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Combating Trafficking in Human Beings in the European Union

Summary
After a short introduction into the institutional framework of the European Union, the following contribution presents the current and future EU-legislation concerning trafficking in human beings as well as specific problems of its prosecution within the EU.

Zusammenfassung
Nach einer kurzen Einführung in den institutionellen Rahmen der Europäischen Union erläutert der folgende Beitrag die aktuelle und künftige EU-Gesetzgebung zum Menschenhandel ebenso wie spezifische Probleme bei dessen Strafverfolgung innerhalb der EU.

Résumé
Après une brève introduction relative au cadre institutionnel de l'Union Européenne, cette contribution présente la législation actuelle et future de l'UE concernant la traite d'êtres humains et les problèmes spécifiques de la poursuite pénale dans l'UE.

1. Introduction

This article aims to give an analysis of the problems in the field of criminal co-operation that may be an obstacle to an efficient prosecution of those suspected of trafficking in human beings (THB) within the EU. Consequently it addresses THB from a criminal law perspective and covers THB with a transnational character (which is the majority of the trafficking cases).

Before these problems are discussed, an introduction to the institutional framework of the EU with regard to police and judicial co-operation will be given in order to be able to interpret the relevance of the problems indicated. The problems that will be discussed are based on the outcome of research on the prosecution of THB in the EU that was published in November 2003.[1] After the identification of the problems the consequences of the Constitutional Treaty for the EU will be discussed as a development that may enhance criminal co-operation within the EU.

Aware of the fact that a vast number of non-binding instruments on THB has been adopted within the EU which have an impact on fighting this crime, as well as the fact that other organisations such as the Council of Europe and the OSCE work in this field, I think that through a more efficient use of the current instruments a step forward can be made in the prosecution of THB. However, without an increase in the willingness of the member states this goal will never be achieved.

2. Evolution of the legislative approach of the EU

With the Treaty of Maastricht,[2] the three-pillar structure of the EU was introduced. The first pillar, the European Community, now consists of two communities, namely the European Eco-

1 Rijken C., Trafficking in Persons, Prosecution From a European Perspective, T.M.C. Asser Press, Den Haag, 2003.
2 The Treaty of Maastricht, signed in Maastricht, 7 February 1992, and in force since 1 November 1993, OJ C 224, 31.8.1992.

nomic Community and the European Atomic Energy Community. The second pillar includes the Common Foreign and Security Policy (Title V EU Treaty), and the third pillar concerns Police and Judicial Co-operation in Criminal Matters (former Justice and Home Affairs, Title VI EU Treaty). In contrast to the first pillar, the powers of the institutions, except for the Council, are restricted in the second and third pillars. In the third pillar the Council of the EU as the representative of the member states is the authoritative organ, and the Commission, the EP, and the European Court of Justice play a subordinate role, as we will see below. This gives the third pillar an intergovernmental rather than a supranational character. The combating of trafficking in human beings falls mainly within the third pillar and therefore its structure will be outlined. However, decisions relevant for combating trafficking in human beings can be taken in the first and to a lesser extent in the second pillar as well.

Before the establishment of the EU in the Treaty of Maastricht, there existed many working groups focusing on co-operation in criminal matters and the avoidance of negative effects of the abolishment of borders between some European states.[3] The member states of the European Community had established most of these groups. Hardly any form of coordination between these groups existed, resulting in an overlap of activities between the different groups. Furthermore, most of these groups lacked democratic legitimacy. The Treaty of Maastricht integrated many of these groups within the structure of the EU. The main aim for the institutionalisation of all these groups was to coordinate their activities. However, the inter-governmental way of policy making on an ad hoc basis, with a lack of democratic or judicial control used by these groups, could not be adopted in the framework of the European Community. Therefore, most of the elements regulated by these groups were placed in Title VI EU Treaty, which meant, at the time, in an intergovernmental framework.

2.1. The decision-making process on police and judicial co-operation in criminal matters

When the Single European Act (SEA)[4] was drafted, it was not possible to overcome the problems related to bringing some areas of Justice and Home Affairs under an EC heading, such as police co-operation and immigration. A special 'General Declaration' was attached to the SEA to emphasise that the competence concerning these issues should remain with the member states.[5] This means that the main decision-making organ within the third pillar remains the Council of the EU, the institution representing the member states. A whole army of experts and officials centralised in COREPER assists the Council in the preparation of its decisions.[6] In the Treaty of Amsterdam, an effort was made to simplify the decision-making structure of the COREPER.[7] Generally, a decision is now prepared and taken in four steps. The Council has to consult the EP in accordance with Article 39 EU Treaty before taking the decisions on the basis of Article 34, with the exception of common positions. In the third pillar, most of the decisions must be adopted unanimously; only measures implementing a decision are taken by qualified majority. The Commission has a shared right of initiative with the member states.

Following this decision-making structure it is not surprising that decisions made by the Council on third-pillar issues are not very accurate and often concern issues that have already been on the political agenda for some time. The efficiency of the Council's decision-making power could be improved if the decision-making structures were further simplified.

According to the Treaty of Maastricht, the third-pillar instruments before the Treaty of Amsterdam were common positions, joint actions, and conventions. The instrument of joint action has no longer been used since the Treaty of Amsterdam. Whether this instrument was legally binding was and is subject to debate. For any binding force the heavy model of a convention had to be established. The disadvantage of adopting a convention to achieve legally binding effect is that the procedure is slow and inflexible because all the national parliaments have to ratify the convention. The current instruments that can be adopted in the third pil-

3 Such as the Groupe d'Assistance Mutuelle 92, The Coordinators Group on the Free Movement of Persons, CELAD (Comité Européen de la Lutte-Anti-Drogue), and the Ad Hoc Immigration Group.

4 Single European Act, signed on 28 February 1986, and in force since 1 July 1987, OJ L 169, 29.6.1987.

5 General Declaration on Articles 13–19 SEA.

6 The abbreviation COREPER stands for COmité REpresentatives PERmanente.

7 Signed in Amsterdam, 2 October 1997, and in force since 1 May 1999, OJ C 340, 10.11.1997.

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

a. *Common positions* define "the approach of the Union to a particular matter". The Council adopts this instrument acting unanimously. The legal status of this instrument is not clear. Neither the Court nor the European Parliament plays any role in these common positions. Therefore, it is likely that it is more a political instrument than a legally binding one.
b. *Framework decisions* are similar to the directives of the first pillar, although the framework decision does not have direct effect but is binding as regards the result to be achieved for the member states. The member states are free to choose the form and measures used to achieve the result. Framework decisions are adopted for the purpose of approximating the laws and regulations of the member states on judicial and administrative issues. Framework decisions are taken unanimously, but a qualified majority may adopt implementing measures.
c. *Decisions* are binding on the member states but lack direct effect. The decisions are normally supplemented by implementing measures. For decisions, the same procedure must be applied as for framework decisions, which means that the decision is taken unanimously but that implementing measures may be adopted by a qualified majority.
d. *Conventions* are drafted by the Council and are presented to the member states for adoption by them. In contrast to the other instruments, conventions have to be ratified by the national parliaments of the member states. This makes the procedure for adopting conventions time-consuming and slow. Measures implementing the convention have to be adopted by two-thirds of the ratifying states.

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

2.2. *Europol*[8]

Two institutions within the EU must be considered relevant to fight THB. These are Europol and Eurojust. The first efforts to establish some form of European police unit was launched in the TREVI[9] group.[10] During a meeting of the Council of the EU in December 1991, agreement was reached on the creation of a European Police Office. The Europol Drugs Unit (EDU), which became operational on 3 January 1994, preceded the establishment of Europol. The initial function of the EDU was to organise the exchange of information on narcotic drugs at the level of the Community's twelve member states. On 18 July 1995, the Council adopted the Convention on the establishment of Europol (the Europol Convention).[11] On 1 October 1998, the Europol Convention entered into force, which terminated the activities of the EDU in accordance with Article 45. Europol took up its full activities on 1 July 1999. The tasks of Europol are to facilitate the exchange of information among the member states; to obtain, collate, and analyse information; to notify the competent authorities of member states, without delay, of any investigation within the member states and to maintain a computerised system for collecting information. Its primary function is to gather and analyse information held by the different national police forces. Therefore, Europol has a Union-wide system for exchanging information. According to Article 2 of the Europol Convention, its aim is "to improve [...] the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved and two or more Member States are affected by the

8 Also de Zwaan J.W., Bultena A.J., Ruimte van vrijheid, veiligheid en rechtvaardigheid. De samenwerking op het gebied van Justitie en Binnenlandse Zaken in de Europese Unie, Sdu publishers, The Hague, 2002, pp. 268–285.
9 TREVI stands for Terrorisme, Radicalisme, Extrémisme et Violence Internationale. Some claim that it is named after the fountain in Rome, where the first steps were taken to establish this group in 1976.
10 Solomon J.S., Forming a More Secure Union: The Growing Problem of Organized Crime in Europe as a Challenge to National Sovereignty, in: Dickens Journal of International Law, Volume 13, no. 3, 1995, p. 627.
11 Convention Based on Article K.3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention), OJ C 316, 27.11.1995, p. 2.

forms of crime in question". This mandate was extended to trafficking in human beings with the joint action of 16 December 1996.[12]

2.3. *Eurojust*

It was proposed in the Presidency Conclusions in Tampere to set up a European unit for the co-ordination of judicial co-operation in cases of organised crime.[13] This unit, Eurojust, should be composed of national prosecutors, magistrates, or police officers of equivalent competence. Eurojust should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases. On 19 June 2000, a Council Decision on setting up an Eurojust team was taken[14] and Eurojust was finally established by the Council Decision of 28 February 2002.[15] According to Article 2 of this decision, the task of Eurojust is to provide support for investigations into major criminal offences in respect of which judicial legal assistance may be required for proceedings and into criminal offences against the financial interests of the EU. Trafficking in human beings is explicitly recognised as belonging to this group of crimes. The liaison officers seconded to Eurojust from each member state are the advisors and coordinators of questions on legal issues concerning their country for the investigating authorities of other member states, the European Commission, and Europol. In this sense, Eurojust will be equipped with similar facilities as Europol.

2.4. *The jurisdiction of the European Court of Justice*

Title VI EU Treaty now includes three procedures for legal protection in third pillar issues. The first is the preliminary ruling of Article 35 paragraph 1, although it does not refer to Article 234 EC Treaty. Member states have to opt for the ECJ's jurisdiction in a special declaration in which they have to decide which national judges may initiate this procedure. This means that there is no obligation for the highest court to ask for preliminary questions. A preliminary ruling can be initiated for the validity and interpretation of framework decisions, decisions, implementing measures and the interpretation of third pillar conventions. This optional procedure seems to give rise to inequality in legal protection among European citizens. The second procedure can be found in Article 35 paragraph 6, which is comparable to Article 230 EC Treaty and can be initiated by the Commission and member states in case of decisions and framework decisions. It is generally accepted that the effect of the procedure under Article 35 paragraph 6 is the annulment of the decision. The third procedure can be found in paragraph 7 and concerns dispute settlement between member states concerning the interpretation and application of the acts adopted under Article 34 paragraph 2 EU Treaty. According to the role of the European Court of Justice in the first pillar, its competences are rather limited in third pillar issues.

3. Present legal provisions on trafficking in persons

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

3.1. *The Council Framework Decision on Combating Trafficking in Human Beings*

This framework decision was set up in reply to the failure of full implementation of the Joint Action of February 1997.[16] According to the Commission, the main reason for this failure was the absence of commonly adopted definitions, incriminations, and sanctions in the member states. Before the adoption of the Framework Decision on Combating Trafficking in Human Beings within the EU, many different definitions of the phenomenon existed. It seemed that the different bodies chose a definition that best suited their activities. These definitions were never adopted in a binding instrument but were included in the many non-binding instruments adopted by the various bodies.[17]

The harmonisation of the definition of trafficking in persons within the EU was achieved in July 2002. In December 2000 the Commission made a proposal for a Framework Decision on

12 Joint Action of 16 December 1996, adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, Extending the Mandate Given to the Europol Drugs Unit, OJ L 342, 31.12.1996, p. 4.
13 Tampere European Council, 15 and 16 October 1999, Presidency Conclusions.
14 Initiative of the Federal Republic of Germany with a view to the adoption of a Council Decision on Setting up a Eurojust Team, OJ C 206, 19.7.2000.
15 Council Decision of 28 February 2002, Setting up Eurojust with a View to Reinforcing the Fight against Serious Crimes, OJ L 63, 6.3.2002.
16 OJ L 63, 4.3.1997, pp. 2–6.
17 For an overview of the non-binding instruments regards THB see: Rijken C., Trafficking in Persons, Prosecution From a European Perspective, T.M.C. Asser Press, Den Haag, 2003, 92–107.

Combating Trafficking in Human Beings. The original proposal distinguished between trafficking in human beings for the purpose of labour exploitation and trafficking in human beings for the purpose of sexual exploitation. However, following comments on this distinction, these two articles were merged, resulting in the following definition in the final Council Framework Decision.[18]

Each Member State shall take the necessary measures to ensure that the following acts are punishable:

the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:

(a) *use is made of coercion, force or threat, including abduction, or*

(b) use is made of deceit or fraud, or

(c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or

(d) payments or benefits are given or received to achieve the consent of a person having control over another person

for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

As stated in the preamble and as follows from the formulation of this article, the Trafficking Protocol to the United Nations Convention on Transnational Organised Crime[19] was the guiding text for the establishment of the framework decision. Unlike the Trafficking Protocol, it is not necessary for the framework decision that the crime is transnational in nature and is committed by an organised crime group. The border crossing as such is not a requirement in the definition. This means that also trafficking within a country or within the EU is included in this framework decision. The decision was published on 1 August 2002 and became fully operational on 1 August 2004 as by then the member states had to have taken the necessary measures to comply with the decision.[20]

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

Furthermore, the term "exploitation" in the Trafficking Protocol must be understood more comprehensively than in the framework decision, where exploitation is limited, in short, to labour exploitation and sexual exploitation. For instance, exploitation through the removal of organs is not included in the framework decision.[21]

As we have seen, a framework decision is legally binding although it lacks direct effect in the member states. Because this instrument is legally binding, this particular framework decision may become an authoritative instrument to combat trafficking in persons at the European level.

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

The definition of the framework decision is largely based on the Trafficking Protocol to the UNCTOC. However, the protection of and assistance to the victims is dealt with in detail in the Trafficking Protocol but is almost completely absent in the framework decision.[22] The framework decision only provides "adequate legal protection and standing in judicial proceedings" although the proposals suggested some guarantees for the victims. This is a missed opportunity and has met with comment at the UN level.[23]

18 Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, OJ L 203, 1.8.2002, pp. 1–4.

19 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention against Transnational Organised Crime, GA Res. 55/25, annex II 55 UN GAOR Supp. (no. 49) at 60, UN Doc. A/45/49 (Vol. 1) (2001).

20 Article 10 of the Council Framework Decision on Combating Trafficking in Human Beings.

21 For further comments on the content of this Framework Decision, see Chapter 4, Section 4.3.3.1.

22 Compare Chapter II Trafficking Protocol and Article 8 Framework Decision.

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

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

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

3.2. *Council Directive 2004/81 on residence permit*[24]

Since the Treaty of Amsterdam, visas, asylum, immigration, and other issues related to the free movement of persons have moved from the third to the first pillar. The provisions on visas, asylum, immigration, and other related areas of free movement of persons are communautarised in Title IV of the EC Treaty. It is clear that Article 61, paragraphs a and b, and Article 63 open the way for a European immigration law.[25] The main aim of this title is the abolition of all internal border controls and to shift these controls to the external borders. In this sense, migration law is connected to trafficking in human beings and it must be admitted that the free movement of persons can be counterproductive in the fight against trafficking in persons: it may be to the advantage of the traffickers that the persons being trafficked do not need to fulfil formalities when moving to another EU country once they have entered the EU. Therefore, it is deemed necessary to conduct certain provisions on the EU level in this area. The Council Directive on the residence permit, mentioned above is one of them. This directive is based on Article 63 point 3 and consequently the instrument of a directive was chosen rather than of one of the third pillar instruments.

According to Article 1, the purpose of this directive is to define the conditions for granting residence permits of limited duration to third-country nationals who cooperate in the fight against trafficking in human being or against action to facilitate illegal immigration. This means that the aim of the directive is twofold: on the one hand, to obtain the co-operation of victims of trafficking and illegal immigration for criminal procedures and to provide assistance to these victims by granting a residence permit, on the other. An earlier proposal of this directive stated explicitly and on several occasions that it is not aimed at the protection of the victims or witnesses of trafficking in persons, although the witness protection programmes of some of the EU member states and other documents concerning the protection of victims and witnesses were often referred to. It is to be welcomed that these phrases were deleted in the final text.

The directive includes provisions specifically drafted for the protection of victims. The most important is of course the introduction of a temporary residence permit for victims who cooperate with the judicial authorities in criminal matters. Witnesses who are not (yet) victims of the crime of trafficking seem to have been forgotten. The protection that can be obtained under this directive is rather elaborate, apparently based on Article 6 of the Trafficking Protocol to the UNCTOC; it includes social, financial, legal, psychological, and medical aid. According to point 16 of the preamble and Article 11, victims are allowed to work and to receive education as soon as an application for a temporary residence permit has been submitted. The third-country nationals concerned shall be granted access to special programmes set up for reintegration, either in the country of origin or the country of residence and to their recovery of a normal social life

23 United Nations High Commissioner for Human Rights, Observations by the UNHCHR and the UNHCR on the Proposal for a EU Council Framework Decision on Combating Trafficking in Human Beings.

24 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L261, 6.8.2004, p. 19.

25 Barents R., Het Verdrag van Amsterdam in werking, Europese Monografieën 62, Kluwer, Deventer, 1999, 349–375.

(Article 12). According to Article 6 of the directive, a reflection period must be granted to the victims allowing them to recover and escape the influence of the perpetrators and to consider whether they want to cooperate with the competent authorities. During this period, it is not allowed to expel the victim from the country. It is to be welcomed that, in the directive, trafficking in human beings is seen as a separate crime and not necessarily as part of illegal immigration. In many earlier EU documents, the crime of trafficking was considered as being part of illegal immigration, impeding the adoption of effective measures for trafficking.

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

3.3. *Other legal instruments that may facilitate combating trafficking in human beings*

Beside these two instruments specifically addressing trafficking in human beings, a number of instruments aiming at the facilitation of criminal co-operation between the member states of the EU have recently been adopted. As these instruments are to be used to combat trafficking, they are worth mentioning here. These instruments are: the Convention on Simplified Extradition Procedure between Member States of the EU,[26] The Convention Relating to Extradition between the Member States of the EU,[27] The European Arrest Warrant (EAW),[28] and the European Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.[29] Instead of discussing these different instruments, some common developments adopted in these instruments that can be traced will be addressed. Firstly, the principle of double criminality, until now rather authoritative in criminal co-operation, is not strictly upheld in the EAW and in the convention relating to extradition. Secondly, the strength of traditional exceptions to extradition, such as not to extradite own nationals, or not to extradite for political or fiscal offences, is limited. Thirdly, the principle of speciality is no longer fully in use in the EU conventions on extradition and the EAW. In addition, some major changes have also been codified in the EU Convention on Mutual Assistance. In general, these changes relate to simplifying the possibility to take operational measures on the territory of another state. This is, for example, the case for the joint investigation teams under Article 13 and the possibilities for intercepting service providers in another state as provided in Article 19. Furthermore, new possibilities are created to facilitate the hearing of experts, witnesses, victims, and accused persons by video conference or telephone conference.

When reviewing all these developments, the impression is given that the EU member states are really willing to improve co-operation in the area of freedom, security, and justice at the cost of their own control over co-operation in criminal matters on their own territory. These developments all facilitate the enforcement of legal instruments on co-operation in criminal matters directly and thus indirectly help the enforcement of the prosecution of trafficking in persons. However, for the moment, it is too early to be too optimistic because, so far, ten member states have not ratified the two EU Conventions on Extradition, and the EU Convention on Mutual Assistance has so far only been ratified by eight member states. Consequently, these

26 The Convention on Simplified Extradition Procedure between the Member States of the European Union, OJ C 78, 30.3.1995, p. 1.

27 The Convention Relating to Extradition between the Member States of the European Union, OJ C 313, 23.10.1996, p.11.

28 Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, 13 June 2002, OJ L 190, 18.7.2002, pp. 1–20. According to Article 32 the EAW became fully operational on 1 January 2004.

29 Convention Established by the Council in Accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the EU, Brussels, 22 May 2000, 7846/1/00 Rev 1, OJ C 197, 12.7.2000, p. 3.

conventions have not yet entered into force. Moreover, states can always make reservations to the most far-reaching provisions in these conventions and thus invalidate the progressive developments discussed here.

4. Future of the fight with Trafficking in Human Beings in the EU

As THB is still a major problem the fight against it has to be improved. From a criminal law perspective the criminal co-operation between the member states should be improved. However before we can identify how this co-operation can be improved we first have to analyse the problems in this area. The problems related to criminal co-operation will be discussed below in order to identify how the co-operation between member states can be improved.

4.1. Evaluation of the current co-operation between the member states of the EU in criminal matters

When we want to identify the problems in combating trafficking in human beings, we have to identify the problems of criminal co-operation between the member states of the EU more in general as there is no reason to believe that these problems are different for THB cases. An evaluation of the effectiveness of the criminal co-operation between the member states of the EU was published in November 2003.[30] A summary of the outcome will be discussed below. The problems can be divided into substantive, procedural, and organisational problems.

Substantive problems

It can be said that the impact of substantive problems in general is less serious than is often thought, for example, the principle of double criminality does not frustrate mutual legal assistance so much. The execution of requests by applying the national law of the requested state (the principle of *locus regit actum*) causes problems when evidence is used in criminal proceedings. A tendency to increasingly use some form of the principle of *forum regit actum* (in which the request is executed by applying the law of the requesting state) can be observed but may cause problems. Moreover, requirements for criminal procedures differ between states, as do the guarantees for witnesses and suspects. Related to these aspects is the lack of confidence between the member states in each other's legal systems as an obstacle for co-operation in criminal matters. Although it is often assumed that the member states have confidence in each other's systems, this is not always the case.

Procedural problems

The procedural problems mainly consist of the absence of transparency as regards the channels to be used and whom to contact, often as a result of differences in competences between the relevant authorities of the member states and a lack of knowledge of each other's systems. Consequently, confusion exists as to what formalities must be fulfilled and which channels must be used. Because the national systems on mutual legal assistance are generally too long and complicated with too many authorities involved, there is a serious risk of duplication of efforts and waste of time and money. Although direct communication between competent authorities in the cooperating countries is generally seen as a major advantage for criminal co-operation, it is not commonly used by the practitioners as they are not familiar with the use of this channel.

Organisational problems

The organisational problems mainly concern the identification of the competent authorities abroad and practical problems in contacting the authorities involved, either due to the absence of telephone or fax numbers and personal details concerning the competent person, or to language problems.

Other problems

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

30 Rijken C., Trafficking in Persons, Prosecution From a European Perspective, T.M.C. Asser Press, Den Haag, 2003, 153–199.

Problems specifically related to THB

Besides the prosecution problems indicated above, some prosecution problems can be identified, directly related to trafficking cases in which co-operation with other states is required for the prosecution of the traffickers.[31] The most important of the prosecution problems that are specifically related to the crime of trafficking is the unavailability of victims and witnesses, often due to the fact that immigration officers have expelled them from the country even when the possibility exists to grant a temporary residence status to victims of trafficking. A considerable reduction in the problems associated with the prosecution of transnational trafficking in persons can be achieved by closer co-operation between the immigration authorities, the police, and the judiciary. The adopted directive on residence permit discussed in section 3.2. may raise awareness and increase the readiness to grant a residence permit. Another major obstacle in the prosecution is the lack of priority and the absence of attention for the phenomenon of trafficking in human beings, which causes serious difficulties and delays with regard to mutual legal assistance in trafficking cases.

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

4.2 A role for Europol and Eurojust in combating trafficking in human beings

Neither Europol nor Eurojust are endowed with operational power. They are no European institutions on the supranational level but function on behalf of the states. Both are mandated to deal with the crime of trafficking in persons. Eurojust is to facilitate judicial co-operation between the member states of the EU without the aim of harmonising national laws. Eurojust has to fulfil its tasks through one or more of the national members or acting as a body. It is composed of one national member seconded by each member state. The competences of the national members are subject to the national law of their member states and the member state will define the right of a national member to act in relation to foreign judicial authorities.[32] It must be concluded that, for its functioning, Eurojust is dependent on the co-operation of the national members and the competent authorities in the member states. Europol is built on a similar basis with the addition that, in each member state, a national unit has been established. Much will depend on the willingness of states to transmit information to Eurojust but the experiences of Europol in this regard are not promising. States tend to be reluctant to share operational information because they think that this information is sensitive or confidential and they themselves want to control this information.

4.3 The Constitutional Treaty for the EU

On 18 July 2004, the European Council reached agreement on a draft Treaty establishing a Constitution for Europe. This text was consolidated and signed by the European Council during its meeting on 29 October 2004, after it had been amended. This Constitutional Treaty was brought to the member states for adoption and is due to be ratified by all signatory states by 1 November 2006. After the ratification the three pillar structure and the current decision-making procedure in third pillar issues will be abandoned. The legal instruments that will replace the current ones are law and framework laws.[33] Both will have direct effect.

The decisions would in general be made by using the co-decision procedure in which the Council of the EU and the European Parliament jointly take the decisions by majority vote. Only in certain areas will unanimous voting be maintained. In third pillar issues these areas are related to member states' essential responsibilities, for example, decisions on the creation of Union bodies with operational powers, the harmonisation and approximation of criminal law, and operational co-operation between police authorities.[34] The right of initiative for the Commission in third pillar issues is further extended in the Constitutional Treaty at the expense of the independent right of initiative of the mem-

31 Rijken C., Trafficking in Persons, Prosecution From a European Perspective, T.M.C. Asser Press, Den Haag, 2003, 201–241.
32 Council Decision on Setting up Eurojust, Article 9.
33 Constitutional Treary Article I-41.
34 Article III-270(2(d)), Article III-271(1), Article III-274(1) and (4), Article III-275(3), Article III-277, Constitutional Treaty.

ber states.[35] Furthermore, the powers of the European Court of Justice would be extended in the Constitutional Treaty.[36] Although these provisions are rather innovative and tend to fully communautarise third pillar issues with some exceptions, the competences of Europol and Eurojust remain limited. In Article II-276(3) on Europol, it is explicated that "any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member States whose territory is concerned." The tasks of Eurojust as described in the Constitutional Treaty seem to open the door for some form of operational powers. Article III-273(1), under a, states that the tasks of Eurojust may include the initiation of criminal investigations. However, its competence will be limited, as paragraph 3 states that "in the prosecutions ... formal acts of judicial procedure shall be adopted by the competent national officials."

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

5. Conclusion

As we have seen above, the combating of trafficking in human beings must take place on several levels. The prosecution of those suspected of trafficking must be optimised and the execution of legal instruments (but also of non-binding instruments) must be prioritised. Both levels will be summarised below.

To optimise the prosecution of those suspected of trafficking in human beings, the use of instruments for co-operation in criminal matters must be improved. The major obstacles for the use of these instruments were discussed above. It turned out that the procedural and organisational problems rather than substantive problems frustrate criminal co-operation. The main obstacle specifically related to trafficking cases is the unavailability of victims or witnesses as a result of expulsion by the immigration services. The Council Directive on short term residence discussed in section 3.2. in which the victims of the crime of trafficking in persons who cooperate with the competent authorities must be granted a residence permit, protection, and support may be a possibility to reduce this problem.

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

- There is intensified co-operation in which the national competences are maintained, although these competences are limited in some regard.
- Cautious steps towards co-operation at a more supranational level, namely, in the provisions of the Constitutional Treaty and with the institutions of Europol and Eurojust and probably a European Public Prosecutor.[37] Following the practises as regards Europol and Eurojust and the discussions and amendments of the article on the European Public Prosecutor, it would be too optimistic to expect a supranational level in this area in the short term. It can only be achieved in the long term if it is achieved at all.

As long as the member states choose to follow this dual track it can be doubted that progress is made in fighting THB. Only when states have the courage to share competences on a more supranational level a considerable step forward can be made. The approximation of law must be seen as a cautious step in this direction.

Furthermore, in order to avoid duplication of efforts and to make use of each others' expertise, the different organisations in Europe have to intensify their co-operation and join effort in this regard. It would be very profitable if, for instance, the EU could make use of the fieldwork experience of the OSCE and the Council of Europe and the OSCE could make use of the knowledge of the expert group established within the EU.

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35 Article III-264 Constitutional Treaty.
36 Article III-365 Constitutional Treaty.
37 Article III-274 Constitutional Treaty.