involving an organised criminal group<sup>62</sup>, the two EU Framework Decisions on Trafficking and Sexual Exploitation of Children stress the need to ensure that legal persons can be held liable for the offences that they define. According to the proposed text of the draft Framework Decisions, it should be possible to impose sanctions on legal persons, such as criminal or non-criminal fines, the exclusion from entitlement to public benefits or aid, or the temporary or permanent disqualification from the practice of commercial activities.

### **b. Substantive criminal law**

A distinction is made hereafter between aspects relating to incriminations (i) and sanctions (ii).

#### **i. Incriminations**

Apart from trafficking and smuggling (1), attention is given to related offences, such as facilitating offences, carrier liability and money laundering (2), prostitution (3) and child pornography (4).

#### **1. Trafficking and smuggling**

As shown above, it is critically important in the area of substantive criminal law to clearly distinguish between smuggling of and trafficking in persons, only the latter presupposing the use of deceit, the abuse of power or the exercise of coercion by the trafficker. Both at EU level and in most EU Member States, such a distinction has been an *acquis* for several years already. At UN level, on the contrary, such a distinction has first time officially been reflected by the adoption in December 2000 of two separate Protocols, supplementing the UN TOC Convention, respectively on Smuggling of Migrants and on Trafficking in Persons.

Hereafter, *first* an overview is made of criminal law definitions of smuggling and/or trafficking as they have been inserted in legal instruments or otherwise discussed at various international cooperation levels (UN, IOM, Group of Budapest, Council of Europe, EU, Schengen). In a *second* stage, a critical discussion is focused around the most striking divergences between and questions concerning international definitions, with a view to

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<sup>62</sup> See Article 10 of the UN TOC Convention.

coming to a set of recommendations on the matter, which can also be used at the national level..

a. Overview of international definitions

An analysis of the definitions of ‘trafficking in human beings or ‘trafficking in women’, as adopted by various international organisations and forums, shows that there is no consensus at the international level about the constituent elements of the crime of trafficking in persons, although there are some elements on which there seems to be an agreement. Furthermore, as indicated above, a number of the international legal instruments that will pass in review provide for a definition of migrant smuggling, however without these definitions being fully compatible either. The brief survey and examination of international definitions below<sup>63</sup> therefore essentially raises the question of where the boundary between notions ‘trafficking’ and ‘smuggling’ must be drawn.

i. UN<sup>64</sup>

*International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic*

In view of the preamble, this Agreement appears to aim at protecting deceived or coerced adult and underaged females from criminal trafficking, referred to as ‘white slavery’, i.e. the procuring of women for immoral purposes abroad. Minors are presumed to be unable to consent due to their age, so deceit or compulsion is not required.<sup>65</sup>

*International Convention of 4 May 1910 for the Suppression of the White Slave Traffic*<sup>66</sup>

In this Convention it is stated that anyone who, to gratify the passions of others, hires, abducts or entices a female minor (i.e. a person under 20 years of age) for immoral purposes shall be punished. With regard to a woman or girl of full age, this has to be accomplished by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint. According to the final protocol, these provisions should be regarded as a minimum, in the sense that the contracting governments remain free to punish other similar offences, such as the hiring of persons of full age, even where there is no deceit or constraint. Apparently, this convention exclusively focuses on trafficking in human beings, while migrant smuggling is not penalised. Only the traffic in women is being dealt with and only insofar such trade takes place with a view to sexual exploitation.

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<sup>63</sup> See: N. SIRON, P. VAN BAEVEGHEM, B. DE RUYVER, T. VANDER BEKEN and G. VERMEULEN, *o.c.*, 7-15. For an exhaustive overview of the then international initiatives in the field of trafficking in human beings, see: X, *Verslag van de regering inzake de bestrijding van de mensenhandel en de toepassing van de wetten van 13 april 1995*, 1996, 60-86; T. KOOTSTRA, *Background Study on Basic Principles for a Code of Conduct within the Member States of the European Union to Prevent and Combat Traffic in Women*, Utrecht, Dutch Foundation against Trafficking in Women (STV), 1996, 73 p. For a more recent and broader overview, see also: G. VERMEULEN (ed.), *Strafrechtelijke bescherming van minderjarigen* (Protection of minors through criminal law), Antwerp-Apeldoorn, Maklu, 2001, forthcoming.

<sup>64</sup> A number of the legal instruments listed below have originally been drawn up at League of Nations level. Later they were, by Protocol, transferred into UN instruments.

<sup>65</sup> K. VAN IMPE, P. DE SOMERE, M. DELCOUR, B. DE RUYVER and W. VAN EECKHOUTTE, *o.c.*, 5.

<sup>66</sup> *Consolidated Treaty Series*, No 20, 1912.

*International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children*<sup>67</sup>

In this Convention, reference is made to the offences described in the Convention of 4 May 1910 with the same conduct being explicitly incriminated when children of both sexes are involved. This Convention, in other words, aims at extending the international protection against prostitution to minor boys.<sup>68</sup> In addition, the age of consent is being raised: a minor is any person below 21 years of age.

*International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age*<sup>69</sup>

According to this Convention, anyone who, in order to gratify the passions of another person, has procured, enticed or led away a woman or girl of full age for immoral purposes to be carried out in another country shall be punished, even if this should take place with her consent.

*UN Trafficking Convention*

To date, this Convention is the most recent binding multilateral instrument that specifically targets traffic in persons. According to Article 28 of the Convention, in the relation between the Parties to it, its provisions supersede those of the Agreement of 1904 and the Conventions of 1910, 1921 and 1933 as referred to above. Each of the latter international instruments shall be deemed to be terminated when all the Parties to it have become Parties to the Convention of 1950. To date, however, this is not the case for any of the instruments concerned, though of course, in the relationship between two State Parties to the 1950 Convention, the latter supersedes the instruments concluded earlier at League of Nations/UN level.

According to the UN Trafficking Convention, anyone must be punished who, in order to gratify the passions of another:

- procures, entices or leads away, for purposes of prostitution, another person, *even with the consent of that person*;
- exploits the prostitution of another person, *even with the consent of that person*;
- keeps or manages, or knowingly finances or takes part in the financing of a brothel;
- knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.

The Convention's scope is restricted to the sex industry. It curbs the exploitation of prostitution, whether or not trafficking is involved (i.e. even where the victim has consented), whether or not an international border is crossed and irrespective of the gender or the age of the victim.

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<sup>67</sup> *League of Nations Treaty Series*, 1922, Vol. 9, No 269, 415.

<sup>68</sup> R. HAMERLYNCK, 'De Verdragsrechtelijke bescherming van de slachtoffers van internationale mensenhandel' (Treat law protection for victims of international trafficking in human beings), *Rechtskundig Weekblad*, 1992-93, 1120.

<sup>69</sup> *League of Nations Treaty Series*, 1934, Vol. 150, No 3476, 431.

Its exclusive focus on sexual exploitation, whilst disregarding other forms of trafficking in human beings, such as forced marriages or the exploitation of domestic servants, is an obvious shortage of the Convention.<sup>70</sup> Trafficking in persons comprises a multitude of situations. The exploitation of a person or his labour may occur in various sectors of the (shadow) economy. Therefore, reducing the phenomenon of trafficking in persons to the sector of the sex industry is an unjustified simplification of - at least nowadays - reality. Every form of exploitation, irrespective of the sector in which it takes place, should be targeted.

In addition, the attitude adopted by the Convention towards exploitation of prostitution is quite ambiguous (*infra*).

*Fourth World Conference for Women, Platform for Equity, Development and Peace, Beijing, 4-15 September 1995*

Further, in 1995, the issue of trafficking in persons was discussed in the Platform for Action of Beijing.<sup>71</sup> Although the Platform for Action refers to the 1950 UN Trafficking Convention, it addresses more than just the trade in women for the purpose of prostitution; it covers other forms of trafficking in persons and slavery as well.<sup>72</sup> In brief, governments and regional and international organisations have been recommended to take measures to suppress all factors 'that encourage traffic in women and girls for prostitution and other forms of commercialised sex, forced marriages and forced labour (...)'.<sup>73</sup>

#### *UN Smuggling Protocol*

As was already stressed before, it is only with the adoption in December 2000 of two separate Protocols, supplementing the UN TOC Convention, respectively on Smuggling of Migrants and on Trafficking in Persons, that the UN has for the first time distinguished between 'smuggling of' and 'trafficking in' persons. In addition to trafficking in persons, and because of its close links with it, smuggling of persons is penalised as a separate offence in the Smuggling Protocol.

According to Article 6 of the UN Smuggling Protocol, State Parties must establish 'the smuggling of migrants' as a criminal offence, 'when committed intentionally and in order to obtain, directly and indirectly, a financial or other material benefit, 'smuggling' being defined in Article 3 as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.'

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<sup>70</sup> UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, *Report of the Special Rapporteur on Violence against Women, its causes and consequences. Ms. Radhika Coomaraswamy. Addendum. Report on the mission of the Special Rapporteur to Poland on the issue of trafficking and forced prostitution of women (24 May to 1 June 1996)*, 10 December 1996, 19.

<sup>71</sup> Under Chapter IV, Strategic objectives and other measures, under D, Violence against women.

<sup>72</sup> K. VAN IMPE, P. DE SOMERE, M. DELCOUR, B. DE RUYVER and W. VAN EECKHOUTTE, *o.c.*, 7.

<sup>73</sup> Strategic Objective D, § 131.

*UN Trafficking Protocol*

According to Article 5 of the Trafficking Protocol to the UN TOC Convention State Parties must establish 'trafficking in persons' as a criminal offence, 'trafficking' being defined in Article 3 as 'the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.' The recruitment, transportation, transfer, harboring or receipt of a person of less than eighteen years of age, for the purpose of sexual exploitation, is considered to be 'trafficking in persons', even if this does not involve any of the means referred to above.

*Optional Protocol of 25 May 2000 to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*<sup>74</sup>

Recently, also at UN level, two Optional Protocols to the Convention on the Rights of the Child were drawn up, one of which obliges State Parties to the Protocol concerned to prohibit the sale of children, child prostitution and child pornography as provided for by the Protocol. In the context of smuggling and trafficking of persons, the aspect of 'sale of children' has particular relevance.

According to the Protocol, in the context of 'sale of children', being defined in Article 2 as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration', at least the following acts and activities, whether such offences are committed *domestically or transnationally or on an individual or organised basis*, must be criminalised or penalised:

- offering, delivering or accepting, by whatever means, a child *for the purpose of sexual exploitation of the child, transfer of organs of the child for profit, or engagement of the child in forced labour*;
- improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.

ii. IOM

Being an intergovernmental organisation, founded in 1951 and consisting worldwide of over 60 countries, IOM aims at assisting both states and individuals in solving migration problems.

IOM uses its own definition of 'trafficking', requiring the following four conditions to be met:

- an international border is crossed;
- a facilitator ('trafficker') is involved;
- money, or another form of payment, changes hands;
- entry and/or stay in the country of destination are illegal.<sup>75</sup>

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<sup>74</sup> URL: [untreaty.un.org/ENGLISH/millennium/law/iv-12.htm](http://untreaty.un.org/ENGLISH/millennium/law/iv-12.htm).

It should be noted that, according to the above definition, no element of (sexual) exploitation is due and no distinction is made depending on whether the victim has consented or not. IOM assumes that the approval by or freedom of choice of the victim is always questionable. The organisation argues that at least a lack of information concerning migration legislation or a compulsion resulting from economic despair or large-scale violence would be involved in trafficking.<sup>76</sup>

### iii. Budapest Group

The Budapest Group was established during the European Conference in the framework of uncontrolled migration, which took place in Budapest in 1993. Today it consists of 33 European countries, as well as Australia, the United States and Canada. An Expert Group that had been charged with preparing actions on several issues in the field of migration, submitted its report to the Budapest Group meeting in Zurich on 14-15 September 1995. On the basis of this report, it was decided at the Bratislava meeting of the Budapest Group on 6-7 December 1995, to establish a *Working Group on Model Legislation*<sup>77</sup> to prepare a set of legal minimum standards in view of the harmonisation of anti-trafficking legislation.<sup>78</sup> The idea was to prepare a statute which could serve as a standard between different countries, and in particular as an example for the Central and Eastern European countries that would wish to enact specific legislation in the fight against trafficking in human beings. However, the preparatory activities led to the conclusion that it was impossible to harmonise all existing legal instruments by drawing up a single new model act. Alternatively, it was decided to provide a list of elements, so-called 'minimum standards', that every state should include in its legislation.<sup>79</sup>

In the end, at the meeting of the Expert Group of the Budapest Group at Ljubljana on 13-14 June 1996,<sup>80</sup> the Working Group recommended that in elaborating national legislation, states would all adopt the definitions of 'illegal migrant smuggling' and 'traffic in human beings' established by the Europol Convention (*infra*).

### iv. Council of Europe

At the level of the Council of Europe, which today has 42 Member States, several non-binding legal instruments that are relevant in the context of trafficking in human beings, have been (or will soon be) adopted. Worth mentioning are at least the following:<sup>81</sup>

*Recommendation R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation*<sup>82</sup>

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<sup>75</sup> IOM, *Trafficking of women to the European Union : characteristics, trends and policy issues. Conference paper submitted by the IOM at the Conference on Trafficking in Women for Sexual Exploitation. Vienna, June 1996*, Geneva, IOM, 1996, 2.

<sup>76</sup> *Ibid.*, 2.

<sup>77</sup> Belgium and Poland led this Working Group.

<sup>78</sup> X, *Anti-trafficking model legislation. Report of the Working group of the Budapest Group, prepared by Belgium and Poland with the technical support of the IGC*, Ljubljana, June 1996.

<sup>79</sup> K. VAN IMPE, P. DE SOMERE, M. DELCOUR, B. DE RUYVER and W. VAN EECKHOUTTE, *o.c.*, 8.

<sup>80</sup> X, *Anti-trafficking model legislation*, 7.

<sup>81</sup> Also: Recommendation R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults (*infra*).

The Member States are recommended *inter alia* to enact or strengthen legislation on trafficking in human beings for the purpose of sexual exploitation and to introduce, where necessary, a specific offence. In the context of the Recommendation, ‘trafficking in human beings for the purpose of sexual exploitation’ has been defined as to include ‘the procurement by one or more natural or legal persons and/or the organisation of the exploitation and/or transport or migration – legal or illegal – of persons, *even with their consent*, for the purpose of their sexual exploitation, *inter alia* by means of coercion, in particular violence or threats, deceit, abuse of authority or of a position of vulnerability’.

The definition used adds to the confusion between the notion ‘trafficking’ and ‘smuggling’, by integrating the ‘organisation of the transport or migration of persons, even with their consent’ in the definition of ‘trafficking’, which, in its turn, presupposes the use of means of coercion.

#### *Draft Recommendation on the protection of children against sexual exploitation*<sup>83</sup>

For the purpose of the Recommendation, ‘trafficking in children’ is considered to be a form of sexual exploitation, and is therefore interpreted as to aim at the use of children in pornography or prostitution. According to the definition used, ‘trafficking in children’ does not require the use of coercion or deceit or the abuse of the vulnerability of the child, as is usually the case when adult victims are concerned.. Apparently, children, defined as persons under the age of eighteen, are presumed to be unable to consent to trafficking for the purpose of exploitation in pornography or prostitution, even when they have reached the maturity to consent to getting involved in sexual activities.

#### v. EU

The EU takes an important place as a destination region for immigrant smuggling and trafficking in human beings. Several specific legal instruments on the matter have been or are about to be adopted at EU level.

#### *Europol Convention*

According to Article 2, under 2 of the Europol Convention of 26 July 1995,<sup>84</sup> which has entered into force on 1 October 1998, Europol’s mandate includes *inter alia* preventing and combating *traffic in human beings* and *illegal immigrant smuggling*.

The Annex to the Europol Convention defines ‘traffic in human beings’ as the ‘subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children.’

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<sup>82</sup> COUNCIL OF EUROPE, URL: [cm.coe.int/ta/rec/2000/2000r11.htm](http://cm.coe.int/ta/rec/2000/2000r11.htm). See *inter alia* points 1 and 42 of the Appendix to the Recommendation.

<sup>83</sup> COUNCIL OF EUROPE, PC-SE (2001) 3, Strasbourg, 6 February 2001. See in particular point 3, under a) and d).

<sup>84</sup> Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), *Official Journal of the European Communities*, C 316/30, 27 November 1995.

Traffic in human beings has thus been defined *irrespective of the gender* of the victim. With regard to victims of full age, trafficking presupposes a *lack of consent*, while its scope is restricted to the fields of *sexual exploitation* and trade in abandoned children.

By Council Decision of 3 December 1998, which has come into force on 1 January 1999, the definition of ‘traffic in human beings’ in the Annex to the Europol Convention was supplemented with the following, explanatory phrase: [...] ‘These forms of sexual exploitation also include the production, sale or distribution of child-pornography material’. For that reason, as was already indicated above, it is important also to deal with the definition of *child pornography* in the context of the present report.

Also in the Annex to the Europol Convention, ‘illegal immigrant smuggling’ has been defined as to encompass ‘activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the Member States of the EU, contrary to the rules and conditions, applicable in the Member States.’

As in the UN Trafficking Protocol, only the smuggling in persons with a *profit motive* is thus being targeted. Unlike the UN Protocol, the Europol Convention does not only take into consideration the illegal entry into or residence in a state, but widens the scope of Europol’s activities in the area of migrant smuggling to the *illegal employment of migrants* as well.

#### *Parliamentary Resolutions of 18 January 1996 and 16 December 1997*

On 14 December 1995, the Committee on Civil Liberties and Internal Affairs of the European Parliament produced a report on trafficking in human. The report contained a proposal for a Parliamentary Resolution on trafficking in human beings, which, on 18 January 1996, was unanimously adopted by the European Parliament.<sup>85</sup>

According to the Resolution, ‘trafficking in human beings’ must be defined as ‘the illegal action of someone who, directly or indirectly, encourages a citizen from a third country to enter or stay in another country in order to *exploit* that person *by using deceit or any form of coercion or by abusing that person’s vulnerable situation or administrative status*’. Previous<sup>86</sup> Parliamentary resolutions on trafficking in persons had been marked by their exclusive focus on the traffic in women with a view to sexual exploitation.

By Resolution of 16 December 1997, the European Parliament further stressed the importance of effective sanctions, such as the closure of establishments where victims of trafficking in human beings have been employed against their will, the confiscation of forged or falsified passports and other travel documents, and the restriction on the exercise of certain professional activities.<sup>87</sup>

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<sup>85</sup> *Official Journal of the European Communities*, C/32/88, 5 February 1996.

<sup>86</sup> See: T. KOOTSTRA, *o.c.*, 5.

<sup>87</sup> EUROPEAN PARLIAMENT, Resolution of 16 December 1997 on the Communication from the Commission to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation, *Official Journal of the European Communities*, C 14/39, 19 January 1998.

*Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children*<sup>88</sup>

Following an initiative of Belgium during the informal Justice and Home Affairs Council meeting in Dublin on 26-27 September 1996,<sup>89</sup> the Council of the EU adopted on 24 February 1997 a Joint Action concerning action to combat trafficking in human beings and sexual exploitation of children.<sup>90</sup>

According to the instrument, the EU Member States must penalize the sexual exploitation or abuse of children and the traffic in children with a view to their sexual exploitation or abuse, as well as the same behaviour *vis-à-vis* adult persons if committed for gainful purposes and where use is made of coercion or deceit or there is abuse of authority or other pressure, which is such that the person concerned has no real and acceptable choice but to submit to the pressure or abuse involved.

The Joint Action aims at protecting men as well as women. Yet, its scope is restricted to the *sexual exploitation* of persons. Migrant smuggling is not being tackled, since the use of force or tricks or the abuse of authority is a condition for punishability in case of adult victims. In as far as adults are concerned, the *profit motive* further constitutes an essential element of the definition of 'trafficking'. In that respect, the Joint Action is more restrictive than both the UN Trafficking Convention and the UN Trafficking Protocol.

*EU Framework Decisions on Trafficking and Sexual Exploitation of Children*

The major shortcoming of the above Joint Action is the fact that it only recognizes trafficking in persons for the purpose of sexual exploitation. Trafficking for the purpose of exploitation in other economic sectors, such as the textile or construction industry, is not covered by the definition used in the 1997 instrument.

In December 2000, as was mentioned in the beginning of this report, the European Commission has submitted two draft Framework Decisions for adoption by the Council, relating to respectively trafficking in human beings and sexual exploitation of children and child pornography, with a view to updating the 1997 Joint Action.

Apart from trafficking in human beings for the purpose of *sexual exploitation* of the Framework Decision on Trafficking also obliges Member States to take the necessary measures to make the traffic in human beings for the purpose of *labour exploitation* punishable, being defined in Article 1 as 'the recruitment, transportation or transfer of a person, including harboring and subsequent reception and the exchange of control over him or her, where the fundamental rights of that person have been and continue to be suppressed for the purpose of exploiting him or her in the production of goods or provision of services in infringement of labour standards governing working conditions, salaries and health and safety, and:

- use is made of coercion, force or threats, including abduction, or
- use is made of deceit or fraud, or

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<sup>88</sup> *Official Journal of the European Communities*, L/63/2, 24 February 1997.

<sup>89</sup> In the summer of 1996, Belgium had been confronted with the *Dutroux* case, which revealed that young girls had been kidnapped, sexually abused and subsequently killed, and which raised suspicion about the activity in Belgium of (international) paedophile networks, involved in trafficking in children, *inter alia* for the purpose of sexual exploitation and exploitation of children in pornographic performances and materials.

<sup>90</sup> *Official Journal of the European Communities*, L/63/2, 24 February 1997.

- there is a misuse of authority, influence or pressure, or
- there is another form of abuse.'

As for trafficking for the purpose of *sexual exploitation*, the Framework Decision requires:

- the use of coercion, force or threats, including abduction, or
- the use of deceit or fraud, or
- a misuse of authority, influence or pressure, or
- another form of abuse.

It should be emphasised that, as already mentioned above, the purpose of 'sexual exploitation', as defined in Article 2, is considered to also cover, next to the exploitation in prostitution, any form of exploitation in 'pornographic performances or in production of pornographic material'.

In its turn, the EU Framework Decision on Sexual Exploitation of Children clarifies, at least in as far as children are involved, what should be considered to be 'pornography' (*infra*).<sup>91</sup>

Finally, it should be underlined<sup>92</sup> that the Commission's proposals on trafficking in human beings for exploitative purposes is to be seen as to complement the French initiatives, also during the second half of 2000, to propose a Framework Decision on strengthening the penal framework for preventing the facilitation of unauthorised entry and residence and a Draft Council Directive defining the facilitation of unauthorised entry, movement and residence.<sup>93</sup> According to these instruments, dealing with the question of immigrant smuggling, each Member State would be obliged to take the measures required to ensure that 'the act of facilitating intentionally, by providing direct or indirect assistance, the unauthorised entry, movement or residence in its territory of an alien who is not a national of a Member State of the EU' is regarded as an offence. Initially,<sup>94</sup> this obligation was intended to apply also in cases where the facilitation of unauthorised entry and residence would be *not profit-driven*, i.e. even where a person would have acted *exclusively* with the aim of providing assistance to refugees and asylum seekers. In the text of the draft instruments as they stand now, an explicit 'humanitarian' exception has been inserted for this situation, allowing Member States not to apply the sanctions required in such a case.

#### vi. Schengen

According to Article 27 of the Schengen Implementing Convention,<sup>95</sup> which currently applies between thirteen EU Member States<sup>96</sup> plus Norway and Iceland,<sup>97</sup> appropriate penalties have

<sup>91</sup> See Articles 1, under b) and 3.

<sup>92</sup> EUROPEAN COMMISSION, *Trafficking in women. The misery behind the fantasy: from poverty to sex slavery. A comprehensive European strategy*, l.c., 9.

<sup>93</sup> See: COUNCIL OF THE EUROPEAN UNION, Draft Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence - Draft Council Directive defining the facilitation of unauthorised entry, movement and residence, 14920/00 DROIPEN 65 MIGR 102 COMIX 925, Brussels, 22 December 2000.

<sup>94</sup> COUNCIL OF THE EUROPEAN UNION, 10373/00 DROIPEN 27 MIGR 55, Brussels, 20 July 2000.

<sup>95</sup> Convention of 19 June 1990 Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders.

<sup>96</sup> Not yet for the United Kingdom and Ireland, that, however, have applied to the Council of the EU to be allowed to enter the Schengen Group.

to be imposed ‘on any person who, *for purpose of gain*, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties contrary to the laws of that Contracting Party on the entry and residence of aliens.’ This implies that, in principle, smuggling of migrants is only recognised in cases where the smuggler is driven by a profit motive and causes a migrant to enter into or reside in a (Schengen) country in an illegal way.

### *b. Discussion*

Because the various definitions of ‘trafficking in persons’ and ‘smuggling of migrants’ sometimes overlap, the boundary between these two notions is not quite clear. However, it is important for substantive criminal law to clearly distinguish between both offences.

#### i. Trafficking

As far as trafficking in persons is concerned, one may infer from the preceding analysis that there is an international consensus (using the largest common denominator concept) to consider as criminal trafficking:

- the contribution to the illegal entry or stay of a foreigner in a state, either with the use of tricks, violence or coercion, or with the abuse of one’s authority or with the abuse of the vulnerable position of this foreigner, for the purpose of sexual exploitation, i.e. with profit motive, and where an organised criminal group is involved;
- the same conduct, when involving a person under the age of consent - and thus irrespective of his/her consent - and where an organised criminal group is involved.

However, there is no coherence between international legal instruments whether ‘trafficking’ should be penalised where:

- the purpose is exploitation in (child) pornography;
- the purpose is labour exploitation;
- the purpose is organ transfer or removal;
- an adult victim has consented;
- there is no profit motive;
- no border has been crossed;
- the offence is not ‘transnational in nature’;
- there is no involvement of an organised criminal group;
- the foreigner has legally entered or has legal residence in the state concerned;
- the victim has the nationality of the state where the exploitation takes place.

In the author’s view, it is essential to also make trafficking for the purpose of exploitation in pornographic performances or materials and for the purpose of labour exploitation punishable. Further, it seems opportune to extend the scope of trafficking to the purpose of organ transfer or removal too; the present discrepancy on this point between the UN Trafficking Protocol and the draft EU Framework Decision on Trafficking could be avoided by extending the scope of the draft EU Framework Decision as to also cover organ transfer or removal.

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<sup>97</sup> On 25 March 2001, the Convention entered into force for the countries of the so-called Nordic Passport Union, encompassing Denmark, Finland, Sweden, Norway and Iceland.

In case the 'victim' is a consenting adult (a person over eighteen, clearly having the age of consent), i.e. when the victim's freedom of choice has not been restricted in any way, in the author's view, a constituent element of the offence of 'trafficking' in human beings is missing, meaning that there is no offence. Some argue, however, that a person can not freely consent to his/her exploitation. The discussion on this point has been further elaborated below, when analysing whether the exploitation of another person's prostitution should be (maintained as) a criminal offence (*infra*).

In as far as it is accepted indeed that a person having the age of consent can agree to be exploited, the - probably sensitive - question arises whether a minor (person below the age of eighteen) must necessarily be considered to be under the age of consent, especially where he/she has reached the legal age limit for having a (part-time) job or having sexual intercourse, which usually is set below the age of eighteen, for instance at the age of sixteen or fourteen. It could be successfully argued that any person over that age limit, even if still being a minor, can also agree to his/her exploitation in labour or sex. It should be mentioned, however, that even in the Netherlands, where the exploitation of prostitution has been decriminalised since October 2000 (*infra*), the protection through criminal law against sexual exploitation has been fully maintained for *all* persons below the age of eighteen, *irrespective* of their actual consent or legal ability to consent to sexual intercourse at a lower age.

In the author's view, trafficking must be punishable, even when not profit-driven.

The questions whether a border must actually have been crossed and whether trafficking must only be punished when 'transnational in nature', have already been addressed in the beginning of the present report, when discussing its scope. It was argued there that neither one of both conditions should be a constituent element of the crime of trafficking in persons, as this would unnecessarily restrict the impact of the incrimination concerned.

In respect to the question whether the involvement of an organised criminal group, as required in the UN Trafficking Protocol for purposes of international co-operation on the matter,<sup>98</sup> is essential, it is obvious that smuggling of and trafficking in persons are often linked to organised crime. Law enforcement experience shows that criminal organisations do stimulate the demand for migration and that they are responsible for the most harmful and degrading forms of human trade, their influence over the victims being stronger, as they control the entire chain from recruitment, over transportation to the concrete sexual exploitation.<sup>99</sup> Large enterprises and international networks have created a sophisticated and well organised 'industry' with political support and economic resources in countries of origin, transit and destination.<sup>100</sup>

However, criminal organisations do not carry out all smuggling of and traffic in persons. There is also small-scale traffic involving few individuals. It is also clear that organised crime

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<sup>98</sup> Not in as far as the obligation of State Parties to incriminate trafficking is concerned. According to the *travaux préparatoires* to the UN TOC Convention, State Parties must even criminalize the offences meant in the Convention and in the Protocols *independently* of the involvement of an organised criminal group. See: M. HOLLÁN, *o.c.*, 6-7.

<sup>99</sup> EUROPEAN COMMISSION, *Trafficking in women. The misery behind the fantasy: from poverty to sex slavery. A comprehensive European strategy*, l.c., 3.

<sup>100</sup> Cases of corruption of officials have also been reported. There seems also to be links with other forms of criminality. Trafficking in women is becoming a major source of income for some organised crime groups. High profits gained by these criminal organisations often imply the creation of front companies involved in legitimate activities. Profits are also laundered and fed into other illicit activities, including narcotics and arms trafficking.

hardly constitutes a structural cause of these phenomena. Indeed, criminal networks would not be successful in offering illegal migration if people did not feel the urge to migrate to begin with, that is to say, if there was no demand for migration. Hence, it must be stressed that the UN Trafficking Protocol falls short of covering the entire range of the criminal phenomenon concerned,<sup>101</sup> and that the involvement of an organised criminal group should not be retained as a constituent element of the offence of ‘trafficking’.

Finally, at least in the author’s view, the question whether trafficking can also have regard to foreigners that have legally entered or have legal residence in the territory of a state or to nationals of a state, should be answered in a positive way.

## ii. Smuggling

An overview of the few specific definitions of migrant smuggling that have been drawn up or proposed at international level, reveals that penalisation is usually due only insofar as a profit motive is involved, and the immigration legislation of a state is violated. Essential also is that the migrants themselves are not being incriminated.

It is critically important that the profit motive is maintained as a constituent element of the smuggling offence. As mentioned above, within the EU a proposal for a Framework Decision has been tabled during the second half of 2000 by the French Presidency, urging each Member State to ‘take the measures necessary to ensure that the act of facilitating intentionally, by providing direct or indirect assistance, the unauthorised entry, movement or residence in its territory of an alien who is not a national of a Member State of the EU is regarded as an offence’.<sup>102</sup> The adoption of the Framework Decision as it was *initially*<sup>103</sup> drafted would have resulted in an obligation for the Member States to incriminate persons who, even for mere *humanitarian reasons*, give assistance to third country nationals. Such development, of course, should be avoided to all price.

As was demonstrated already for trafficking in human beings (*supra*), the involvement of an organised criminal group, as required in the UN Smuggling Protocol for purposes of international co-operation on the matter, should not be retained as an essential element of the criminal law definition of migrant smuggling.

Finally, it should be recalled that only under the Europol Convention, illegal migrant smuggling also encompasses the ‘illegal employment’ of a foreigner.

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<sup>101</sup> See: C. BASSIOUNI, *o.c.*, 3.

<sup>102</sup> Draft Framework Decision on strengthening the penal framework for preventing the facilitation of unauthorised entry and residence, COUNCIL OF THE EUROPEAN UNION, 10373/00 DROIPEN 27 MIGR 55, Brussels, 20 July 2000.

<sup>103</sup> As mentioned above, in a later stage, and as a result from the harsh critique formulated by other Member States, the draft text was changed as to allow Member States to ‘take the measures necessary to ensure that the penalties provided for shall not apply to any natural or legal person whom the judicial authorities consider to have acted exclusively with the aim of providing assistance to refugees and asylum seekers’. See: COUNCIL OF THE EUROPEAN UNION, Draft Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence - Draft Council Directive defining the facilitation of unauthorised entry, movement and residence, 14920/00 DROIPEN 65 MIGR 102 COMIX 925, Brussels, 22 December 2000.

## 2. Facilitating offences, carrier liability and money laundering

The various offences *facilitating* smuggling or trafficking in persons, such as corruption<sup>104</sup> or - as mentioned *inter alia* in the UN Trafficking and Smuggling Protocols - the forgery or theft of official documents (passports, visas, ..), have to be targeted as well. Doing so has an indirect preventive effect, since important tools for traffickers are thus rendered less usable or accessible. One should also consider making the taking away of travel documents a punishable offence.<sup>105</sup>

Various international legal instruments also have recourse to carrier liability as a means to prevent immigrant smuggling and trafficking in human beings. It must be observed that, whereas a *profit motive* is generally being considered to be an essential condition for criminal liability in the case of illegal migrant smuggling (*supra*), this is not the case for carrier liability. Reference can be made here to e.g. the Schengen Implementing Convention,<sup>106</sup> both the UN Smuggling and Trafficking Protocol,<sup>107</sup> and a draft EU Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals not in possession of the documents necessary for admission,<sup>108</sup> introduced by the French Presidency during the second half of 2000.<sup>109</sup> Introducing an obligation for states to provide for criminal liability for (commercial) carriers that fail to ascertain that all passengers are in possession of the travel documents required for entry into a receiving state, is of course a particularly effective way to prevent the illegal entry into a country (and, as a result, i.e. *indirectly*, to prevent the illegal smuggling of and international trafficking in persons). On the other hand, one should be aware that the introduction of carrier sanctions also produces the reverse affect that, as a rule, Geneva Convention refugees will be prevented from getting to a country where they can seek asylum. From a humanitarian viewpoint, this is a real problem.

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<sup>104</sup> J. WINER, 'Alien Smuggling: Elements of the Problem and the U.S. Response', *Trends in Organized Crime*, 1998, No 3, 5; X, 'Trafficking from South Asia: the key to a dream or a nightmare?', *Trafficking in Migrants*, March 1997, 2.

<sup>105</sup> EUROPEAN PARLIAMENT, Resolution of 16 December 1997.

<sup>106</sup> Despite the general principle reflected in Article 27 of the Convention that migrant smuggling is only recognised in cases where the smuggler is driven by a profit motive, Article 26, under 2, of the Convention, introduces an obligation to have recourse to sanctions for commercial carriers that, *even without purpose of gain*, have allowed persons to illegally enter the Schengen area.

<sup>107</sup> According to Article 11, under 3 and 4 of the two Protocols, State Parties must take the necessary measures, in accordance with their domestic law, to provide for sanctions in cases where commercial carriers fail to ascertain that all passengers are in possession of the travel documents required for entry into the receiving state.

<sup>108</sup> According to the draft instrument, Member States would have to provide in their national law for financial penalties to be imposed on carriers bringing into the territory of the Member States third-country nationals who are not in possession of the travel documents and, where appropriate, the visas required by the regulations applicable to them by virtue of their nationality. Moreover, the penalties referred to would have to be dissuasive, meaning that their minimum amount would be 2,000 EUR for each person carried. See: COUNCIL OF THE EUROPEAN UNION, Initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals not in possession of the documents necessary for admission, 10207/00 FRONT 40, Brussels, 31 August 2000 (Article 4, under 1 and 2), published also in: *Official Journal of the European Communities*, C 269/8, 20 September 2000. At the moment of drafting the present report, no final decision has been taken by the Council of the EU in respect to the adoption of the instrument concerned.

<sup>109</sup> Together with the draft Council Directive and Framework Decision on the facilitation of unauthorised entry and residence referred to above.

From the international legal instruments referred to above, only the draft EU Council Directive explicitly recognizes that 'it is essential that the existence of provisions on carrier liability should not prejudice the exercise of the right to asylum'. The solution proposed in the draft instrument to overcome this incompatibility, is that the obligation of Member States to impose financial penalties upon carriers would not apply if the third-country national is admitted to the territory for asylum purposes. The introduction of such an exemption from the normal obligations under the draft Directive may well bring a solution that, seen from a strictly legalistic viewpoint, is acceptable, but does not exempt carriers to perform preventive checks in countries of origin or transit, resulting in proper Geneva Convention refugees to be prevented to travel to an asylum country of their choice. It should be clear that it cannot be expected from, nor be entrusted to carriers to set up their own - private! - procedure for distinguishing between travellers according to the likeliness of being granted the refugee status in the country of destination.

It is commonly accepted that the best way to deal with organised crime is the proceeds-orientated way. Such an approach implies *inter alia* a maximal *suppression of money laundering*.<sup>110</sup> Indeed, the illegal income made by a criminal organisation has to be injected into the regular economy at some moment in time, preferably without raising any suspicion. To this end, criminals try to hide the source of assets through a series of financial transactions.<sup>111</sup> By taking anti-money laundering measures, authorities attempt to prevent, or at least hamper, the execution of such financial transactions. This, of course, adds an extra negative weight to the cost-benefit-analysis that precedes the commitment of the offence. Therefore, such measures have a repressive and a generally preventive effect in the context of smuggling of and trafficking in persons as well.

### 3. Prostitution

It should be recalled that it was only with the adoption of the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age (*supra*) that, at the international level,<sup>112</sup> prostitution was stigmatised as to be morally reprehensible and adult women have been exempted from the right to freely agree to their exploitation in prostitution.<sup>113</sup>

This new international attitude towards the exploitation of prostitution was further reinforced in 1950, with the adoption of the UN Trafficking Convention (*supra*). Compared with pre-existing international legal instruments, which essentially only intended to sanction the recruitment of women for the purpose of prostitution (against their will), the UN Trafficking

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<sup>110</sup> COUNCIL OF EUROPE AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, 'Corruption and Organised Crime in States in Transition (Octopus) Conclusions, Multilateral Conference, Sofia, 12-14 December 1996', *Trends in Organized Crime*, 1997, No 4, 51; X, *European Conference on Trafficking in Women, Recommendations from the Working Group on Judicial Cooperation*, Vienna, 10-11 June 1996.

<sup>111</sup> G. MÖBIUS, 'Money Laundering', *International Criminal Police Review*, 1993, No 48, 2.

<sup>112</sup> For a more complete overview of international legal instruments and initiatives having regard to the exploitation of prostitution, see *inter alia*: G. VERMEULEN (ed.), *Strafrechtelijke bescherming van minderjarigen* (Protection of minors through criminal law), Antwerp-Apeldoorn, Maklu, 2001, forthcoming.

<sup>113</sup> According to the Convention, anyone who, in order to gratify the passions of another person, has procured, enticed or led away a woman or girl of full age for immoral purposes to be carried out in another country must be punished, even if this should take place with her consent.

Convention also condemned prostitution *in se*,<sup>114</sup> whereas, until then, the exploitation of women in the brothels had been considered to be a matter of national discretion only. Hence, from 1950 on, the position is taken that there should be an irrefutable presumption that women in prostitution could not have given their consent to such a practice.<sup>115</sup> The fact that the new UN Trafficking Protocol only targets the exploitation of another (adult) person's prostitution *against her/his will*,<sup>116</sup> does not affect that position, as the Trafficking Protocol does not supersede the Trafficking Convention.

As stated already above, the attitude adopted by the UN Trafficking Convention towards the exploitation of a person's prostitution is quite ambiguous.

In general, one can distinguish four positions with regard to prostitution and each of them entails a different approach towards the suppression of trafficking in persons.<sup>117</sup>

The *prohibitionist* vision considers prostitution to be a moral evil, which must be completely eradicated. A policy based on this vision, involves a total prohibition of prostitution. Not only third parties, such as pimps and brothel owners, but also the prostitutes themselves should therefore be punishable. Being considered as criminals themselves, the prostitutes are completely in the power of those third parties.

The UN Trafficking Convention reflects a clear *abolitionist* view. This vision morally condemns prostitution because it undermines the family or because it is considered to be by definition a type of sexual violence. The prostitute him/herself is not considered to be a criminal, but a victim, in need for protection. This protection is ensured by making each type of exploitation of prostitution by others punishable, regardless of the form in which the exploitation takes place. As the prostitute is considered to be irresponsible for his/her actions, the question whether or not he/she has consented with being a prostitute, is irrelevant. This leads to the paradoxical situation that being a prostitute is not punishable, whereas all aspects related to working as a prostitute, such as advertising or renting a room for providing sexual services, are. Although this may be intended to protect the prostitutes against exploitation by third persons, the result is exactly the opposite. Decriminalising prostitution, while at the same time maintaining the illegal nature of the organisation of their work, leads to the isolation and marginalisation of prostitutes, whilst it leaves exploitative and coercive exploitation out of reach of the law.<sup>118</sup>

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<sup>114</sup> T. KOOTSTRA, *o.c.*, 10.

<sup>115</sup> See in this respect also C. BASSIOUNI, *o.c.*, 2, where it is argued *inter alia* that 'the dimensions of the problem compel us to adopt a strong policy of presumption against consent in prostitution, leaving only a small opportunity for clear and unambiguous cases of an adult's choice to engage in sex for money'.

<sup>116</sup> The elements 'force' and 'consent' in relation to prostitution have been one of the items inducing discussions during the negotiations on the Protocol. The negotiating parties disagreed on the point whether prostitution could be practised voluntarily or not (see: negotiation versions A/AC/254/4/add.3/Rev.5 and A/AC.254/4/Add.3/Rev.7). Among the EU Member States, however, there was general agreement that women can work as prostitutes voluntarily and that a form of force is therefore an essential element in the definition of trafficking. See: C. RIJKEN and V. KRONENBERGER, *l.c.*, 28.

<sup>117</sup> See: M. WIJERS, 'Supporting Victims of Trafficking', in M. KLAP, Y. KLERK and J. SMITH (ed.), *Combating Traffic in Persons*, Utrecht, Netherlands Institute of Human rights, 1995, 153-155; see also: P. BAEHR, 'General Introduction and Keynote Speech', in M. KLAP, Y. KLERK and J. SMITH (ed.), *o.c.*, 6.

<sup>118</sup> K. VAN IMPE, P. DE SOMERE and M. DELCOUR, B. DE RUYVER and W. VAN EECKHOUTTE, *o.c.*, 149; J. VISSER, 'Tussen zonde en werk; prostitutiebeleid in Nederland', in X, *Vrouwenhandel. Tussen migrant en Handelswaar*, Amsterdam, Anne Vondeling Stichting, 1988, 32-33.

While prohibitionism and abolitionism aim at the eradication of prostitution, the *regulatory* vision more or less accepts prostitution. This is considered to be an inevitable evil; consequently, it is best to regulate the matter, instead of ignoring the problem. Regulations, usually providing for a mandatory registration and imposed checks for venereal diseases, are issued in order to fight inconveniences and protect public health and order.

A fourth policy option, finally, which can be referred to as *decriminalisation*, is under discussion in a number of countries. In October 2000,<sup>119</sup> decriminalisation has even become a fact in the Netherlands, that had chosen never to accede to the UN Trafficking Convention in the first place.

The bottom line of a choice in favour of decriminalisation is that people ought to be free to decide themselves whether or not they want to work as prostitutes. Consequently, running a prostitution business should not be punishable unless there is coercion, deceit or exploitation, and the prohibition of brothels should be abolished.

Among the EU Member States, it is generally accepted that women can work as prostitutes voluntarily.<sup>120</sup> Many countries, also outside the EU, are currently debating about or evolving towards a policy of regulation, or even of decriminalisation of the exploitation of prostitution. Prostitutes should have the same rights as other citizens, especially the right to choose a profession. They should be protected from exploiters by regulating the sector, and by providing them, as a result, with easier access to justice. Such regulation should involve the elaboration of a status as employee or as a self-employed person for prostitutes, and the award of social security rights.<sup>121</sup>

The UN Trafficking Convention is clearly maladjusted to such a changed attitude towards prostitution. The abolitionist tone should make way for an approach in which the *non-coercive and non-abusive employment and organisation of prostitution involving sufficiently mature or non-minors is internationally decriminalised*,<sup>122</sup> which requires the UN Trafficking Convention to be amended or, alternatively, to be renounced by the State Parties

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<sup>119</sup> Act of 28 October 1999 ('tot wijziging van het Wetboek van strafrecht, enige andere wetboeken en enige wetten', *Staatsblad*, 1999, 464. See: S. BOUZOUMITA and P. THION, 'Strafrechtelijke bescherming van minderjarigen in Nederland', as well as Y. NUYTINCK and E. VAN ACKER, 'Bederf van de jeugd en prostitutie', in G. VERMEULEN (ed.), *Strafrechtelijke bescherming van minderjarigen* (Protection of minors through criminal law), Antwerp-Apeldoorn, Maklu, 2001. Interesting to mention is also the recent initiative of the Antwerp city council to establish a facility that it would like to contract to a manager who could/would have to run it as a brothel. See on the Antwerp situation: STAD ANTWERPEN, *De integrale aanpak van de prostitutie te Antwerpen* (The integrated approach of prostitution in Antwerp), 19 June 2001, 17 p.. For an analysis of pro's and con's of and reactions from the prostitution sector to decriminalisation of exploitation of prostitution in the Netherlands, see: T. VAN DER HELM, 'Nieuwe regelgeving ten aanzien van prostitutiebedrijven en de gevolgen voor de gezondheidszorg voor de prostitueés in Amsterdam', in: A. MEHEUS, B. DE RUYVER, K. VAN IMPE and M. MORIVAL, *Van opjaagbeleid tot gedoogbeleid. De aanpak van prostitutie in Nederland en Vlaanderen doorgelicht* (An analysis of a policy in the field of prostitution in the Netherlands and Belgium), Antwerp, Maklu, 1999, 93-95, respectively N. CORBA, 'Beleid met betrekking tot prostitutiebedrijven in Amsterdam', in A. MEHEUS, B. DE RUYVER, K. VAN IMPE and M. MORIVAL, *o.c.*, 125-136.

<sup>120</sup> See: Resolution of the European Parliament on 'Trafficking in Human Beings', *Official Journal of the European Communities*, 1996, C 32/88. For a definition given by the Commission, see: Communication from the European Commission to the Council and the European Parliament on Trafficking in Women for Sexual Exploitation, COM (96) 567 final, Brussels, 11 November 1996.

<sup>121</sup> This is called the 'labourist' vision. See: R. HAVEMAN, *Voorwaarden voor strafbaarstelling van vrouwenhandel*, Deventer, Gouda Quint, 1998, 246-248.

<sup>122</sup> See also: J. MEESE, K. VAN IMPE, S. VANHESTE, B. DE RUYVER and W. VAN EECKHOUTTE, *o.c.*, 82.

to it. Instead, legislator and law enforcement attention should be focused on a more efficient and vigorous suppression of forced or abusive exploitation of prostitution, i.e. trafficking in persons for the purpose of sexual exploitation.<sup>123</sup> In addition, work should be made of the criminality that may accompany the (even non-abusive) exploitation of prostitution, such as migrant smuggling or organised crime.<sup>124</sup>

Of course, children below a certain age must be considered not be sufficiently mature to agree to their own exploitation in prostitution. Similar as for trafficking for the purpose of labour or sexual exploitation, the principal question in this respect is whether a minor (below the age of eighteen) must necessarily be considered to be under the age of consent to prostitute him/herself, especially where he/she has reached the legal age limit for having sexual intercourse, which usually is set below the age of eighteen, for instance at the age of sixteen or fourteen.

The responses to this question, given at various international levels, differ.

At UN level, reference must be made to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. According to the Protocol, each State Party must *inter alia* ensure that offering, obtaining, procuring or providing a child for child prostitution, defined as the use of a person *below the age of eighteen* in sexual activities for remuneration or any other form of consideration, are fully covered under its criminal or penal law, whether committed domestically or transnationally or on an individual or organised basis.

At Council of Europe level, the Parliamentary Assembly, in Recommendation 1371 (1998) on the abuse and neglect of children, has recommended to set the age of consent to prostitution at the age of 15 maximum, which better reflects the age above which it is usually allowed to have sex with consenting minors. According to the Recommendation, it is essential for the Member States of the Council in combating child prostitution to state 'unequivocally that prostitution of minors of under 15 years always constitutes rape or sexual abuse and that, even where money has been handed over, there is a presumption of violence since a child cannot be regarded as a consenting party'. According to the draft Recommendation on the protection of children against sexual exploitation, referred to above,<sup>125</sup> the Council of Ministers, seemingly has a different opinion than the Parliamentary Assembly. It looks as if child prostitution, a 'child' being any 'person under the age of eighteen', will be defined as the 'offering, obtaining, providing, procuring or using a child for sexual activities for any kind of remuneration or benefit'. The protection of all persons below the age of eighteen against prostitution would thus be absolute.

At national level, even in countries that are quite tolerant on the issue exploitation of consented adults in prostitution, a trend can be observed to follow and even strengthen the policy line set in the Optional UN Protocol and the draft Council of Europe Recommendation, in that protection through criminal law against the exploitation in prostitution of *any minor below the age of eighteen*, even when consenting, is guaranteed in

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<sup>123</sup> R. HAVEMAN, *o.c.*, 249.

<sup>124</sup> *Ibid.*, 253-256.

<sup>125</sup> COUNCIL OF EUROPE, PC-SE (2001) 3, Strasbourg, 6 February 2001. See in particular point 3, under c).

an absolute way, by not only incriminating pimps or traffickers but even the client or observer of child prostitution or fornication.<sup>126</sup>

#### 4. Child pornography

Before discussing the principal questions related to the incrimination of child pornography, a brief overview of international definitions on the matter is presented below.

##### a. Overview of international definitions

###### i. UN

At UN level, the problem of child pornography has been addressed explicitly in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. According to the Protocol, each State Party must *inter alia* ensure that producing, distributing, disseminating, importing, exporting, offering, selling or *possessing for the above purposes* child pornography, defined as ‘any representation, by whatever means, of a child engaged in *real or simulated* explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes’, is fully covered under its criminal or penal law, whether committed domestically or transnationally or on an individual or organised basis. Striking is the fact that the *mere* possession of child pornography, i.e. for personal purposes, must not be incriminated under the Protocol.

###### ii. G8

Also the G8 Ministers of Justice and Home Affairs have recently, during their meeting in Milan in February 2001, taken on the issue of child pornography, in particular in the context of high-tech crime.<sup>127</sup> The G8 Ministers, however, have not touched upon the issue of definition. Instead, reference has been made to both the UN Optional Protocol referred to above, and the Council of Europe Convention on Cyber-Crime, as discussed below.

###### iii. Council of Europe

Already in the early nineties, the Council of Ministers of the Council of Europe, in Recommendation R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults specifically addressed the issue of child pornography. Governments were *inter alia* recommended to raise public awareness about the problem and to examine the advisability of introducing penal sanctions for *mere possession*

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<sup>126</sup> See e.g. Article 380, §5, under 5, and §6 of the Belgian Criminal Code (client and observer), as inserted by Act of 28 November 2000 on the protection of minors through criminal law, *Moniteur Belge*, 17 March 2001. For the Netherlands, see: Article 248b of the Dutch Criminal Code (client), as inserted by Act of 28 October 1999, *Staatsblad*, 1999, 464; S. BOUZOUMITA and P. THION, ‘Strafrechtelijke bescherming van minderjarigen in Nederland’, as well as Y. NUYTINCK and E. VAN ACKER, ‘Bederf van de jeugd en prostitutie’, both forthcoming in G. VERMEULEN (ed.), *Strafrechtelijke bescherming van minderjarigen* (Protection of minors through criminal law), Antwerp-Apeldoorn, Maklu, 2001.

<sup>127</sup> Conference of the G8 Ministers of Justice and Interior, l.c., 2.

of pornographic material involving children. Other constituent elements of crimes related to child pornography were not given.<sup>128</sup>

A very useful point of reference is also the Draft Convention on Cyber-Crime that has been negotiated for the past few years at Council of Europe level with the active participation also of non-Member States, such as Canada, Japan, South-Africa and the US,<sup>129</sup> and which is due to be adopted and opened for signature in the Autumn of 2001. In the context of content-related cyber-crime, an obligation has been inserted in the draft Convention<sup>130</sup> for each Party to establish as criminal offences under its domestic law, when committed intentionally and *without right*, the:

- production of child pornography for the purpose of its distribution through a computer system;
- offering or making available child pornography through a computer system;
- distribution or transmission of child pornography through a computer system;
- procuring of child pornography through a computer system for oneself or for another;
- *possession* of child pornography in a computer system or on a computer-data storage medium, 'child pornography' being defined as pornographic material that visually depicts either a person (*appearing to be*) under eighteen years of age engaged in sexually explicit conduct, or realistic images (even if *morphed*) *representing* a person under that engaged in sexually explicit conduct.

Parties, however, will be allowed to require a lower age-limit, which would not be less than 16 years, though.<sup>131</sup> In addition, Parties may also reserve the right not to incriminate the possession of child pornography, and to limit the scope of the required incriminations to cases of *real*, as opposed to *pseudo*-child pornography, where the person concerned only appears to be a child or is only *represented* as a child, for instance through the morphing of images. Further, the Explanatory Report to the Convention will also clarify that a Party may provide that the offences related to child pornography are considered not to have been committed 'without right' if it is established that the person depicted is not a child, meaning that a suspect in such a case would be relieved of criminal responsibility. In other words, the convention presumes that, unless proof of the contrary is given, *pseudo*-child pornography is *real* child pornography.

Worth mentioning is also that the Explanatory Report will set criteria for the interpretation of the terms 'pornographic material'<sup>132</sup> and 'sexually explicit conduct'.<sup>133</sup>

<sup>128</sup> COUNCIL OF EUROPE, URL: [cm.coe.int/ta/rec/1991/91r11.htm](http://cm.coe.int/ta/rec/1991/91r11.htm).

<sup>129</sup> COUNCIL OF EUROPE, *Crime in Cyberspace. First Draft of International Convention Released for Public Discussion*, URL: [conventions.coe.int/treaty/en/projects/cybercrime.htm](http://conventions.coe.int/treaty/en/projects/cybercrime.htm), 28 August 2000, 2.

<sup>130</sup> In Article 9, COUNCIL OF EUROPE, PC-CY (2000), Draft No 25 Rev., Strasbourg, 22 December 2000.

<sup>131</sup> In earlier discussions, in March 2000, the age of fourteen had even been discussed as an alternative age limit. See: COUNCIL OF EUROPE, *Crime in Cyberspace. First Draft of International Convention Released for Public Discussion*, 17, foot-note 18. Reference should also be made here to the draft Recommendation on the protection of children against sexual exploitation, referred to above, in which apparently it will be recommended to stick to the age limit of eighteen years. See: COUNCIL OF EUROPE, PC-SE (2001) 3, Strasbourg, 6 February 2001, point 3, under b.

<sup>132</sup> See foot-note 21, COUNCIL OF EUROPE, PC-CY (2000), Draft No 25 Rev., Strasbourg, 22 December 2000. The Explanatory Report will clarify that the term 'is governed by national standards pertaining to the classification of materials as obscene, inconsistent with public morals or similarly corrupt'.

<sup>133</sup> See foot-note 22, COUNCIL OF EUROPE, PC-CY (2000), Draft No 25 Rev., Strasbourg, 22 December 2000. The Explanatory Report will clarify that the term covers at least real or simulated (a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between minors, or between an adult and a

iv. EU

In the Joint Action of 24 February 1997, the EU Member States have agreed to regard as criminal the exploitation of children in pornographic presentations and materials including production, sale and distribution or other forms of trading, including the *possession* of pornography.

By Council Decision of 29 May 2000, also the EU has specifically addressed the problem of child pornography on the Internet.<sup>134</sup> According to the instrument, Member States must, in line with existing arrangements and agreements, ensure the widest and speediest possible cooperation to facilitate an effective investigation and prosecution of offences concerning child pornography on the Internet. Further, it should be recalled that Europol has been mandated to deal with trafficking in children for the purpose of the production, sale or distribution of child-pornography material. In that capacity, it is essential for Europol to have a proper insight into and understanding of the *national* child pornography legislations of the various Member States. To that end, a manual of these legislations has recently been developed.<sup>135</sup>

Europol's work in this context will of course considerably be facilitated once the EU Framework Decision on Sexual Exploitation of Children, which has also regard to child pornography, will have been adopted. The aim of the instrument is precisely to approximate the Member States' national legislation on the matter. Member States will at least need to incriminate the production, distribution, dissemination, transmission, offering, otherwise making available, acquiring and *possession* of child pornography, being defined as pornographic material that visually depicts a person below the age of eighteen engaged in sexually explicit conduct, or that visually represents such a person engaged in sexually explicit conduct, unless it is established that the person representing such a person was actually over the age of eighteen at the time of depiction.<sup>136</sup>

It can be observed that the EU Framework Decision strongly resembles the Council of Europe Cyber-Crime Convention,<sup>137</sup> without allowing for the making of reservations by the Member States, however. In this context, it must be stressed that the European Commission, in drafting the proposal for the Framework Decision, has chosen for a strict age level of eighteen years. The Commission has expressed the view that depictions of persons under the age of eighteen involved in sexually explicit conduct, even when they have reached the maturity to take an informed decision about involving themselves in sexual activities, constitute sexual exploitation of children.<sup>138</sup>

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minor, of the same or opposite sex, (b) bestiality, (c) masturbation, (d) sadistic or masochistic abuse in a sexual context, or (e) lascivious exhibition of the genitals or the pubic area of a minor.

<sup>134</sup> *Official Journal of the European Communities*, L 138/1, 9 June 2000.

<sup>135</sup> See: C. RIJKEN, *Manual on Child Pornography. Legislation*, Europol, Trafficking in Human beings Unit, October 2000, The Hague, 88 p.

<sup>136</sup> See Articles 1 and 3.

<sup>137</sup> Even as regards the interpretation to be given to certain notions, such as 'sexually explicit conduct'. See: COMMISSION OF THE EUROPEAN COMMUNITIES, Communication from the Commission to the Council and the European Parliament on Combating trafficking in human beings and combating the sexual exploitation of children and child pornography, COM (2000) 854, Brussels, 21 December 2000, 22-23.

<sup>138</sup> *Ibid.*, 22.

### *b. Discussion*

The above overview of international definitions and legal instruments shows that the discussion is primarily focused around the question to what extent:

- the *mere* possession, i.e. for personal purposes, of child pornography should be incriminated;
- *pseudo*-child pornography should be targeted as well;
- pornography-related conduct should be incriminated when the 'child' that is visually depicted has reached the legal age limit for consenting to get involved in sexual activities, e.g. the age of sixteen or fourteen.

### **ii. Sanctions**

In so far as the different forms of conduct referred to above should indeed be made or remain criminal offences, *dissuasive sanctions* should be imposed.

Especially when dealing with organised crime, imposition of *serious monetary penalties* and *confiscation of the proceeds* of crime are required.

There should also be scope for the *closure of places or businesses* where victims of trafficking in human beings have been employed against their will, for the *confiscation of forged, falsified or stolen passports* and other travel documents, and for the *restriction or disqualification of the offender's right to exercise professions* that are likely to stimulate or facilitate re-offending.

### *c. Procedural criminal law*

In order to combat traffic in persons effectively, it does, however, not suffice to penalize the aforementioned forms of conduct. It is critically important also that a *proper procedural status* be created for the *victims* of trafficking in persons, especially when cooperating with justice.

The *rights of the victim during the criminal trial* should be developed considerably. The law should provide for the right to free legal aid for all those who do not dispose of the necessary means to pay a lawyer. Efforts should be made to get enough and skilled interpreters at the disposal of the criminal justice system on all procedural levels. Separate waiting rooms should be made available for the victims in court, so that they do not needlessly have to confront the offenders. The criminal profits that have been confiscated from the traffickers, should be used primarily to compensate the victims.<sup>139</sup> Ideally, the law should also provide for the *opportunity for NGO's to participate in a criminal trial* and to claim damages in the name and for the sake of the victim. In addition, while staying in the country, victims should also be allowed to work and/or be granted *financial support*, for instance, contributions in medical costs or minimum allowances. Efforts should be made to create more *shelters* and to extend *medical, psychological and social care* in general. Considerable attention must also be given to the *sensitizing* of official authorities (such as police officials, prosecutors and judges) confronted with the problem, and to the organisation of special *training* in treating victims of trafficking, in particular when they have been forced into prostitution. In addition, *awareness* raising among social workers, doctors and lawyers by focused campaigns is due, this in order

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<sup>139</sup> EUROPEAN PARLIAMENT, Resolution of 16 December 1997.

to increase their readiness to report offences that may come to their knowledge in the performance of their profession. Also, *witness protection programs* should be developed and law enforcement officers should be *trained* to apply them in an effective way.

Whilst the UN Trafficking Convention, in Article 19, only urged the State Parties to commit themselves to provide temporary relief for the victims while their repatriation, an important chapter on the protection of victims has been inserted in the UN Trafficking Protocol, primarily under the impulse of the Belgian delegation. According to Article 6, State Parties must protect the privacy and identity of victims of trafficking in persons in appropriate cases, including, *inter alia*, by making legal proceedings relating to such trafficking confidential. Moreover, the State Parties have to ensure that their domestic legal or administrative system contains measures that give victims information on relevant court and administrative proceedings, and assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders. They must also ensure that their domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered. In addition, each State Party has to consider implementing measures to provide for the physical, psychological and social recovery of victims, such as appropriate housing, medical, psychological and material assistance, employment, educational and training opportunities. Finally, efforts must be made to guarantee the physical safety of the victims while they are within the territory of the State Parties.

All these measures are bound to increase the willingness to report and to cooperate with justice among the victims. However, they can only be effective provided that a system of granting *temporary or permanent residence permission* is introduced for those victims who are willing to cooperate with justice.<sup>140</sup>

EU legislative action will be undertaken on the specific issue of *temporary* permits of stay for victims of trafficking willing to co-operate with the judicial system. The European Commission had already indicated its intention to make a proposal on the matter, but has recently announced it will propose an even broader approach for all victims of trafficking prepared to co-operate in the fight against traffickers.<sup>141</sup> Also the UN Trafficking Protocol addresses the issue of residence permits. According to Article 7, State Parties must consider adopting measures that permit victims of trafficking in persons to remain in their territory, *temporarily or permanently*, in appropriate cases.

Finally, if victims are not allowed to permanently stay in the country, the item of repatriation comes into play.

Provisions relating to the repatriation of victims have been inserted in Article 8 of the UN Trafficking Protocol.

As repatriation must preferably happen voluntarily, the introduction of a *reintegration premium* for the victims could be considered. Such premium ought to stimulate victims to return to their country of origin and help them reintegrate within their families, as victims of human trafficking are often rejected by their families when they return penniless. The payment of a reintegration premium, however, should be subject to strict conditions in order

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<sup>140</sup> As is the case for instance in Belgium and the Netherlands.

<sup>141</sup> EUROPEAN COMMISSION, *Trafficking in women. The misery behind the fantasy: from poverty to sex slavery. A comprehensive European strategy*, l.c., 10.

to prevent abuse. For instance, it would be advisable to hand over the money to the victim in the country of origin under the supervision and guidance of an NGO.<sup>142</sup>

#### *d. International criminal law*

A distinction is made hereafter between items relating to jurisdiction and to international cooperation in criminal matters.

#### **i. Jurisdiction**

Provisions relating to jurisdiction as contained in the specific international legal instruments that have passed in review, are very similar to provisions that are commonly being inserted in international legal instruments addressing other crime phenomena. As a rule, territorial jurisdiction and extra-territorial jurisdiction on the basis of the active personality principle are mandatory. Traditionally, also the *aut dedere aut judicare* principle has been embedded in the instruments concerned, in some cases limited to cases where extradition has been refused solely because the person concerned is a national of the requested state. In some cases, express mention is made of the possibility to claim jurisdiction on the basis of passive personality.

Striking is that none of the international legal instruments calls for universal jurisdiction for the offences of trafficking, smuggling, sexual exploitation or child pornography, whereas in a number of cases, universal jurisdiction for the offences concerned has (recently) been introduced at national level, often even in a quite absolute way.

In the author's view, this development is to be regretted. Universal jurisdiction claims should be based on a broad consensus (established at world or at least regional level and formalised in a convention or binding legal instrument) that a certain form of criminal behaviour must be punished throughout the world or region concerned, irrespective of the country where the crime was committed or of the nationality of the victim or offender.<sup>143</sup> In the absence of such a consensus, it is not opportune for individual states, perhaps not even conceivable with international law,<sup>144</sup> to autonomously claim universal jurisdiction, especially not when exercising that jurisdiction is not even subjected any more to the traditional conditions for extraterritorial jurisdiction (such as double criminality, the receipt of an official complaint from the foreign authority or victim, the presence of the foreign offender in the state's territory). If providing after all for 'unilateral' universal jurisdiction for the offences of

<sup>142</sup> B. DE RUYVER and K. VAN IMPE, *o.c.*, 25.

<sup>143</sup> See: G. VERMEULEN, 'Kinderhandel, seksuele uitbuiting van kinderen, kinderporno en kinderekstoerisme. Naar een verdere internationale harmonisering van strafbepalingen en jurisdictierecht?' (Trafficking in children, sexual exploitation of children, child pornography and sex tourism. Towards a further international harmonisation of substantive criminal law provisions and jurisdiction rules? ), *Panopticon*, 2000, 200-207. G. VERMEULEN, 'Efficiënt noch opportuun? Over de universele strafbaarstelling van inbreuken op fundamentele sociale rechten in het wetsvoorstel-Van der Maelen' (Efficient nor opportune? On universal jurisdiction for violations of fundamental social rights), *Samenleving en Politiek*, 1998, No 1, 44-46.

<sup>144</sup> Traditionally, it has been assumed, in line with the *Lotus* case (Decision No 9 of 7 September 1927, *P.C.I.J.* (Permanent Court of International Justice), A series, No 10), that national jurisdiction claims are allowed unless explicitly prohibited by international law. Since the mid-nineties, the International Court of Justice has softened its standpoint. See for instance: Advisory Opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons (General list No 95). Interesting in this respect is also the pending case relating to the compatibility with international law of the Belgian arrest warrant of 11 April 2000 (and predicate extra-territorial jurisdiction claim) against Minister Yerodia from the Democratic Republic of the Congo. See: URL: [www.icj-cij.org](http://www.icj-cij.org).

trafficking, smuggling, sexual exploitation or child pornography, the rationale therefore can, in the author's view, only be the victim's particularly young age (under sixteen or fourteen), which then should be made a condition to actually exercise that jurisdiction.

Given the importance of expanding the scope *ratione personae* of the offences discussed in this report to legal persons also (*supra*), a mandatory extension of extra-territorial jurisdiction claims to offences committed for the benefit of a legal person established in a state's territory,<sup>145</sup> should be envisaged.

## ii. International cooperation in criminal matters

Attention can be drawn to the importance of inserting provisions allowing for video (or telephone) conference hearing of victims who have returned to their country of origin<sup>146</sup> in both multilateral conventions that specifically have regard to the issue of trafficking in persons and in bilateral conventions concluded with traditional sending countries.<sup>147</sup>

Further, it should be stressed that in view of combating international trafficking in and smuggling of persons, the involvement of and cooperation with and between *customs* authorities is very important also.

A sensitive question, finally, concerns the recourse to controlled deliveries in the fight against international trafficking in human beings and illegal migrant smuggling. In the light of the Dover tragedy during the summer of 2000, one should be aware of the intrinsic risk in allowing an illegal consignment or transport of persons to pass out of, through or onto the territory of one or more states, without promptly intervening.

Unlike the UN TOC Convention<sup>148</sup> and the Mutual Legal Assistance Convention of May 2000<sup>149</sup> and so-called Naples II Convention of December 1997<sup>150</sup> that have been adopted at EU level, allowing all for the controlled delivery of persons also, the draft Second Additional Protocol to the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters only allows for the controlled delivery of goods and money.<sup>151</sup>

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<sup>145</sup> As foreseen e.g. in the EU Framework Decisions on Trafficking and Sexual Exploitation of Children.

<sup>146</sup> See on the issue: K. VAN IMPE, P. DE SOMERE, M. DELCOUR, B. DE RUYVER and W. VAN EECKHOUTTE, *o.c.*, 220-223; G. VERMEULEN, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulp ruimte voor de Lid-Staten?* (Mutual assistance in criminal matters in the EU: to a full-fledged own legal area for the Member States?), Antwerp-Apeldoorn, Maklu, 1999, 376-419.

<sup>147</sup> In the bilateral treaties on judicial cooperation in criminal matters that are currently being negotiated between Belgium and respectively the Philippines and Thailand, detailed provisions have been inserted allowing for the hearing of witnesses abroad through the use of audio(visual) equipment, modeled on the provisions of the recent EU Mutual Legal Assistance Convention of 29 May 2000 (*infra*) pertaining to the use of such techniques.

<sup>148</sup> Article 20.

<sup>149</sup> Article 12 (Convention on mutual assistance in criminal matters between the Member States of the European Union, *Official Journal of the European Communities*, C 197, 12 July 2000).

<sup>150</sup> Article 22 (Convention on mutual assistance and cooperation between customs administrations, *Official Journal of the European Communities*, C 024, 23 January 1998).

<sup>151</sup> See Article 15, COUNCIL OF EUROPE, PC-OC (2000) 19, Strasbourg, 14 June 2000, 23.