

Violence against Women, Trafficking, and Migration in the European Union

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Abstract: *This article examines the evolving EU policy against human trafficking, especially trafficking that targets migrant women for sexual exploitation. It maintains that even though action against trafficking is now firmly on the EU agenda, current policies excessively focus on repressive measures and lack attention to the broader setting in which the exploitation of migrants takes place. This means that current EU anti-trafficking policy remains ineffectual, and may in some cases even be counterproductive.*

I Introduction

This article takes stock of the policies developed in the European Union against one of the most blatant contemporary manifestations of gender inequality, namely trafficking in women for sexual exploitation. It is now a decade since the first European Commission Communication on trafficking was adopted (after the first European Conference on trafficking in 1996), and many measures then envisaged are now in place. Therefore it is a good time to take a critical look at where, from the point of view of gender equality, the last decade has taken measures against trafficking—and, more tentatively, what, if anything, this anti-trafficking action might reveal about the state of gender equality in the EU.

This article argues that while trafficking in women for sexual exploitation has experienced an almost meteoric rise onto the EU agenda, it is still not framed as a phenomenon of gender (as well as racial and class) inequality despite the obvious concerns over gendered harms that it raises. European gender equality law has, of course, evolved into an impressive body of law from its humble origins, and gender equality is now recognised as a fundamental principle of Community law. Yet the lack of attention to the gender equality implications of issues such as trafficking illustrate how gender equality in the EU setting is still largely confined to the realm of the EC in particular in the sphere of employment, where the primary beneficiaries are EU citizen women. Trafficking, which primarily (if not exclusively) affects non-EU women, is instead regarded as a matter of organised crime and irregular migration. This goes hand in hand with a very limited approach to anti-trafficking action: the adopted policies focus on

* Cardiff Law School, Cardiff University, UK. I am grateful to Annick Masselot, Francis Snyder and to the participants at the 'State of Gender Equality in the EU' workshop in Leeds, 21 November 2005. A full version of the work that this article is derived from will be published as H. Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart Publishing, 2007).

short-term stop-gap measures rather than long-term action advancing the position of female migrants.

The argument of this article is presented in four parts. The first part is a brief introduction to trafficking as a manifestation of a range of gendered inequalities related to nationality, race, and class. The following part outlines the main policy framework now in place in the EU, while the next section argues that despite the vast advances made in terms of bringing trafficking onto the EU agenda, the current policy is flawed in that it does not grasp the basic nature of trafficking, which in turn has led to a failure both in the design of existing legal instruments in the framework of the Area of Freedom, Security and Justice and with regard to the broader focus of anti-trafficking action. The policy will remain unworkable and even counterproductive until these issues are addressed. The final part discusses current and future concerns in light of the Commission Communication and the Council Action Plan, which were adopted in 2005.

II On Trafficking, Migration, and Violence against Women

Interest in developing a specifically European or EU anti-trafficking policy has been increasing in the last few years, in accordance with the alleged growth in the scale of the phenomenon in Europe. At the same time estimates of the true number of trafficked persons remain 'guesstimates', as do any claims of 'increased trafficking', in part because trafficking is typically an underground practice that involves illegal activities (and because its victims are often too scared to stand up to their exploiters). Beyond the few identified cases that are actually investigated and prosecuted, there are few official statistics on the *actual* scale of such practices, despite increased attention to the problem of lacking numbers.¹

'Guesstimates' are, however, also the result of the difficulties involved in defining what 'trafficking' actually entails. While there is basic agreement that trafficking involves often violent abuses of the basic human rights of its victims in the course of exploitative practices, there are in fact diverging views as to the nature, extent, and resolution of the 'trafficking problem'. The origins of the concern over trafficking link it firmly with the exploitation of women and girls in prostitution.² Yet the most famous controversy today regards the issue of whether or not involvement in prostitution is by definition exploitative of female sexuality: while some think so and thus would consider most migrant women involved in prostitution in the EU as 'trafficked',³ others argue that prostitution is not uniquely exploitative work⁴ and that what counts is the use of violence or coercion, regardless of what form the actual

¹ For an illustrating compilation of various trafficking statistics from around the world, see UNESCO Bangkok Trafficking Statistics Project, available at <<http://www.unescobkk.org/index.php?id=1022>> (accessed 16 November 2006) and for a global overview of trends, see United Nations Office on Drugs and Crime, *Trafficking in Persons. Global Patterns* (UNODC, 2006). For an analysis on the lack of accurate statistics and the difficulties imposed by a lacking knowledge base, see L. Kelly, "'You Can Find Anything You Want': A Critical Reflection on Research on Trafficking in Persons within and into Europe", (2005) 43 *International Migration* 1/2.

² See e.g. J. Walkowitz, *Prostitution and Victorian Society* (Cambridge University Press, 1982). See also J. Doezema, 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women', (2000) 18 *Gender Issues* 1.

³ See e.g. K. Barry, *The Prostitution of Sexuality* (New York University Press, 1995).

⁴ K. Kempadoo and J. Doezema (eds) *Global Sex Workers: Rights, Resistance and Redefinition* (Routledge, 1998).

work takes (for instance prostitution, sweatshop labour, domestic work)—however, the problem then becomes one of drawing the boundary between coercive and non-coercive kinds of work.⁵

The most widely used compromise definition shifts the discourse towards the language of ‘exploitation’ and is now to be found in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000), Especially Women and Children, which defines trafficking as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁶

The key element, exploitation, is in turn further described as covering ‘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’. In other words, while trafficking is not confined to prostitution-related exploitation, sexual exploitation remains the paradigmatic understanding of trafficking.⁷ Yet the crucial word ‘exploitation’ is not defined, which, along with the use of other rather woolly terms such as ‘abuse of a position of vulnerability’, leave the debate on coercion and choice open.⁸

While defining trafficking in a rather imprecise way, the UN negotiations ended up distinguishing rather sharply between trafficking in persons and smuggling in persons.⁹ The underlying idea behind such a distinction is that the freedom and agency of those ‘trafficked’ are violated (as they are ‘exploited’), while smuggling is simply arranging consensual (and presumably non-exploitative) facilitated (often irregular) entry of a migrant into a chosen country.¹⁰ The problem with this distinction, apart from an implicit understanding that ‘trafficking victims’ tend to be female migrants while ‘smuggled migrants’ (or indeed irregular migrants more broadly) are male,¹¹ is that it masks the reality in which the experience of exploitation resides within a rather more complex range of coercion and choice. Many irregular and even regular migrants’

⁵ See e.g. M. Wijers, and L. Lap-Chew, *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution* (STV, 1997).

⁶ See Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, A/53/383, Annex II, (UN Trafficking Protocol). The Protocol entered into force on 25 December 2003 after 40 ratifications (and has 110 parties in November 2006).

⁷ On the negotiations over the definition, see A. Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’, (2001) 23 *Human Rights Quarterly* 4, at 984–988.

⁸ Compare J. Raymond, ‘The New UN Trafficking Protocol’, (2002) 25 *Women’s Studies International Forum* 5 with J. Doezeema, ‘Who gets to choose? Coercion, Consent, and the UN Trafficking Protocol’, (2002) 10 *Gender and Development* 1.

⁹ A separate protocol was adopted on human smuggling. See the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, A/55/383, Annex III (UN Smuggling Protocol). It entered into force on 28 January 2004 after receiving 40 ratifications (with 103 parties in November 2006).

¹⁰ See e.g. P. Twomey, ‘Europe’s Other Market: Trafficking in People’, (2000) 2 *European Journal of Migration and Law* 1, at 6–7.

¹¹ Although it is currently acknowledged that men too can be trafficked, even the concept of ‘trafficking in human beings’ tends to be framed (either explicitly or implicitly) by an understanding that the primary victims of exploitative migration are women.

experiences actually involve a degree of deception, coercion, abuse of vulnerability, or exploitation, and there appears to be ample overlap between irregular migration, smuggling, and trafficking. Most typically, a person can initially consent to being assisted to migrate irregularly (or even to being smuggled), but become instead 'trafficked' if upon arrival to the country of destination debt bondage, threats, or violence are used to coerce this person into forced labour, for example, in sweatshop work or in prostitution.¹²

Perhaps most tellingly though, migrants may accept (consent to) an 'exploitative' or even a coercive situation simply because it is the best option available to them. While automatically categorising migrant women as *uniquely* victimised by trafficking remains problematic, it is important to note that much international migration, whether it involves smuggling or trafficking, takes place in a setting where huge global economic, social, and legal inequalities prevail, and that many of these inequalities are gendered.¹³ For instance, many female migrants come from societies where failure to respect the human rights of (especially some groups of) women is endemic, or where women find themselves in dire economic need to provide for their children as a result of changed circumstances (such as the economic restructuring that took place in Eastern Europe after the Cold War, or armed conflicts).¹⁴ It is as a result of such situations that many female migrants seek better lives in well-off countries, such as the 'old EU-15'—and increasingly the 'new EU-27' as well. Even when they succeed, they often become unskilled or semiskilled workers in the more undesirable low-wage sectors of the economy as a result of factors such as lacking education, language barriers, racism, and sexism.¹⁵

However, as a result of domestic panics over 'fake' asylum-seekers and the fears over lacking integration of ethnic minorities, most destination countries, including EU Member States, have taken major steps to stem 'unwanted' migration.¹⁶ Although this has meant that many women are prevented from migrating legally into growth sectors which need the migrant workforce (such as domestic work or agriculture), crucially however, this has not succeeded in stopping migration—rather it has generated more demand for assisted migration services of smugglers and others.¹⁷ This in turn creates more space for exploitative practices abusing those most vulnerable because of gendered economic, social, legal, and political systems.¹⁸ Moreover, as a result of these stricter and increasingly Europeanised migration policies, many non-EU women

¹² See Gallagher, *op. cit.* note 7 *supra*, at 1001; Kelly, *op. cit.* note 1 *supra*, at 238.

¹³ See e.g. E. Kofman, A. Phizacklea, P. Raghuran and R. Sales, *Gender and International Migration in Europe* (Routledge, 2000).

¹⁴ See e.g. the analysis (regarding Ukraine) in V. von Struensee, 'Sex Trafficking: A Plea for Action', (2000) 6:4 *European Law Journal*.

¹⁵ See Kofman et al., *op. cit.* note 13 *supra*. See also the contributions to B. Ehrenreich and A. Hochschild (eds), *Global Woman. Nannies, Maids, and Sex Workers in the New Economy* (Metropolitan Books, 2002).

¹⁶ See e.g. C. Joppke, 'European Immigration Policy at the Crossroads', in P. Heywood, E. Jones and M. Rhodes (eds), *Developments in West European Politics 2* (Palgrave, 2002). For country studies, see G. Brochmann and T. Hammar (eds) *Mechanisms of Immigration Control: A Comparative Analysis of European Regulation Policies* (Berg, 1999).

¹⁷ For an analysis on the varied reasons behind the 'policy failure' on controlling migration see e.g. S. Castles, 'Why migration policies fail', (2004) 27 *Ethnic and Racial Studies* 2.

¹⁸ Those who are vulnerable include, of course, also potential asylum-seekers who find it increasingly difficult to seek protection in developed countries. See J. Morrison and B. Crosland, 'The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?', (2001) *New Issues in Refugee Research*, Working Paper 39.

who are discovered working in prostitution or other forms of underground work are typically detained or expelled as irregular migrants or workers. Swift repatriation without due consideration as to the circumstances in the country of origin often involves further risks such as re-trafficking or social ostracism, and can be particularly harmful to the recovery of those who have suffered repeated sexual violence.¹⁹

The individual acts of violence perpetrated by exploitative 'traffickers' (be they part of larger criminal networks or less-organised middlemen) against female migrants and the human rights abuses suffered by 'victims of trafficking' are in some ways the most egregious end of a continuum where many migrants live and work in situations of varying degrees of exploitation. While none of this background removes the responsibility of the individuals who use violence against or exploit migrants, it does mean that trafficking at a certain level implicates not only those guilty of exploiting migrant women, for example, in prostitution (or other forms of exploitative labour), but governments, employers, and individuals within 'receiving' countries who accept and perpetuate discrimination against people on the grounds of their gender, nationality, and status as third-country nationals.

III A Decade of EU Anti-Trafficking Policy at a Glance

Since the initial Commission Communication in 1996,²⁰ the development of an EU policy against trafficking has taken several important steps forward. Two binding legal instruments, the Framework Decision on combating trafficking in human beings and the Directive on the short-term residence permit for victims of trafficking, have been adopted; the so-called Brussels Declaration—listing concrete measures, standards, best practices, and mechanisms to prevent trafficking—was adopted in 2002 at the end of a major European Conference on trafficking;²¹ the European Forum on the Prevention of Organised Crime has organised workshops on prevention of trafficking in human beings; Europol and now also Eurojust have been set up and equipped with competencies in area of trafficking.²² Funding for projects aiming at improving the prevention of and the fight against trafficking has been available under several funding schemes and remains so under, for example, the AGIS framework programme²³ and the Daphne II Programme.²⁴ Trafficking is also a topic in EU relations with third countries in Eastern and South-Eastern Europe, Central Asia, and the Mediterranean region. Lastly, a Commission Experts Group on trafficking in human beings was set up by the

¹⁹ On the adverse physical and mental health consequences of trafficking, see e.g. London School of Hygiene and Tropical Medicine, *The Health Risks and Consequences of Trafficking in Women and Adolescents. Findings from a European Study* (LSHTM, 2003). For criticism of state practices, see e.g., E. Pearson, *Human Traffic, Human Rights: Redefining Victim Protection* (Anti-Slavery International, 2002).

²⁰ Commission Communication of 20 November 1996 to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation, COM(96) 567 final.

²¹ The European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21st Century, 18–20 September 2002. See Council Conclusions of 8 May 2003, OJ C 137, 12 June 2003, for the text of the Declaration.

²² Article 2(2) of the Europol Convention; on Eurojust, see Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA, OJ L 63, 6 March 2002.

²³ Council Decision 2002/630/JHA of 22 July 2002 establishing a framework programme on police and judicial cooperation in criminal matters (AGIS), OJ L 203, 1 August 2002.

²⁴ European Parliament and Council Decision 803/2004/EC of 21 April 2004 adopting a programme of Community action (2004 to 2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk, OJ L 143, 30 April 2004.

Commission in 2003²⁵ and reported in 2004 with a host of recommendations for a new Communication, which was adopted in 2005 (see part V below).²⁶

An ongoing evaluation of relevant EU legislation is being taken under the Hague Programme on Freedom, Security and Justice,²⁷ but for the purposes of this enquiry it is useful to take a closer look at the two oft-mentioned legal instruments on trafficking, which remain the milestones of EU policy in terms of concrete and binding obligations.²⁸

The Commission's Proposal for a Framework Decision on combating trafficking in human beings was put forward to the Council and the European Parliament in December 2000, that is, around the same time when the Charter of Fundamental Rights of the European Union²⁹ was proclaimed by the Community institutions. The lofty Article 5(3) of the Charter of Fundamental Rights declares that 'Trafficking in human beings is prohibited', and the Framework Decision, finally adopted in July 2002, put this prohibition into practice by setting up a common framework of provisions on the criminalisation of trafficking (Articles 1–2), on effective, proportionate, and dissuasive penalties, along with a list of aggravating circumstances such as endangering the life of the victim (Article 3), on the liability of legal persons (Articles 4–5), and on jurisdiction and extradition (Article 6).

While basically incorporating many of the UN Trafficking Protocol's provisions, including (with some slight modifications) its definition of trafficking (see Article 1), what the Framework Decision omitted to address (with the minor exception of Article 7) was the situation of victims of trafficking, who are typically first detained and then expelled as irregular migrants under the increasingly strict and 'Europeanised' migration policies of the Member States. Summary expulsion is obviously often disastrous for the victims in terms of their recovery and right to redress, but also means that after their repatriation their testimony, often crucial for a conviction against those who have harmed them, is not available at a trial against the traffickers. Despite this, because of its limited scope as a measure aimed at the approximation of criminal law, the Framework Decision left out practically all of the UN Protocol's (optional) provisions on the protection of victims of trafficking, as well as its measures on the prevention of trafficking.

However, by the time the Framework Decision was adopted, the Commission had put forward another proposal, this time for a Directive on a short-term residence permit for victims of trafficking and smuggling, which—it was argued—partly addressed also the protection needs of victims by envisaging granting (some of) them a temporary right to stay in the destination country.³⁰ Political compromise on the

²⁵ Commission Decision of 25 March 2003 setting up a consultative group, to be known as the 'Experts Group on Trafficking in Human Beings', 2003/209/EC, OJ L 79, 26 March 2003.

²⁶ See Report of the Experts Group on Trafficking in Human Beings, 22 December 2004.

²⁷ The Hague Programme (2005–2010), OJ C 53, 3 March 2005, was adopted in November 2004 (as the successor to the Tampere programme). See also the Commission Communication listing the priorities for the next five years, COM(2005) 184 final.

²⁸ For other relevant acts, see e.g. Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 83, 22 March 2001, and Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002.

²⁹ Charter of Fundamental Rights of the European Union, OJ C 364, 18 December 2000.

³⁰ Commission Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, COM(2002) 71 final, OJ C 126 E, 28 May 2002.

proposal was reached in November 2003 and it was formally adopted³¹ in April 2004, giving Member States until August 2006 to comply with it.³²

This Directive requires Member States to introduce a temporary residence permit for victims of trafficking in human beings (or, if a Member State so decides, to those smuggled by migration networks), intended to encourage third-country nationals to cooperate with the competent authorities. Granting such permits is subject to a number of conditions: the authorities are to assess whether the presence of the victim serves a useful purpose (in terms of investigations or judicial proceedings), whether s/he has shown a clear intention to cooperate and whether s/he has severed all relations with those suspected of the relevant offences (Article 8). If these three conditions are fulfilled (and after a domestically determined reflection period, about which see Article 6) and subject to public policy and national security considerations, a residence permit of limited duration can be issued (Article 8(2)). The permit is renewable but shall not be renewed if the conditions cease to be fulfilled (Article 13) and can be withdrawn on grounds of *in particular* (in other words, the list is not exhaustive) renewed contact with the suspected exploiters, authorities' belief in fraudulent cooperation or a fraudulent complaint, public policy, or national security, ceased cooperation by the victim and discontinued proceedings (Article 14).

During the period that the short-term permit covers, victims holding such a permit are to be guaranteed a minimum standard of living; access to emergency medical treatment; attention to their safety and protection needs; translation and interpretation where appropriate; free legal aid (optional); and 'necessary medical or other assistance to the third-country nationals concerned, who do not have sufficient resources and have special needs, such as pregnant women, the disabled or victims of sexual violence or other forms of violence' (Article 9). Member States are also expected to define the rules for victims' access to the labour market, vocational training, and education during the period covered by the residence permit (Article 11).³³ Additional conditions regarding participation on programmes or schemes for third-country nationals can be imposed on permit-holders (Article 12). More permanent right to stay is not envisaged; after the victims have assisted with the proceedings, normal immigration rules apply.³⁴

IV Taking a Closer Look: Addressing Symptoms Rather Than Causes?

There are two aspects to the criticisms that can be targeted at the current EU anti-trafficking instruments and initiatives, which are part of burgeoning functional co-operation between law enforcement and judicial authorities of Member States in general. These are interrelated, as they stem from insufficient attention to the factors that create and uphold migrant women's vulnerability to trafficking-like practices, but it is worth looking at both in turn. The first is an internal kind of critique which maintains that the current EU policy is problematic on its own stated terms, while the

³¹ The UK and Ireland opted out; Denmark is not bound by the measure either.

³² See 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 L 261, 6 August 2004.

³³ The formulation does not specify (perhaps on purpose) if this means freedom of choice over whether to allow such access or only over how this access is arranged.

³⁴ Note, however, that the preamble of the Directive does state that Member States should consider the fact that the victim already has had a residence permit issued on the basis of this Directive if the victim applies to stay on another ground.

second argues, in a more external vein, that the current approach merely perpetuates the same inequalities that trafficking exemplifies in the first place, without tackling the real causes of exploitative practices.

Accepting for the time being the premise that trafficking in women should be targeted primarily as part of the law enforcement and judicial cooperation agenda, several immediate problems with the above-mentioned instruments give rise to questions about how far EU anti-trafficking action can go as part of a rather fragile EU consensus on Justice and Home Affairs.

One of the arguments behind adopting both of the above-mentioned instruments was that the lack of uniform standards between the Member States helps traffickers to escape investigation and prosecution and means that victims who might have relevant evidence cannot access national systems of protection. Thus, it was argued, legal harmonisation is necessary for effective enforcement action. This is true; yet for instance the Framework Decision introduced above is likely to lead to modest harmonisation or agreement on priority-setting. The Framework Decision largely adopts the wide and vague definition of the UN Trafficking Protocol,³⁵ which was a result of arduous multilateral negotiations, during which it was impossible to agree on anything more specific.³⁶ Thus the 'harmonised' European definition of the Framework Decision, as well as the compromise on suitable penalties (maximum penalty not less than eight years when aggravated but otherwise left to the Member States) also leaves the specifics open, which, considering the diversity in national conceptions of sexual morality, permissible migration, labour standards, and prostitution policies in effect harmonises little.³⁷

Nor can agreement on a definition or sanctions (especially when so general) in itself make trafficking, let alone more general exploitative practices against migrants, a priority of national law enforcement action—the law remains a dead letter if it is not used. Considering the very small role of the Union in participating in practical law enforcement action in the field and the suspicious attitude of some Member States to European initiatives in this area, the role of the EU remains very restricted (to training, organising seminars, and so on), which in turn means that making trafficking a priority is still up to the Member States. This may in itself not be a bad thing, considering the diversity of trafficking situations in different Member States and the open questions about the role of the Union in pursuing convergence in criminal justice and the appropriateness of developing transnational law enforcement in the EU.³⁸ However, this clearly shows the very real limits that currently hamper the Union's ambition to pursue further EU policy on trafficking owing to any kind of 'regional consensus'.

³⁵ Although note that there are some discrepancies (for instance, regarding the scope of application and the exact way in which the exploitative practices that are covered by the definition are formulated—compare Article 3 of the UN Trafficking Protocol with Article 1 of the Framework Decision).

³⁶ About the negotiations over the definition, see Gallagher, *op. cit.* note 7 *supra*.

³⁷ A comparative Europol report on Member States' current legislation affirms that huge differences remain. For instance, if the crime of trafficking for sexual exploitation has been committed in aggravating circumstances, the penalties vary between six months and a life sentence. See Europol, *Legislation on Trafficking in Human Beings and Illegal Immigrant Smuggling* (Europol, 2005). See also the Commission's recent report, based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, COM(2006) 187 final, which indicates gaps and persisting divergences.

³⁸ On the contested notion of criminal law harmonisation, see eg A. Klip and H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Sciences, 2002).

A similar argument can be made about the Directive on residence permits, only more forcefully. The instrument, which is intended to harmonise national responses to victims, is subordinate to national laws of the Member States, which are allowed to define the length of the reflection period, the availability of psychological assistance, victims' access to legal aid, rules on the possibility to work, and access to education. Because of domestic concerns over migration, security, and the threat of crime, and because migrant women's experience as victims is conflated with their involvement in illicit activities (irregular migration and prostitution), the Directive views victims extremely suspiciously, while being eager to make use of them as a potential source of valuable information. Thus, while foreseeing that a limited number of victims (who are useful and thus considered deserving) can stay temporarily, the Directive evidences an inherent desire to minimise the number of people who might make use of the instrument and, deep down, the assumption (as with asylum-seeking) that the opportunity will be misused by clever migrants looking for loopholes. It is thus not a measure aimed at the protection of trafficking victims, but at squeezing out any relevant information that could be used against the 'real criminals', that is, those who assist and organise irregular migration. After that even the 'useful' victims are discarded.

As a result of this ambivalence the Directive ends up as a 'race to the bottom' instrument that fails to address the real-life circumstances of trafficking victims. It is telling that the fact that victims of trafficking have nearly always experienced repeated and often aggravated sexual violence barely gets a mention in the Directive (see Article 9). Because the Directive is not alert to the complex gendered issues underpinning trafficking as a phenomenon and because it does not put the interests of the trafficked persons first, even those victims with useful information are not likely to cooperate in the manner that was foreseen by the original proposal. Moreover, considering the perceived need to be seen as tough on 'illegal immigration', the Directive might even encourage those Member States having in some respects more generous and workable provisions to cut down their existing systems so as not to 'attract' unwanted immigrants.

Furthermore, the Directive raises serious concerns about the general treatment of not only *all* trafficking victims but (irregular) migrants in general. As it remains likely that those who actually benefit from this kind of limited opportunity will be few and far between, the rest are left to fend for themselves as before. In this regard, it can be argued that the Member States use the EU to lower their standards below the level of international human rights norms.³⁹ The EU and its Member States, where asylum-seekers are vilified, hardly mention some trafficking victims' potential right to asylum or other humanitarian leave to stay based on the principle of non-refoulement, owing to, among others, a real risk of retribution, violence, and/or re-trafficking if returned to country of transit or origin.⁴⁰ Extending the right to asylum or subsidiary protection (for example, based on the threat of torture or inhuman or degrading treatment as elaborated in Article 3 of the European Convention of Human Rights) on trafficking-related grounds could be justified and even required in some cases where the country of

³⁹ Note that under the rejected Constitutional Treaty the extension of the European Court of Justice's competence regarding Justice and Home Affairs (now Title IV EC and police and judicial co-operation under the Third Pillar), would have made it easier to challenge JHA instruments.

⁴⁰ The European Parliament has mentioned (but not elaborated on) the possibility to seek asylum status for trafficking victims (see e.g. EP Resolution on trafficking in women for the purpose of sexual exploitation, OJ C 14 19 January 1998).

origin cannot guarantee protection from further harm.⁴¹ Yet while the necessity of examining repatriation risks and protection needs both before and after return to the country of origin features in some best practice documents, there is little by way of official affirmation of this in the Union.⁴²

The more fundamental criticism of EU policy is, however, that as the above instruments illustrate, EU anti-trafficking strategy at present evidences a clear trend towards a law enforcement agenda that is unsound in principle, and unworkable and repressive in practice. Inspired by a frail consensus over the need for more external migration control, the current approach actually perpetuates rather than addresses the global inequalities that trafficking exemplifies in the first place, as not enough attention is devoted to why migration to the European Union takes place, what if anything can be done to minimise the harms suffered by migrants, and what role gender plays in these processes. In short, the main problem with the current measures is that they focus almost solely on repressive, reactive measures, whereas activists in the field (among others) have for long recognised that effective strategies to counteract trafficking in human beings require a range of carefully considered long-term preventive and protective measures that would take gender equality seriously.

The need for a wider approach has also been acknowledged by the European Commission, most obviously in the information sheets dedicated to 'a comprehensive European strategy' against trafficking in women, which assert that 'since women are in a position of vulnerability to become victims, there is also a clear need to tackle this problem from the angle of promoting gender equality'.⁴³ Knowing the mechanisms that underpin trafficking and the (often sexual) exploitation of migrant women, it is difficult to disagree with this assertion. As was seen above, in many ways, trafficking is a relatively uncontroversial manifestation of (among others, gender) inequality: multiple discrimination against migrant women severely restricts their range of opportunities and exposes them to exploitation, for instance (but not only) in prostitution, as most trafficking takes place in the unregulated informal sector. Even though victims of trafficking are increasingly often from non-EU countries, one can hardly talk of gender equality in the EU if it is accompanied by channelling groups of other women into exploitation.

The problem is turning these insights into policy. In the past, wider preventative policies have been, if anything, an afterthought; even now that the word 'prevention' increasingly finds its way into official policy documents and some funding is directed that way, the focus is skewed in favour of repressive rather than proactive measures.

⁴¹ Note that the Council Directive 2004/83/EC of 29 April 2004, OJ L 304, 30 September 2004, explicitly covers gender-based persecution and in some circumstances extends to persecution committed by non-state actors. For arguments on trafficking-asylum nexus, see J. Demir, 'Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?', (2003) *New Issues in Refugee Research*, Working Paper 80. For human rights benchmarks, see United Nations High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1 (2002).

⁴² On the contrary, the European Union seems to be more inclined to actually import its low standards into organisations traditionally based on promoting human rights. The 2005 Council of Europe Convention Against Trafficking is a case in point. Remarkably reminiscent of the EU measures, it adds little in terms of hard obligations to protect and assist victims. See Recommendation 1695 (2005) by the Council of Europe Parliamentary Assembly, which states that the European Commission, negotiating on behalf of 22 Member States, 'systematically refused' to adopt provisions that would have widened the scope of protection beyond what had been agreed in the Directive on residence permits.

⁴³ <http://europa.eu.int/comm/justice_home/news/8mars_en.htm> (accessed 16 November 2006).

Migration policy is a case in point. Restrictive immigration policies have developed since the 1970s in most Member States and are increasingly harmonised at the European level.⁴⁴ In an effort to eradicate most forms of external labour migration (rather than to target particular instances of abuse or exploitation) considerable resources have been mobilised to 'fight' irregular migration, especially traffickers and smugglers.⁴⁵ Yet seeking to stop external migration (especially when it relies on externalised control) has not worked.⁴⁶ If anything, it might cause migrants to use even more clandestine and more dangerous routes. Moreover, many of the introduced control measures effectively criminalise and marginalise all migrants, whether trafficked or not. As a result of the 'illegalisation' of migrants they cannot access even those few rights that they have (regarding protection from abuse, work safety, health, and so on), which remain illusory.

Yet instead of tackling these issues head on, the last few years have evidenced a growing trend towards mobilising, for example, EC development policy and external relations with the main source countries, with the aim of preventing migration rather than facilitating legal labour migration options for women or improving women's living conditions in countries of origin, which might be more effective ways forward.⁴⁷ This imbalance goes hand in hand with a general approach that predominantly seeks to tackle the 'supply side' (and thus 'export' the perceived problem), ignoring the mechanisms of EU demand.⁴⁸ Indeed, perhaps the most damning criticism of European anti-trafficking initiatives is that they target potential migrants while largely ignoring the fact that trafficking is bound with issues such as the European need for migrant labour in certain sectors, the (lack of) rights of migrant workers and the structural changes in the role of women (including migrant and minority women) in the labour market. Although trafficking-related issues are now included on the agenda of, for example, the Community Framework Strategy on Gender Equality,⁴⁹ this side is not yet addressed in depth by EU or Member State initiatives, even though arguably this is the area that the EU and its Member States could actually influence much more effectively than the issue of supply, which has proved impossible to control effectively. Yet the

⁴⁴ R. Miles and D. Thranhardt (eds), *Migration and European Integration. The Dynamics of Inclusion and Exclusion* (Pinter Publishers, 1995); A. Geddes, *Immigration and European Integration. Towards Fortress Europe?* (Manchester University Press, 2000).

⁴⁵ See P. Martin, *Bordering on Control: Combating Irregular Migration in North America and Europe* (IOM Migration Research Series No. 13, 2003) for a comparison of the resources invested in migration control in a number of developed nations. On EU policy, see Comprehensive Plan to combat illegal immigration and trafficking of human beings in the European Union, 28 February 2002, OJ C 142, 14 June 2002.

⁴⁶ See Castles, *op. cit.* note 14 *supra*.

⁴⁷ For examples on typical control measures suggested, see the Action Plans by the High Level Working Group on Migration and Asylum and the 2002 Seville European Council Conclusions, which focused on repatriation of undocumented migrants. For comments on how the current EU migration policy damages external policy objectives, see S. Peers, 'Irregular Immigration and EU External Relations', in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyssczak (eds) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers, 2004).

⁴⁸ The mechanisms of demand are complex and very little research has been done on them yet, but see B. Anderson and J. O'Connell Davidson (2003), *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*. IOM Migration Research Series, No. 15.

⁴⁹ See 'Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on equality between women and men', 2005, COM(2005) 44 final, 14 February 2005, which discusses, among other issues, the role of immigrant women in the labour market.

current EU and Member State measures try very hard to do just that, rather than taking a long hard look at their economies to see why they seem to have a chronic structural need for a cheap, exploitable, vulnerable workforce and what could be done to protect those most affected.⁵⁰

The focus on supply rather than demand has only been questioned vis-à-vis prostitution and has even there proved extremely controversial.⁵¹ The fact that European demand factors are usually conveniently ignored is not surprising as any measures involved in tackling grey labour, non-observance of labour standards and the exploitation of migrant women by European employers or prostitution customers are likely to be met with considerable hostility by domestic constituencies. Moreover, tackling prevention and protection also implicates a complex policy setting: debates over the exact meaning of gender equality, contested areas of EU competence (over gender equality but also over the entry of migrants)⁵² and the broader future of the EU. This is why they are hardly elaborated on. Lack of consistent action merely highlights the concern, however. In brief, the EU now uses its potential and its economic clout as a trade block for short-sighted stop-gap measures that are a far cry from more ethical policies regarding global phenomena interwoven with exploitative practices, such as international migration, discrimination against women, and trade and development.

V Current Concerns and Future Directions

Lastly, this article looks at how (if at all) some recent developments answer the criticisms presented above. In October 2005, the European Commission issued a Communication on preventing and combating trafficking in human beings,⁵³ meant to feed into (the UK presidency goal of developing) an Action Plan on people trafficking and working for greater EU-wide police co-operation. The Action Plan was adopted in December 2005.⁵⁴

Promisingly, the Action Plan begins with a statement (largely adopted from the Communication) that:

⁵⁰ Indeed, it could be maintained that some Member States rather cynically exploit and further the unprotected situation of undocumented migrants as it usefully keeps the (needed) migrant workers both available and docile.

⁵¹ Much of the controversy has centred on the Swedish law that in 1999 criminalised the buying of sexual services while leaving selling legal, inspired by a (radical) feminist understanding of prostitution as exploitative. On the law's adoption see Y. Svanström, 'Criminalising the john – a Swedish gender model?', in J. Outshoorn (ed) *The Politics of Prostitution. Women's Movements, Democratic States and the Globalisation of Sex Commerce*. (Cambridge University Press, 2004). On its implementation, see C. Holst and P. Lindström, *Förbud mot köp av sexuella tjänster. Tillämpningen av lagen under första året* (Brottsförebyggande rådet, 2000); A. Nord and T. Rosenberg, *Rapport: Lag (1998:408) om förbud mot köp av sexuella tjänster* (Polismyndigheten i Skåne, 2001).

⁵² See for instance Communication COM(2006) 92 final, 'A Roadmap for equality between men and women (2006–2010)', which mentions trafficking but has limited proposals for action; or see Communication COM(2006) 26 final, Thematic programme for the cooperation with third countries in the areas of migration and asylum, which is quite thin on 'promoting well-managed labour migration' in the absence of legislative instruments regulating entry and residence conditions.

⁵³ 'Communication from the Commission to the European Parliament and the Council, Fighting trafficking in human beings—an integrated approach and proposals for an action plan', COM(2005) 514 final, 18 October 2005.

⁵⁴ 'EU plan on best practices, standards and procedures for combating and preventing trafficking in human beings' (2005/C 311/01), OJ C 311, 9 December 2005.

In order to address effectively human trafficking an integrated approach is needed, having as its basis the respect of human rights and taking into account its global nature. This approach calls for a coordinated policy response notably in the area of freedom, security and justice, external relations, development cooperation, social affairs and employment, gender equality and non-discrimination.⁵⁵

This statement seems to imply an acceptance that a new balance between a wider range of relevant policy concerns is needed. It is clearly inspired by the Experts Group report⁵⁶ which highlighted, among other things, the need for a human rights perspective and argued that victim assistance and protection as well as broad-based prevention measures were lagging behind and needed to be made central.

However, in particular when contrasted against the Experts Group report, the Communication and the subsequent Action Plan look rather meagre in terms of concrete measures needed in order to tip the balance in favour of more a proactive and wide-ranging approach aimed at tackling the poor legal and social position of women as workers and as migrants. Nonetheless, there are steps forward. The stated human rights commitment, while thinly formulated, still survived, and its inclusion stresses the human tragedies that trafficking involves. The commitment to addressing the gender equality dimension in the Action Plan brings in calls to support broader measures addressing the root causes of trafficking (such as gender inequalities), the inclusion of gender-specific prevention measures in development cooperation and strategies to strengthen the economic, legal, and political position of women. The controversial issue of reducing the demand side of trafficking has got its own heading, even if the measures incorporated are limited to reporting on best practice.

The challenge lies in making sure these positive elements do not remain window-dressing, as the bulk of the Action Plan is still devoted to the familiar dimensions of external migration control and investigation and prosecution. It is also crucial that the measures envisaged there (such as developing the Common Visa Information System, or improving operational cooperation between Member States) are kept under scrutiny for they still emphasise the repressive side of the now well-established law enforcement agenda. For instance, most of the measures on external migration in the Action Plan are still all about the control of 'illegal' migration, not about a proactive approach to migration management. There is no sign of following the recommendation articulated (among others) by the Commission's Experts Group that 'the EU and its Member States should review and modify policies that may compel people to resort to irregular and vulnerable labour migration'.⁵⁷ There is no recognition of the promotion of regular migration channels for women as an important factor in preventing exploitative practices or of the need to encourage the ratification of the UN Convention the Protection of the Rights Migrant Workers.⁵⁸

Considering the ways in which the status quo is *not* challenged in the Action Plan, there is a danger that the inclusion of a rather hazy promise to address gender inequalities in the anti-trafficking framework may also remain a rhetorical commitment with little or no substance. The already myopic vision of the Justice and Home Affairs regarding the potential gender implications of measures adopted in that field can only be redressed though concrete and cross-cutting efforts to examine the effects

⁵⁵ EU plan, 1. See also COM(2005) 514 final, at 3.

⁵⁶ Note 26 *supra*.

⁵⁷ Note 26 *supra*, at 86.

⁵⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA res. 45/158 (18 December 1990).

nationality, migration, and labour migration laws on women, to study the lack of basic protection in the sectors in which predominantly migrant women work, and by implementing gender sensitive programmes to tackle the disadvantaged situation of migrant women marginalised by immigration legislation and unequal access to the labour market. Much of this could of course be connected to the Community commitment to integrating equality between women and men into all Community policies and activities.⁵⁹ Even if in the current EU framework the policies specifically on gender equality still do not reach the niche where trafficking—primarily conceived as violence against non-EU women—is located, it is possible to argue that the potential is there to start viewing gender equality not as an add-on but as the lens through which anti-trafficking action should be evaluated.

VI Conclusion

Trafficking in women for sexual exploitation implicates a range of issues, in particular the underprivileged legal and social position of its victims as migrant women (often) in irregular situations. This article has argued that the focus on law enforcement and migration control has left protection measures rather half-hearted and that the debate on prevention needs to be connected to the nature of trafficking and the complex gendered factors that underpin it. In an increasingly interconnected world, the scope of both regional and local action against trafficking cannot afford to ignore the global dimension of the injustices perpetrated in Europe—nor should those seriously working for gender equality in the EU close their eyes to violence against migrant women.

In the EU setting, trafficking also shows the limits of current EU capacity to take action in areas where the role and anxieties of the Member States remain central, and the difficulties involved in taking gender equality beyond its current sphere to challenge the location of anti-trafficking measures in the current Justice and Home Affairs area. Part of the problem stems from the fact that tackling trafficking is a huge task: ultimately it requires bridging the growing gap between the rich and the poor (states, regions, individuals) which, if anything, is a long-term project. Faced with such a daunting task, it may seem easier to seek interim measures in order to take at least some action; however, there is an urgent need to start devising and implementing more sustainable solutions that devote serious attention to the causes of trafficking, the risks faced by migrants and the role played by gender in exposing women to exploitation.

First submission: April 2006

Accepted: October 2006

⁵⁹ See Arts 2 and 3(2) of the EC Treaty.

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