EDITIONS DE L'UNIVERSITE DE BRUXELLES

The evaluation of European criminal law

The example of the Framework Decision on combating trafficking in human beings

EDITED BY ANNE WEYEMBERGH
AND VERONICA SANTAMARIA

iee INSTITUT D'ETUDES EUROPEENNES

The evaluation of European criminal law
The example of the Framework Decision on combating trafficking in human beings

Edited by
Anne Weyembergh, Veronica Santamaria

ISBN 978-2-8004-1437-9
© 2009 by Editions de l'Université de Bruxelles
Avenue Paul Héger 26
1000 Bruxelles (Belgique)
EDITIONS@.ulb.be
http://www.editions-ulb.be

Imprimé en Belgique

Avertissement

Cet ouvrage est l'aboutissement d'un projet de recherche visant à élaborer un modèle standard d'évaluation de la mise en œuvre et de l'impact des instruments de l'Union européenne adoptés dans le secteur du droit pénal. Ce projet fut mené au cours de l'année 2006-2007 par l'Institut d'Etudes européennes de l'Université libre de Bruxelles en collaboration avec plusieurs universités partenaires du réseau ECLAN (*European Criminal Law Academic Network*, www.eclan.eu) [1]. Il a été financé par le programme Agis de la Commission européenne et par les ministères de la Justice belge et luxembourgeois.

Les éditeurs remercient tous ceux et celles qui ont pris part au projet précité, et en particulier les points de contact et membres du réseau ECLAN, de même que les membres du Comité d'accompagnement de ce réseau. Ils tiennent également à exprimer leur plus vive reconnaissance à Serge de Biolley pour sa collaboration et son précieux soutien au présent projet.

[1] Vrije Universiteit Brussels (Belgique), Instituto de derecho penal europeo e internacional (Universidad de Castilla y la Mancha) (Espagne), Université de Bayonne (France), Institute for Legal Studies of the Hungarian Academy of Sciences – Université Eőtvős Loränd (Hongrie), Université de Catania (Italie), Université de Maastricht (Pays-Bas), Université de Coimbra (Portugal), Université de Ljubljana (Slovénie).

Introduction

Anne Weyembergh et Veronica Santamaria

1. Le contexte dans lequel s'inscrit l'ouvrage

L'évaluation a acquis une importance croissante dans les politiques de l'UE liées à la coopération en matière pénale. Ceci s'explique par un ensemble d'éléments. Le premier est l'importance quantitative du droit de l'Union adopté en application du titre VI du TUE. Depuis l'entrée en vigueur du traité d'Amsterdam et les conclusions du Conseil européen de Tampere, le développement de ce secteur a connu une accélération majeure qui a mené, durant les dernières années, à l'adoption d'un nombre important d'instruments juridiquement contraignants. A cette évolution quantitative vient s'ajouter un changement qualitatif. Parmi les instruments adoptés, et particulièrement parmi les décisions-cadres, certains affectent profondément les droits nationaux et/ou la coopération transnationale. C'est notamment le cas des décisions-cadres de rapprochement des législations en matière de droit pénal matériel ainsi que de celles qui mettent en œuvre le principe de la reconnaissance mutuelle des décisions judiciaires pénales.

Face à ce développement quantitatif et qualitatif, il est généralement admis que le défi actuel est, avant d'adopter de nouveaux instruments, d'assurer la mise en œuvre du droit préexistant, afin que ces évolutions du cadre juridique européen produisent bien leurs effets. Pour assurer cette mise en œuvre, il est indispensable d'évaluer correctement celle-ci. Une évaluation efficace est également nécessaire pour poursuivre le développement des politiques de l'Union dans ce secteur. Les nouveaux instruments viennent de plus en plus s'insérer dans un cadre juridique européen existant, de sorte que toute nouvelle intervention du législateur européen nécessite une démonstration de la valeur ajoutée de l'instrument concerné. Cela suppose de pouvoir identifier et mesurer les effets du droit en vigueur jusque-là. Enfin, l'évaluation est un facteur important de renforcement de la confiance mutuelle au sein de l'espace

européen de justice pénale. Cette évaluation vient en effet objectiver et influencer la qualité et l'efficacité des systèmes nationaux ainsi que la connaissance réciproque de ces systèmes.

Cette importance de l'évaluation est soulignée par les institutions européennes elles-mêmes, entre autres par la Commission [1] et le Conseil JAI [2], de même que par divers instruments européens de nature programmatique, tels que le Programme de la Haye adopté le 5 novembre 2005 par le Conseil européen [3] – qui considère l'évaluation comme « vitale » pour l'avenir – et le Plan d'action visant à le mettre en œuvre [4]. Elle fut en outre mise en exergue dans le traité constitutionnel [5] et dans le traité de Lisbonne [6].

Or, telle qu'elle se fait aujourd'hui, cette évaluation présente des lacunes, lacunes qui ont été identifiées et mises en évidence lors d'un colloque international organisé par ECLAN les 21 et 22 octobre 2005 et intitulé « Evaluation de la mise en œuvre du droit pénal de l'UE : quelle méthodologie ? », puis dans l'ouvrage collectif édité par A. Weyembergh et S. de Biolley, *Comment évaluer le droit pénal européen ?* [7].

Ce sont ces travaux qui ont inspiré le projet d'élaboration d'un modèle standard d'évaluation, dans lequel s'inscrit le présent ouvrage collectif.

Ce projet comporte deux éléments principaux :

- d'une part, l'élaboration du modèle d'évaluation académique lui-même (A) ;
- d'autre part, la réalisation d'un « test pilote » destiné à « tester » la pertinence du modèle standard d'évaluation sur un instrument spécifique du droit pénal de l'UE (B).

A. Un modèle standard d'évaluation académique

L'outil d'évaluation a été réalisé sur la base d'une réflexion méthodologique qui s'est nourrie des travaux menés auparavant par ECLAN de même que d'une analyse de la littérature scientifique existante sur l'évaluation des politiques publiques [8].

Le modèle standard d'évaluation académique vise principalement à contribuer à l'amélioration et à la rationalisation des mécanismes d'évaluation existants ainsi qu'à compenser une partie des lacunes constatées ; il est ainsi destiné à compléter

---

[1] Voy. entre autres la communication de la Commission, « on evaluation of EU policies on freedom, security and justice », COM (2006) 332 final, 28 juin 2006 et la communication de la Commission « on the creation of a forum for discussing EU justice policies and practice », COM (2008) 38 final, 4 février 2008 ; voy. aussi la communication de la Commission sur la reconnaissance mutuelle des décisions de justice en matière pénale et le renforcement de la confiance mutuelle entre les Etats membres, COM (2005) 195 final, 19 mai 2005, p. 8 et s.

[2] Voy. les conclusions du Conseil JAI du 24 janvier 2005.

[3] Voy. entre autres le point II.3 des orientations générales et le point III.3.2. des orientations particulières du Programme de La Haye.

[4] *JO*, n° C 198, 12 août 2005, p. 1 et s., en particulier les par. 1.1, 3.3. et 4.1.

[5] Voy. entre autres l'article III-260 du traité établissant une constitution pour l'Europe.

[6] Voy. en particulier l'article 70 du TFUE.

[7] Bruxelles, Editions de l'Université de Bruxelles, 2006.

[8] Voy. la note d'orientation méthodologique et la bibliographie sélective relative à la problématique de l'évaluation qui y est jointe (annexe 1).

les évaluations réalisées actuellement par la Commission européenne et par les Etats membres au sein du Conseil de l'UE (évaluations par les pairs).

A cet effet, il a pour principale caractéristique d'avoir une portée globale, dans la mesure où il vise à évaluer non seulement si l'instrument concerné par l'exercice a fait l'objet d'une transposition correcte dans le droit interne des Etats membres, mais aussi à apprécier sa mise en œuvre pratique, son impact sur les systèmes internes et le niveau de réalisation des objectifs poursuivis.

B. Le test pilote

La réalisation d'un « test pilote » cherche à « tester » la pertinence du modèle standard d'évaluation sur un instrument spécifique du droit pénal de l'UE.

Le choix de l'instrument qui a fait l'objet du test a été déterminé par les partenaires en fonction de l'importance et de la « représentativité » de la matière concernée mais aussi de sa période de mise en œuvre : l'instrument à choisir devait en effet être en vigueur depuis un laps de temps suffisant pour donner le recul nécessaire afin de permettre une évaluation de sa transposition comme de sa mise en œuvre pratique. Le choix des partenaires s'est très vite orienté sur un instrument de rapprochement du droit pénal matériel, plus précisément sur la décision-cadre (ci-après DC) 2002/629/JAI du 19 juillet 2002 sur la lutte contre la traite des êtres humains [9]. Le test en question fut réalisé dans quinze Etats membres sélectionnés sur la base de critères tendant à assurer une représentation équilibrée au plan géographique, entre « anciens » et « nouveaux » Etats membres et selon la nature des systèmes juridiques (système continental ou de « *common law* »). Il s'agit de la Belgique, du Luxembourg, de la France, des Pays-Bas, de l'Allemagne, du Royaume-Uni, de la Grèce, de l'Italie, de l'Espagne, du Portugal, de la Finlande, de la Lituanie, de la Hongrie, de la Pologne et de la Slovénie.

Le test pilote a ainsi débouché sur la rédaction de quinze rapports nationaux rédigés par les partenaires ou correspondants nationaux ainsi que sur un rapport final composé d'une synthèse verticale et d'une synthèse horizontale des rapports nationaux.

Douze des quinze rapports nationaux précités sont publiés dans le présent ouvrage de même que la synthèse horizontale [10]. Ces rapports et la synthèse suivent la structure qui était celle du questionnaire rédigé sur la base du modèle standard d'évaluation.

Le test pilote s'est révélé essentiel pour affiner la réflexion sur la méthodologie de l'évaluation et pour affiner également le modèle standard d'évaluation projeté. A cet égard, si, à l'origine, le projet avait pour objectif principal l'élaboration d'un modèle standard d'évaluation applicable de manière transversale à tous les instruments juridiques de droit pénal de l'UE, la prise en compte des spécificités de *chaque type d'instrument* (rapprochement des législations matérielles, rapprochement des législations procédurales, coopération et reconnaissance mutuelle, mise sur pied d'acteurs spécialisés au niveau européen…) s'est révélée plus essentielle que prévu. C'est la raison pour laquelle deux modèles d'évaluation distincts ont finalement été élaborés :

[9] *JO*, n° L 203/1, 1er août 2002.

[10] Les trois autres rapports nationaux (Finlande, Portugal et Luxembourg) de même que la synthèse verticale peuvent être consultés sur le site web du réseau ECLAN (www.eclan.eu).

- le premier limité à une structure ou ossature commune d'évaluation reprenant un certain nombre d'éléments minimaux à traiter et susceptible de s'appliquer de manière transversale aux divers instruments juridiques de droit pénal de l'UE, quel que soit leur type (rapprochement des législations matérielles, rapprochement des législations procédurales, coopération et reconnaissance mutuelle, mise sur pied d'acteurs spécialisés au niveau européen…) [11] ;
- le second, plus développé, consistant en un modèle standard d'évaluation de la mise en œuvre et de l'impact des instruments de rapprochement des législations de droit pénal matériel, réalisé et testé sur la base du projet pilote [12].

Idéalement, le premier modèle, à savoir la structure commune d'évaluation, devrait pouvoir être testé sur d'autres types d'instruments (par exemple sur des instruments relevant du rapprochement des procédures pénales, du processus de la reconnaissance mutuelle), et ce afin de le développer et de l'affiner, comme le projet a permis de le faire pour le rapprochement des législations matérielles.

Ce test pilote s'est également révélé représentatif des difficultés mais aussi de l'importance de l'exercice d'évaluation (voy. à cet égard la note d'orientation méthodologique figurant dans l'annexe 1 et les conclusions de cet ouvrage).

2. L'instrument qui a fait l'objet du test pilote : la décision-cadre 2002/629/JAI du 19 juillet 2002 sur la lutte contre la traite des êtres humains [13]

Cette DC du 19 juillet 2002 a été adoptée sur la base de l'article 31 e) du TUE et vise donc à adopter des règles minimales relatives aux éléments constitutifs des infractions pénales et aux sanctions applicables. Conformément à ses propres considérants, elle a pour objectif principal de « réduire les disparités entre les approches juridiques des Etats membres et à contribuer au développement de la coopération judiciaire et policière efficace contre la traite des êtres humains ».

Cette DC n'est pas le seul texte à avoir été adopté qui vise à rapprocher les législations dans le secteur de la traite. Au sein même de l'Union, elle avait été précédée par une action commune du 24 février 1997 relative à la lutte contre la traite des êtres humains et l'exploitation sexuelle des enfants [14], qu'elle abroge. Au sein des Nations unies, le protocole additionnel à la convention des Nations unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants, fut adopté à Palerme en date du 12 décembre 2000. Il convient aussi de signaler la convention du Conseil de l'Europe du 16 mai 2005 sur la lutte contre la traite des êtres humains [15].

L'article 1er de la DC de 2002 a trait aux incriminations. Il a été fortement influencé par le protocole des Nations unies. Son impact [16] se ressent tout particulièrement

---

[11] Voy. annexe 2.

[12] Voy. annexe 3.

[13] Voy. annexe 4.

[14] *JO*, n° L 63, 4 mars 1997, p. 2.

[15] STE, n° 197, article 19.

[16] En vertu de l'article 3, a) du protocole de Palerme, l'expression « traite des personnes » désigne le recrutement, le transport, le transfert, l'hébergement ou l'accueil de personnes, par la menace de recours ou le recours à la force ou à d'autres formes de contrainte, par

dans la définition commune que la DC donne des infractions liées à la traite [17]. Bien qu'il y ait quelques différences entre les deux textes, la DC reprend les trois éléments caractéristiques de la définition de la traite qui figure dans le protocole de Palerme, à savoir les actes matériels (recrutement, transfert, hébergement ou accueil de personnes, etc.), le recours à certains moyens (à la contrainte, à la force ou à des menaces, y compris l'enlèvement, la fraude ou la tromperie, l'abus d'autorité ou d'une situation de vulnérabilité, ou l'offre ou l'acceptation de paiements ou d'avantages pour obtenir le consentement d'une personne ayant autorité sur une autre) et la finalité poursuivie, à savoir l'exploitation (exploitation sexuelle, du travail ou des services). Dans aucun des deux instruments, le consentement de la victime n'a d'incidence sur la qualification de la traite si un des moyens de contrainte énumérés a été utilisé et, lorsque la traite concerne des enfants définis comme toute personne âgée de moins de dix-huit ans, les moyens de contrainte n'entrent pas en ligne de compte. En d'autres termes, il suffit d'avoir recruté, transféré, hébergé ou accueilli un enfant aux fins d'exploitation énumérées pour que la traite soit identifiée en tant que telle.

L'article 2 de la DC impose aussi aux Etats membres de punir l'instigation, la participation, la complicité et la tentative des infractions visées précédemment.

L'article 3 de la DC cherche également à rapprocher les sanctions prévues : selon l'expression « consacrée », les infractions couvertes doivent être passibles de sanctions pénales effectives, proportionnées et dissuasives, susceptibles d'entraîner l'extradition. Si les faits de traite ont été commis dans quatre circonstances spécifiques

---

enlèvement, fraude, tromperie, abus d'autorité ou d'une situation de vulnérabilité, ou par l'offre ou l'acceptation de paiements ou d'avantages pour obtenir le consentement d'une personne ayant autorité sur une autre aux fins d'exploitation. L'exploitation comprend, au minimum, l'exploitation de la prostitution d'autrui ou d'autres formes d'exploitation sexuelle, le travail ou les services forcés, l'esclavage ou les pratiques analogues à l'esclavage, la servitude ou le prélèvement d'organes.

[17] En vertu de l'article 1er de la DC : « le recrutement, le transport, le transfert, l'hébergement, l'accueil ultérieur d'une personne, y compris la passation ou le transfert du contrôle exercé sur elle :

a) lorsqu'il est fait usage de la contrainte, de la force ou de menaces, y compris l'enlèvement, ou
b) lorsqu'il est fait usage de la tromperie ou de la fraude, ou
c) lorsqu'il y a abus d'autorité ou d'une situation de vulnérabilité, de manière telle que la personne n'a en fait pas d'autre choix véritable et acceptable que de se soumettre à cet abus, ou
d) lorsqu'il y a offre ou acceptation de paiements ou d'avantages pour obtenir le consentement d'une personne ayant autorité sur une autre,

à des fins d'exploitation du travail ou des services de cette personne, y compris sous la forme, au minimum, de travail ou de services forcés ou obligatoires, d'esclavage ou de pratiques analogues à l'esclavage ou de servitude, ou à des fins d'exploitation de la prostitution d'autrui et d'autres formes d'exploitation sexuelle, y compris pour la pornographie ».

énumérées, ils doivent être passibles de peines privatives de liberté, la peine maximale ne pouvant être inférieure à huit ans [18].

Les articles 4 et 5 de la DC concernent la responsabilité des personnes morales et les sanctions à leur encontre. Ces dispositions sont semblables à celles figurant dans les autres DC consacrées au rapprochement de certaines infractions. Il en va de même de l'article 6 relatif aux mesures à prendre par les Etats membres quant à leurs compétences à l'égard des infractions concernées : ceux-ci doivent établir leur compétence à l'égard des infractions commises en tout ou en partie sur leur territoire, à l'égard de celles commises par un de leurs ressortissants et de celles commises pour le compte d'une personne morale établie sur leur territoire. Mais ils peuvent décider de ne pas appliquer les deux derniers critères de compétence ou de ne les appliquer que dans des cas et conditions spécifiques. Cette marge de manœuvre est toutefois supprimée en ce qui concerne le deuxième critère pour les Etats membres qui n'extradent pas leurs ressortissants.

La DC de 2002 consacre son article 7 à la protection et à l'assistance aux victimes. Il stipule que les enquêtes et poursuites ne doivent pas dépendre de la déclaration ou de l'accusation émanant d'une personne victime de l'infraction, du moins lorsque l'infraction a été commise en tout ou en partie sur le territoire national. Il fait également référence à la DC du 15 mars 2001 relative au statut des victimes dans le cadre de procédures pénales et dispose que les enfants devraient être considérés comme des « victimes particulièrement vulnérables » au sens de cette DC. Enfin, il stipule que lorsque la victime est un enfant, les Etats membres prennent toutes les mesures pour assurer une aide adéquate à sa famille.

Conformément à son article 10, la DC de 2002 devait être transposée au 1er août 2004. Elle a fait l'objet d'un premier rapport d'évaluation remis au mois de mai 2006 par la Commission européenne [19].

---

[18] Article 3, par. 3 :

« … a) l'infraction a délibérément ou par négligence grave mis la vie de la victime en danger, ou

b) l'infraction a été commise à l'encontre d'une victime qui était particulièrement vulnérable. Une victime est considérée comme ayant été particulièrement vulnérable au moins lorsqu'elle n'avait pas atteint l'âge de la majorité sexuelle prévu par la législation nationale et que l'infraction a été commise à des fins d'exploitation de la prostitution d'autrui et d'autres formes d'exploitation sexuelle, y compris pour la pornographie ;

c) l'infraction a été commise par recours à des violences graves ou a causé un préjudice particulièrement grave à la victime ;

d) l'infraction a été commise dans le cadre d'une organisation criminelle au sens de l'action commune 98/733/JAI ».

[19] Rapport de la Commission au Conseil et au Parlement européen fondé sur l'article 10 de la décision cadre du Conseil du 19 juillet 2002 relative à la lutte contre la traite des êtres humains, COM (2006) 187 final. Il convient également de se rapporter dans ce secteur au doc. de travail de la Commission « Evaluation and monitoring of the implementation of the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, COM (2008) 657 final, 17 octobre 2008.

Comme l'a annoncé publiquement le commissaire Jacques Barrot le 16 octobre 2008, la Commission européenne travaille maintenant à la révision de la DC de 2002.

Annexe 1. Note d'orientation méthodologique et bibliographie sélective relative à la problématique de l'évaluation

1. Orientations générales du modèle standard

Le modèle standard proposé est fondé sur les orientations suivantes :

1.1. Le champ d'application du modèle

Initialement, le projet avait pour objectif principal l'élaboration d'un modèle standard d'évaluation applicable de manière transversale à tous les instruments juridiques de droit pénal de l'UE, tout en ne négligeant pas les différences existant entre ces instruments.
La réflexion menée afin d'élaborer un modèle unique d'évaluation a pris en compte 3 niveaux de questions à poser aux évaluateurs :

- questions générales *communes à tous les instruments*
- questions spécifiques à *chaque type d'instruments de l'UE* (rapprochement des législations matérielles, rapprochement des législations procédurales, coopération et reconnaissance mutuelle, acteurs…)
- et questions spécifiques à *chaque instrument* évalué (prenant en compte la matière visée, la structure de l'instrument…).

Au fil des travaux et du test pilote, la prise en compte des spécificités de *chaque type d'instrument* s'est révélée essentielle. C'est la raison pour laquelle deux modèles d'évaluation distincts ont été élaborés :

- le premier, général, sous forme d'une structure/ossature commune d'évaluation reprenant un certain nombre d'éléments minimaux à traiter et susceptible de s'appliquer de manière transversale aux divers instruments juridiques de droit pénal de l'UE ;
- le second plus développé, réalisé sur la base du test pilote, consistant dans un modèle standard d'évaluation de la mise en œuvre et de l'impact des instruments de rapprochement des législations de droit pénal matériel.

La structure de chacun de ces deux modèles est divisée en six sections différentes consacrées respectivement aux questions générales de droit interne (1), au contrôle de conformité formelle et substantielle de droit interne (2), au contrôle d'effectivité et de la mise en œuvre pratique (3), au contrôle de l'efficacité et de l'efficience du texte (4), à la réception et à la perception du texte et de sa loi de transposition (5) et à quelques questions générales constituant les conclusions du rapport (6).

1.2. L'objet de l'évaluation

Par son objet, l'évaluation visée cherche à être globale. Partant du constat qu'il est nécessaire d'évaluer non seulement les ordres juridiques nationaux mais également les instruments de l'Union européenne dans le secteur pénal eux-mêmes, l'évaluation qui est au cœur de ce projet consiste à examiner la mise en œuvre des normes européennes au niveau interne mais aussi à étudier l'impact de ces dernières sur les systèmes de justice pénale des Etats membres.
Par ailleurs, l'évaluation de la mise en œuvre des normes européennes au niveau interne ne porte pas seulement sur les textes législatifs adoptés et sur l'état du droit écrit mais également sur l'application pratique de la norme et de la jurisprudence qui en résultent. L'évaluation s'étend également à la réception dans chaque Etat membre – entre autres par les praticiens de

la justice – de la loi de transposition et de la norme européenne et à la perception des effets des normes concernées sur le secteur visé.

1.3. Critères et moyens

1.3.1. Les critères de l'évaluation

- *Contrôle de conformité (*en anglais « *conformity* ») : un contrôle de conformité du droit interne aux exigences européennes est réalisé qui ne se limite pas au contrôle de la transposition formelle de l'instrument européen (contrôle de la lettre des dispositions législatives) mais vise à examiner si le droit national est substantiellement conforme au droit européen (contrôle élargi de conformité, prenant entre autres en considération l'existence de principes juridiques généraux). Conformités formelle et substantielle sont complémentaires et doivent être évaluées simultanément car, parfois, la simple vérification du texte de transposition peut conduire à conclure à la non-conformité de la norme tandis qu'une étude plus approfondie du droit interne est au contraire susceptible de faire apparaître sa conformité au droit européen. L'inverse est possible aussi : tandis qu'un contrôle de conformité formelle peut dans un premier temps laisser croire à une conformité du droit interne aux exigences européennes, le contrôle de conformité substantielle peut révéler sa non-conformité. Lors de ce contrôle de conformité formelle/substantielle, il convient de prendre en compte les critères de conformité qui ont été dégagés par ailleurs par la Commission et la CJ en ce qui concerne les directives.
- *Contrôle de l'impact* : l'évaluation de l'impact des instruments européens et de leurs lois internes de transposition consiste à apprécier les effets de ces normes. Ceux-ci peuvent être directs/indirects, positifs ou pervers, concrets ou plutôt symboliques. Cette évaluation de l'impact des normes permet d'évaluer leur :
  - effectivité (en anglais « *implementation* »), c'est-à-dire le niveau d'application de la norme, le niveau de son utilisation par les autorités nationales compétentes
  - efficacité, (en anglais « *effectiveness* ») qui vise le niveau de réalisation des objectifs de l'instrument
  - et efficience (en anglais « *proportionnality* » et « *adequacy* ») qui consiste à mesurer le coût engendré pour atteindre le but visé.

Outre ces critères, l'exercice d'évaluation devra également prendre en considération la nature spécifique du droit pénal, notamment, le respect de ses principes fondateurs et fondamentaux. Cet aspect a été abordé de façon transversale lors de la conception du modèle et constitue un des éléments principaux de la conclusion de l'évaluation.

1.3.2. Les outils et les moyens de l'évaluation

Le choix des outils et des moyens pour réaliser l'évaluation est essentiel. Les données et informations utilisées seront de nature aussi variée que possible : de nature quantitative recours aux statistiques) et qualitative ; de nature objective (données concrètes et empiriques) et subjective (perception des normes par les acteurs de la justice exprimées lors d'interviews, etc.).
L'hétérogénéité des sources devrait être garantie autant que possible. Les sources et la nature des données/informations utilisées doivent être spécifiées. En fonction des secteurs et des questions posées, les sources peuvent faire l'objet d'une hiérarchisation : ainsi, bien qu'ils soient toujours précieux et recommandés, les interviews de praticiens par exemple peuvent s'avérer moins essentiels en ce qui concerne l'évaluation des instruments européens de rapprochement des législations matérielles qu'en ce qui concerne les instruments organisant les mécanismes de coopération.

1.4. Faisabilité et difficultés de l'évaluation, ses limites et ses contraintes

Avant de lancer un exercice d'évaluation, sa faisabilité doit être questionnée. Si l'évaluation est considérée comme faisable, les difficultés auxquelles elle est susceptible d'être confrontée doivent être prises en compte.

Si le questionnaire modèle d'évaluation tend à être le plus complet et ambitieux possible, lors de son utilisation dans le cadre d'un exercice d'évaluation concret, le rédacteur du questionnaire – éventuellement aidé/éclairé par le/les évaluateurs – devra identifier les difficultés, limites et contraintes propres à l'exercice concret d'évaluation qu'il s'apprête à lancer (délais, ressources financières, ressources humaines, accès aux documents et à d'autres sources d'information…). Il conviendra de ne pas sous-estimer l'ampleur de l'exercice d'évaluation.

A cet égard, il convient de faire les observations qui suivent.

– Parmi les éléments à prendre en compte lors du lancement d'un exercice d'évaluation figure la nécessité de disposer d'un certain recul. Pareil recul est surtout essentiel pour pouvoir évaluer convenablement l'impact et les effets des normes européennes et de leurs lois de transposition, c'est-à-dire leur effectivité, efficacité et efficience. Une évaluation adéquate des effets et de l'impact d'une norme ne pourra avoir lieu qu'après écoulement d'un laps de temps suffisant après son entrée en vigueur. Lorsque la mise en œuvre de l'instrument européen est récente il convient plutôt de cibler l'évaluation sur le droit écrit, sur les aspects législatifs de la transposition.
– De manière générale l'évaluation de l'impact des normes européennes et de leurs lois de transposition est un exercice difficile. C'est surtout l'évaluation de l'efficacité et de l'efficience d'une norme qui paraît malaisée. A cet égard, l'approche des évaluateurs doit être nuancée et prudente. Les conclusions doivent être scientifiquement fondées, ce qui implique de recourir à un faisceau d'éléments et d'indices empiriques et concrets. Les sources doivent être le plus hétérogènes/diverses possibles (mesures législatives ou réglementaires adoptées, statistiques officielles, rapports gouvernementaux, rapports des ONG, entretiens avec les différents praticiens de la justice…). Certaines données et informations doivent être utilisées avec précaution : c'est notamment le cas des statistiques, dont les résultats doivent être nuancés et, dans la mesure du possible, complétés par des informations de nature différente et en provenance d'autres sources (entretiens, présentation de cas pratiques concrets…).
– Qu'il s'agisse par exemple d'évaluer l'efficacité des normes européennes ou d'apprécier leur impact général sur la réalisation de l'espace de liberté, de sécurité et de justice dans l'Union, plusieurs aspects du modèle élaboré impliquent une identification préalable des objectifs poursuivis par l'instrument européen lui-même ou des objectifs que l'Union poursuit en voulant bâtir un espace de liberté, de sécurité et de justice. C'est à celui qui élabore le questionnaire qu'il revient de procéder à une telle identification. Il s'agit d'une opération qui est malaisée et délicate. Ces objectifs peuvent parfois être nombreux, de nature diverse, être ambigus, dissimulés ou cachés. Les objectifs des instruments européens eux-mêmes sont le plus souvent identifiables à l'aide de leur préambule. Mais d'autres éléments peuvent être utiles pour les identifier, comme les programmes de nature sectorielle ou transversale de l'Union européenne. Ces documents de l'UE sont également des outils indispensables pour donner un contenu à l'objectif européen de mise sur pied d'un espace de liberté, de sécurité et de justice.
– Parmi les difficultés susceptibles d'apparaître figure le fait qu'il ne sera pas toujours facile pour les évaluateurs d'isoler dans les effets constatés l'impact de l'instrument de l'UE. Il sera en effet parfois malaisé de distinguer ce qui relève précisément de la mise en œuvre et de l'impact de la norme européenne évaluée et ce qui relève plutôt de la mise en œuvre et de l'impact d'autres instruments internationaux et/ou régionaux adoptés dans le secteur (voy. par ex. les instruments adoptés en la matière au sein des NU ou du Conseil de l'Europe).

Il ne sera pas toujours facile non plus de distinguer précisément ce qui relève de la mise en œuvre et de l'impact de la norme européenne évaluée et ce qui relève des choix faits par les législateurs nationaux au moment de la transposition.

- Parmi les questions à trancher au moment du lancement de l'exercice de l'évaluation figure l'identification des disciplines auxquelles faire appel. Afin d'être la plus complète possible, l'évaluation devrait idéalement suivre une approche multidisciplinaire et surtout faire appel à des éléments criminologiques. Il convient toutefois de rester réaliste et d'examiner si le temps et les moyens consacrés à l'exercice d'évaluation permettent de suivre pareille recommandation. Lorsque l'évaluation porte sur un instrument juridique spécifique, l'approche criminologique est moins indispensable que lorsque l'évaluation porte sur une politique criminelle. Lorsque les ressources et le temps le permettent, l'approche criminologique est recommandée, surtout lorsqu'il s'agit d'évaluer un instrument concernant le rapprochement des législations pénales matérielles.
- Dans la mesure du possible, l'évaluateur utilisera la version linguistique nationale du texte européen mais également une autre version (française ou anglaise) afin de pouvoir comparer les deux versions et d'identifier les éventuelles différences ou erreurs de traduction. Le questionnaire d'évaluation doit être rédigé et les évaluateurs doivent répondre dans une seule langue, et ce afin d'éviter des contradictions terminologiques.

2. Structure du modèle

Le modèle proposé est structuré en six sections.

1. Questions générales de droit interne

1.1. Signature, ratification, mise en œuvre d'instruments internationaux ou européens en relation avec la matière couverte par l'instrument de l'UE concerné

1.2. Questions élémentaires liées au droit pénal interne

L'objectif de ces questions n'est pas de donner une vision synthétique générale du système pénal national considéré mais bien de faire comprendre les caractéristiques et le fonctionnement de celui-ci par rapport à la matière couverte par l'instrument européen qui fait l'objet de l'évaluation. Les questions devront donc être identifiées en fonction de cet instrument et du domaine auquel il se rapporte. Elles seront déterminées selon leur intérêt pour les réponses aux questions plus ciblées qui suivent. Elles pourront par exemple avoir trait aux aspects suivants :

- sources de droit : continental ou « *common law* » ;
- principes fondamentaux relevant du droit pénal matériel comme classification des actes criminels dans le système interne, typologie des peines/sanctions pénales dans l'Etat concerné ; responsabilité pénale des personnes morales, etc. ;
- principes fondamentaux relevant de la procédure pénale : procédure de nature plutôt inquisitoire ou accusatoire, principe de légalité/opportunité des poursuites, titres de compétences des autorités de poursuites et des juridictions nationales… ;
- principes fondamentaux relatifs à l'organisation judiciaire/policière et/ou répartition des compétences entre les acteurs (police, ministère public, juges d'instruction ou de l'instruction, juges et magistrats…).

1.3. Contexte politique, criminologique et/ou sociologique de l'Etat membre concerné par rapport à la matière visée

L'objectif de ces questions n'est pas de donner une vision synthétique générale du contexte interne politique, criminologique ou sociologique mais bien de laisser un espace aux évaluateurs afin qu'ils puissent mettre en exergue certaines particularités éventuelles du contexte national dans le secteur concerné par l'instrument qui fait l'objet de l'évaluation. Cet espace peut par

exemple être utilisé afin de souligner les enjeux de ce secteur pour un Etat, l'importance que revêt au plan national un phénomène criminel ou, au contraire, sa (quasi-)absence…

2. Contrôle de conformité formelle et substantielle du droit interne

L'objectif des questions qui suivent consiste à exercer un contrôle de conformité du droit interne aux exigences européennes. Ce contrôle ne se limite pas au contrôle de la transposition formelle de l'instrument européen (contrôle de conformité formelle) mais vise à examiner si le droit national est substantiellement conforme au droit européen (contrôle de conformité substantielle). Il vise à permettre à l'évaluateur d'expliquer les raisons éventuelles de la non-conformité si elle est « substantiellement » confirmée.

2.1. Questions générales

Cette partie vise à identifier si et, le cas échéant, dans quelle mesure et par quel biais le droit national s'est conformé au droit européen. Il s'agit de repérer l'instrument national de transposition de l'instrument européen et, si un tel instrument de transposition n'a pas été adopté, quelles sont les raisons de cette non-adoption. Le respect du délai de mise en conformité de même que les principaux changements apportés au droit interne par cette mise en conformité (par ex. abrogation/modification d'anciennes dispositions, changements apportés à la définition des éléments constitutifs d'autres infractions du code pénal national ou au niveau de sanction prévu, création de nouveaux organes nationaux spécialisés, nouvelle répartition des compétences…) sont également abordés.

2.2. Contrôle de conformité formelle et substantielle

Cette partie du questionnaire suit la structure de l'instrument européen et en reprend chaque disposition. L'objectif consiste à vérifier la conformité formelle et substantielle du droit interne à chacune d'entre elles. Lors de ce contrôle, il convient de prendre en compte les critères de conformité dégagés par ailleurs par la Commission et la CJ en ce qui concerne les directives (voy. en particulier la nécessité de garantir l'effet utile de l'instrument et la nécessité de satisfaire à l'exigence de sécurité juridique). Il convient de requérir des évaluateurs qu'ils fournissent en annexe le texte des articles et dispositions internes concernées (dans la langue originale et, si possible, avec leur traduction officielle vers l'anglais) de même que les éventuelles « tables d'équivalence » officielles.

3. Contrôle de l'effectivité et de la mise en œuvre pratique

Cette partie du questionnaire vise à l'évaluation de l'effectivité (*implementation*) c'est-à-dire, à examiner le niveau d'application et d'utilisation de la norme. Elle cherche aussi de manière plus large à évaluer sa mise en pratique. L'analyse porte sur la jurisprudence nationale mais s'étend aussi aux éventuelles décisions de la CJ.

3.1. Jurisprudence nationale et application pratique du texte

Outre une évaluation quantitative (recours aux statistiques si elles sont disponibles), cette partie vise à analyser le contenu de la jurisprudence et de la pratique nationales. A partir de cas concrets, exemples ou illustrations, l'évaluateur signalera les aspects les plus pertinents de la pratique nationale comme l'interprétation qui est faite de la norme (suivi de l'intention du législateur, interprétation large ou restrictive de la norme, respect de l'obligation d'interprétation conforme au droit européen), les éventuelles difficultés spécifiques liées à la mise en œuvre pratique de l'instrument ainsi que les « meilleures pratiques ».

3.2. Jurisprudence CJ

L'évaluateur signalera ici l'introduction éventuelle par les juridictions internes de questions préjudicielles concernant l'instrument européen qui fait l'objet de l'évaluation. Le cas échéant, il convient aussi de signaler les conséquences légales et jurisprudentielles d'un éventuel arrêt rendu par la CJ.

4. Contrôle de l'efficacité et de l'efficience du texte

4.1. Contrôle d'efficacité (examen du niveau de réalisation des objectifs)

L'évaluation de l'efficacité (*effectiveness*) consiste à apprécier le degré de réalisation de chaque objectif de l'instrument qui aura fait l'objet d'une identification préalable par les rédacteurs du questionnaire. Ces objectifs seront spécifiques à l'instrument européen et/ou communs à tous les instruments relevant du même type. Ainsi dans le cas d'un instrument de rapprochement des législations pénales matérielles, il faudra réaliser cette évaluation par rapport aux objectifs spécifiquement relatifs à la prévention/lutte contre le phénomène criminel couvert et par rapport aux objectifs poursuivis par les travaux de rapprochement du droit pénal en général. Ainsi, il conviendra entre autres d'examiner si le texte européen a effectivement entraîné un rapprochement des législations entre les Etats membres réduisant ainsi les disparités d'approches juridiques au sein de l'UE, si un renforcement de la confiance mutuelle et de la coopération en a résulté, etc. En ce qui concerne l'appréciation d'un éventuel renforcement de la confiance mutuelle, il faut garder en tête la possibilité que le rapprochement effectivement réalisé n'ait aucun impact sur celle-ci. La question se pose par ailleurs de savoir comment la mesurer. La confiance mutuelle n'est pas en tant que tel un concept légal. Afin d'objectiver cette appréciation, deux solutions sont envisageables : soit l'évaluation est programmée sur le long terme soit l'évaluation est de nature multidisciplinaire (sciences politiques, sociologie, etc.). Chacune de ces deux solutions implique que soient mis en œuvre des moyens/ressources considérables. Si de tels moyens ne sont pas à disposition, il conviendra d'évaluer la perception du niveau de confiance à partir d'entretiens avec des praticiens. Dans le cas des instruments de coopération transversaux, cette distinction entre objectifs spécifiques à l'instrument et objectifs communs au type d'instrument n'aura pas lieu d'être.

Afin d'évaluer le degré de réalisation des objectifs poursuivis, il s'agira entre autres d'examiner si l'entrée en vigueur du texte concerné a entraîné des conséquences/changements pratiques concrets. Il s'agira aussi de prendre en compte l'éventuelle sensibilisation entraînée par l'instrument européen et son texte de transposition. A cette fin, des exemples et des illustrations seront nécessaires. Leur nature variera selon le type d'instrument évalué et selon la matière concernée (par ex. augmentation/diminution du nombre d'enquêtes, poursuites et condamnations par rapport à une période antérieure déterminée, renforcement de la prévention, réduction du phénomène criminel concerné, multiplication des cas de coopération interétatique ayant abouti, etc.).

4.2. Contrôle d'efficience

L'évaluation de l'efficience (*proportionality* ou *adequacy*) consiste à examiner la relation entre les moyens utilisés et les résultats obtenus, et entre autres à se poser la question de savoir si d'autres mesures, plus proportionnées et plus adéquates n'auraient pas pu être adoptées. L'analyse à mener est du type « coûts-bénéfices ». Il s'agit entre autres d'examiner la relation entre les résultats obtenus et leurs coûts en termes financiers, en termes de ressources humaines, de protection des droits fondamentaux et des libertés publiques, notamment, au regard du principe de la légalité, des droits de la défense dans le procès pénal etc. La prise en compte des effets pervers (non attendus) du texte européen et de sa loi de transposition s'avère essentielle.

5. *Réception et perception*

Cette partie du questionnaire vise à rassembler l'information concernant la façon dont l'instrument de l'UE et sa transposition ont été reçus en droit interne et la façon dont leurs effets sont perçus au plan national.
Pour réaliser cette partie de l'évaluation les interviews s'avèrent très importants. Il convient de veiller à une prise en compte équilibrée des différents points de vue, de manière à ce que tous les « intérêts » en présence soient représentés (et surtout poursuite/défense).

5.1. Réception et perception par les praticiens de la justice

Il s'agit d'évaluer la réception de l'instrument européen lui-même et de la loi nationale de transposition par les différents acteurs de la justice de l'Etat membre concerné, de même que leur perception des effets de ces textes. Leur attitude envers la transposition et la pratique dans les autres Etats membres relève également de l'exercice, de même que leur niveau de connaissance des normes en question et les éventuelles références au texte européen lui-même dans les décisions judiciaires nationales.
Le point de vue de tous les types de praticiens concernés doit être pris en compte (ministère public, policiers, avocats, magistrats du siège, fonctionnaires et agents des administrations compétentes…). Idéalement, il convient de connaître tant les positions institutionnelles des juridictions nationales – ordinaires, suprêmes ou constitutionnelles – et d'autres organismes professionnels, que les opinions individuelles des acteurs de la justice précités.

5.2. Réception et perception par les politiques

Il s'agit surtout ici d'évaluer l'accueil qui a été réservé à l'instrument européen par le gouvernement et le Parlement national ainsi que de soulever toute question pertinente relative au processus de transposition en droit interne (travaux préparatoires). A ce propos, il peut par exemple être intéressant d'examiner si la transposition du droit de l'UE en matière pénale est perçue comme une « perte » ou une « cession » de la souveraineté nationale.
Le cas échéant, il s'agit également d'analyser tout travail d'évaluation rétrospective effectué au plan interne sur la mise en œuvre de la norme nationale découlant de la transposition.

5.3. Réception et perception par les media et la presse écrite

Il s'agit d'étudier la couverture médiatique dont l'instrument européen et sa mise en œuvre ont fait l'objet dans l'Etat concerné. La recherche se réalise ici surtout à partir des outils informatiques.

5.4. Réception et perception par la société civile

Il s'agit d'examiner l'attitude générale de la société civile et, en particulier, des ONG, associations, réseaux… envers la norme européenne et sa mise en œuvre en droit interne. Il importe ici de prendre en compte les différents intérêts en présence, et entre autres de consulter tant le monde associatif s'occupant plutôt des droits des victimes que celui plutôt tourné vers la défense des droits de l'homme en général et des droits des suspects. L'évaluation peut s'effectuer à partir des rapports publiés par des associations spécialisées dans le secteur concerné par le texte européen, des entretiens ponctuels, des baromètres d'opinion, d'actions introduites auprès des juridictions constitutionnelles nationales…

5.5. Réception/perception par la doctrine

Il s'agit d'évaluer l'attitude générale de la doctrine scientifique envers la norme européenne en question et sa transposition et mise en œuvre nationale. L'exercice implique d'évaluer la quantité des commentaires existants dans la matière et d'analyser les principales questions

soulevées par ceux-ci. Une courte bibliographie des contributions les plus pertinentes s'avère utile.

6. Conclusions du rapport d'évaluation : questions générales communes

Cette partie vise à conclure l'évaluation en répondant à quelques questions transversales communes. A cette fin, il convient de se servir principalement des réponses données aux questions précédentes et éventuellement d'éléments non encore développés.

6.1. Analyse de l'impact (direct/indirect) de l'instrument et de sa loi nationale de transposition sur les objectifs généraux de l'UE dans le secteur de l'espace de liberté, de sécurité et de justice.
6.2. Analyse de l'impact (direct/indirect) de l'instrument et de sa loi nationale de transposition sur la protection des droits fondamentaux (principe de légalité, principe de sécurité juridique, principe de proportionnalité de la peine, présomption d'innocence, charge de la preuve, indépendance des juges, etc.).
6.3. Analyse de l'impact de l'instrument européen et de sa loi nationale de transposition sur le système national interne, sur sa cohérence, ses équilibres et, de manière générale, sur la politique criminelle nationale.
6.4. Evaluation de l'impact de l'instrument européen et de sa loi nationale de transposition sur la nature du droit pénal (principe « ultima ratio » du droit pénal, balance fonction épée-bouclier droit pénal…)
6.5. Analyse de l'impact (direct/indirect) sur le niveau de confiance du citoyen par rapport à la loi pénale et aux institutions publiques de sécurité (police) et l'administration de justice.

Bibliographie sélective

A. Balthasar, « Was ist Evaluation und für wen evaluieren wir ? », *in LeGes Gesetzgebung & Evaluation* 2005/1, p. 65 et s.

G. Barclay, & C. Tavares, *International comparison of Criminal Justice Statistics 2001*, Home Office Statistical Bulletin 12/03, 2003, London.

J.-L. Bœuf, *L'évaluation des politiques publiques*, Paris, La Documentation française, 2001.

C. Bőhret & G. Konzendorf, *Handbuch Gesetzesfolgenabschätzung (GFA) : Gesetze, Verordnungen, Verwaltungsvorschriften*, Baden-Baden, Nomos, 2001.

—, W. Hugger, *Test und Prüfung von Gesetzentwürfen*, Cologne/Bonn, Carl Heymann Verlag, 1980.

S. V. Borodin, « Some aspects of the organization of research in criminology », *in* United Nations Social Defence Research Institute, *Evaluation research in criminal justice : Material and proceedings of a research conference convened in the context of the fifth United Nations Congress on the prevention of crime and treatment of offenders*, UNICRI, publication 11, Rome, 1976, p. 287 et s.

M. H. Brenner & D. Carrow, « Evaluative research with hard data », *in Ibid*., p. 11 et s.

H. H. Bruydensholt, « Impact of criminological research on Decision making », *in Ibid*., p. 153 et s.

W. Buikhuisen & L. J. M. D'Anjou, « Analyzing evaluative research », *in Ibid*., p. 119 et s.

W. Bussmann, U. Klöti & P. Knoepf, *Politiques publiques : évaluation*, Paris, Economica, 1998.

—, *Accompagner et mettre à profit avec succès les évaluations des mesures étatiques*, Genève, Georg, 1995.

J. Chevallier, « L'évaluation législative : un enjeu politique », *in* A. Delcamp *et al.*, *Contrôle parlementaire et évaluation*, Paris, 1995, p. 15 et s.

G. Cerexe, « L'évaluation des lois », *in* C. de Visscher, Fr. Varone (éd.), *Evaluer les politiques publiques,* Louvain-la-Neuve, Bruylant-Academia, 2001, p. 117 et s.

H. Chen & P Rossi, « Evaluating with sense ; the theory-driven approach », *Evaluating Review*, 7, 1983, p. 283 et s.

R. V. G. Clarke, « Cross-institutional designs and their place in evaluating penal treatments », *in* United Nations Social Defence Research Institute, *op. cit.*, p. 99 et s.

A. Clarke & M. Cough, *Crime and Police Effectiveness*, Home office Research Study 79, London, Her majesty's Stationery Office, 198.

Commission europeenne, *Communication au Conseil et au Parlement européen, Evaluer les politiques de l'Union européenne en matière de liberté, de sécurité et de justice*, COM (2006) 332 final, 28 juin 2006.

Commission de gestion du Conseil national. *Les Tests-PME de la Confédération et leur influence sur les lois et ordonnances. Rapport de la Commission de gestion du Conseil national sur la base d'une analyse effectuée par le Contrôle parlementaire de l'administration,* 20 mai 2005, Berne, http://www.parlament.ch/f/ed-pa-gpk-kmu-tests.pdf.

Conseil scientifique de l'évaluation, *Petit guide de l'évaluation des politiques publiques,* Paris, La documentation française, 1996.

J.-D. Delley, « L'évaluation législative entre rigueur scientifique et utilité pratique. L'expérience de la commission externe d'évaluation des politiques du canton de Genève », *in* A. Auer, J.-D. Delley, M. Hottelier, & G. Malinverni (éd.), *Aux confins du droit, Essais en honneur du professeur Charles-Albert Morand*, Helbing & Lichtenhahn, Genève et Munich, 2001, p. 51 et s.

—, « L'évaluation législative : un outil d'intelligence politique », *in Théorie et pratique de la démocratie : essais en l'honneur du Professeur Yves Fricker*, Paris, Economica, 2005, p. 167 et s.

—, « L'évaluation législative au défi de l'objectivité », *in* B. Bovay, M. Nguyen Son (éd.), *Mélanges en l'honneur de Pierre Moor. Théorie du droit – droit administratif – organisation du territoire*, Berne, Stämpfli, 2005, p. 223 et s.

—, « Du miroir tendu au miroir tenu. L'administration face à l'obligation d'évaluer », *in* J. Kellerhals *et al.* (éd.), *Pour un droit pluriel. Etudes offertes au professeur Jean-François Perrin.* Genève/Bâle/Munich, Helbing & Lichtenhahn, 2002, p. 303 et s.

—, « L'évaluation législative entre rigueur scientifique et utilité pratique. L'expérience de la Commission externe d'évaluation des politiques publiques du canton de Genève », *in Aux confins du droit. Essais en l'honneur du Prof. Charles-Albert Morand*, Genève/Bâle, Helbing & Lichtenhahn, 2001, p. 51 et s.

—, « Evaluer l'action de l'Etat. Remarques préliminaires »*, Annuaire suisse de science politique* 29, 1989, p. 241 et s.

— & L. Mader, « Que faire des objectifs dans une étude de mise en œuvre de la législation ? », *Revue suisse de sociologie*, 1981, p. 385 et s.

R. Dreifuss, « L'indispensable connaissance des effets de l'action publique », *LeGes Gesetzgebung & Evaluation* 2005/1, p. 21 et s.

J.-P. Dupart, « Urgence pour l'évaluation législative ! », *AJDA,* 2002, p. 1093 et s.

M. Fabri, J.-M. Jean, P. Langbroek & H. Pauliant (dir.), *L'administration de la justice en Europe et évaluation de sa qualité, Mission de recherche sur les systèmes judiciaires,* IRSIG-CNR, Mission de recherche droit et justice, Institut de droit constitutionnel et administratif-Université d'Utrecht Pays-Bas, Paris, Montchrestien, 2005.

A. Flückiger, « Le droit administratif en mutation : l'émergence d'un principe d'efficacité », *Revue de droit administratif et fiscal*, 2001, p. 93 et s.

D. Freiburghaus « De l'efficacité des évaluations. Un discours en trois étapes », *in* C.-A. Morand (éd.), *Evaluation législative et lois expérimentales*, Aix-en-Provence, 1993, p. 47 et s.

M. K. Grün & B. Morsey, *Prospektive Gesetzesfolgenabschätzung zum Problembereich Somatische Gentherapie.* Cahier de recherche n° 176, Spire, 1998.

—, —, « Methode für eine prospektive Gesetzesfolgenabschätzung », *in* M. K Grün & L. Brocker, *Gesetzesfolgenabschätzung, Schriften zur Verwaltungsmodernisierung in Rheinland-Pflaz*, Cahier n° 5, Mayence, 1997.

H. Hill, Hermann, Hof, *Wirkungsforschung zum Recht II, Verwaltung als Adressat und Akteur.* Baden-Baden, Nomos, 2000.

A. Höland, « L'évaluation législative comme auto-observation du droit et de la société » , *in* Ch.-A. Morand (éd.), *Evaluation législative et lois expérimentales*, Aix-en-Provence, 1993, p. 19 et s.

« L'évaluation des politiques publiques », *Informations sociales,* 110, 2003.

J.-P. Jean, « De quelques principes directeurs pour faire progresser le débat sur l'évaluation et la qualité auprès des professionnels de la justice », *in* M. Fabri, J.-P. Jean, P. Langbroek & H. Pauliant (dir.), *L'administration de la justice en Europe et évaluation de sa qualité, Mission de recherche sur les systèmes judiciaires,* IRSIG-CNR, Mission de recherche droit et justice, Institut de droit constitutionnel et administratif-Université d'Utrecht Pays-Bas, Paris, Montchrestien, 2005, p. 407.

R. K. Jonas, *Legislative Program Evaluation : Utilization-Driven Research for Decision Makers,* San Francisco, Jossey-Bass, 1999.

U. Karpen, H. Hof, *Wirkungsforschung zum Recht IV, Möglichkeiten einer Institutionalisierung der Wirkungskontrolle von Gesetzen*. Baden-Baden, Nomos, 2003.

— (dir.), *Legislative Evaluation*, Baden-Baden, Nomos, 2002.

D. Kettinger, *Gesetzescontrolling : Ansätze zur nachhaltigen Pflege von Gesetzen*, Berne, Haupt, 2000.

A. M. Khalifa, « Evaluating programmes for crime prevention and control » , *in* United Nations Social Defence Research Institute, *op. cit.*, 1976, p. 237 et s.

E. Kuhlhorn, « Experimental Activities and their evaluation-an outline of rules for co-coordinating evaluation and an experimental activity », *in Ibid*., 1976, p. 299.

A. Lötscher, « Evaluationsklauseln : Überlegungen aus gesetzesredaktioneller Sicht », *LeGes Gesetzgebung & Evaluation*, 2005/1, p. 103 et s.

L. Mader, *L'évaluation législative. Pour une analyse empirique de la législation,* Lausanne, Payot, 1985.

E. Monnier, *Evaluation de l'action des pouvoirs publics*, Paris, Economica, 1992.

C.-A. Morand, « Formes et fonctions de l'évaluation législative », *in* B. Jadot, et F. Ost, *Elaborer la loi aujourd'hui, mission impossible*, Bruxelles, Publications des Facultés universitaires Saint-Louis, 1999, p. 213 et s.

— *Evaluation législative et lois expérimentales*, Aix-en-Provence, Presses universitaires d'Aix-Marseille, 1995.

— « L'évaluation des effets des mesures étatiques», *in Droit constitutionnel suisse*, Zurich, Schulthess, 2001, p. 1119 et s.

— « Formes et fonctions de l'évaluation législative », *Gesetzgebung heute*, 1999/2, p. 79 et s.

— « L'évaluation législative ou l'irrésistible ascension d'un quatrième pouvoir », *Revue de la recherche juridique : droit prospectif*, 1994/59, p. 1141 et s.

C. Minke, « Effets, effectivité efficience et efficacité du droit : le pole réaliste de la validité », *RIEJ*, 1998, p. 115 et s.

B. Niederöst, « Erfolgsbedingungen für Evaluationen», *LeGes Gesetzgebung & Evaluation,* 2002/1, p. 39 et s.

Organisation de coopération et de développement économiques (OCDE), *Evaluation prévisionnelle de l'impact des lois et des règlements*, Documents sigma, n° 13, Paris, 1997.

F. OST et M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Bruxelles, Publications des FUSL, 2002, p. 324-371.
R. PAWSON & N. TILLEY, *Realistic évaluation*, London, Sage publications, 1997.
H. PAULIAT, « Les différents modes d'administration de la justice en Europe et au Québec et leur influence sur la qualité », *in* M. FABRI, J.-M. JEAN, P. LANGBROEK & H. PAULIANT (dir.), *op. cit.*, p. 21.
M. Q. PATTON, *How to Use Qualitative Methods in Evaluation*, Newbury Park, Sage publications, 1987.
B. PERRET, *L'évaluation des politiques publiques*, Paris, La Découverte, 2001.
« N'ayez pas plus peur de l'évaluation ! », *Pouvoirs locaux*, 57, 2003.
D. RENARD, J. CAILLOSSE & D. DE BÉCHILLON (dir.), *L'analyse des politiques aux prises avec le droit*, Paris, LGDJ, 2000.
I. SANDERSON, « Evaluation, Policy Learning and Evidence-Based Policy Making », *Public administration*, 2002/1, p. 1 et s.
H. SCHÄFFER (éd.), *Evaluierung der Gesetze/Gesetzesfolgenabschätzung in Österreich und im benachbarten Ausland : ÖGGL-Tagung 2003*, Vienne, Manz, 2005.
Ph. SCHWAB, « L'évaluation au service du Parlement ? », *LeGes Gesetzgebung & Evaluation* 2005/1, p. 39 et s.
I. F. SHAW & J. C. GREENE, *Handbook of evaluation : policies, programs and practice*, London, Sage publications, 2006.
N. TILLEY & A. CLARKE, « Evaluation in criminal justice » , *in* I. F. SHAW & J. C. GREENE, *Handbook of evaluation : policies, programs and practice*, London, Sage publications, 2006, p. 512 et s.
UNITED NATIONS SOCIAL DEFENCE RESEARCH INSTITUTE, *Evaluation research in criminal justice : Material and proceedings of a research conference convened in the context of the fifth United Nations Congress on the prevention of crime and treatment of offenders*, UNICRI, publication n° 11, Rome, 1976.
A. VATTER, « Politik und Evaluation », *LeGes Gesetzgebung & Evaluation*, 2005/1, p. 7 et s.
A. WEYEMBERGH, & S. DE BIOLLEY (éd.), *Comment évaluer le droit pénal européen ?*, Bruxelles, Editions de l'Université de Bruxelles, 2006.
H. WOLLMANN, « Kontrolle in Politik und Verwaltung : Evaluation, Controlling und Wissensnutzung », *in* K. SCHUBERT, N. C. BANDELOW, *Lehrbuch der Politikfeldanalyse*, Munich, Vienne, R. Oldenbourg Verlag, 2003, p. 335 et s.
D. WÜEST-RUDIN, « Evaluation von Reformen der öffentlichen Verwaltung, Bedeutung und Erfolgsfaktoren », *LeGes Gesetzgebung & Evaluation* 2002/1, p. 57 et s.

Annexe 2. Structure commune d'évaluation [20]

1. Questions générales de droit interne

1.1. Signature, ratification, mise en œuvre d'instruments internationaux ou européens

1.2. Questions élémentaires liées au droit pénal interne

1.3. Contexte politique, criminologique et/ou sociologique de l'Etat membre concerné par rapport à la matière visée

2. Contrôle de conformité formelle et substantielle du droit interne

2.1. Questions générales

2.1.1. Indiquez si un ou des texte(s) législatif(s) ou réglementaire(s) nationaux ont été spécifiquement adoptés en vue de transposer expressément l'instrument européen. Si la réponse est positive, identifiez-le/les. Si la réponse est négative, indiquez-en les raisons (par exemple : parce que la législation existante était auparavant déjà conforme ou considérée comme telle, parce que les exigences européennes ont déjà été satisfaites ou considérées comme telles suite à la mise en œuvre en droit interne d'un autre instrument européen ou international, parce que la procédure de transposition est retardée, etc.).

2.1.2. Indiquez si le délai de mise en conformité/transposition prévu par l'instrument européen a été respecté. En cas de non-respect du délai prévu, indiquez les raisons de ce retard.

2.1.3. Indiquez si l'instrument de transposition a introduit des changements limités/symboliques ou au contraire des changements importants en droit interne (une réponse synthétique à cette question est recommandée afin de ne pas faire double emploi avec les réponses aux questions suivantes).

2.1.4. Indiquez l'existence des dispositions légales internes couvrant la matière concernée qui ont éventuellement été revues ou abrogées afin de se conformer à l'instrument européen.

2.2. Contrôle de conformité formelle et substantielle

2.2.1. Passez en revue chacune des dispositions de l'instrument de l'UE et vérifiez qu'elle est couverte par le droit interne formellement (spécifier la disposition légale interne) ou substantiellement (par exemple, par certains principes juridiques généraux).

2.2.2. Le cas échéant, indiquez les éventuelles raisons des lacunes précédemment identifiées. Indiquez si elles sont liées au droit interne (par exemple pour préserver la cohérence du système interne, pour contourner des problèmes constitutionnels) ou liées au droit de l'UE lui-même (objectif du texte européen ambigu ou inconnu, formulation vague…).

2.2.3. A partir de l'entrée en vigueur du traité de Lisbonne, indiquez si votre Etat fait l'objet d'une procédure en manquement. En cas de réponse positive, pour quelle raison ?

3. Contrôle de l'effectivité et de la mise en œuvre pratique

3.1. Jurisprudence nationale et application pratique du texte

3.1.1. Evaluation quantitative. Cette section implique le recours aux statistiques si elles sont disponibles. Le cas échéant, veuillez spécifier la source et la nature des données.

3.1.2. Etude du contenu de la jurisprudence/pratique. Cette section implique de recourir à des cas concrets, exemples ou illustrations s'ils sont disponibles. A l'occasion de cette évaluation, veuillez notamment signaler si les praticiens suivent la volonté/intention du

[20] Il convient d'utiliser le présent modèle conformément à la note d'orientation méthodologique qui précède (annexe 1).

législateur dans l'interprétation et application du texte, s'ils donnent une interprétation restrictive ou extensive des dispositions, etc. Dans le cas où des éléments non conformes au droit européen ont été précédemment relevés en droit interne, veuillez préciser si, en pratique, les juridictions internes mettent en œuvre leur obligation d'interprétation conforme.

3.1.3. Signalez les éventuelles difficultés spécifiques liées à la mise en œuvre pratique de l'instrument (présence de contradictions dans le texte européen, dans la loi interne ou entre lois internes, manque de clarté, formulations trop vagues, manque de lisibilité et de cohérence de la norme européenne et/ou nationale, chevauchements, confusion et/ou rapports paradoxaux avec d'autres dispositions internes, problèmes liés à la terminologie et/ou à la traduction, conflits de compétence…) ?

3.1.4. Veuillez identifier les éventuelles « meilleures pratiques ».

3.2. Jurisprudence CJ

3.2.1. Indiquez si les juridictions internes ont introduit des questions préjudicielles concernant l'instrument européen qui fait l'objet de l'évaluation. Le cas échéant, signalez les conséquences légales et jurisprudentielles d'un éventuel arrêt rendu par la CJ. Veuillez préciser s'il s'agit d'une procédure préjudicielle de « droit commun » ou d'urgence.

4. Contrôle de l'efficacité et de l'efficience du texte

4.1. Contrôle d'efficacité (examen du niveau de réalisation des objectifs)

4.1.1. Evaluez le niveau de réalisation de chaque objectif identifié.

4.2. Contrôle d'efficience (proportionnalité, subsidiarité et adéquation)

5. Réception et perception

5.1. Réception et perception par les praticiens de la justice

5.1.1. Indiquez l'approche ou l'attitude des praticiens vis-à-vis de l'instrument européen lui-même et de l'instrument de transposition dans l'Etat qui fait l'objet de l'évaluation ?

5.1.2. Indiquez l'attitude ou avis des praticiens dans l'Etat qui fait l'objet de l'évaluation quant à la transposition et son application pratique dans les autres Etats membres ?

5.1.3. Quel est le degré de connaissance du texte interne et de l'instrument concerné parmi les praticiens de l'Etat qui fait l'objet de l'évaluation ? (organisation de formations spécialisées, citations des textes européens dans les décisions judiciaires,…).

5.2. Réception et perception par les politiques

5.3. Réception et perception par les media et la presse écrite

5.4. Réception et perception par la société civile

5.5. Réception/perception par la doctrine (veuillez joindre en annexe une bibliographie)

6. Conclusions du rapport d'évaluation : questions générales communes

6.1. Veuillez évaluer l'impact (direct/indirect) de l'instrument et de sa loi nationale de transposition sur les objectifs généraux de l'UE dans le secteur de l'espace de liberté, de sécurité et de justice.

6.2. Veuillez évaluer l'impact (direct/indirect) de l'instrument et de sa loi nationale de transposition sur la protection des droits fondamentaux (principe de légalité, principe de sécurité juridique, principe de proportionnalité de la peine, présomption d'innocence, charge de la preuve, indépendance des juges, etc.).

6.3. Veuillez évaluer l'impact de l'instrument européen et de sa loi nationale de transposition sur le système national interne, sur sa cohérence et ses équilibres.

6.4. Veuillez évaluer l'impact de l'instrument européen et de sa loi nationale de transposition sur la nature du droit pénal (principe « ultima ratio » du droit pénal, balance fonction épée-bouclier droit pénal…).

6.5. Veuillez évaluer l'impact (direct/indirect) sur le niveau de confiance du citoyen par rapport à la loi pénale et aux institutions publiques de sécurité (police) et l'administration de justice.

Annexe 3. Modèle standard d'évaluation de la mise en œuvre et de l'impact des instruments de rapprochement des législations de droit pénal matériel [21]

1. Questions générales de droit interne

1.1. Nature, ratification, mise en œuvre d'instruments internationaux ou européens

1.1.1. Indiquez les instruments juridiques internationaux (Nations unies…) ou européens (Conseil de l'Europe) qui se rapportent à la matière concernée et auxquels votre Etat est partie

1.1.2. Indiquez les instruments de l'UE qui se rapportent à la matière concernée et qui ont été ratifiés/ transposés par votre Etat

1.1.3. Indiquez les autre(s) traité(s), accord(s) bilatéraux, régionaux ou multilatéraux qui se rapportent à la matière concernée

1.1.4. Existence d'interférences entre les instruments de l'UE et ceux d'autres enceintes internationales/régionales

1.2. Questions élémentaires liées au droit pénal interne

1.2.1. Classification des infractions pénales en droit interne

1.2.2. Quel est le régime généralement applicables aux actes de participation et à la tentative ?

1.2.3. Typologie des sanctions pénales en droit national

1.2.4. Votre droit pénal connaît-il la responsabilité pénale des personnes morales ?

1.2.5. Quels sont les titres de compétences pénales que connaît votre droit interne ?

1.3 Contexte politique, criminologique et/ou sociologique de l'Etat membre concerné par rapport à la matière visée

Veuillez indiquer l'éventuelle importance que revêt au plan national le phénomène criminel concerné par l'instrument qui fait l'objet de l'évaluation.

2. Contrôle de conformité formelle et substantielle du droit interne

2.1. Questions générales

2.1.1. Indiquez si un ou des texte(s) législatif(s) ou réglementaire(s) nationaux ont été spécifiquement adoptés en vue de transposer expressément l'instrument européen. Si la réponse est positive, identifiez-le/les. Si la réponse est négative, indiquez-en les raisons (par exemple : parce que la législation existante était auparavant déjà conforme ou considérée comme telle, parce que les exigences européennes ont déjà été satisfaites ou considérées comme telles suite à la mise en œuvre en droit interne d'un autre instrument européen ou international, parce que la procédure de transposition est retardée, etc.).

2.1.2. Indiquez si le délai de mise en conformité/transposition prévu par l'instrument européen a été respecté. En cas de non-respect du délai prévu, indiquez les raisons de ce retard.

---

[21] Il convient d'utiliser le présent modèle conformément à la note d'orientation méthodologique qui précède (annexe 1).

2.1.3. Indiquez si l'instrument de transposition a introduit des changements limités/symboliques ou au contraire des changements importants en droit interne (une réponse synthétique à cette question est recommandée afin de ne pas faire double emploi avec les réponses aux questions suivantes).

2.1.4. Indiquez l'existence des dispositions légales internes couvrant la matière concernée qui ont éventuellement été revues ou abrogées afin de se conformer à l'instrument européen.

2.2. Contrôle de conformité formelle et substantielle

2.2.1. Passez en revue chacune des dispositions de l'instrument de l'UE et vérifiez qu'elle est couverte par le droit interne formellement (spécifier la disposition légale interne) ou substantiellement (par exemple, par certains principes juridiques généraux).

- *2.2.1.1.* Définition des incriminations
- *2.2.1.2.* Sanctions (afin d'évaluer le caractère effectif, proportionné et dissuasif des sanctions prévues, veuillez fournir des exemples concrets de la peine prévue dans le code pénal national pour d'autres infractions liées à la matière concernée par l'instrument).
- *2.2.1.3.* Responsabilité pénale des personnes morales et sanctions à leur encontre
- *2.2.1.4.* Compétences et poursuites
- *2.2.1.5.* (Protection et assistance aux victimes)

2.2.2. Le cas échéant, indiquez les éventuelles raisons des lacunes précédemment identifiées. Indiquez si elles sont liées au droit interne (par exemple pour préserver la cohérence du système interne, pour contourner des problèmes constitutionnels) ou liées au droit de l'UE lui-même, (objectif du texte européen ambigu ou inconnu, formulation vague…).

2.2.3. A partir de l'entrée en vigueur du traité de Lisbonne, indiquez si votre Etat fait l'objet d'une procédure en manquement. En cas de réponse positive, pour quelle raison ?

3. Contrôle de l'effectivité et de la mise en œuvre pratique

3.1. Jurisprudence nationale et application pratique du texte

3.1.1. Evaluation quantitative. Cette section implique le recours aux statistiques si elles sont disponibles. Le cas échéant, veuillez spécifier la source et la nature des données.

3.1.2. Etude du contenu de la jurisprudence/pratique. Cette section implique de recourir à des cas concrets, exemples ou illustrations s'ils sont disponibles. A l'occasion de cette évaluation, veuillez notamment signaler si les praticiens suivent la volonté/intention du législateur dans l'interprétation et application du texte, s'ils donnent une interprétation restrictive ou extensive des dispositions, etc. Dans le cas où des éléments non conformes au droit européen ont été précédemment relevés en droit interne, veuillez préciser si, en pratique, les juridictions internes mettent en œuvre leur obligation d'interprétation conforme. Pour les exemples de décisions de condamnations rendues, veuillez dans la mesure du possible indiquez quelle a été leur exécution.

3.1.3. Signalez les éventuelles difficultés spécifiques liées à la mise en œuvre pratique de l'instrument (présence de contradictions dans le texte européen, dans la loi interne ou entre lois internes, manque de clarté, formulations trop vagues, manque de lisibilité et de cohérence de la norme européenne et/ou nationale, chevauchements, confusion et/ou rapports paradoxaux avec d'autres dispositions internes, problèmes liés à la terminologie et/ou à la traduction, conflits de compétence…) ?

3.1.4. Veuillez identifier les éventuelles « meilleures pratiques ».

3.2. Jurisprudence CJ

Indiquez si les juridictions internes ont introduit des questions préjudicielles concernant l'instrument européen qui fait l'objet de l'évaluation. Le cas échéant, signalez les conséquences légales et jurisprudentielles d'un éventuel arrêt rendu par la CJ. Veuillez préciser s'il s'agit d'une procédure préjudicielle de « droit commun » ou d'urgence.

4. Contrôle de l'efficacité et de l'efficience du texte

4.1. Contrôle d'efficacité (examen du niveau de réalisation des objectifs)

4.1.1. Evaluez le niveau de réalisation de chaque objectif spécifique à l'instrument européen identifié (par ex. prévention/lutte contre le phénomène criminel couvert)

4.1.2. Evaluez le niveau de réalisation des objectifs poursuivis par les travaux de rapprochement du droit pénal matériel en général (par ex. renforcement de la confiance mutuelle et de la coopération)

4.2 Contrôle d'efficience (proportionnalité, subsidiarité et adéquation)

5. Réception et perception

5.1. Réception et perception par les praticiens de la justice

5.1.1. Indiquez l'approche ou l'attitude des praticiens vis-à-vis de l'instrument européen lui-même et de l'instrument de transposition dans l'Etat qui fait l'objet de l'évaluation ?

5.1.2. Indiquez l'attitude ou avis des praticiens dans l'Etat qui fait l'objet de l'évaluation quant à la transposition et son application pratique dans les autres Etats membres ?

5.1.3. Quel est le degré de connaissance du texte interne et de l'instrument concerné parmi les praticiens de l'Etat qui fait l'objet de l'évaluation ? (organisation de formations spécialisées, citations des textes européens dans les décisions judiciaires, …)

5.2. Réception et perception par les politiques

5.3. Réception et perception par les media et la presse écrite

5.4. Réception et perception par la société civile

5.5. Réception/perception par la doctrine (veuillez joindre en annexe une bibliographie)

6. Conclusions du rapport d'évaluation : questions générales communes

6.1. Veuillez évaluer l'impact (direct/indirect) de l'instrument et de sa loi nationale de transposition sur les objectifs généraux de l'UE dans le secteur de l'espace de liberté, de sécurité et de justice.

6.2. Veuillez évaluer l'impact (direct/indirect) de l'instrument et de sa loi nationale de transposition sur la protection des droits fondamentaux (principe de légalité, principe de sécurité juridique, principe de proportionnalité de la peine, présomption d'innocence, charge de la preuve, etc.).

6.3. Veuillez évaluer l'impact de l'instrument européen et de sa loi nationale de transposition sur le système national interne, sur sa cohérence et ses équilibres (veuillez dans la mesure du possible, fournir en annexe un schéma sous forme de « carte » (*map*) afin de décrire de manière concise et schématique l'impact du texte européen et de la norme nationale de transposition sur le cadre légal national). Veuillez également indiquer si ces textes ont eu un impact direct ou indirect sur la politique criminelle nationale.

6.4. Veuillez évaluer l'impact de l'instrument européen et de sa loi nationale de transposition sur la nature du droit pénal (principe « ultima ratio » du droit pénal, balance fonction épée-bouclier droit pénal…).

6.5. Analyse de l'impact (direct/indirect) sur le niveau de confiance du citoyen par rapport à la loi pénale et aux institutions publiques de sécurité (police) et l'administration de justice.

Annexe 4. Décision-cadre du Conseil du 19 juillet 2002 relative à la lutte contre la traite des êtres humains (2002/629/JAI), *JO*, n° L 203, 1er août 2002, p. 1 et s.

LE CONSEIL DE L'UNION EUROPEENNE,

vu le traité sur l'Union européenne, et notamment son article 29, son article 31, point e), et son article 34, paragraphe 2, point b),
vu la proposition de la Commission [1],
vu l'avis du Parlement européen [2],
considérant ce qui suit :
(1) Le plan d'action du Conseil et de la Commission concernant les modalités optimales de mise en œuvre des dispositions du traité d'Amsterdam relatives à l'établissement d'un espace de liberté, de sécurité et de justice [3], les conclusions du Conseil européen de Tampere des 15 et 16 octobre 1999, les conclusions du Conseil européen de Santa Maria da Feira des 19 et 20 juin 2000, tels que repris dans le tableau de bord, et le Parlement européen dans sa résolution du 19 mai 2000 sur la communication de la Commission au Conseil et au Parlement européen « Pour de nouvelles actions dans le domaine de la lutte contre la traite des femmes », indiquent ou sollicitent des actions législatives contre la traite des êtres humains, notamment des définitions, des incriminations et des sanctions communes.
(2) L'action commune 97/154/JAI du Conseil du 24 février 1997 relative à la lutte contre la traite des êtres humains et l'exploitation sexuelle des enfants [4] doit être suivie de mesures législatives complémentaires afin de réduire les disparités entre les approches juridiques des Etats membres et de contribuer au développement d'une coopération judiciaire et policière efficace contre la traite des êtres humains.
(3) La traite des êtres humains constitue une violation grave des droits fondamentaux de la personne et de la dignité humaine et implique des pratiques cruelles, telles que l'exploitation et la tromperie de personnes vulnérables, ainsi que l'usage de la violence, de menaces, de la servitude pour dettes et de la contrainte.
(4) Le protocole des Nations unies visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants, qui complète la convention des Nations unies contre la criminalité transnationale organisée, représente un pas décisif vers la coopération internationale dans ce domaine.
(5) Les enfants sont plus vulnérables et courent, par conséquent, un risque plus grand de devenir victimes de la traite des êtres humains.
(6) L'Union européenne doit compléter le travail important réalisé par les organisations internationales, en particulier les Nations unies.
(7) A l'égard de l'infraction pénale grave que constitue la traite des êtres humains, il faut non seulement que chaque Etat membre engage une action particulière, mais il est également nécessaire d'adopter une approche globale, dont la définition d'éléments du droit pénal communs à tous les Etats membres, notamment en matière de sanctions effectives, proportionnées et dissuasives, ferait partie intégrante. Conformément aux principes de subsidiarité et de

[1] *JO*, n° C 62 E, 27 février 2001, p. 324.
[2] *JO*, n° C 35 E, 28 février 2002, p. 114.
[3] *JO*, n° C 19, 23 janvier 1999, p. 1.
[4] *JO*, n° L 63, 4 mars 1997, p. 2.

proportionnalité, la présente décision cadre se limite au minimum requis pour réaliser ces objectifs au niveau communautaire et n'excède pas ce qui est nécessaire à cette fin.
(8) Il y a lieu de prévoir, contre les auteurs de ces infractions, des sanctions suffisamment sévères pour faire entrer la traite des êtres humains dans le champ d'application des instruments déjà adoptés pour lutter contre la criminalité organisée, tels que l'action commune 98/699/JAI du Conseil du 3 décembre 1998 concernant le blanchiment d'argent, l'identification, le dépistage, le gel ou la saisie et la confiscation des instruments et des produits du crime [5] et l'action commune 98/733/JAI du Conseil du 21 décembre 1998 relative à l'incrimination de la participation à une organisation criminelle dans les Etats membres de l'Union européenne [6].
(9) La présente décision-cadre devrait contribuer à la prévention de la traite des êtres humains et à la lutte contre ce phénomène en complétant les instruments déjà adoptés dans ce domaine, tels que l'action commune 96/700/JAI du Conseil du 29 novembre 1996 établissant un programme d'encouragement et d'échanges destiné aux personnes responsables de l'action contre la traite des êtres humains et l'exploitation sexuelle des enfants (STOP) [7], l'action commune 96/748/JAI du Conseil du 16 décembre 1996 élargissant le mandat donné à l'unité « Drogues » Europol [8], la décision n° 293/2000/CE du Parlement européen et du Conseil du 24 janvier 2000 adoptant un programme d'action (programme Daphné) (2000-2003) relatif à des mesures préventives pour lutter contre la violence envers les enfants, les adolescents et les femmes [9], l'action commune 98/428/JAI du Conseil du 29 juin 1998 concernant la création d'un Réseau judiciaire européen [10], l'action commune 96/277/JAI du Conseil du 22 avril 1996 concernant un cadre d'échange de magistrats de liaison visant à l'amélioration de la coopération judiciaire entre les Etats membres de l'Union européenne [11] et l'action commune 98/427/JAI du Conseil du 29 juin 1998 relative aux bonnes pratiques d'entraide judiciaire en matière pénale [12].
(10) Il convient d'abroger l'action commune 97/154/JAI du Conseil, dans la mesure où elle concerne la traite des êtres humains,

A ARRETE LA PRESENTE DECISION-CADRE :

Article premier
Infractions liées à la traite des êtres humains à des fins d'exploitation de leur travail ou d'exploitation sexuelle
1. Chaque Etat membre prend les mesures nécessaires pour faire en sorte que les actes suivants soient punissables :
le recrutement, le transport, le transfert, l'hébergement, l'accueil ultérieur d'une personne, y compris la passation ou le transfert du contrôle exercé sur elle :
a) lorsqu'il est fait usage de la contrainte, de la force ou de menaces, y compris l'enlèvement, ou
b) lorsqu'il est fait usage de la tromperie ou de la fraude, ou
c) lorsqu'il y a abus d'autorité ou d'une situation de vulnérabilité, de manière telle que la personne n'a en fait pas d'autre choix véritable et acceptable que de se soumettre à cet abus, ou

---

[5] *JO*, n° L 333, 9 décembre 1998, p. 1. Action commune modifiée en dernier lieu par la décision-cadre 2001/500/JAI (*JO*, n° L 182, 5 juillet 2001, p. 1).
[6] *JO*, n° L 351, 29 décembre 1998, p. 1.
[7] *JO*, n° L 322, 12 décembre 1996, p. 7.
[8] *JO*, n° L 342, 31 décembre 1996, p. 4.
[9] *JO*, n° L 34, 9 février 2000, p. 1.
[10] *JO*, n° L 191, 7 juillet 1998, p. 4.
[11] *JO*, n° L 105, 27 avril 1996, p. 1.
[12] *JO*, n° L 191, 7 juillet 1998, p. 1.

d) lorsqu'il y a offre ou acceptation de paiements ou d'avantages pour obtenir le consentement d'une personne ayant autorité sur une autre,
à des fins d'exploitation du travail ou des services de cette personne, y compris sous la forme, au minimum, de travail ou de services forcés ou obligatoires, d'esclavage ou de pratiques analogues à l'esclavage ou de servitude, ou
à des fins d'exploitation de la prostitution d'autrui et d'autres formes d'exploitation sexuelle, y compris pour la pornographie.
2. Le consentement d'une victime de la traite des êtres humains à l'exploitation envisagée ou effective est indifférent lorsque l'un quelconque des moyens visés au paragraphe 1 a été utilisé.
3. Lorsque les actes visés au paragraphe 1 concernent un enfant, ils relèvent de la traite des êtres humains et, à ce titre, sont punissables, même si aucun des moyens visés au paragraphe 1 n'a été utilisé.
4. Aux fins de la présente décision cadre, on entend par « enfant », toute personne âgée de moins de dix-huit ans.

Article 2
Instigation, participation, complicité et tentative
Chaque Etat membre prend les mesures nécessaires pour que soit puni le fait d'inciter à commettre l'une des infractions visées à l'article 1er, d'y participer, de s'en rendre complice, ou de tenter de commettre cette infraction.

Article 3
Sanctions
1. Chaque Etat membre prend les mesures nécessaires pour faire en sorte que les infractions visées aux articles 1er et 2 soient passibles de sanctions pénales effectives, proportionnées et dissuasives, susceptibles d'entraîner l'extradition.
2. Chaque Etat membre prend les mesures nécessaires pour que les infractions visées à l'article 1er soient passibles de peines privatives de liberté, la peine maximale ne pouvant être inférieure à huit ans, lorsqu'elles ont été commises dans les circonstances suivantes :
a) l'infraction a délibérément ou par négligence grave mis la vie de la victime en danger, ou
b) l'infraction a été commise à l'encontre d'une victime qui était particulièrement vulnérable. Une victime est considérée comme ayant été particulièrement vulnérable au moins lorsqu'elle n'avait pas atteint l'âge de la majorité sexuelle prévu par la législation nationale et que l'infraction a été commise à des fins d'exploitation de la prostitution d'autrui et d'autres formes d'exploitation sexuelle, y compris pour la pornographie ;
c) l'infraction a été commise par recours à des violences graves ou a causé un préjudice particulièrement grave à la victime ;
d) l'infraction a été commise dans le cadre d'une organisation criminelle au sens de l'action commune 98/733/JAI.

Article 4
Responsabilité des personnes morales
1. Chaque Etat membre prend les mesures nécessaires pour que les personnes morales puissent être tenues pour responsables des infractions pénales visées aux articles 1er et 2, lorsque ces dernières sont commises pour leur compte par toute personne, agissant soit individuellement, soit en tant que membre d'un organe de la personne morale en cause, qui exerce un pouvoir de direction en son sein, sur l'une des bases suivantes :
a) un pouvoir de représentation de la personne morale, ou
b) une autorité pour prendre des décisions au nom de la personne morale, ou
c) une autorité pour exercer un contrôle au sein de la personne morale.
2. Abstraction faite des cas déjà prévus au paragraphe 1, chaque Etat membre prend les mesures nécessaires pour qu'une personne morale puisse être tenue pour responsable lorsque le défaut

de surveillance ou de contrôle de la part d'une personne visée au paragraphe 1 a rendu possible la commission de l'une des infractions visées aux articles 1er et 2, pour le compte de ladite personne morale, par une personne soumise à son autorité.
3. La responsabilité de la personne morale en vertu des paragraphes 1 et 2 n'exclut pas les poursuites pénales contre les personnes physiques auteurs, instigatrices ou complices des infractions visées aux articles 1er et 2.
4. Aux fins de la présente décision-cadre, on entend par « personne morale », toute entité ayant ce statut en vertu du droit national applicable, exception faite des Etats ou des autres entités publiques dans l'exercice de leurs prérogatives de puissance publique et des organisations internationales publiques.

Article 5
Sanctions à l'encontre des personnes morales
Chaque Etat membre prend les mesures nécessaires pour s'assurer que toute personne morale déclarée responsable au sens de l'article 4 soit passible de sanctions effectives, proportionnées et dissuasives, qui incluent des amendes pénales ou non pénales et éventuellement d'autres sanctions, notamment :
a) des mesures d'exclusion du bénéfice d'un avantage ou d'une aide publics, ou
b) des mesures d'interdiction temporaire ou permanente d'exercer une activité commerciale, ou
c) un placement sous surveillance judiciaire, ou
d) une mesure judiciaire de dissolution, ou
e) la fermeture temporaire ou définitive d'établissements ayant servi à commettre l'infraction.

Article 6
Compétence et poursuites
1. Chaque Etat membre prend les mesures nécessaires pour établir sa compétence à l'égard des infractions visées aux articles 1er et 2 dans les cas suivants :
a) l'infraction a été commise, en tout ou en partie, sur son territoire, ou
b) l'auteur de l'infraction est l'un de ses ressortissants, ou
c) l'infraction a été commise pour le compte d'une personne morale établie sur son territoire.
2. Tout Etat membre peut décider de ne pas appliquer, ou de n'appliquer que dans des cas ou conditions spécifiques, les règles de compétence définies au paragraphe 1, points b) et c), pour autant que l'infraction en cause ait été commise en dehors de son territoire.
3. Tout Etat membre qui, en vertu de sa législation, n'extrade pas ses ressortissants prend les mesures nécessaires pour établir sa compétence sur les infractions visées aux articles 1er et 2, et pour les poursuivre, le cas échéant, lorsqu'elles sont commises par l'un de ses ressortissants en dehors de son territoire.
4. Les Etats membres informent le secrétariat général du Conseil et la Commission de leur décision d'appliquer le paragraphe 2, au besoin en indiquant les cas ou conditions spécifiques dans lesquels leur décision s'applique.

Article 7
Protection et assistance apportées aux victimes
1. Les Etats membres s'assurent que les enquêtes ou les poursuites concernant les infractions visées par la présente décision-cadre ne dépendent pas de la déclaration ou de l'accusation émanant d'une personne victime de l'infraction, du moins dans les cas dans lesquels l'article 6, paragraphe 1, point a), s'applique.
2. Les enfants qui sont victimes d'une infraction visée à l'article 1er devraient être considérés comme des victimes particulièrement vulnérables, conformément à l'article 2, paragraphe 2, à l'article 8, paragraphe 4, et à l'article 14, paragraphe 1, de la décision-cadre 2001/220/

JAI du Conseil du 15 mars 2001 relative au statut des victimes dans le cadre de procédures pénales [13].
3. Lorsque la victime est un enfant, les Etats membres prennent toutes les mesures possibles pour assurer une aide adéquate à sa famille. En particulier, lorsque cela est nécessaire et possible, chaque Etat membre applique l'article 4 de la décision-cadre 2001/220/JAI.

Article 8
Champ d'application territorial
La présente décision-cadre s'applique à Gibraltar.

Article 9
Application de l'action commune 97/154/JAI
L'action commune 97/154/JAI cesse de s'appliquer dans la mesure où elle concerne la traite des êtres humains.

Article 10
Mise en œuvre
1. Les Etats membres adoptent les mesures nécessaires pour se conformer aux dispositions de la présente décision-cadre avant le 1er août 2004.
2. Les Etats membres communiquent au secrétariat général du Conseil et à la Commission, dans le même délai que celui visé au paragraphe 1, le texte des dispositions transposant dans leur droit national les obligations que leur impose la présente décision-cadre. Sur la base d'un rapport établi à partir de ces informations et d'un rapport écrit de la Commission, le Conseil vérifie, pour le 1er août 2005 au plus tard, dans quelle mesure les Etats membres ont pris les dispositions nécessaires pour se conformer à la présente décision-cadre.

Article 11
Entrée en vigueur
La présente décision-cadre entre en vigueur le jour de sa publication au *Journal officiel des Communautés européennes*.

Fait à Bruxelles, le 19 juillet 2002.

Par le Conseil

Le président

T. Pedersen

[13] *JO*, n° L 82, 22 mars 2001, p. 1.

Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,
Having regard to the proposal of the Commission [1],
Having regard to the opinion of the European Parliament [2],
Whereas:
(1) The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [3], the Tampere European Council on 15 and 16 October 1999, the Santa Maria da Feira European Council on 19 and 20 June 2000, as listed in the Scoreboard, and the European Parliament in its Resolution of 19 May 2000 on the communication from the Commission "for further actions in the fight against trafficking in women" indicate or call for legislative action against trafficking in human beings, including common definitions, incriminations and sanctions.
(2) Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children [4] needs to be followed by further legislative action addressing the divergence of legal approaches in the Member States and contributing to the development of an efficient judicial and law enforcement cooperation against trafficking in human beings.
(3) Trafficking in human beings comprises serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion.
(4) The UN protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UN Convention against transnational organised crimes, represents a decisive step towards international cooperation in this field.
(5) Children are more vulnerable and are therefore at greater risk of falling victim to trafficking.
(6) The important work performed by international organisations, in particular the UN, must be complemented by that of the European Union.
(7) It is necessary that the serious criminal offence of trafficking in human beings be addressed not only through individual action by each Member State but by a comprehensive approach in which the definition of constituent elements of criminal law common to all Member States, including effective, proportionate and dissuasive sanctions, forms an integral part. In accordance with the principles of subsidiarity and proportionality, this Framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose.
(8) It is necessary to introduce sanctions on perpetrators sufficiently severe to allow for trafficking in human beings to be included within the scope of instruments already adopted for the purpose of combating organised crime such as Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime [5] and Council Joint Action

[1] *OJ*, No. C 62 E, 27 February 2001, p. 324.
[2] *OJ*, No. C 35 E, 28 February 2002, p. 114.
[3] *OJ*, No. C 19, 23 January 1999, p. 1.
[4] *OJ*, No. L 63, 4 March 1997, p. 2.
[5] *OJ*, No. L 333, 9 December 1998, p. 1. Joint Action as last amended by Framework Decision 2001/500/JHA (*OJ*, No. L 182, 5 July 2001, p. 1).

98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union [6].

(9) This Framework Decision should contribute to the fight against and prevention of trafficking in human beings by complementing the instruments adopted in this area such as Council Joint Action 96/700/JHA of 29 November 1996 establishing an incentive and exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children (STOP) [7], Council Joint Action 96/748/JHA of 16 December 1996 extending the mandate given to the Europol Drugs Unit [8], Decision No. 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women [9], Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network [10], Council Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union [11] and Council Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters [12].

(10) Council Joint Action 97/154/JHA should accordingly cease to apply in so far as it concerns trafficking in human beings,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation

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

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

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

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

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

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

for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or

for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

2. The consent of a victim of trafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 have been used.

3. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable trafficking offence even if none of the means set forth in paragraph 1 have been used.

4. For the purpose of this Framework Decision, "child" shall mean any person below 18 years of age.

---

[6] *OJ*, No. L 351, 29 December 1998, p. 1.

[7] *OJ*, No. L 322, 12 December 1996, p. 7.

[8] *OJ*, No. L 342, 31 December 1996, p. 4.

[9] *OJ*, No. L 34, 9 February 2000, p. 1.

[10] *OJ*, No. L 191, 7 July 1998, p. 4.

[11] *OJ*, No. L 105, 27 April 1996, p. 1.

[12] *OJ*, No. L 191, 7 July 1998, p. 1.

Article 2
Instigation, aiding, abetting and attempt
Each Member State shall take the necessary measures to ensure that the instigation of, aiding, abetting or attempt to commit an offence referred to in Article 1 is punishable.

Article 3
Penalties
1. Each Member State shall take the necessary measures to ensure that an offence referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.
2. Each Member State shall take the necessary measures to ensure that an offence referred to in Article 1 is punishable by terms of imprisonment with a maximum penalty that is not less than eight years where it has been committed in any of the following circumstances:
(a) the offence has deliberately or by gross negligence endangered the life of the victim;
(b) the offence has been committed against a victim who was particularly vulnerable. A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;
(c) the offence has been committed by use of serious violence or has caused particularly serious harm to the victim;
(d) the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein.

Article 4
Liability of legal persons
1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for an offence referred to in Articles 1 and 2, committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
(a) a power of representation of the legal person, or
(b) an authority to take decisions on behalf of the legal person, or
(c) an authority to exercise control within the legal person.
2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 have rendered possible the commission of an offence referred to in Articles 1 and 2 for the benefit of that legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in an offence referred to in Articles 1 and 2.
4. For the purpose of this Framework Decision, legal person shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 5
Sanctions on legal persons
Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:
(a) exclusion from entitlement to public benefits or aid, or
(b) temporary or permanent disqualification from the practice of commercial activities, or
(c) placing under judicial supervision, or

(d) a judicial winding-up order, or
(e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 6
Jurisdiction and prosecution
1. Each Member State shall take the necessary measures to establish its jurisdiction over an offence referred to in Articles 1 and 2 where:
(a) the offence is committed in whole or in part within its territory, or
(b) the offender is one of its nationals, or
(c) the offence is committed for the benefit of a legal person established in the territory of that Member State.
2. A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) as far as the offence is committed outside its territory.
3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 1 and 2 when it is committed by its own nationals outside its territory.
4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

Article 7
Protection of and assistance to victims
1. Member States shall establish that investigations into or prosecution of offences covered by this Framework Decision shall not be dependent on the report or accusation made by a person subjected to the offence, at least in cases where Article 6(1)(a) applies.
2. Children who are victims of an offence referred to in Article 1 should be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [13].
3. Where the victim is a child, each Member State shall take the measures possible to ensure appropriate assistance for his or her family. In particular, each Member State shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family referred to.

Article 8
Territorial scope
This Framework Decision shall apply to Gibraltar.

Article 9
Application of Joint Action 97/154/JHA
Joint Action 97/154/JHA shall cease to apply in so far as it concerns trafficking in human beings.

Article 10
Implementation
1. Member States shall take the necessary measures to comply with this Framework Decision before 1 August 2004.
2. By the date referred to in paragraph 1, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national

[13] *OJ*, No. L 82, 22 March 2001, p. 1.

law the obligations imposed on them under this Framework Decision. The Council will, by 1 August 2005 at the latest, on the basis of a report established on the basis of this information and a written report transmitted by the Commission, assess the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision.

Article 11
Entry into force
This Framework Decision shall enter into force on the day of its publication in the Official Journal.

Done at Brussels, 19 July 2002.

For the Council

The President

T. Pedersen

Politiques pénales et évaluation : des défis renouvelés

Robert Roth

1. La tradition pénale

L'évaluation repose sur une solide *tradition* en droit pénal [1]. En tant que politique publique particulièrement exposée dans la sphère publique et médiatique, l'administration de la justice pénale doit, plus encore que la plupart des autres politiques publiques, rendre des comptes. Cette obligation porte en particulier sur la *sanction* et la prise en charge dans le cadre de l'exécution des sanctions pénales des personnes condamnées [2]. A ce jour, l'harmonisation des *sanctions*, et davantage encore l'harmonisation des pratiques de *l'exécution* de ces sanctions, doit toutefois être considérée comme un parent pauvre de la politique pénale européenne [3]. Ce

[1] Voy. pour l'exemple belge et des repères méthodologiques, M.-A. Beernaert, « De quelques considérations profanes sur l'évaluation de l'impact, au niveau national, des lois pénales internes », *in* A. Weyembergh et S. de Biolley (éd.), *Comment évaluer le droit pénal européen ?*, Bruxelles, Editions de l'Université de Bruxelles, 2006, p. 21 et s.

[2] Voy. à ce sujet, le bilan très instructif, malheureusement axé essentiellement sur les pays anglo-saxons, de N. Tilley & A. Clarke, « Evaluation in Criminal justice », *in* I.F. Shaw & J.C. Greene (ed.), *Handbook of evaluation : policies, programs and practice*, London, Sage, 2006, p. 512 et s. La jurisprudence de la Cour constitutionnelle allemande sur laquelle on reviendra plus loin (point 3.A.) sur l'« obligation jurisprudentielle d'évaluation législative » a porté en particulier sur les effets des sanctions applicables aux jeunes délinquants (2 BvR 1673/04 du 31 mai 2006) et de la détention à vie (BVerfGE 45, 187), voy. A. Flueckiger, « L'obligation jurisprudentielle d'évaluation législative : une application du principe de précaution aux droits fondamentaux », *in Les droits de l'homme et la constitution, Etudes en l'honneur du prof. G. Malinverni*, Zurich, Schulthess, 2007, p. 155 et s., ici p. 161-162.

[3] Voy. le Livre vert sur le rapprochement, la reconnaissance mutuelle et l'exécution des sanctions pénales dans l'Union européenne, 30 avril 2004, COM (2004) 334 final, en particulier p. 24.

n'est donc pas sur elle que se concentrent les travaux d'évaluation entrepris à cette échelle. Ce sont davantage les politiques en matière d'*incriminations* qui, depuis une dizaine d'années, sont soumises à examen. Le présent ouvrage se situe dans ce dernier contexte.

La recherche sur l'application des politiques pénitentiaires et l'évaluation de la mise en œuvre du droit pénal européen présente toutefois plus de points communs qu'il n'y paraît au premier abord.

Tout d'abord, l'enjeu commun est la *qualité de la justice* [4]. Truisme sans doute que d'affirmer cela. Mais il convient d'insister : la confiance que le public et les pouvoirs nationaux accordent à l'administration de la justice pénale *ne se divise pas*. Dès lors, même si le débat sur les incriminations et les conditions générales de la répression pénale ne suscite, et de loin, pas les mêmes passions que les controverses sur l'« enfermement », les uns et l'autre ne doivent pas être dissociés.

Sur un plan plus conceptuel, l'évaluation des politiques pénales législatives et l'évaluation des pratiques sanctionnelles partagent une caractéristique, qui les distingue de bien d'autres domaines de l'évaluation : une réticence à l'égard des « *effets symboliques* », voire un rejet de ces effets. Cela ne va pas de soi dans une discipline, le droit pénal, qui est traditionnellement une terre d'élection de ces « règles de droit dont la vocation, paradoxalement, est de ne pas être appliquées », selon la formule du doyen J. Carbonnier [5]. Nombreuses sont les prohibitions, celles de l'inceste ou de l'adultère hier, de la consommation de drogues aujourd'hui, dont la présence ou le maintien dans l'arsenal législatif a peu à voir avec l'efficacité réelle et beaucoup avec le souci d'informer ou de maintenir la cohésion ou la discipline sociale. L'usage symbolique l'emporte alors sur les attentes en matière d'effets réels. Dans ce contexte, le refus d'admettre que les textes d'harmonisation restent déclaratoires prend un certain relief [6].

2. L'évaluation propre et l'évaluation multilatérale

L'histoire récente du droit pénal européen est celle d'un renforcement progressif de la place de l'évaluation et de l'« obligation d'évaluer », jusqu'à leur consécration par l'article 70 du traité sur le fonctionnement de l'Union européenne (TFUE), adopté dans le cadre du traité de Lisbonne. Cette disposition établit un lien fort – dorénavant de nature institutionnelle pour ne plus dire constitutionnelle – entre évaluation et développement de la reconnaissance mutuelle. Cette affirmation s'inscrit dans une logique historique cohérente [7] : elle réduit toutefois la portée de l'évaluation.

---

[4] S. De Biolley et A. Weyembergh, « Conclusions », *in* A. Weyembergh et S. de Biolley (éd.), *op. cit.*, insistent à juste titre sur ce point, entre autres p. 225.

[5] J. Carbonnier, « Effectivité et ineffectivité de la règle de droit », *L'Année sociologique*, 1957, p. 16.

[6] Voy. par exemple, dans le présent ouvrage, le rapport hongrois par K. Ligeti, *in fine*.

[7] Retracée avec soin dans l'Introduction (G. de Kerchove) et les Conclusions (S. de Biolley et A. Weyembergh) de A. Weyembergh et S. de Biolley (éd.), *op. cit.* Voy. en particulier le Programme de la Haye du 5 novembre 2004, *JO*, n° C 53, 3 mars 2005, p. 1, points II.3 et III.3.2.

Il faut en effet rappeler que cette dernière est tout autant synallagmatique que solipsiste. Autrement dit, elle peut ou doit être tout autant un instrument *d'amélioration de la « performance »* du système confiée à ceux qui en ont la responsabilité qu'un moyen de porter un *jugement* sur le système d'autrui.

A. Dans sa première fonction, *introspective* [8], on peut aisément substituer à « évaluation » des termes prisés à l'époque contemporaine : *monitoring*, et surtout contrôle de qualité (ou contrôle qualité). L'aspect *monitoring* est présent par exemple dans le rapport espagnol de cet ouvrage, qui met en évidence la nécessité de contrôler l'application, ici de la décision-cadre sur la traite d'êtres humains, afin d'éviter les excès de sévérité répressive [9]. Quant au *contrôle de qualité*, même si sa vocation première et son histoire sont différentes de celles de l'évaluation, leur rapprochement actuel est évident, depuis que le contrôle de qualité est sorti de son cadre originaire, industriel et médical, pour s'étendre aux entreprises et organisations et à leur gestion, y compris environnementale et sociale [10]. Le nom de l'organisation internationale qui occupe la première ligne en matière de conseil au contrôle de qualité est à lui seul instructif quant aux effets *d'égalisation des conditions* que ce contrôle partage avec les mécanismes d'évaluation : l'acronyme choisi, qui ne correspond ni à l'appellation anglaise ni à la dénomination française de l'organisation, est emprunté au grec *« isos »,* parce qu'il signifie « égal », nous apprend son site officiel [11].

B. Comme on le sait, l'article 70 TFUE, en tant qu'héritier de l'histoire propre à l'évaluation en tant que composante de la politique pénale européenne, ignore cette dimension auto-réflexive : l'évaluation devra (continuer à) « favoriser la pleine application du principe de reconnaissance mutuelle ». Cette relation privilégiée mérite d'être décomposée en *plusieurs niveaux d'interaction*.

Au *premier degré*, l'évaluation est un instrument de *connaissance*, qui est indispensable pour asseoir la *confiance mutuelle*. Au second degré, elle est un instrument de *mesure* (on retrouve la *norma* latine ou le *nomos* grec déjà mentionnés) : mesure de l'*adéquation* avec un *objectif* ou une *exigence*, pour reprendre à nouveau le parallèle avec le contrôle de qualité [12]. Dans cette seconde dimension, l'évaluation ne peut se passer de ce qu'un spécialiste des politiques publiques appelle un *référentiel* [13] : cette condition correspond parfaitement à l'évolution du débat dont le nouvel article 70

---

[8] Sur l'usage « interne » des procédures d'évaluation, même quand elles n'ont pas été établies à cette fin, voy. H. G. Nilsson, « Eight years of experiences with evaluation within the European Union », *in* A. Weyembergh et S. de Biolley (éd.), *op. cit.*, p. 118.

[9] Voy., dans le présent ouvrage, le rapport espagnol par F. J. de Leon, M. Maroto et M.A. Rodriguez.

[10] L'organisation internationale de normalisation ISO – nous revenons plus bas sur ce nom – annonce pour 2010 un ensemble de normes sur la responsabilité sociale, voy. son site : http://www.iso.org.

[11] Voy. note précédente.

[12] La norme ISO 9000:2005 définit la qualité comme l'« aptitude (d'une organisation, d'un système etc.) à satisfaire des exigences », lesquelles peuvent être « exprimées, habituellement implicites ou imposées ».

[13] B. Perret, *L'évaluation des politiques publiques*, Paris, La Découverte, 2001 (2e éd. 2008), p. 19.

TFUE pose un jalon important : l'évaluation comme la reconnaissance mutuelle appellent l'établissement de *standards* ; la mesure de l'efficacité ou de l'efficience [14] suppose ainsi *à la fois* une détermination claire des objectifs ou des exigences et une référence à des standards permettant de mesurer la réalisation de ces objectifs ou de ces exigences

Ce que l'on peut sans hésiter qualifier de « *talon d'Achille* » actuel de la reconnaissance mutuelle illustre bien le propos : comment assurer une meilleure reconnaissance mutuelle des jugements rendus *in absentia* ? Sans doute en procédant à une évaluation comparative des procédures européennes. Mais comment les apprécier ? Le refus global des jugements *in absentia* étant exclu, car contraire à la tradition juridique européenne [15], il faut, pour éviter le « nationalisme judiciaire », qui s'est exprimé dans l'affaire précédemment citée [16], puis dans le célèbre arrêt de la Cour constitutionnelle allemande [17] relatif au mandat d'arrêt européen et à sa mise en œuvre par l'Allemagne [18], un standard, dont la densité normative dépasse celle de l'article 6 CEDH et de la jurisprudence rendue par la Cour de Strasbourg sur ce point [19]. L'harmonisation législative paraît pour l'heure exclue, comme en atteste l'échec du projet de réglementation générale des droits procéduraux [20]. Dès lors, on se rabattra sur un objectif moins ambitieux, qui est de « rapprocher les *critères d'application du motif de non-reconnaissance* des décisions rendues par défaut » [21] ; tel est le sens de l'initiative prise par une demi-douzaine de pays au début de l'année

[14] Voy. ci-après point 3, B.

[15] Voy. l'arrêt de la Cour eur. des droits de l'homme du 13 février 2001, *Krombach c. France*, req. 29731/96, *Recueil*, 2001-II, p. 1, par. 85.

[16] Voy. l'arrêt de la CJ du 28 mars 2000, aff. C-7/98, *Krombach c. Bambersk*, *Rec*., p. I-1935, dans lequel la Cour autorise le juge allemand à ne pas reconnaître un jugement rendu par défaut à Paris, dans des conditions contraires à l'ordre public allemand, au sens de l'article 27, point 1, de la convention de Bruxelles du 27 septembre 1968, *JO*, n° L 299, 1972, p. 32. La procédure française sera également condamnée un an plus tard dans l'arrêt de la Cour européenne des droits de l'homme précité.

[17] Arrêt 2 BvR 223604 du 18 juillet 2005 : alors que le gouvernement avait vainement plaidé (par. 34 de l'arrêt) contre l'application d'un « standard des droits fondamentaux allemands » (*Masststab der deutschen Grundrechte*) et une « réserve constitutionnelle nationale » (*nationaler Verfassungsvorbehalt*), la Cour constate que la citoyenneté nationale n'a pas été remplacée par une « citoyenneté de l'Union » et que la protection des droits fondamentaux reste l'affaire des Etats, en tout cas en ce qui concerne leurs ressortissants (par. 74 et 118).

[18] Voy. également les développements de l'avocat général Sharpston dans l'affaire *Kretzinger* (aff. C-288/05, arrêt du 18 juillet 2007), selon lesquels l'Etat appelé à reconnaître un jugement *in absentia* peut refuser de le faire si le jugement « a méconnu la convention européenne (des droits de l'homme), même s'il était considéré comme valide et définitif en droit interne » (Conclusions, par. 101).

[19] Dans la même affaire *Krombach*, le gouvernement français relevait à juste titre la rareté (surprenante) du contentieux portant sur les jugements *in absentia*, voy. arrêt précité, par. 77.

[20] Voy. projet de décision-cadre sur les droits procéduraux dans l'Union européenne dans son dernier état, au 5 juin 2007 (DROIPEN 56).

[21] Exposé des motifs à l'appui de l'initiative citée dans la note suivante, du 30 janvier 2008, COPEN 4 (doc. 5213/08) ADD 1, p. 4 (nos italiques).

2008 [22], qui est supposée « établir un juste équilibre » entre l'objectif de mieux protéger les droits fondamentaux et celui de faciliter l'application du principe de reconnaissance mutuelle [23]. Les promoteurs de l'initiative se défendent de vouloir le « rapprochement des législations nationales pour ce qui est des affaires purement nationales » et donc d'établir un standard procédural. L'établissement d'un cadre unifié et détaillé pour la non-reconnaissance des jugements par défaut doit toutefois avoir un effet *d'harmonisation indirecte* [24], puisqu'un jugement par défaut rendu dans les conditions prévues dans le projet de décision-cadre est assuré d'une reconnaissance supranationale et que ces conditions sont unifiées et quant au langage et quant au fond. Dès lors, le débat qui s'est ouvert avec la transmission de ce projet au Parlement européen [25] marquera, selon notre analyse, malgré tout un jalon important dans le processus de « standardisation », qui aura à son tour des effets sur les démarches d'évaluation.

C. Certaines jurisprudences nationales sur le mandat d'arrêt ne cachent pas la nécessité d'utiliser le pouvoir de *contrôle*, reconnu par le considérant 8 du préambule de la décision-cadre sur le mandat d'arrêt européen comme compatible avec le « degré de confiance élevé » sur lequel repose l'ensemble (considérant 10). La Cour de cassation italienne écrit assez crûment dans sa décision *Ramoci* que ce pouvoir est indispensable « dans le contexte de l'adhésion progressive à l'Union européenne de pays formés sur des réalités civiles et économiques et sur des histoires politiques et institutionnelles souvent sensiblement différentes de celles qui caractérisent les pays d'Europe occidentale » [26].

La difficulté – on pourrait parler du dilemme du juge – est de *ne pas abdiquer* sa mission de garant des droits fondamentaux, tout en ne faisant pas obstacle à un programme de reconnaissance mutuelle et donc de rapprochement entre les systèmes judiciaires et juridiques européens, auquel, pour l'essentiel, il adhère. L'évaluation peut venir à son secours. Particulièrement intéressante est ici la jurisprudence de la Cour constitutionnelle allemande sur l'obligation de « veille et de correction

---

[22] Initiative de la Slovénie et de six autres pays en vue d'établir une décision-cadre dans le but de « faciliter la coopération judiciaire et la reconnaissance mutuelle de jugement par défaut » (document 5213/08), *JO*, n° C 52, 26 février 2008, p. 1.

[23] Exposé des motifs cité p. 4.

[24] Nous transposons ici la notion d'« intégration pénale indirecte » développée dans l'ouvrage du même titre sous la direction de G. GIUDICELLI-DELAGE et S. MANACORDA, Paris, Soc. de législ. comparée, 2005.

[25] Voy. la note du 7 février 2008 du secrétariat général du Conseil, COPEN 25.

[26] Arrêt du 31 janvier 2007, par. 7 (notre traduction), que l'on lit par exemple dans *Cassazione penale*, 2007, p. 1923 (suivi d'une note de E. CAVANESE). Dans cet arrêt, très proche dans sa démarche de l'arrêt *Dabas* de la Chambre des lords du mois suivant (28 février 2007, [2007] UKHL 6), la Cour de cassation revient sur sa jurisprudence antérieure et considère comme non compatible avec l'esprit de la décision-cadre d'imposer une condition matérielle telle qu'en l'espèce une limitation constitutionnelle ou légale de la détention avant jugement telle que la connaît l'Italie. La demande émanait toutefois ici de la République fédérale d'Allemagne, ce qui explique sans doute cette réserve des juges de cassation italiens.

législative » [27] ; elle consiste à « observer la loi dans son exécution et à en évaluer les effets… La Cour de Karlsruhe demande de prendre en compte les impacts incertains de la loi sur les droits fondamentaux en exigeant de recueillir de manière systématique les données pertinentes et de les apprécier dans le but d'évaluer le plus précisément possible les effets… Le législateur doit selon la doctrine recourir à la méthodologie applicable à l'évaluation *législative rétrospective* et en reprendre les critères, c'est-à-dire l'efficacité (…) l'effectivité (…) et l'efficience » [28].

Qu'en est-il de la transposition de cette jurisprudence à l'échelon supranational ? La veille est conceptuellement parfaitement admissible, mais quels seront les protagonistes ? Le traité de Lisbonne (article 69 TFUE) confie aux *parlements nationaux* la charge de « veiller (…) au respect du principe de subsidiarité ». L'article 5 du protocole sur l'application des principes de subsidiarité et de proportionnalité prévoit la rédaction d'une fiche accompagnant tout projet d'acte législatif ; cette fiche permettra d'évaluer son adéquation avec les principes susmentionnés. L'absence de violation des droits fondamentaux n'entre toutefois pas dans le champ de la proportionnalité telle que définie par les instruments de Lisbonne, et une extension de la veille dans cette direction n'est ni possible en l'état actuel des textes ni sans doute souhaitable. De son côté, la Cour de justice est-elle disposée à assumer le rôle de *garant juridictionnel*, prêt à déclencher l'alerte ? Une prévision de l'évolution de la juridiction relative aux droits fondamentaux dans le nouveau système mis en place par le traité de Lisbonne sort du cadre de cette contribution et de nos compétences. La transposition de la jurisprudence allemande sur l'obligation de veille et de correction législative relève certainement aujourd'hui d'une *utopie*, fertile certes, mais d'une utopie.

3. Objet et contenu

A. Les travaux d'évaluation réunis dans le présent ouvrage illustrent bien, dans leur diversité, les *enjeux méthodologiques* essentiels de toute démarche d'évaluation**.** Certains rapports rendent en particulier compte de la distinction entre les « deux concepts centraux » que sont l'efficacité et l'efficience [29]. C'est ainsi que le rapport luxembourgeois décrit (positivement) l'approche « multidisciplinaire » choisie par les responsables nationaux, qui a certes retardé la mise en œuvre mais paraît apte à

---

[27] Voy. en langue française la présentation de A. FLUECKIGER, « L'obligation jurisprudentielle d'évaluation législative », *op. cit.*, p. 155 s. ; en langue allemande avant tout Y. CHOI, *Die Pflicht des Gesetgebers zur Beseitigung von Gesetezmängeln*, thèse, Hambourg, 2002.

[28] A. FLUECKIGER, *op. cit.*, p. 156-157 (italiques de l'auteur).

[29] Dans l'immense littérature consacrée aux trois grands piliers conceptuels que sont l'effectivité, l'efficacité et l'efficience, on peut renvoyer à l'excellente synthèse que propose C. MINCKE, « Effets, effectivité, efficience et efficacité du droit : le pôle réaliste de la validité », *Rev. interdisc. d'ét. jur.*, 40, 1998, en particulier p. 131 et s. On ne nous en voudra pas de mentionner deux « produits régionaux » relativement pionniers dans la littérature en langue française : P. GUIBENTIF, *Les effets du droit comme objet de la sociologie juridique. Réflexions méthodologiques et perspectives de recherche*, Travaux-CETEL, n° 8, Genève, 1979 et J. F. PERRIN, *Introduction à la sociologie du droit privé*, Travaux-CETEL, n° 31, Genève, 1988, tous deux d'ailleurs amplement discutés et critiqués par MINCKE. Voir également S. DE BIOLLEY et A. WEYEMBERGH, « Conclusions », *op. cit.*, p. 225.

garantir une appréhension globale du « phénomène criminel concerné, afin de garantir la cohérence du système dans son ensemble » [30]. A l'inverse, le rapport portant sur le Royaume-Uni met en cause l'approche « essentiellement répressive », qui limite (à l'excès) les droits fondamentaux [31]. Dans le second cas, l'évaluation pointe un *décalage* possible *entre l'efficacité et l'efficience*, phénomène que la démarche suivie dans le premier cas paraît propre à prévenir.

B. L'évaluation d'un instrument de droit européen dérivé telle que la décision-cadre présente une particularité *institutionnelle* : l'instrument évalué en premier lieu est supra-national, tandis que l'évaluation proprement dite porte nécessairement, en l'état actuel du « droit constitutionnel européen », sur sa mise en œuvre à l'échelon national. Ainsi, objet (principal) de l'*évaluation* et objet (exclusif) de l'*observation* sont *dissociés*. Cette caractéristique institutionnelle se double d'une contrainte de politique juridique : l'on doit s'accommoder de la *diversité,* mais la démarche d'harmonisation *réduit* nécessairement cette diversité. Dès lors, on sera tenté d'observer un type particulier d'effets, façonné par cette particularité et cette contrainte : les « *effets systémiques* » [32].

Le droit britannique offre, en raison de sa diversité vis-à-vis des droits continentaux nettement majoritaires, les meilleurs exemples de ces effets. Le plus prévisible tient au renforcement de la « légalité formelle », liée au travail de transposition dans le droit statutaire des éléments d'incrimination contenus dans la décision-cadre [33]. De manière plus générale, la *simultanéité* plus ou moins complète du travail de transposition conduit nécessairement à un rapprochement entre les droits, que ce soit par un effet de mode ou d'imitation ou que ce soit par le travail des instances de coordination ou d'information réciproque. Toute nouvelle occasion de travail simultané entraîne un effet de rapprochement plus ou moins marqué.

4. Perspectives critiques

A. L'évaluation est essentiellement une démarche opérationnelle, et elle doit amener à des résultats. Le droit pénal européen peut à cet égard faire valoir de bons antécédents. C'est ainsi que le protocole du 16 octobre 2001 à la convention relative à l'entraide judicaire en matière pénale « s'inspire directement des conclusions du cycle

---

[30] Référence est faite ici au rapport relatif au grand-duché du Luxembourg par S. Braum et S. Khabirpour, non publié dans le présent ouvrage mais disponible sur le site du réseau ECLAN : www.eclan.eu.

[31] Voy. dans le présent ouvrage, le rapport sur le Royaume-Uni par J. Spencer et G. Gamberini. Le rapport relève toutefois également l'« effet bouclier » lié entre autres au renforcement de la sécurité juridique.

[32] Voy., dans un contexte différent, B. Perret, *L'évaluation*, *op. cit*., p. 19.

[33] Et cela même si « la transposition d'une directive ne requiert pas obligatoirement la transcription exacte dans celle-ci dans une disposition juridique expresse du droit national ; l'existence de principes juridiques généraux… peut suffire », Rapport de la Commission fondé sur l'article 11 de la décision-cadre du Conseil du 29 mai 2000 visant à renforcer par des sanctions pénales et autres la protection contre le faux-monnayage en vue de la mise en circulation de l'euro (COM (2001) 771 du 13 décembre 2001, ch. 1.2.2.3).

d'évaluation concernant l'entraide judiciaire pénale » [34]. L'évaluation doit donc être tournée vers le futur et vers l'action, cela aux fins d'éviter, comme le dit avec ironie et élégance G. de Kerchove, que « l'évaluation remplace l'action » [35]. Toutefois, pour bien maîtriser l'avenir, il faut connaître le passé. Peut-être manque-t-il parfois dans les évaluations un regard critique sur l'histoire de l'élaboration des textes. Les difficultés rencontrées dans la mise en œuvre viennent souvent de choix, implicites ou explicites faits en amont du texte officiel et définitif. L'équilibre établi alors entre expertise technique et orientations ou arbitrages politiques peut de même aider à comprendre les apparentes lacunes ou incohérences du dispositif [36].

B. Le pendant de l'« harmonisation en trompe-l'œil », selon l'expression pertinente de D. Flore [37], est l'*évaluation en trompe-l'œil.* L'une ne découle pas nécessairement de l'autre : une harmonisation imparfaite n'entraîne pas nécessairement une évaluation boiteuse, ou myope. Le flou dans les exigences de la règle d'harmonisation ne peut toutefois que favoriser des constats de conformité de complaisance. Nul objet ne présente sans doute davantage de risques à cet égard que la responsabilité (pénale) des personnes morales. Facteur indiscutable de distorsion de concurrence et source, peut-être, d'une frustration du citoyen et de la victime d'infraction, la disparité des régimes européens en la matière est depuis bien des années une cible privilégiée des efforts d'harmonisation. Celle-ci ne peut être qu'imparfaite, puisqu'à ce jour, les instances de l'Union européenne n'ont pas franchi le pas qui les amènerait à imposer un régime *pénal* de responsabilité [38]. Les normes modelées d'après le deuxième protocole de la « convention PIF » [39] prévoient par conséquent un régime de responsabilité *et* de sanction des personnes morales, mais sans trancher la question de la nature de cette responsabilité et de ces sanctions [40]. Dès lors, l'éventail de choix laissé aux législateurs nationaux est si large que l'on pourrait croire la déviance impossible. Pourtant, le rapport portugais démontre de manière exemplaire comment une transposition apparemment complète cache une impossibilité matérielle de pleine conformité, puisque, aux yeux du rapporteur, la responsabilité pénale « objective »

---

[34] G. DE KERCHOVE, « Introduction », *in* A. WEYEMBERGH et S. DE BIOLLEY (éd.), *op. cit.*, p. 15-16, voy. *JO*, n° C 216, 1er août 2001, p. 4.

[35] G. DE KERCHOVE, *ibid.*, p. 17.

[36] Nous nous sommes efforcés de suivre cette démarche globale dans P. PONCELA et R. ROTH, *La fabrique du droit des sanctions pénales au Conseil de l'Europe*, Paris, La Documentation française, 2006.

[37] Voy. par exemple D. FLORE, « La notion de confiance mutuelle : l'« alpha ou l'omega » d'une justice pénale européenne », *in* G. DE KERCHOVE et A. WEYEMBERGH (éd.), *La confiance mutuelle dans l'espace pénal européen*, Bruxelles, Editions de l'Université de Bruxelles, 2005, p. 123-124 ; ID., « Une justice pénale européenne après Amsterdam », *JTDE*, 1999, p. 122-123.

[38] Voy. entre autres A. WEYEMBERGH, *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles, Editions de l'Université de Bruxelles, 2004, p. 58.

[39] Second protocole de la convention relative à la protection des intérêts financiers des Communautés européennes (« convention PIF »), *JO*, n° C 221, 19 juillet 1997, p. 12, articles 3-4, dont la formulation est devenue le standard.

[40] Voy. articles 4-5 de la décision-cadre sous évaluation dans le présent ouvrage.

qu'il lit dans l'article 4 de la décision-cadre [41] est « inacceptable au regard de la Constitution portugaise » [42].

C. Les limites de l'exercice d'évaluation signalent peut-être celles de la structure même adoptées dans le cadre du troisième pilier, et les limites de l'harmonisation elle-même. La décision-cadre dont il est question ici relève de ce que la littérature appelle un « *programme législatif finalisé* », dans lequel le droit légal est présenté comme un instrument au service d'un programme politique, ou de politique publique [43], auquel il offre un moyen rationnel de réalisation ; l'évaluation législative est elle-même au service de la rationalisation, et en particulier de celle du langage législatif [44]. Le mécanisme de la transposition comporte le risque d'introduire de la *non-rationalité* dans le processus. Il consiste après tout à reformuler dans un langage *et* dans un langage juridique différent ce qui a déjà été exprimé ; à dire vingt-sept fois et de vingt-sept manières ce qui a déjà été dit de manière uniforme. De plus, le langage juridique initial « recourt (fréquemment) à des formulations vagues et floues », résultat de compromis politiques toujours plus complexes [45].

---

[41] La question de savoir si cette clause, qui est la clause standard que l'on retrouve depuis le deuxième protocole de la convention PIF précitée, instaure réellement une responsabilité « objective » peut être largement discutée. Le trompe-l'œil provient déjà du fait que la définition même de la responsabilité « objective » varie d'un ordre juridique à l'autre. La Cour de justice n'est à notre connaissance jamais revenue sur sa position en retrait en la matière, telle qu'établie dans son arrêt *Hansen* de 1990 (*Rec.*, p. I-2911) : dans le cadre de l'application d'un règlement (en l'espèce, règlement CEE/543/69 du 25 mars 1969), les « principes généraux de droit communautaire » ne font pas obstacle à l'application de dispositions nationales instaurant une responsabilité sans faute de l'employeur, à condition toutefois i) que la sanction prévue soit analogue à celles qui sont appliquées en cas de violation du droit national « de nature et d'importance similaire » (notions hautement indéterminées ; c'est le principe du « maïs grec » à l'envers) ; ii) que la sanction soit proportionnée à la gravité de l'infraction commise » (par. 20). En l'état actuel de la jurisprudence, à notre connaissance, l'exigence de proportionnalité ne comprend toujours pas l'exclusion de la responsabilité objective, voy. à ce sujet A. BERNARDI, *L'europeizzazione del diritto e della scienza penale*, Torino, Giappichelli, 2004, p. 26 et s. On pourrait à l'inverse considérer cette dernière comme comprise dans la formulation du règlement CE/1/2003 du 16 décembre 2002 (*JO*, n° L 1, 4 janvier 2003, p. 1), article 3, al. 2, qui réserve « les lois nationales plus strictes », s'agissant du comportement d'une entreprise contraire aux articles 81-82 du traité CE.

[42] Référence est faite ici au rapport relatif au Portugal par P. Caeiro et M. Manero de Lemos, non publié dans le présent ouvrage mais disponible sur le site du réseau ECLAN : www.eclan.eu.

[43] Voy. dans ce sens la communication de la Commission « Lutter contre la traite des êtres humains – approche intégrée et propositions en vue d'un plan d'action », COM (2005) 514 final.

[44] Voy. R. ROTH, « La politique pénale européenne est-elle une politique publique ? », *in* A. WEYEMBERGH et S. DE BIOLLEY (éd.), *op. cit.*, p. 150, qui s'appuie essentiellement pour ce point sur C.-A. MORAND, *Le droit néo-moderne des politiques publiques*, Paris, LGDJ, 1999.

[45] M. VAN DE KERCHOVE et A. WEYEMBERGH, « La transposition des normes européennes : transferts de sens et de pouvoirs », texte présenté lors du séminaire pluridisciplinaire organisé par les Facultés universitaires Saint-Louis portant sur « Le droit comme traduction », 18 février 2008.

Le « rapport final » que l'on lira ci-après illustre bien le phénomène, quand il s'efforce de mesurer *l'écart au texte* (de la décision-cadre) des incriminations nationales [46]. Parce qu'elle s'inscrivait dans un projet exclusif de coopération inter-étatique et surtout parce qu'elle avait, sous cet angle, pour objectif de contourner l'obstacle de la double incrimination, la décision-cadre sur le mandat d'arrêt européen a inauguré une technique, qui est peut-être le palliatif à l'irrationalité que l'évaluation révèle. Elle a en effet créé d'un *objet hybride*, qui n'est ni du droit supranational, ni du droit immédiatement transposable en droit national, avec la liste des trente-deux « comportements » de son article 2. On connaît les vives réactions que cette technique et son application ont suscitées sous l'angle de la sécurité du droit et du principe de légalité [47], et on sait dans quels termes, à notre sens décevants, la Cour de justice a répondu aux objections dans son arrêt *Advocaten voor de Wereld VZW* du 3 mai 2007 [48]. La technique hétérodoxe de la décision-cadre sur le mandat d'arrêt européen modifie les termes des défis de rationalité et simplifie les comparaisons en termes d'efficacité et d'efficience. Sa duplication – ou l'utilisation future de l'instrument réglementaire dans le domaine de la reconnaissance mutuelle dans l'hypothèse d'une entrée en vigueur du traité de Lisbonne – renouvellerait les aspects méthodologiques de l'évaluation.

[46] Voy., dans le présent ouvrage, le rapport final par V. SANTAMARIA et A. WEYEMBERGH.

[47] Pour une bonne synthèse de ces critiques, S. MANACORDA, « L'exception à la double incrimination et le principe de légalité », *CDE*, 2007, 1-2, p. 149 et s.

[48] Aff. C-303/05.

Combating trafficking in human beings in Belgium
Conformity of the transposition of the Council Framework Decision?

Paul De Hert and Jürgen Millen [1]

1. Introduction

The maintaining and the development of the European Union as an area of freedom, security and justice in which the free movement of persons is guaranteed, in combination with appropriate measures concerning external border controls, asylum, immigration, and prevention and combating crime, are important aims of the European Union. The FD of 19 July 2002 [2] on combating human trafficking has a direct impact on these general objectives of the European Union.

On the 10th of August 2005, the Belgian Parliament approved a proposition of law amending several provisions with a view to strengthening the fight against human trafficking and smuggling and against practices of rackrent landlords in the Belgian Criminal Code (hereafter CC) [3].

---

[1] The authors would like to thank Karen Weis (Vrije Universiteit Brussel).

[2] Council FD of 19 July 2002 on combating trafficking in human beings, *OJ*, No. L 203, 1, hereafter "the FD".

[3] Act of 10 August 2005 amending several provisions with a view to strengthening the fight against trafficking in human beings and smuggling of human beings and against practices of rackrent landlords into the Belgian CC, *MB*, 2 September 2005 hereafter: the 2005 Act) and the Act of 15 December 1980 concerning the access to the territory, the stay, the establishment and the disposal of foreigners (hereafter: the Immigration Act of 15 December 1980) (*MB*, 31 December 1980). See in general about the evolution of the Belgian legislation concerning the fight of trafficking in human beings: G. Coene, "Mensensmokkel en mensenhandel", *in Het Belgisch asielbeleid. Kritische perspectieven*, p. 73-102; Centre pour l'egalite des chances et la lutte contre le racisme, *La loi du 13 avril 1995 contenant des dispositions en vue de la répression de la traite des êtres humains et de la pornographie enfantine: jurisprudence*, Bruxelles, Centre pour l'égalité des chances et la lutte contre le racisme, 2002, p. 458; Centrum

In the preparatory documents of the 2005 Act explicit reference was made to the above mentioned FD which requires every Member State to "take the necessary measures to ensure that human trafficking and smuggling are punishable" [4].

In this contribution, the conformity of the FD with Belgian national law will be examined, after having introduced the reader in the legal framework concerning traffic in human beings, both national and international. We will also discuss cases of human trafficking and smuggling that were brought before the Belgian courts and these cases show how the Belgian law is applied in practice.

2. The international legal framework

In order to fight human trafficking and smuggling, Belgium has signed, ratified and implemented international, regional and bilateral instruments that directly or indirectly contribute to the fight against these crimes.

Belgium has signed and ratified several United Nations instruments to prevent, suppress and punish trafficking of persons: (1) the United Nations Convention against Transnational Organized Crime [5], (2) the Protocol to Prevent, Suppress and Punish

---

VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING, *Het Belgisch mensenhandelbeleid: gewikt en gewogen*, Brussel, Centrum voor gelijkheid van kansen en voor racismebestrijding, 2005; F. GOOSSENS, "De strijd tegen de mensenhandel en de huisjesmelkerij vertaald in het Strafwetboek", *TVW*, 10, 2005, p. 411-413; I. AENDENBOOM, "Nieuwe wetsbepalingen tot versterking van de strijd tegen mensenhandel en mensensmokkel. Een overzicht in vogelvlucht", *T. Vreemd.*, 4, 2005, p. 340-344; M.-A. BEERNAERT, P. LE COCQ, "La loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil", *RDPC*, 2006, p. 335-406 ; G. VERMEULEN en F. DHONDT,"België als voortrekker in de internationale strijd tegen mensenhandel en -smokkel. Een nadere analyse van de bestaande regelgeving en de vernieuwingen n.a.v. de wet van 10 augustus 2005 ter versterking van de strijd tegen mensenhandel en -smokkel", *in XXXIIe Postuniversitaire cyclus Willy Delva, Strafrecht & Strafprocesrecht*, 2006; C. HUBERTS, "Les innovations de la loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite des êtres humains et contre les pratiques des marchands de sommeil", *JDJ*, 2006, p. 6-22; E. VAN DEN HERREWEGEN, L. VAN PUYENBROECK & G. VERMEULEN, *Mensenhandel in beeld: eerste kwantitatieve en kwalitatieve analyse van Belgische slachtofferdata*, Antwerpen, Maklu, 2007; I. AENDENBOOM, "Nieuwe bepalingen inzake verblijfsregeling voor slachtoffers mensenhandel en mensensmokkel, een stap naar meer rechtszekerheid?", *in Migratie- en migrantenrecht. Recente ontwikkelingen. Deel 12*; I. AENDENBOOM, "Van doe-het-zelver tot designer? Aanpassingen verblijfsregeling slachtoffers mensenhandel", *T. Vreemd*, 2007, p. 85-92.

[4] The Act also implemented other international instruments for suppression of trafficking in human beings and smuggling of human beings: the United Nations Convention against Transnational Organized Crime; the Protocol to prevent, suppress and punish trafficking in persons, especially women and children and the Protocol against the smuggling of migrants by land, sea and air. See also J.-S. JAMART, "Le protocole des Nations unies contre le trafic de migrants par terre, air et mer, additionnel à la Convention des Nations unies contre la criminalité transnationale organisée", *Revue du droit des étrangers*, 111, 2000, p. 633-647.

[5] New York, 15 November 2000, signed by Belgium on 12 December 2000 and ratified by Belgium on 11 August 2004. See also http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html.

Trafficking of Persons, especially Woman and Children, supplementing the United Nations Convention against Transnational Organized Crime [6] and (3) the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime [7].

Belgium also signed bilateral agreements (ratified by the Belgian Parliament), in order to improve the cooperation between the police forces of the different States and to improve the fight against human trafficking and smuggling [8].

Next to these international and bilateral instruments, Belgium has implemented several European Union measures that are related to human trafficking and were adopted in the framework of the third pillar [9].

---

[6] *Ibid.*

[7] *Ibid.*

[8] Each of the bilateral agreements has been ratified by the Belgian Parliament and published in the Belgian Official Journal (*MB*):

- Act of May 2005 concerning the approval of the Treaty between the government of the kingdom Belgium and the government of the republic Lithuania concerning the police force amen functioning, signed in Vilnius on 19 November 2003;
- Act of 13 January 2005 concerning the approval of the Treaty between the government of the kingdom Belgium and the government of the republic Latvia concerning the police force amen functioning, signed in Brussels on 16 October 2001;
- Act of 13 January 2005 concerning the approval of the Treaty between the government of the kingdom Belgium and the government of the republic Latvia concerning the police force amen functioning, signed in Brussels on 16 October 2001;
- Act of 13 May 2003 concerning approval of the Treaty between the government of the kingdom Belgium and the government of the republic Poland concerning combating crime, signed in Brussels on 13 November 2000;
- Act of 7 October 2002 concerning the approval of: 1) Treaty signed between the government of the kingdom Belgium and the government of the republic Bulgaria concerning police force amen functioning, signed in Oostende on 24 June 1998, 2) Protocol, signed in Sofia on 27 November 2000, concerning Article 1 of the Treaty between the government of the kingdom Belgium and the government of the republic Bulgaria concerning police force amen functioning, in Oostende, Belgium, on 24 June 1998;
- Act of 12 July 2002 concerning the approval of the Treaty between the government of the kingdom Belgium and the government of the republic Slovakia concerning police force amen functioning, signed in Brussels on 29 June 2000;
- Act of 12 July 2002 concerning the approval of the agreement between the government of the kingdom Belgium and the government of the Federal Republic of Germany concerning the cooperation of the police forces and the customs authorities administrations in the border areas, signed in Brussels on 27 March 2000;
- Act of 27 May 2002 concerning approval of the Treaty between the government of the kingdom Belgium and the government of the republic Hungary concerning police force amen functioning and cooperation concerning combating organised crime, signed in Brussels on 4 November 1998.

[9] The European Union's third pillar contains provisions on police and judicial cooperation in criminal matters (Title VI TEU). This pillar works in a more intergovernmental way, for example unanimity is required, the Commission needs to share the right of initiative with the Member States, the European Parliament is only consulted and the European Court of Justice's

The Joint Action of 24 February 1997 concerning the action to combat human trafficking and sexual exploitation of children [10] was the first EU instrument in the common fight against human trafficking and smuggling. This joint action was followed by the FD of 19 July 2002 on combating trafficking in human beings and the FD of 22 December 2003 on combating the sexual exploitation of children and child pornography.

In 2004 the European Community enacted a Directive [11] on the residence permit issued to third country nationals, who are victims of human trafficking or have been the subject of an action to facilitate illegal immigration, at least when they cooperate with the competent authorities [12]. This Directive introduced a residence permit intended for victims of human trafficking or, if a Member State decides to extend the scope of this Directive, for third-country nationals. The Directive was implemented by the Act of 15 September 2006 amending the Immigration Act of 15 December 1980 [13].

Next to the specific Treaties and instruments on the crime itself, trafficking and smuggling of human beings often involve serious violations of fundamental human rights. These rights are protected by the International Covenant on Civil and Political Rights, as well as by the European Convention on Human Rights, which have direct effect in the Belgian legal order.

3. The Belgian implementation of the FD

Belgium chose criminal law to implement the FD [14]. This is not a surprise, seen the fact that human trafficking already was a crime in Belgium before the birth of the FD.

---

authority is restricted. Article 34, 2 (b) TEU gives the Council the competence to approximate the criminal laws of the Member States through FDs, as is done in this case.

[10] *OJ*, No. L 63, 4 March 1997. See also http://europa.eu/scadplus/leg/en/lvb/l33072.htm.

[11] In Maastricht the EU Treaty was introduced. This treaty contained a title VI on cooperation in the field of justice and home affairs. With the Treaty of Amsterdam the content of that title was divided in 2 parts: the part that was transferred to the first pillar (Title IV of the EC Treaty) and the part that was kept in Title VI of the EU Treaty and thus remained in the third pillar. The first pillar of the EU is the supranational pillar, which can be found in the EC Treaty. The framework in which this Directive was taken can be found in Title IV of that EC Treaty created at Amsterdam: "Visas, asylum, immigration and other policies related to free movement of persons". The policy on human trafficking and smuggling is drawn up in both pillars, and because of that a Directive and a FD were drawn up.

[12] 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*, No. L 261, 6 August 2004, p. 19-23.

[13] *MB*, 6 October 2006, see also *infra*.

[14] J. E. B. Coster Van Voorhout, "Human trafficking for labour exploitation: Interpreting the crime", *Utrecht Law Review*, 3/2, 2007, p. 51 (http://www.utrechtlawreview.org/publish/articles/000045/article.pdf). For more general descriptions of Belgium criminal law, see M. Franchimont, A. Jacobs & A. Masset, *Manuel de procédure pénale*, Brussels, De Boeck & Larcier, 2006; C. Van Den Wyngaert with assistance of S. Vandromme, *Strafrecht, strafprocesrecht en internationaal strafrecht*, Antwerp, Maklu, 2006; L. Dupont & C. Fijnaut (ed.), *International Encyclopedia of Laws: Criminal Law*, Deventer, Kluwer Law International,

Originally smuggling, as well as trafficking in human beings, was criminalized through Article 77*bis* of the Immigration Act of 15 December 1980 [15]. Afterwards a specific incrimination for human trafficking was introduced by the Act of 13 April 1995 [16].

These legal instruments were adopted after the publication of the book "*Ze zijn zo lief, meneer*" by the Belgian journalist Chris De Stoop [17]. The research conclusion, that there was no strategy in Belgium to combat human trafficking and that the victims did not receive any support whatsoever, shocked the public opinion as well as the Belgian politicians [18]. The Belgian parliament decided to appoint a Parliamentary Research Commission in order to examine how the fight against trafficking in human beings and the support of victims was organized in Belgium. The results of the Commission's investigations confirmed the observations of De Stoop, namely that there was no policy to fight human trafficking and that a system to help the victims did not exist. Structural recommendations were addressed to the Belgian government and Parliament in order to correct such a lacunae.

As a result of these societal and institutional developments, the Act of 13 April 1995 concerning the suppression of human trafficking and child pornography amended the CC ; the Act of 13 April 1995 concerning provisions to suppress human trafficking and smuggling integrated also human trafficking as a crime in the Immigration Act of 15 December 1980.These changes were followed by slight modifications introduced in order to transpose the FD of 2002.

For a good understanding of the Belgian criminal law system, some remarks on the Criminal Code must be made before we start comparing the FD with the Belgian CC.

Criminal offences are divided into three categories, which are defined by reference to their corresponding penalties [19]. This statutory triple division distinguishes (Article 1 CC) between:

– crimes (*misdaden* or *crimes*) sanctioned by criminal penalties (detention for a period longer than 5 years and fines higher than 26 euros);

1992, Chapter on Belgium; B. Pesquié (supervised by F. Tulkens, revised by Y. Cartuyvels), "Belgian system" *in* M. Delmas-Marty & J.R. Spencer, *European criminal procedures*, Cambridge, Cambridge UP, 2005, p. 81-141.

[15] Articles 77-77*sexies* of this Act.

[16] Act of 13 April 1995 concerning provisions to suppress trafficking in human beings and smuggling of human beings, *MB*, 25 April 1995, err. 17 June 1995 and 6 July 2005. This Act defined trafficking of human beings as (1) the crimes that are described in the Article 77*bis* of the Immigration Act of 15 December 1980 and (2) the crimes of prostitution that were mentioned in the CC. For a critical analysis of these bills, see F. Deruyck & A. De Nauw, "Belgique. Le droit pénal spécial belge à l'épreuve du crime organisé", *RIDP*, 1998, p. 192-212.

[17] Translation: "They are so sweet, sir". C. De Stoop, *Ze zijn zo lief, meneer*, Amsterdam, De Bezige Bij, 1992.

[18] For details about the societal context of Belgian law: L. Stevens & M. Hooghe, "The swing of the pendulum: the detraditionalisation of the regulation of sexuality and intimacy in Belgium (1973-2003)", *International Journal of the Sociology of Law*, 31/2, 2003, p. 131-151.

[19] L. Dupont & C. Fijnaut, *op. cit.*, p. 102.

– misdemeanours (*wanbedrijven* or *délits*) sanctioned by "correctional" penalties (detention for a period between 8 days and 5 years, fines higher than 26 euros and community service for 46-300 hours);
– contraventions (*overtredingen* or *contraventions*) sanctioned by police penalties (detention for a period between 1 and 7 days, fines between 1 and 25 euros and community service for 20-45 hours).

According to the findings (aggravating circumstances or not) [20] penalties will either belong to the category of crimes, misdemeanours or contraventions.

4. Conformity of the transposition of the Council FD of 19 July 2002 [21]

A. The incrimination of trafficking in human beings (Articles 1 and 2 FD)

The 2005 Act, amending several provisions with a view to strengthening the fight against human trafficking and smuggling and against practices of rackrent landlords, amended the pre-existing legal framework in three regards:

– the crime of human trafficking was taken out of Article 77*bis* of the Immigration Act of 15 December 1980 and was moved to a newly created Article 433*quinquies* in the CC. Article 77*bis* of the Immigration Act of 15 December 1980 was rewritten and is now limited to the crime of smuggling of non-EU citizens into EU-territory [22];
– the crime of human trafficking shifted to Article 433*quinquies* of the CC is no longer limited to foreigners (as was the case with the crime of human trafficking in the original Article 77*bis* of the Immigration Act), but is now applicable to every person who could be considered a victim of human trafficking;
– in line with Article 1 of the FD, the crime of human trafficking is no longer limited to sexual exploitation, but becomes also applicable to economic exploitation.

The FD foresees that every Member State shall take the necessary measures to declare illegal the recruitment, transportation, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where payments or

---

[20] According to the general provisions of the CC on extenuating and aggravating circumstances, the judge may take various factors into account in determining the penalty (OECD, *Belgium: Phase 2*, Organisation for Economic Cooperation and Development 40).

[21] Most of the general descriptions of the Belgian criminal system *below* are based on electronic sources available on the Internet. In particular we made use of the following reports: OECD, *Belgium: Phase 1: Report on Implementation of the OECD Anti-Bribery Convention*, 27 June 2000 (http://www.oecd.org/dataoecd/13/7/2385130.pdf ; OECD Directorate For Financial And Enterprise Affairs); *Belgium: Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 10 October 2005 (http://www.oecd.org/dataoecd/59/8/35461651.pdf); B. Demeyere, "Survey Response, Laws of Belgium", *in Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions*, Fafo AIS, 2006, p. 42, http://www.fafo.no/liabilities/CCCSurveyBelgium06Sep2006.pdf; G. Stessens, "Belgium", *RIDP*, 2003, p. 133-147 (via http://www.cairn.info/article_p.php?ID_ARTICLE=RIDP_741_0133).

[22] See P. Herbots, "Europese rechtsruimte voor mensensmokkel", *Juristenkrant*, 12 maart 2008, p. 4-5.

benefits are given or received to achieve the consent of a person having control over another person [23].

In Article 433*quinquies*, para. 1 of the Belgian CC, human trafficking has been *defined* as the recruitment, the transportation, the transfer, the harbouring, the subsequent reception of a person, the exchange or transfer of control over that person, in order to use this person for prostitution (Article 433 *quinquies*, para. 1, 1°), for exploitation of begging (Article 433*quinquies*, para. 1, 2°), to employ this person or have him employed in circumstances which are contrary to human dignity (Article 433*quinquies*, para. 1 3°), to take away human organs from that person [24] (Article 433*quinquies*, para. 1, 4°) or to force a person against his will to commit a crime [25] (Article 433*quinquies*, para. 1, 5°). Article 433*quinquies*, para. 1 *in fine* goes on saying that consent will never be taken into account, unless in the case of Article 433*quinquies*, para. 1, 5°.

This definition of human trafficking in Article 433*quinquies* is wider than the FD's definition :

- reference is made to the removal of human organs in Article 433*quinquies*, para. 1, 4°. It is not clear from the text of the FD whether the removal of human organs falls under the FD's definition of human trafficking for labour exploitation [26];

---

[23] See Article 1, para. 1, d FD of 19 July 2002 on combating trafficking in human beings.

[24] See H. Nys, "Geneeskunde en medisch handel", *Algemene Praktische Rechtsverzameling*, 1991, p. 345-384; T. Goorden, "Trafic d'organes au cœur de l'Europe", *Le Journal du médecin*, 2003, p. 12 ; L. Cerulis, *Orgaanhandel: een exploratieve studie van het fenomeen*, KULeuven, Faculteit der rechtsgeleerdheid, 2006, p. 171.

[25] In the preparatory activities of the Act of 10 August 2005 for transposition of the FD reference is made to the French law in which is referred to the fact that trafficking in human beings sometimes goes together with the use of victims of trafficking in human beings for drug trafficking and robberies. See p. 20 of the proposition of Act of 10 August 2005, http://www.dekamer.be/FLWB/pdf/51/1560/51K1560001.pdf.

[26] In contrast to the FD, the Council of Europe Convention of 16 May 2005 on Action against trafficking in human beings foresees that the removal of organs falls under the definition of human trafficking. Article 4a of this convention states: "a trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. See also http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm. Also the Protocol of 15 November 2000 to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime foresees in Article 3 that the removal of organs falls under the definition of human trafficking. The Article 3 of this convention says: "trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum,

– other types of behaviour, absent in the FD are criminalised. Article 433*quinquies*, para. 1 also includes exploitation of begging and coercion to commit a crime or offence, acts that are not mentioned in the FD. In these cases it is required that the person is employed "in conditions incompatible with human dignity" [27];
– Article 433*quinquies*, para. 1 uses as a generic reference the terms "human trafficking", whereas the FD focuses on offences "concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation" (see Article 1 FD);
– the requirement in the FD about the means of payment or benefit, that are given or received to achieve "consent or control", is not mentioned in the Belgian CC [28].

In the FD certain acts, such as recruitment, transportation and transfer of persons, are only punishable when certain means defined in Article 1, para. 1 (a) to (d) are used. These means that make human trafficking an offence in the FD can be found in Article 433*quinquies* and Article 433*septies* CC [29], be it in an unexpected way: the use of coercion, force and threat, including abduction (Article 1, para. 1, (a) FD), the use of deceit or fraud (Article 1, para. 1, (a) FD), the abuse of authority or of a position of vulnerability so that the person has no real and acceptable alternative but to submit to the abuse (Article 1, para. 1, (c) FD), are not constituent elements of the offence of human trafficking in the Belgian CC, but they are aggravating circumstances.

Consequently, whereas Article 1, para. 3 FD distinguishes between, on the one hand, trafficking involving adults – punishable if one of the above mentioned means has been used (coercion, force or threat, etc.) – and, on the other hand, trafficking involving minors – punishable even if none of the means set forth have been used, according to Article 433*quinquies* CC, the crime of trafficking is punishable even when none of these means has been used towards an adult victim. When the crime of

---

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.

[27] J.E.B. Coster Van Voorhout, *op. cit.*, p. 51.

[28] See http://www.dekamer.be/FLWB/pdf/51/1560/51K1560001.pdf.

[29] – The requirement of *use of coercion, force and threat, including abduction as well as the use of deceit or fraud* (Article 1, para. 1, (a) and (b) FD) can be found in Article 433*septies*, 3° of the Belgian CC.

– The requirement *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* (Article 1, para. 1 (c) FD) can be found in Article 433*septies* 2° of the Belgian CC. In this provision "the position of vulnerability" is clarified as the position in which a person can be found as a result of his illegitimate or precarious administrative situation, of his/her precarious social situation or as a result of pregnancy, sickness or physical or mental lack or deficiency.

– The requirement *payments or benefits given or received to achieve the consent of a person who has the 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 prostitution* (Article 1, para. 1 (d) of the FD) is incorporated in Article 433*quinquies*, para. 1 of the Belgian CC.

human trafficking involves a minor, the use of force and other means is also considered as an aggravating circumstance in Belgian law [30].

The first three aggravating circumstances are thus transposed in Article 433*septies* CC [31]. The fourth aggravating circumstance, trafficking committed within the framework of a criminal organisation (Article 3, para. 2 (d) FD), is transposed in Article 433*octies* [32].

In Belgian criminal law, the aiding or abetting to commit an offence can also be placed within the framework of an association aiming to commit an attack on persons or properties [33] or in the framework of a criminal organisation [34]. The Belgian CC considers human trafficking within the framework of a criminal organisation (Articles 322-324 Belgian CC) or within an association aiming to commit an attack on properties or persons (Articles 324*bis* and 324*ter* Belgian CC) an aggravating circumstance. Regarding penalties, the Belgian CC makes no distinction between the person who is

---

[30] For example, the prostitution of an adult can be punished with a prison sentence between one and five years (Article 433*quinquies*, para. 2 Belgian CC), while the prostitution of a minor can be punished with a prison sentence between ten and fifteen years (Article 433*septies* Belgian CC).

[31] – The aggravating circumstance that the trafficking in human beings has deliberately or by gross negligence endangered the life of the victim (Article 3, para. 2a FD) can be found in Article 433*septies*, 4° of the Belgian CC.

- The aggravating circumstance that the trafficking of human beings has been committed against a victim who was particularly vulnerable (Article 3, para. 2b of the FD) can be found in Article 433*septies*, 2° of the Belgian CC. Article 3, para. 2b FD does not give an exhaustive definition of a vulnerable victim but does contain a kind of bottom definition of "particularly vulnerable". This is the case when "at least" the victim is under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography. The terms "at least" are again not exhaustive. The Belgian CC describes the vulnerable position of a person in a much broader way: it is the position in which a person finds oneself, as a result of his/her illegitimate or precarious administrative situation, of his/her precarious social situation or as a result of pregnancy, sickness or a physical or mental deficiency, in such a situation that he/she cannot make a real and acceptable choice than to be abused for prostitution or for exploitation by begging or working in circumstances which are contrary with human dignity or by taking away from that person her/his organs or by forcing him/her to commit a crime against his/her will. Consequently, the "vulnerable position" in Belgian law is not limited to sexual exploitation, but includes every form of exploitation.
- The aggravating circumstance that the offence has been committed by use of serious violence or has caused particularly serious harm to the victim (Article 3, para. 2c of the FD) is transposed in Article 433*septies*, 5° of the Belgian CC.

[32] When the crime of trafficking in human beings is committed by a member of a criminal organisation, the prison sentence as well as the fine are higher than in case of the first three aggravating circumstances transposed in Article 433*septies* of the Belgian CC and punished by a sentence from ten up to 15 years imprisonment: when this fourth aggravating circumstance is realized, the offence is punishable with a prison sentence from fifteen up to twenty years (Article 433*octies*).

[33] Articles 322-324 Belgian CC.

[34] Articles 324*bis*-*ter* Belgian CC.

the leader of this criminal organisation or association and the person who is aiding or abetting to commit this crime within this criminal organisation or association.

Article 2 FD demands for necessary measures to ensure that the attempt to commit a trafficking offence is punishable.

In Belgian law the attempt to commit a criminal offence or misdemeanour is covered by Articles 51, 52 and 53 CC. "There is punishable attempt when the intent to commit a criminal offence or misdemeanour has been demonstrated by outward acts that constitute a first step towards committing this offence, and which were only stopped or only proved ineffective due to circumstances beyond the author's control" (Article 51 CC). Article 52 contains a general rule for the attempt to commit a crime: this kind of attempt is punished by the penalty directly below that imposed for the offence itself. "Attempt" to commit a misdemeanour must be provided for in legislation (Article 53 CC). The attempt to commit the offence of trafficking in human beings is punishable according to Article 433*quinquies*, para. 3 of the Belgian CC, namely by a prison sentence of one up to five years and a fine of five hundred up to ten thousand euro. This is in accordance with the requirements of the FD.

Article 2 FD also demands for necessary measures to ensure that the instigation, aiding or abetting to commit a trafficking offence is punishable.

Complicity, including incitement, aiding and abetting, or authorisation of an act of trafficking, is covered by Articles 66 and 67 CC on co-authors and accomplices [35]. Co-authors receive the same punishment as authors of an offence (Article 66), while accomplices to a crime are punished by the penalty immediately below that they would have received if they had been the authors of the offence (Article 69). Accomplices of a misdemeanour receive a penalty not exceeding two-thirds of the penalty that they would have received if they had been the authors of the offence. Participation in a contravention is not punishable under Belgian law. Again, the Belgian law is in accordance with the demands of the FD since all the offences contained in the FD are either crimes or misdemeanours in Belgian law.

---

[35] We rely on OECD, *Belgium: Phase 1, op. cit.*, p. 6-7; B. Demeyere, *op. cit.*, p. 16-19. Article 66 of the CC establishes that "the following shall be punished as the authors of a criminal offence or misdemeanour: (i) anyone who has committed the offence or directly co-operated in committing it; (ii) anyone who has in any way aided or abetted those committing the offence, if without their assistance it could not have been committed; (iii) anyone who, through gifts, promises, threats, misuse of authority or power, plots or deception, has directly caused the offence; (iv) anyone who, through what they have said in meetings or public places, or what they have written or published or through any kinds of pictures or symbols posted, distributed or sold, placed on sale or put on public view, has directly caused the offence to be committed, without prejudice to the penalties imposed by law upon those who incite others to commit crimes or offences, even if this incitement is without effect". As for Article 67 CC, it provides that "the following shall be punished as accomplices to a criminal offence or misdemeanour: (i) anyone who has given instructions to commit the offence; (ii) anyone who has procured arms, tools, or any other means used to commit the offence, with full knowledge that they would be used for that purpose; (iii) anyone who, apart from the cases provided for under paragraph 3 of Article 66, has knowingly aided or abetted the author or authors of the offence in preparing, facilitating or committing the offence".

B. The sanctions for natural and legal persons (Articles 3-5 FD)

In order to punish trafficking and smuggling in the most effective and appropriate way, the Belgian legislator has made a provision for different sanctions, both in the CC and in the Immigration Act of 15 December 1980. The courts can punish these crimes committed by a person with one or more of the following sanctions: prison sentence, a fine, deprivation of political and civil rights [36] and confiscation [37]. The FD asks the Member States to ensure that the crime of human trafficking is punishable by effective, proportionate and dissuasive criminal penalties [38]. This is certainly the case.

A *natural person* who commits one of the offences enumerated in Article 433*quinquies*, para. 1 can be convicted to a prison sentence of one up to five years and a fine of five hundred up to fifty thousand euro (Article 433*quinquies*, para. 2 of the Belgian CC). When the aggravating circumstances listed in Article 433*septies* apply, penalties rise: prison sentences from ten to fifteen years and fines from thousand Euros to hundred thousand Euros [39].

As a result of the Act of 4 May 1999 introducing the criminal responsibility of legal persons (published in the *MB* of 22 June 1999 and entered into force on 2 July 1999), the Belgian CC provides, in its Article 5, for the criminal liability of private *legal persons* [40]. This provision states that the criminal responsibility of a legal person for offences requires that these offences have an intrinsic link with the realisation of the aim or the perception of the interests of this legal person, or that these offences have been committed at its expense [41].

---

[36] See Article 433*novies* Belgian CC and Article 77*sexies* of the Act of 15 December 1980 concerning the access to the territory, the stay, the establishment and the disposal of foreigners.

[37] Article 7*bis* Belgian CC.

[38] Article 3, 1 FD.

[39] Article 433*septies* Belgian CC.

[40] Zie alg. G. STESSENS, "De bestraffing van rechtspersonen", *in Bestendig Handboek Vennootschap & Aansprakelijkheid*, Kluwer, Mechelen, losbl., z.p.; S. VAN GARSSE, *De strafrechtelijke verantwoordelijkheid van publiekrechtelijke rechtspersonen*, *CDPK*, 2000, p. 347-359; S. COISNE and P. WAETERINCKX, "La sauvegarde des droits de la défense d'une personne morale, son droit au silence et le mandataire ad hoc comme garant de ces droits", *in* M. NIHOUL (dir.), *La responsabilité pénale des personnes morales en Belgique*, La Charte, 2004, 309-364; M. FAURE, "La responsabilité pénale des personnes morales: regard sur la jurisprudence", *Amén.*, 2004, 129-163 ; L. BIHAIN, "Responsablité pénale des personnes morales. Petite synthèse cinq ans après l'entrée en vigueur", *JLMB*, 2004, p. 1752-1765; P. WAETERINCKX, "De autonome strafrechtelijke verantwoordelijkheid van de rechtspersoon en de samenloop van de strafrechtelijke verantwoordelijkheid van de rechtspersoon met deze van de natuurlijke persoon (Article 5 lid 2 Sw.). "A never ending story" – De gecombineerde toepassing van de eendaadse samenloop/eenheid van opzet", *T. Strafr.*, 2005, p. 461-472.

[41] Article 5 CC states that "any legal person is criminally liable for offences which are intrinsically linked to the achievement of its purpose or to the defence of its interests or for offences on whose behalf the facts show they were committed. When a legal person is liable solely because of the intervention of an identified natural person, only the person who committed the more serious fault may be convicted. If the identified natural person committed the fault

This Article has a broad scope. Article 5, para. 3 expressly stipulates that the following economic actors are to be equated with legal persons (which are in any event subject to criminal liability), even though domestic law does not necessarily grant them legal personality, for example temporary associations and joint ventures, companies referred to in Article 2, para. 3 of the co-ordinated Acts on commercial companies [42], as well as companies which are in the process of being established and civil partnerships which have not been constituted as a commercial company. Hence, many types of economic actors can be held criminally liable, "legal personality" not necessarily being a prerequisite [43].

Article 5 of the CC also has a broad scope *rationae materiae*. It covers, in principle, all offences irrespective of whether they require intention or not. For offences requiring intent it is possible for both individuals and legal persons to be jointly or separately liable: both an individual and a legal person might be liable, or one of them could be liable while the other is not [44].

In contrast to Article 5 of the Belgian CC, the FD of 19 July 2002 foresees that a legal person can only be held responsible when the indictable offence of trafficking in human beings has been committed to the advantage of this legal person and by a person with a leading function and who is an organ of this legal person [45]. The Belgian CC does not require that the person is an organ of the legal person or that he has a leading function. Also Article 5 of the Belgian CC does not foresee that the indictable offence has to be committed to the advantage of this legal person. The Code does not identify the persons or entities through whose acts the legal person can be held liable, the only element required is a link between the offence and the enterprise. As the author of the Bill pointed out in the travaux préparatoires "it was not thought necessary to identify the individuals or bodies through whose acts the legal person might be held liable" [46].

So the Belgian CC foresees in a wider criminal responsibility for legal persons than the FD.

---

knowingly and voluntarily, he/she can be convicted at the same time as the legal person that is liable.

The following are deemed to be legal persons:

1° momentary associations and associations in which one or more persons have an interest in operations managed by other persons in their own name;

2° companies referred to under Article 2, para. 3 of the coordinated regulations on commercial companies, as well as commercial companies in the process of incorporation;

3° companies or partnerships regulated by the Civil Code that have not taken the form of companies or partnerships regulated by the Commercial Code".

[42] Viz, agricultural companies, governed by Book XIII of the Belgian Company Code (Articles 789-838).

[43] B. Demeyere, *op. cit.*, p. 7.

[44] OECD, *Belgium: Phase 2*, *op. cit.*, p. 37.

[45] Article 4, para. 1 FD.

[46] OECD, *Belgium: Phase 2*, *op. cit.*, p. 37 with reference to the introductory statement by the author of the draft law, *Rapport de la Commission de la Justice du Sénat*, *Doc. parl.*, Senate, 1998-99, No. 1217/6. More in detail, see OECD, *Belgium: Phase 1*, *op. cit.*, p. 7-8.

The Belgian CC provides in its Article 7*bis* the following sentences for any private legal person who commits an offence: fines (Articles 7*bis* and 41*bis* of the Belgian CC), confiscation (Articles 42-43*quater* of the Belgian CC), dissolution of the legal person (Article 7*bis* of the Belgian CC), prohibition of any activity falling within its social aim with exception of activities belonging to tasks of public service (Article 7*bis* of the Belgian CC) and fence of one or more institutions with exception of the institutions where activities are performed which belong to a task of public service (Article7*bis* of the Belgian CC) [47]. Next to this Article 7*bis*, Article 433*novies* of the Code provides the possibility for Belgian courts to close temporarily or definitely a legal person without taking into account the quality of the person or legal person as a manager, owner or tenant of a venture. In literature, it is rightly mentioned that in the Belgian legal practice, penalties are determined in light of the circumstances surrounding the offence and the personal characteristics of the offenders [48]. The judge can take various factors into account in determining the penalty and conclude that extenuating or aggravating circumstances exist, also in the case of legal persons [49]. A legal person may also obtain, like a natural person, in accordance with the probation Act of 29 June 1964, a suspended or deferred sentence (Article 18 of the Act) [50].

These sanctions can be seen as effective, proportionate and dissuasive sanctions as asked for in the FD of 19 July 2002.

Article 4, para. 4 of the FD excludes from the scope of Article 4 “States or other public bodies in the exercise of State authority and for public international organisations”.

Article 5 of the Belgian CC excludes from criminal liability a number of legal persons all of which belong to public law or political sphere, and which thus benefit from criminal immunity in front of Belgian courts, namely the federal State of Belgium, the regions, the communities, the provinces, the agglomeration of Brussels, the communes, intra-communal territorial bodies, the French Community Commission, the Flemish Community Commission, the Joint Community Commission and the communal public welfare centres.

In essence, this means that virtually all public authorities are immune to criminal prosecution, and that only a civil law suit could potentially be introduced against this type of defendants. Contrary to what the FD seems to suggest in its Article 4, para. 4, nothing in Belgian law seems to prevent a civil lawsuit against the State and its authorities [51].

C. (Universal) jurisdiction and prosecution (Article 6 FD)

In Belgium, human trafficking constitutes an extraditable offence pursuant to four types of legal instruments, namely:

---

[47] More in detail, see OECD, *Belgium: Phase 1*, *op. cit.*, p. 6-7; B. Demeyere, *op. cit.*, p. 7-10.

[48] OECD, *Belgium: Phase 2*, *op. cit.*, p. 40.

[49] *Ibid.*

[50] *Ibid.*

[51] B. Demeyere, *op. cit.*, p. 7.

(1) the Belgian Extradition Act of 15 March 1874 [52], which provides that extradition may be allowed for acts punishable, under Belgian and foreign legislation, by a penalty entailing deprivation of liberty for at least one year;
(2) the European Convention on Extradition of 13 December 1957, that in Article 2 lays down that extradition may be allowed for acts punishable by a penalty entailing deprivation of liberty for at least one year, on the condition that the maximum penalty provided for in the other State is at least one year;
(3) the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others which lays down in Article 8 that the offences referred to in Articles 1 and 2 of that Convention shall be regarded as extraditable offences in any extradition treaty that has been or may be concluded between any of the Parties to this Convention [53];
(4) bilateral extradition treaties signed with 20 States [54].

All of these conventions and bilateral extradition treaties require the fulfilment of the condition of dual criminality [55].

Under Section 1 of the Extradition Act of 15 March 1874, no Belgian national may be extradited to a foreign country. In that case the competent Belgian authorities will commence proceedings against the person accused of the offence, provided that the requesting Party is bound by the European Convention on Extradition or by a bilateral treaty providing for such action.

With the Act of 19 December 2003 implementing the FD on the European Arrest warrant [56] the extradition regime in Belgium was supplemented with a surrender procedure for cooperation within the EU. The Act came into effect on January 1st 2004

[52] *MB*, 17 March 1874.

[53] See Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, New York, 21 March 1951, signed by Belgium on 21 March 1965 and ratified on 6 May 1965. Articles 1 and 2 describe the following offences:
- Article 1. The parties to the present convention agree to punish any person who, to gratify the passions of another: (1) procures, entices or leads away, for the purpose of prostitution, another person, even with the consent of that person; (2) exploits the prostitution of another person, even with the consent of that person.
- Article 2. The parties to the present convention agree to punish any person who: (1) keeps or manages, or knowingly finances or takes part in the financing of a brothel; (2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.

[54] OECD, *Belgium: Phase 1*, *op. cit.*, p. 17-18. See also: G. Stessens, *op. cit.*, p. 133-147, sub 30.

[55] See amongst others the Belgium reservation re Article 2, para. 1, of the 1957 European Convention on Extradition.

[56] Act of 19 December 2003 concerning the arrest warrant, *MB*, 22 December 2003, 60075-60100. See G. Stessens, "Het Europees aanhoudingsbevel", *RW*, 2004-2005, p. 561-581; V. Franssen, "Het Europees aanhoudingsbevel gered, hoera?", *RW*, 2007-2008, p. 1138-1145; A. Braem & B. Bilquin, "Le mandat d'arrêt européen. Un instrument majeur de la coopération judiciaire et policière européenne en matière pénale", *Vigiles. Revue du droit de police*, 2003, p. 86-98.

and replaced Belgium's existing laws governing its relationships with Member States of the European Union.

The new regime dispenses of the verification of the requirement of dual criminality, especially in respect to the offences listed in Article 2(2) of FD on the European arrest warrant and the surrender procedures between Member States. Trafficking in human beings is one of the offences enumerated in the "list of 32 crimes" for which the control of dual criminality has been abolished and cannot be reintroduced by the Member States in their implementing legislation.

The surrendering of Belgian nationals becomes possible, although some escape routes are set up [57].

Jurisdiction rules are stated in Articles 3 and 4 of the Belgian CC and in the Articles 6-14 of the Preliminary Title of the Code of Criminal Procedure (hereafter CCP).

The Belgian criminal law is applicable to every crime committed on the Belgian territory [58]. Article 3 of the Belgian CC explicitly stipulates that its provisions apply, not only to Belgians, but also to all foreigners present on the Belgian territory. Belgian case law and legal commentary have given a broad interpretation to the notion of territoriality of the offence, applying the theory of ubiquity, so that Belgian courts have jurisdiction over offences even when they were only partly committed in Belgium. Thus, the *Cour de Cassation* has ruled that the commission of one of the "material" elements (and not merely intentional elements) on Belgian soil, is enough to establish jurisdiction of Belgian criminal courts. Territorial jurisdiction under Belgian criminal law therefore exists for offences committed abroad that were or are inextricably linked to offences committed in Belgium. The Belgian courts have thus convicted offenders, co-offenders, co-authors and accomplices for an offence committed in Belgium, even when the acts in which they participated took place entirely abroad [59].

For crimes not committed on the Belgian territory, Belgian courts can also be competent to pass judgement, under certain conditions though [60].

Article 4 CC states that crimes committed outside Belgian territory by nationals or foreigners are punishable in the cases determined by law. Consequently, there has to be a legal basis. These cases are listed in Articles 6-14 of the Preliminary Title of the CCP. The jurisdiction of Belgian courts over crimes committed abroad can be based on different basic elements:

- the Belgian nationality of the offender (active personal jurisdiction),
- the Belgian nationality of the victim of a crime (passive personal jurisdiction),
- the protection of the Belgian state (protective principle),
- the international character of a crime (universal jurisdiction) [61].

---

[57] See "Belgium: Legislation on European Arrest Warrant (December 19, 2003)", *International Law In Brief*, May 20, 2004.

[58] Article 3 of the Belgian CC.

[59] Cass., 7 March 1955, *Pas.* I, 746; Cass., 20 February 1961, *Pas*. I, 664 referred to in OECD, *Belgium: Phase 2*, *op. cit.*, p. 32.

[60] See in general M. Franchimont, A. Jacobs & A. Masset, *op. cit.*, p. 1255-1277.

[61] See in general *Ibid*.

The requirements for Belgian jurisdiction based on the principle of "active personal jurisdiction" are specified in Article 7 of the Preliminary Title of the CCP. Belgian criminal law applies to crimes and offences committed outside the Kingdom of Belgium by Belgian nationals or any person that has his principal residence in Belgium, when the facts are punishable both under Belgian law and the law of the place where the crime was committed (Article 7, para. 1). This requirement of dual criminality in respect of acts committed abroad is complemented in Article 7, para. 2 of the Preliminary Title of the CCP by a second requirement for crimes committed against foreigners: in such cases, the prosecution can only be started by the public prosecutor [62], and requires either a prior complaint by the victim or an official request addressed to the Belgian authorities from the authorities of the country where the offence took place.

The prosecution of human trafficking abroad on the basis of universal jurisdiction is made possible by Article 10*ter* of the Preliminary Title of the CCP [63]. This provision was inserted in the CCP by Article 8 of the Act of 13 April 1995 concerning the suppression of human trafficking and child pornography and subsequently amended by Article 34 of the Act of 28 November 2000 on Protection of Minors by Criminal Law and Article 23 of the Act of 10 August 2005 amending several provisions with a view to strengthening the fight against human trafficking and smuggling. Article 10*ter* of the Preliminary Title of the CCP lays down the cases of human trafficking outside the Belgian territory over which Belgian judges have jurisdiction: any person (even those who are neither Belgian nationals nor have their principal place of residence in Belgium) can be found guilty in Belgium of human trafficking and smuggling, even when these crimes were commited outside the Belgian territory.

Dual criminality is not required in order to prosecute a person who committed a crime of human trafficking or smuggling outside of Belgium. However, the presence in Belgium of the person accused of human trafficking or smuggling is obligatory (Article 12 of the Preliminary Title of the CCP). This extra-territorial jurisdiction can also be exercised vis-à-vis co-authors or accomplices of a crime perpetrated by a Belgian national outside Belgian territorial jurisdiction [64]. However the right that

[62] In Belgian law, the prosecution can in principle be instituted either by the public prosecutor or by an individual joining in the proceedings to make a civil claim.

[63] The principle of universal jurisdiction is founded on the international character of a crime: on the basis of this principle, all States have the right, and even the obligation, to prosecute and punish certain international crimes irrespective of the place where they were committed and irrespective of the nationality of the offender and the victim. See in general M. Henzelin, *Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, Brussels, Bruylant, 2000, p. 527. See for a recent article concerning the Belgian protection of victims in human trafficking and smuggling of human beings: E. Van Der Sijpt & P. Herbots, "De verblijfsrechtelijke bescherming van slachtoffers van mensenhandel en -smokkel", *RW*, 2007-2008, p. 1010-1030.

[64] Article 11 of the preliminary title of the CCP: "The foreigner who is a co-author of or an accomplice to a crime, which has been perpetrated outside Belgium by a Belgian national, can be prosecuted in Belgium, together with the suspected Belgian national or after the latter's having been condemned". On Article 11 and 12 of the said preliminary title, more in detail, see B. Demeyere, *op. cit.*, p. 54-57.

the individual normally has in Belgium to trigger a prosecution when the prosecutor decides not to proceed is limited in cases of extra-territorial jurisdiction (Articles 10 and 12 Preliminary Title of CCP).

There is dissent amongst European Member States about provisions like Article 10*ter* of the Belgian Code granting extra-territorial jurisdiction and omitting the requirement of double criminality with regard to crimes such as human trafficking and sex tourism. Some Member States oppose to these provisions that allow some sort of extended universal jurisdiction [65]. It is therefore not surprising that neither Article 6 of the 2002 FD on trafficking, nor Article 8 of the FD of 22 December 2003 on combatting the sexual exploitation of children and child pornography [66] require the Member States to omit the requirement of dual criminality, but prefer to keep silent on the matter.

D. Protection of and assistance to victims (Article 7 FD)

With regard to the victims, Belgium has chosen for a multidisciplinary treatment to fight trafficking and smuggling in human beings. Consequently, besides the prosecution of the offenders, specific attention is paid to the adult and minor victims of trafficking or smuggling.

The Centre for Equal Opportunities and Combating Racism [67] plays an important role in the defence and the representation of the victims of human trafficking and/or smuggling. In all cases related to these offences, the Centre can appear in its own name and/or in the name of the victims in front of Belgian courts. This is very advantageous in cases where victims are the object of intimidations and threats and they do not dare to take any judicial step against the offenders. In order to appear in the name of the victims and defend their rights in court, it needs to have their authorisation.

Each year, the Centre [68] sends a report concerning their tasks to the Prime minister [69], who in turn sends a duplicate of that report to the Parliament and ensures the publication [70]. The yearly report is divided into three parts [71]. The first one discusses policy issues, for example guidelines concerning the fight against human trafficking, prevention, protection and assistance to the victims, detection and prosecution policy. The second part deals with the recent developments and evolutions concerning sexual exploitation. A number of sexual exploitation networks are examined. The files are

---

[65] C. Van Den Wyngaert, *op. cit.*, p. 1237.

[66] Council FD 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, *OJ,* No. L 13, 20 January 2004, p. 13.

[67] The Centre for Equal Opportunities and Combating Racism was created by the Act of 15 February 1993. See in general http://www.diversiteit.be/?&setLanguage=3&titel=Centre+for+Equal+Opportunities+and+Opposition+to+Racism+.

[68] Centre for Equal Opportunities and Combating Racism: Koningstraat 138, 1000 Brussels, website : www.diversiteit.be.

[69] See Article 6 of the Act of 15 February 1993 to create a Centre for Equal Opportunities and Combating Racism.

[70] See *Ibid.*

[71] See for the annual report of 2007 of the Centre for Equal Opportunities and Combating Racism, http://www.diversiteit.be/index.php?action=onderdeel&onderdeel=4&titel=Home.

analysed both from the victim perspective and from that of the structural functioning of the criminal system, with an eye for the victim's account of details, of their detection and treatment. In the third and last part of the report, the centre discusses the Belgian jurisprudence. It considers the interpretation of the policy in judgements of the courts with respect to trafficking and smuggling [72].

The prosecution authorities have full discretion when deciding on prosecution. Both local and federal Belgian magistrates (Public Prosecutor and Labour Auditor) [73] are authorised to prosecute trafficking and smuggling in human beings [74]. The federal magistrates will prosecute cases of international organized trafficking or smuggling as well as in very complex cases. These federal magistrates are more specialized in and more familiar with the prosecution of international organized crime than the local Belgian prosecutors [75]. A lot of trials were heard in the past years in order to penalise persons who committed trafficking or smuggling [76]. This is remarkable given the lack of resources experienced by the examining magistrates and local prosecutors[77] and their considerable case load. Legal steps have been taken to improve the legal framework for special evidence-gathering techniques and the protection of witnesses, but there was not always a corresponding increase in financial resources to make sure that the new measures are fully and efficiently used. This is most important, for instance, for the long-distance hearing of witnesses [78].

Victims can stay in one of the three specialized centres [79] Pag-Asa [80], Sürya [81] or Payoke [82]. These centres are set up to take care of the victims and provide them with the necessary goods, mental and legal aid [83]. The Centre for Equal Opportunities and Combating Racism and the three specialized centres [84] work closely together. Four

[72] See Title 4 of this text: Legal Practice.

[73] See http://www.diplomatie.be/en/pdf/mensenhandelen.pdf.

[74] For an introduction to the Belgian actors responsible for public (criminal) proceedings, see OECD, *Belgium: Phase 2*, *op. cit.*, p. 21-24.

[75] Within the office of the federal prosecutors, there were and are several units. Until 2006, one of these units was the central service for trafficking in human beings, that coordinated actions against trafficking in human beings, gave support and coordinated the cooperation with several partners who fought (and fight) against sexual abuse of children like ECPAT (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes) and Childfocus. Since 2006, there are five units within the office of the federal public prosecutor (organized crime, international collaboration, special assignments, terrorism and international law, humanitarian law and military powers). The unit organized crime handles the files concerning the trafficking in human beings and the smuggling of human beings.

[76] See Title 4 in this text: Legal Practice.

[77] See OECD, *Belgium: Phase 2*, *op. cit.*, p. 25.

[78] See *Ibid.*, p. 28.

[79] See also http://www.diplomatie.be/en/pdf/mensenhandelen.pdf.

[80] See www.pag-asa.be.

[81] See info@asblsurya.be.

[82] See www.payoke.be.

[83] These centres can also represent the victims of smuggling of human beings in front of the Belgian courts.

[84] See http://www.steunpunt.be/xcms/lang__nl-BE/5118/default.aspx.

times a year a legal meeting with their representatives is organised by the Centre for Equal Opportunities and Combatting Racism. The issues discussed in these meetings are, for example, the cooperation with the prosecutors, the exchange and analysis of recent case law, the coordination of legal action, shortcomings in the legislation, etc. [85].

The 2006 annual report of Pag-Asa [86] mentioned that this centre helped 64 new victims of trafficking in 2005 and 68 victims in 2006. The most recent annual report of Payoke [87] mentions that 121 victims of trafficking were sent to them. These different reports indicate an increase of victims of trafficking and smuggling in human beings in general, as well as an increase of trafficking of persons who are used for sexual exploitation.

To guarantee the relief and the accompaniment of victims of trafficking and smuggling, the Immigration Act of 15 December 1980 foresees that a foreign victim can get the permission to stay in Belgium if that person cooperates with the Belgian authorities. Persons who were brought to Belgium by traffickers or smugglers will then need to formally obtain the statute of "victim of human trafficking or smuggling". Three conditions have to be fulfilled:

(1) the victim has to leave the trafficker(s) or the network of traffickers;
(2) the victim must agree to be accompanied by acknowledged and specialized centres for the relief and accompaniment of victims of human trafficking;
(3) the victim must lodge a complaint against the person(s) or the network who/which committed the crime of human trafficking or must make a statement concerning the person(s) or the network which exploited him or her [88].

The victim must pass the procedure as provided for in the Immigration Act of 15 December 1980 to obtain such a residence permit [89]. That procedure is divided into different stages.

The procedure starts with a period of 45 days, in which the victim has to decide if he or she will cooperate with the Belgian judicial authorities in the fight against trafficking or smuggling in human beings. More concretely, the victim will need to provide a statement concerning the person or the network that made themselves guilty of committing these indictable offences. If the victim decides to cooperate with the Belgian authorities, he or she will receive a three month residence permit. A second period of three months is possible. If the prosecutor cannot provide four answers after this second period, the victim will be granted permission to stay for a further period of six months [90]. The public prosecutor will have to answer four questions which will determine if the victim receives a residence permit for another six months:

(a) is the judicial research still going on?

---

[85] See http://www.payoke.be/pages/webjaarverslag2004.pdf.

[86] See for this annual report of 2006 http://www.pagasa.be/uploads/documenten/JAARVERSLAG_LR.pdf .

[87] See for this annual report of 2005, www.payoke.be.

[88] Article 61, 2 of the Immigration Law of 15 December 1980.

[89] E. Van Der Sypt & P. Herbots, *op. cit*., p. 1019-1026.

[90] Article 61, 3 para. 1 of the Immigration Law of 15 December 1980.

(b) can the person who claims to be a victim of trafficking or smuggling, in light of the ongoing investigations, still be considered as a victim of trafficking or smuggling?
(c) is the victim cooperating with the police?
(d) has every contact been broken between the victim and the person suspected of having committed the crime of trafficking or smuggling in human beings [91]?

One month before the end of the period of three months (at the latest) the immigration service contacts the public prosecutor in order to know what effect will be given to the statement or complaint of the victim. If the answers to all these questions are positive and the victim is not in danger, he or she will be allowed to stay on the Belgian territory for a further period of six months. Normally, that permit will be prolonged as long as the investigation concerning the crime of trafficking or smuggling continues [92].

When the complaints or statements of the victim have led to a condemnation on the basis of the law on human trafficking, the victim will receive a residence permit of indefinite duration [93]. This also applies to cases in which a condemnation is pronounced on the basis of another legislation, and in the indictment the element of trafficking is mentioned as well as the fact that the complaints or declarations of the victim were of great importance for the legal action undertaken by the authorities [94].

Unlike the FD, the term "child" [95] is not used in the CC that uses the term "minor". However, the content of the term "child" (as mentioned in the FD) and the term "minor" (as mentioned in the Belgian CC) correspond. Both refer to anyone who has not reached the age of 18 years [96].

Since 2002, a new system of protection for non accompanied minors has been set up. Each non accompanied minor gets an assigned tutor, who is in charge of the minor's protection and must take care of his/her interests. The structures of the specialized centres are not adapted to the relief of non-accompanied minors. For this reason minors, who are victims of human trafficking are taken care of in centres for non accompanied minors (such as Esperanto Juna or Minor N Dako) [97].

Another institution that plays a pivotal role is Child Focus. Child Focus is an independent and non governmental organisation that has been operational since the 31st of March 1998. It is 50% subsidized by competent public authorities. The

[91] Article 61, 3 para. 2 of the Immigration Law of 15 December 1980.

[92] Article 61, 4 para. 1 of the Immigration Law of 15 December 1980.

[93] Article 61, 5 of the Immigration Law of 15 December 1980.

[94] See http://www.diversiteit.be/CNTR/NL/human_trafficking/status+traffic/.

[95] See Article 1, para. 4 FD of 19 July 2002 on combating trafficking in human beings.

[96] The FD describes in Article 1, para. 4 a child as following: For the purpose of this FD, "child" shall mean any person below 18 years of age. The word child has not been defined in the Belgian CC. The Belgian CC only defines in Article 100*ter* a minor as "every person under the age of eighteen years old".

[97] See http://www.childfocus.be/uploads/documents/113-413-samenvatting%20nl%20def initief.doc.

remaining 50% comes from donations by the public and companies [98]. The activities of Child Focus are centered around the search for disappeared children, the fight against sexual exploitation of children, aid for victims of sexual exploitation and their parents as well as assistance for non-accompanied minors [99].

Child Focus has signed cooperation agreements with the police forces and the Ministry of Justice. For instance, Child Focus receives every year about 3,500 to 4,000 reports concerning child pornography that are forwarded to the federal police computer crime unit, as well as to the federal police unit against traffick in human beings [100].

Child Focus also carries out research, often in cooperation with universities, for instance concerning the disappearance and sexual exploitation of children. This research is carried out in order to formulate policy recommendations and organize information campaigns. Child Focus also plays an important role at European and International levels: together with the European Federation for Missing and Sexually Exploited Children, it represents Europe in the International Centre for Missing and exploited Children [101].

5. Legal practice

Numerous cases concerning trafficking and smuggling in human beings have been heard in the last years by Belgian courts. They have convicted people to severe sanctions, especially when the crime of trafficking or smuggling was conducted by a criminal organisation [102]. In these cases, the judges have clarified some of the terms used in the provisions concerning human trafficking and smuggling [103].

Several courts have given an interpretation of the terms "working in circumstances contrary to human dignity" [104].

The Court of Appeal of Antwerp decided that the use of an illegal minor for housekeeping can be a circumstance contrary to human dignity. In this case a young girl had come to Belgium under false pretences at the invitation of a Belgian couple by whom she was used as a slave to do the housekeeping. She did not go to school, was forced to perform numerous domestic tasks, was beaten, she lived locked up in a cellar, did not have any contact with her family and did not get sufficient nutrition. The fact that the victim also brought the children to school and had to do the groceries

---

[98] See the interview with Jean Denis Lejeune, the founding father of Child Focus, http://www.childfocus.be/en/about_2.php.

[99] See for instance the hearing of Child Focus in Belgian Parliament, http://www.dekamer.be/FLWB/PDF/51/2840/51K2840001.pdf.

[100] See http://www.dekamer.be/FLWB/PDF/51/2840/51K2840001.pdf.

[101] See http://be.missingkids.com/missingkids/servlet/PublicHomeServlet?PageType=ContentMain&LanguageCountry=nl_BE.

[102] See in general http://www.diversiteit.be/?action=zoek_advanced&search%5Bwoord%5D=mensenhandel.

[103] See the annual report of 2006 http://www.diversiteit.be/?action=publicatie_detail&id=6&thema=2 and of 2007 http://www.diversiteit.be/index.php?action=artikel_detail&artikel=42. For a discussion of Belgian case law: J.E.B. Coster Van Voorhout, *op. cit.*, p. 52-54.

[104] Article 1, para. 1, d FD transposed in Article 433*quinquies* of the Belgian Code.

did not suppress the circumstances contrary to human dignity, because she did not have any knowledge of the Dutch language. She was isolated, had no social contacts and did not have any official document allowing her to stay in Belgium.

The court of Bruges convicted, on 12 September 2006, a person who for many years had used employees of Polish origin in his tearoom [105]. He was convicted for human trafficking because the illegal employees were forced to work in circumstances contrary to human dignity. They were promised 500 euros a month if they worked 8 hours a day. In reality, they worked between fourteen and seventeen hours a day, without being paid! They only received lodging in miserable circumstances in the cellar of the tearoom or in a small studio. The Polish women were also pressured to have sexual intercourse with the owner of the tearoom.

The court of Liège decided that an employee can also be considered as "being in a particularly vulnerable situation" when he is in Belgium illegally (when he has no passport, no visa etc.) or when he has a precarious residence permit (for example one that is limited in time, when his identity papers are seizured or lost) or for example, when the person is pregnant [106].

Also the "use of coercion, force or threat, as well as deceit or fraud" has been defined by the Belgian courts.

The court of Ghent considered the interrogation of women about their families and personal matters, in order to use this information to force them to work as prostitutes, a form of coercion, force or threat [107].

The court of Antwerp described the use of deceit as the creation of false expectations, as a result of which the person is living in a position of vulnerability, having no real and acceptable alternative but to accept their situation [108]. Whereas traffickers generally appear to use physical violence in sexual trafficking, traffickers for the purpose of labour exploitation generally show "softer" means, such as debt bondage, removal of identity documents or intimidation and threats [109].

6. Conclusion

The FD of 19 July 2002 is transposed in Belgian law by the Act of 10 August 2005 amending several provisions with a view to strengthening the fight against human trafficking and smuggling and against practices of rackrent landlords. Belgium already possessed several legal instruments to combat trafficking and smuggling in human

---

[105] Correctionele rechtbank van Brugge, 14e Kamer, 25 April 2006. For a discussion of this unpublished case: J.E.B. Coster Van Voorhout, *op. cit.*, p. 52-53.

[106] Court of Appeal (criminal cases) Luik (4e k.) 25 april 2001, *JLMB*, 37, 2002, p. 1620 and http://jlmbi.larcier.be (23 November 2002); *Rechtspraak Mensenhandel*, 2002, p. 428 and http://www.antiracisme.be/nl/mensenhandel/rechtspraak/mens-kader.htm (17 March 2003).

[107] Correctionele rechtbank van Gent (19e k.), 11 October 2000, *Rechtspraak Mensenhandel*, 2002, p. 360, http://www.antiracisme.be/nl/mensenhandel/rechtspraak/mens-kader.htm (14 March 2003).

[108] See Court of Appeal (criminal cases) Antwerp, 16 October 2000, http://www.diversiteit.be/?action=zoek_advanced&search%5Bwoord%5D=MENSENHANDEL&search%5Bin%5D=everything.

[109] J.E.B. Coster Van Voorhout, *op. cit.*, p. 44-69.

beings. Consequently, Belgian law was already familiarized with the fight against human trafficking and possessed some of the instruments and measures that were also proposed by the FD of 19 July 2002, for instance, with regard to extra-territoriality and liability of legal persons.

Due to this FD, some elements of the already existing framework were changed. For example, after the transposition, the protection offered by criminal law was no longer limited to foreigners but was expanded to all the persons who are victims of trafficking (as outlined in Article 433*quinquies* CC).

The definition of trafficking in Article 433*quinquies* of the Belgian CC is more than a literal translation of the FD's definition. It covers crimes that are not in the FD, like the removal of human organs and exploitation of begging.

The Belgian law is also far more repressive. Whereas trafficking in the FD is only punishable when certain means defined in Article 1, para. 1 (a) to (d) are used, Belgian law does not require the use of these means for the application of its criminal provisions, but regards them as aggravating circumstances.

The Belgian law is in accordance with the FD with regard to the liability of legal persons. All the sanctions for legal persons mentioned in Article 5 FD are provided for in the Belgian CC. The requirements concerning attempt and complicity are also fulfilled.

Belgian legislation and case law confer a broad territorial jurisdiction over human trafficking on Belgian courts. The prosecution of trafficking committed outside Belgian territory can be based on Belgian extra-territorial jurisdiction (Article 10*ter* Preliminary Title of the CCP). It is recommended to continually assess these limiting conditions in the light of the need to combat effectively the crime of human trafficking. This goes far beyond the requirements of the FD on jurisdiction.

Regarding the help and assistance of victims of trafficking or smuggling, Belgian authorities understand the victim's fear to lodge a complaint against the offenders. Consequently, as mentioned in Article 7, para. 1 FD, the investigations and prosecutions of these offences do not depend on the report or accusation made by the person subjected to the offence. Moreover, the Centre for Equal Opportunities and Combating Racism plays an essential role, since it may defend and represent the victims of trafficking.

Annex

The Immigration Law of 15 December 1980

*Article 77*bis

The offence of human trafficking consists in knowingly aiding or abetting an alien in his preparations for illegal entry or illegal residence in the Kingdom, facilitating these preparations, or aiding and abetting him in carrying out these acts, or knowingly aiding or trying to aid an alien to enter the territory of a State which is a contracting party to an international convention relating to the crossing of external borders, binding on Belgium, or to reside there, in violation of the legislation of that State relating to the entry and the residence of aliens.

The offence referred to in paragraph 1 shall be punishable by imprisonment for a term of one year to three years and a fine of five hundred to fifty thousand euros.

The attempt to commit the offence referred to in paragraph 1 shall be punishable by imprisonment for a term of one year to three years and a fine of one hundred to ten thousand euros.

*Article 77*ter

The offence referred to in Article 77*bis* shall be punishable by detention for a term of five years to ten years and a fine of seven hundred fifty-five euros to seventy-five thousand euros if committed:

1° by a person having authority over the victim or by a person abusing of his authority or the abilities that his functions confer on him;
2° by an official or a civil servant, a depository or a member of the police force acting in the performance of his duties.

*Article77*quater

The offence referred to in Article 77*bis* shall be punishable by detention for a term of ten to fifteen years and a fine of one thousand to one hundred thousand euros in the following cases:

1° when the offence is committed towards a minor of age;
2° when the offence is committed by taking advantage of the particularly vulnerable situation in which the person finds himself as a result of an illegal or precarious administrative status or as a result of pregnancy, sickness, a physical or mental defect or deficiency, so that the person concerned has no other real and acceptable choice than accepting it;
3° when the offence is committed by using, directly or indirectly, fraudulent devices, violence, threats or any other form of coercion;
4° when the life of the victim was endangered deliberately or by gross negligence;
5° when the offence caused an apparently incurable illness, a permanent physical or psychical incapacity, the complete loss of an organ or of use of an organ, or a serious mutilation;
6° when the activity in question is a normal activity;
7° when it concerns an act of participation in the main or subsidiary activity of an association, whether the culprit has the quality of leader or not.

*Article 77*quinquies

The offence referred to in Article 77*bis* shall be punishable by detention for a term of fifteen to twenty years and a fine of one thousand to one hundred and fifty thousand euros in the following cases:

1° when the offence resulted in involuntary manslaughter;
2° when it concerns an act of participation in the main or subsidiary activity of an association, whether the culprit has the quality of leader or not.

*Article 77*sexies

In the cases referred to in Articles 77*ter*, 77*quater* and 77*quinquies*, the culprits will be sentenced to deprivation of the rights referred to in Article 31 of the Criminal Code.

The special confiscation provided for in Article 42, 1°, of the Criminal Code applies to the persons who perpetrate the offences referred to in Articles 77*bis* to 77*quinquies*, even when the things it concerns do not belong to the sentenced person, but such confiscation may not harm third parties' rights over the goods which are likely to be the object of the confiscation.

Criminal Code

*Article 433*quinquies

§ 1. The offence of human trafficking consists in recruiting, transporting, transferring, taking in or accomodating a person, passing over or transferring the control over him in order to:

(1°) enable the commission against that person of the offences referred to in Articles 379, 380, § 1and § 4, and 383*bis*, § 1;
(2°) enable the commission against that person of the offence referred to in Article 433*ter*;
(3°) put that person to work or to enable to put that person to work in conditions contrary to human dignity;
(4°) remove on that person or to enable to remove on that person some organs or tissues in violation of the Law of 13 June 1986 concerning the removal and transplantation of organs;
(5°) make that person commit a crime or an offence against his will.
Except in the case referred to under 5, the consent of the person referred to in paragraph 1 to the foreseen or effective exploitation is not relevant.

§ 2. The offence referred to in paragraph 1 shall be punishable by imprisonment for a term of one to five years and a fine of five hundred to fifty thousand euros.
§ 3. The attempt to commit the offence referred to in paragraph 1 shall be punishable by imprisonment for a term of one to three years and a fine of one hundred to ten thousand euros.

*Article 433*sexies

The offence referred to in Article 433*quinquies*, § 1 shall be punishable by detention for a term of ten to fifteen years and a fine of seven hundred fifty to seventy-five thousand euros when the offence was committed:

(1°) by a person having authority over the victim or by a person abusing of his authority or the abilities that his functions confer on him;
(2°) by an official or a civil servant, a depository or a member of the police force acting in the performance of his duties.

*Article 433*septies

The offence referred to in Article 433*quinquies*, § 1 shall be punishable by detention for a term of ten to fifteen years and a fine of one thousand to one hundred thousand euros in the following cases:

(1°) when the offence is committed towards a minor of age;
(2°) when the offence is committed by taking advantage of the particularly vulnerable situation in which the person finds himself as a result of an illegal or precarious administrative status or as a result of pregnancy, sickness, a physical or mental defect or deficiency, so that the person concerned has no other real and acceptable choice than accepting it;
(3°) when the offence is committed by using, directly or indirectly, fraudulent devices, violence, threats or any other form of coercion;

(4°) when the life of the victim was endangered deliberately or by gross negligence;
(5°) when the offence caused an apparently incurable illness, a permanent physical or psychical incapacity, the complete loss of an organ or of use of an organ, or a serious mutilation;
(6°) when the activity in question is a normal activity;
(7°) when it concerns an act of participation in the main or subsidiary activity of an association, whether the culprit has the quality of leader or not.

*Article 433*octies

The offence referred to in Article 433*quinquies*, § 1 shall be punishable by detention for a term of fifteen to twenty years and a fine of one thousand to one hundred and fifty thousand euros in the following cases:
(1°) when the offence resulted in involuntary manslaughter;
(2°) when it concerns an act of participation in the main or subsidiary activity of an association, whether the culprit has the quality of leader or not.

*Article 433*novies

In the cases referred to in Articles 433*sexies*, 433*septies* and 433*octies*, the culprits will be sentenced to deprivation of the rights referred to in Article 31.

Regardless the quality of legal entity or natural person of the manager, owner, tenant or business manager, the court may order the temporary or permanent, partial or total closure of the company where the offence referred to in Article 433*quinquies* was committed.

The special confiscation provided for in Article 42, 1°, applies to the persones who perpetrate the offences referred to in Article 433*quinquies*, even when the things it concerns do not belong to the sentenced person, but such confiscation may not harm third parties' rights over the goods which are likely to be the object of the confiscation.

De wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen

*Artikel 7*bis

Levert het misdrijf mensensmokkel op het ertoe bijdragen, op welke manier ook, rechtstreeks of via een tussenpersoon, dat een persoon die geen onderdaan is van een lidstaat van de Europese Unie het grondgebied van een lidstaat van de Europese Unie of van een Staat die partij is bij een internationale overeenkomst betreffende de overschrijding van de buitengrenzen, die België bindt, binnenkomt, erdoor reist of aldaar verblijft, zulks in strijd met de wetgeving van deze Staat, met het oog op het direct of indirect verkrijgen van een vermogensvoordeel.

Het in het eerste lid bedoelde misdrijf wordt gestraft met gevangenisstraf van een jaar tot vijf jaar en met geldboete van vijfhonderd euro tot vijftigduizend euro.

Poging tot het in het eerste lid bedoeld misdrijf wordt gestraft met gevangenisstraf van een jaar tot drie jaar en met een geldboete van honderd euro tot tienduizend euro.

*Artikel 77*ter

Het in artikel 77*bis* bedoelde misdrijf wordt gestraft met opsluiting van vijf jaar tot tien jaar en met geldboete van zevenhonderdvijftig euro tot vijfenzeventigduizend euro ingeval het werd gepleegd:

1° door een persoon die gezag heeft over het slachtoffer, of door een persoon die misbruik heeft gemaakt van het gezag of de faciliteiten die zijn functies hem verlenen;

2° door een openbaar officier of ambtenaar, drager of agent van de openbare macht die handelt naar aanleiding van de uitoefening van zijn bediening.

*Artikel 77*quater

Het in artikel 77*bis* bedoelde misdrijf wordt gestraft met opsluiting van tien jaar tot vijftien jaar en met geldboete van duizend euro tot honderdduizend euro in de volgende gevallen :

1° ingeval het misdrijf is gepleegd ten opzichte van een minderjarige;
2° ingeval het is gepleegd door misbruik te maken van de bijzonder kwetsbare situatie waarin een persoon verkeert ten gevolge van zijn onwettige of precaire administratieve toestand, zijn precaire sociale toestand of ten gevolge van zwangerschap, ziekte dan wel een lichamelijk of geestelijk gebrek of onvolwaardigheid, zodanig dat de betrokken persoon in feite geen andere echte en aanvaardbare keuze heeft dan zich te laten misbruiken;
3° ingeval het is gepleegd door direct of indirect gebruik te maken van listige kunstgrepen, geweld, bedreigingen of enige vorm van dwang;
4° ingeval het leven van het slachtoffer opzettelijk of door grove nalatigheid in gevaar is gebracht;
5° ingeval het misdrijf een ongeneeslijk lijkende ziekte, hetzij een blijvende fysieke of psychische ongeschiktheid, hetzij het volledig verlies van een orgaan of van het gebruik van een orgaan, hetzij een zware verminking heeft veroorzaakt;
6° in geval van de betrokken activiteit een gewoonte wordt gemaakt;
7° ingeval het een daad van deelneming aan de hoofd- of bijkomende bedrijvigheid van een vereniging betreft, ongeacht of de schuldige de hoedanigheid van leidend persoon heeft of niet.

*Artikel 77*quinquies

Het in artikel 77*bis* bedoelde misdrijf wordt gestraft met opsluiting van vijftien jaar tot twintig jaar en met geldboete van duizend euro tot honderdvijftigduizend euro in de volgende gevallen :

1° ingeval het misdrijf de dood van het slachtoffer heeft veroorzaakt zonder het oogmerk te doden;
2° ingeval het een daad van deelneming aan de hoofd- of bijkomende bedrijvigheid van een criminele organisatie betreft, ongeacht of de schuldige de hoedanigheid van leidend persoon heeft of niet.

*Artikel 77*sexies

In de gevallen bedoeld in de artikelen 77*ter*, 77*quater* en 77*quinquies* worden de schuldigen bovendien veroordeeld tot ontzetting van de in artikel 31 van het Strafwetboek genoemde rechten.

De bijzondere verbeurdverklaring zoals bedoeld in artikel 42, 1°, van het Strafwetboek wordt toegepast op degenen die zich schuldig hebben gemaakt aan de in de artikelen 77bis tot 77quinquies bedoelde misdrijven, zelfs ingeval de zaken waarop zij betrekking heeft, geen eigendom van de veroordeelde zijn, zonder dat deze verbeurdverklaring nochtans de rechten van derden op de goederen die het voorwerp kunnen uitmaken van de verbeurdverklaring schaadt.

Strafwetboek

*Artikel 433*quinquies

(§ 1) Levert het misdrijf mensenhandel op, de werving, het vervoer, de overbrenging, de huisvesting, de opvang van een persoon, de wisseling of de overdracht van de controle over hem teneinde :

(1°) ten aanzien van deze persoon de misdrijven te laten plegen die bedoeld worden in de artikelen 379, 380, § 1 en § 4, en 383*bis*, § 1;
(2°) ten aanzien van deze persoon het misdrijf te laten plegen dat bedoeld wordt in artikel 433*ter*;
(3°) deze persoon aan het werk te zetten of te laten aan het werk zetten in omstandigheden die in strijd zijn met de menselijke waardigheid;
(4°) bij deze persoon organen of weefsels weg te nemen of te laten wegnemen in strijd met de wet van 13 juni 1986 betreffende het wegnemen en transplanteren van organen;
(5°) of deze persoon tegen zijn wil een misdaad of een wanbedrijf te doen plegen.
Behalve in het in 5 bedoelde geval is de toestemming van de in het eerste lid bedoelde persoon met de voorgenomen of daadwerkelijke uitbuiting van geen belang.

(§ 2) Het in § 1 bedoelde misdrijf wordt gestraft met gevangenisstraf van één jaar tot vijf jaar en met geldboete van vijfhonderd euro tot vijftigduizend euro.

(§ 3) Poging tot het in § 1 bedoelde misdrijf wordt gestraft met gevangenisstraf van één jaar tot drie jaar en met geldboete van honderd euro tot tienduizend euro.

*Artikel 433*sexies

Het in artikel 433*quinquies*, § 1, bedoelde misdrijf wordt gestraft met opsluiting van vijf jaar tot tien jaar en met geldboete van zevenhonderd vijftig euro tot vijfenzeventigduizend euro ingeval het werd gepleegd:

(1°) door een persoon die gezag heeft over het slachtoffer of door een persoon die misbruik heeft gemaakt van het gezag of de faciliteiten die zijn functies hem verlenen;
(2°) door een openbaar officier of ambtenaar, drager of agent van de openbare macht die handelt naar aanleiding van de uitoefening van zijn bediening.

Artikel 433septies

Het in artikel 433*quinquies*, §1, bedoelde misdrijf wordt gestraft met opsluiting van tien jaar tot vijftien jaar en met geldboete van duizend euro tot honderdduizend euro in de volgende gevallen:

(1°) ingeval het misdrijf is gepleegd ten opzichte van een minderjarige;
(2°) ingeval het is gepleegd door misbruik te maken van de bijzonder kwetsbare positie waarin een persoon verkeert ten gevolge van zijn onwettige of precaire administratieve toestand, zijn precaire sociale toestand of ten gevolge van zwangerschap, ziekte dan wel een lichamelijk of geestelijk gebrek of onvolwaardigheid, zodanig dat de betrokken persoon in feite geen andere echte en aanvaardbare keuze heeft dan zich te laten misbruiken;
(3°) ingeval het is gepleegd door direct of indirect gebruik te maken van listige kunstgrepen, geweld, bedreigingen of enige vorm van dwang;
(4°) ingeval het leven van het slachtoffer opzettelijk of door grove nalatigheid in gevaar is gebracht;
(5°) ingeval het misdrijf een ongeneeslijk lijkende ziekte, hetzij een blijvende fysieke of psychische ongeschiktheid, hetzij het volledig verlies van een orgaan of van het gebruik van een orgaan, hetzij een zware verminking heeft veroorzaakt;

(6°) in geval van de betrokken activiteit een gewoonte wordt gemaakt;
(7°) ingeval het een daad van deelneming aan de hoofd - of bijkomende bedrijvigheid van een vereniging betreft, ongeacht of de schuldige de hoedanigheid van leidend persoon heeft of niet.

Artikel 433octies

Het in artikel 433*quinquies*, § 1, bedoelde misdrijf wordt gestraft met opsluiting van vijftien jaar tot twintig jaar en met geldboete van duizend euro tot honderdvijftigduizend euro in de volgende gevallen:

(1°) ingeval het misdrijf de dood van het slachtoffer heeft veroorzaakt zonder het oogmerk te doden;
(2°) ingeval het een daad van deelneming aan de hoofd- of bijkomende bedrijvigheid van een criminele organisatie betreft, ongeacht of de schuldige de hoedanigheid van leidend persoon heeft of niet.

*Artikel 433*novies

In de gevallen bedoeld in de artikelen 433*sexies*, 433*septies* en 433*octies* worden de schuldigen bovendien veroordeeld tot ontzetting van de in artikel 31 genoemde rechten. Zonder rekening te houden met de hoedanigheid van natuurlijke persoon of rechtspersoon van de uitbater, eigenaar, huurder of zaakvoerder, kan de rechtbank de tijdelijke of definitieve, gedeeltelijke of volledige sluiting bevelen van de onderneming waar het in artikel 433quinquies bedoelde misdrijf is gepleegd. De bijzondere verbeurdverklaring zoals bedoeld in artikel 42, 1°, wordt toegepast op degenen die zich schuldig hebben gemaakt aan het in artikel 433quinquies bedoelde misdrijf, zelfs wanneer de zaken waarop zij betrekking heeft geen eigendom van de veroordeelde zijn, zonder dat deze verbeurdverklaring nochtans de rechten van derden op de goederen die het voorwerp kunnen uitmaken van de verbeurdverklaring schaadt.

Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers

*Article 77*bis

Constitue l'infraction de trafic des êtres humains, le fait de contribuer, de quelque manière que ce soit, soit directement, soit par un intermédiaire, à permettre l'entrée, le transit ou le séjour d'une personne non ressortissante d'un Etat membre de l'Union européenne sur ou par le territoire d'un tel Etat ou d'un Etat partie à une convention internationale relative au franchissement des frontières extérieures et liant la Belgique, en violation de la législation de cet Etat, en vue d'obtenir, directement ou indirectement, un avantage patrimonial.

L'infraction prévue à l'alinéa 1er sera punie d'un emprisonnement d'un an à cinq ans et d'une amende de cinq cents euros à cinquante mille euros.

La tentative de commettre l'infraction visée à l'alinéa 1er sera punie d'un emprisonnement d'un an à trois ans et d'une amende de cent euros à dix mille euros.

*Article 77*ter

L'infraction prévue à l'article 77*bis* sera punie de la réclusion de cinq ans à dix ans et d'une amende de sept cent cinquante euros à septante-cinq mille euros lorsqu'elle aura été commise :

1° par une personne qui a autorité sur la victime, ou par une personne qui a abusé de l'autorité ou des facilités que lui confèrent ses fonctions ;

2° par un officier ou un fonctionnaire public, un dépositaire ou un agent de la force publique agissant à l'occasion de l'exercice de ses fonctions.

*Article77*quater

L'infraction prévue à l'article 77*bis* sera punie de la réclusion de dix ans à quinze ans et d'une amende de mille euros à cent mille euros dans les cas suivants :

1° lorsque l'infraction a été commise envers un mineur ;
2° lorsqu'elle a été commise en abusant de la situation particulièrement vulnérable dans laquelle se trouve une personne, en raison de sa situation administrative illégale ou précaire, de sa situation sociale précaire, d'un état de grossesse, d'une maladie, d'une infirmité ou d'une déficience physique ou mentale, de manière telle que la personne n'a en fait pas d'autre choix véritable et acceptable que de se soumettre à cet abus ;
3° lorsqu'elle a été commise en faisant usage, de façon directe ou indirecte, de manœuvres frauduleuses, de violence, de menaces ou d'une forme quelconque de contrainte ;
4° lorsque la vie de la victime a été mise en danger délibérément ou par négligence grave ;
5° lorsque l'infraction a causé une maladie paraissant incurable, une incapacité permanente physique ou psychique, la perte complète d'un organe ou de l'usage d'un organe, ou une mutilation grave ;
6° lorsque l'activité concernée constitue une activité habituelle ;
7° lorsqu'elle constitue un acte de participation à l'activité principale ou accessoire d'une association, et ce, que le coupable ait ou non la qualité de dirigeant.

*Article 77*quinquies

L'infraction prévue à l'article 77*bis* sera punie de la réclusion de quinze ans à vingt ans et d'une amende de mille euros à cent cinquante mille euros dans les cas suivants :

1° lorsque l'infraction a causé la mort de la victime sans intention de la donner ;
2° lorsqu'elle constitue un acte de participation à l'activité principale ou accessoire d'une organisation criminelle, et ce, que le coupable ait ou non la qualité de dirigeant.

*Article 77*sexies

Dans les cas visés aux articles 77*ter*, 77*quater* et 77*quinquies*, les coupables seront en outre condamnés à l'interdiction des droits énoncés à l'article 31 du Code pénal.

La confiscation spéciale prévue à l'article 42, 1°, du Code pénal est appliquée aux coupables des infractions visées par les articles 77*bis* à 77*quinquies*, même lorsque la propriété des choses sur lesquelles elle porte n'appartient pas au condamné, sans que cette confiscation puisse cependant porter préjudice aux droits des tiers sur les biens susceptibles de faire l'objet de la confiscation.

Code pénal

*Article 433*quinquies

§ 1er. Constitue l'infraction de traite des êtres humains le fait de recruter, de transporter, de transférer, d'héberger, d'accueillir une personne, de passer ou de transférer le contrôle exercé sur elle, afin :

(1°) de permettre la commission contre cette personne des infractions prévues aux articles 379, 380, § 1er et § 4, et 383*bis*, § 1er ;
(2°) de permettre la commission contre cette personne de l'infraction prévue à l'article 433*ter*;
(3°) de mettre au travail ou de permettre la mise au travail de cette personne dans des conditions contraires à la dignité humaine ;

(4°) de prélever sur cette personne ou de permettre le prélèvement sur celle-ci d'organes ou de tissus en violation de la loi du 13 juin 1986 sur le prélèvement et la transplantation d'organes ;
(5°) ou de faire commettre à cette personne un crime ou un délit, contre son gré. Sauf dans le cas visé au 5, le consentement de la personne visée à l'alinéa 1er à l'exploitation envisagée ou effective est indifférent.

§ 2. L'infraction prévue au § 1er sera punie d'un emprisonnement d'un an à cinq ans et d'une amende de cinq cents euros à cinquante mille euros.
§ 3. La tentative de commettre l'infraction visée au § 1er sera punie d'un emprisonnement d'un an à trois ans et d'une amende de cent euros à dix mille euros.

*Article 433*sexies

L'infraction prévue à l'article 433*quinquies*, § 1er, sera punie de la réclusion de cinq ans à dix ans et d'une amende de sept cent cinquante euros à septante-cinq mille euros lorsque l'infraction aura été commise :

(1°) par une personne qui a autorité sur la victime, ou par une personne qui a abusé de l'autorité ou des facilités que lui confèrent ses fonctions ;
(2°) par un officier ou un fonctionnaire public, un dépositaire ou un agent de la force publique agissant à l'occasion de l'exercice de ses fonctions.

*Article 433*septies

L'infraction prévue à l'article 433*quinquies*, § 1er, sera punie de la réclusion de dix ans à quinze ans et d'une amende de mille euros à cent mille euros dans les cas suivants :

(1°) lorsque l'infraction a été commise envers un mineur ;
(2°) lorsqu'elle a été commise en abusant de la situation particulièrement vulnérable dans laquelle se trouve une personne, en raison de sa situation administrative illégale ou précaire, de sa situation sociale précaire, d'un état de grossesse, d'une maladie, d'une infirmité ou d'une déficience physique ou mentale, de manière telle que la personne n'a en fait pas d'autre choix véritable et acceptable que de se soumettre à cet abus ;
(3°) lorsqu'elle a été commise en faisant usage, de façon directe ou indirecte, de manœuvres frauduleuses, de violence, de menaces ou d'une forme quelconque de contrainte ;
(4°) lorsque la vie de la victime a été mise en danger délibérément ou par négligence grave ;
(5°) lorsque l'infraction a causé une maladie paraissant incurable, une incapacité permanente physique ou psychique, la perte complète d'un organe ou de l'usage d'un organe, ou une mutilation grave ;
(6°) lorsque l'activité concernée constitue une activité habituelle ;
(7°) lorsqu'elle constitue un acte de participation à l'activité principale ou accessoire d'une association, et ce, que le coupable ait ou non la qualité de dirigeant.

*Article 433*octies

L'infraction prévue à l'article 433*quinquies*, § 1er, sera punie de la réclusion de quinze ans à vingt ans et d'une amende de mille euros à cent cinquante mille euros dans les cas suivants :

(1°) lorsque l'infraction a causé la mort de la victime sans intention de la donner ;
(2°) lorsqu'elle constitue un acte de participation à l'activité principale ou accessoire d'une organisation criminelle, et ce, que le coupable ait ou non la qualité de dirigeant.

*Article 433*novies

Dans les cas visés aux articles 433*sexies*, 433*septies* et 433*octies*, les coupables seront en outre condamnés à l'interdiction des droits énoncés à l'article 31.

Sans avoir égard à la qualité de personne physique ou morale de l'exploitant, propriétaire, locataire ou gérant, le tribunal peut ordonner la fermeture temporaire ou définitive, partielle ou totale de l'entreprise dans laquelle l'infraction prévue à l'article 433*quinquies* a été commise.

La confiscation spéciale prévue à l'article 42, 1°, est appliquée aux coupables de l'infraction visée à l'article 433*quinquies*, même lorsque la propriété des choses sur lesquelles elle porte n'appartient pas au condamné, sans que cette confiscation puisse cependant porter préjudice aux droits des tiers sur les biens susceptibles de faire l'objet de la confiscation.

Other references

I. Aendenboom, "Van doe-het-zelver tot designer? Aanpassingen verblijfsregeling slachtoffers mensenhandel", *T. Vreemd*, 2007/2, 85-2.

P. De Cock and E.Ward, *Politie, mensenhandel en prostitutie*, Cahiers Vast Comité P, Brussel, Politeia, 2006, 200.

H. De Pauw, *La disparition de mineurs non accompagnés et de mineurs victimes de la traite des êtres humains*, Bruxelles, Child Focus, 2002.

I. Derluyn and E. Broekaert, "Niet begeleide buitenlandse minderjarigen", *TJK*, 2005/1, p. 12 *et s*.

C. De Roy, "Mensenhandel en de verzwarende omstandigheid van de vereniging", *RW*, 10, 2003-2004, p. 386 *et s*.

L. Dreser, "Een nieuw instrument om de strijd aan te gaan tegen de seksuele uitbuiting van kinderen en kinderpornografie binnen de Europese Unie: het kaderbesluit van de Raad van 22 december 2003", *TJK*, 3, 2004, p. 191 *et s.*

L. Drubbel, "De rol, bevoegdheden en taken van de arbeidsauditoraten in de strijd tegen de mensenhandel", *RW*, 22, 2003-2004, p. 841 *et s.*

M. Foblets and D. Vanheule, "Anno 2006: de Belgische wetgever brengt het vreemdelingenrecht in lijn met de Europese regelgeving. Een tussentijdse stand van zaken", *RW*, 22, 2006-2007, p. 902 *et s*.

G. Franssens, "Welke bijstand voor slachtoffers van mensenhandel? De onduidelijke bevoegdheid van de gespecialiseerde centra", *T. Vreemd*., 2002, p. 57 *et s.*

R. Hamerlynck, "Verdragrechtelijke bescherming van de slachtoffers van de internationale mensenhandel", *RW*, 1992-1993, p. 1118 *et s.*

P. Herbots, "Huisjesmelkerij. Een autonoom misdrijf sinds 10 augustus 2005", *NjW*, 2 november 2005, p. 1118 *et s.*

—, "Mensensmokkel (sensu strictio) en artikel 2 Strafwetboek", *T. Strafr*., 5, 2006, p. 277 *et s*

—, "Huisjesmelkerij", *Postal Memorialis*, 1 maart 2007, H 218, 1 *et s.* ; 14 januari 2008, H 218, p. 1 *et s.*

—, "La traite des êtres humains. Une législation modèle pour l'Europe ?", *JT*, 1995, p. 553 *et s*.

B. Hubeau, " De huisjesmelkerij en de mensenhandel: een stand van zaken over de toepassing van artikel 77 bis van de vreemdelingenwet", *T. Vreemd*., 4, 2003, p. 282 *et s.*

F. Loore & J.-Y.Tistaert, *Belgique en sous-sol: immigration, traite et crime organisé,* Bruxelles, Racine, 2007.

I. Onsea, "Gemeenschappelijk optreden door de Europese Raad van 24 februari 1997 ter bestrijding van mensenhandel en seksuele uitbuiting van kinderen", *Panopticon*, 1997, p. 620 *et s.*

G. Stessens, "Het Europees aanhoudingsbevel", *RW*, 2004-2005, p. 561 *et s.*

J. Van Briel, E. Sneijers, K. Vereecke and N. Bosschem, "Mensenhandel", *in* G. Vermeulen (ed.), *Aspecten van Europees materieel strafrecht*, Maklu, 2002, p. 231 *et s.*

A. Vandeplas, "Over mensenhandel en de transitzone van luchthavens", *RW*, 2000-2001, p. 709.

G. Vermeulen and F. Dhont, "Bescherming van minderjarigen via het strafrecht. Verdiensten en beperkingen van de wet van 28 november 2000 betreffende de strafrechtelijke bescherming van minderjarigen", *T. Strafr.*, 3, 2002, p. 124 *et s.*

—, "Matroesjka's: tien jaar later. Repressie en controle als speerpunten van het vernieuwde mensenhandelbeleid", *Panopticon*, 2005/2, p. 1 *et s*.

—, "Visa: een instrument in de strijd tegen mensensmokkel en mensenhandel?", *T. Vreemd.*, 3, 2007, p. 194 *et s.*

P. Zanders, "Politiële samenwerking inzake illegale immigratie en mensenhandel in de Europese Unie", *in Migratie- en migrantenrecht*. *Recente ontwikkelingen*. Deel 11. Europa in het vreemdelingenrecht. Actualia in het vreemdelingenrecht.

La transposition en France de la décision-cadre 2002/629/JAI du 19 juillet 2002 sur la traite des êtres humains

Maiténa POELEMANS

1. Introduction

L'ampleur du phénomène de la traite des êtres humains depuis plusieurs décennies explique la production juridique soutenue aux niveaux international et européen pour traiter ce nouveau type de criminalité organisée à dimension mondiale. Loin d'être une pionnière dans la lutte contre ce nouveau fléau, la France, en introduisant en 2003 l'incrimination de la traite des êtres humains dans le Code pénal (ci-après CP) n'a fait que mettre le droit français en conformité avec ses engagements internationaux. Cette nouvelle incrimination, dont nous étudierons les contours plus en détails, se caractérise en définitive par son essence fondamentalement internationale issue de l'accumulation de textes, parfois récurrents, souvent complémentaires, issus des Nations unies, du Conseil de l'Europe et de l'Union européenne.

Force est de constater la lenteur avec laquelle le législateur français s'est décidé à prendre en considération la traite des êtres humains en tant que « fait, en échange d'une rémunération ou de tout autre avantage ou d'une promesse de rémunération ou d'avantage, de recruter une personne, de la transporter, de la transférer, de l'héberger ou de l'accueillir, pour la mettre à sa disposition ou à la disposition d'un tiers, même non identifié, afin soit de permettre la commission contre cette personne des infractions de proxénétisme, d'agression ou d'atteintes sexuelles, d'exploitation de la mendicité, de conditions de travail ou d'hébergement contraires à sa dignité, soit de contraindre cette personne à commettre tout crime ou délit ».

Ces termes du nouvel article 225-4-1 inséré dans le CP par la loi n° 2003-239 du 18 mars 2003 ont été directement inspirés du protocole additionnel à la convention des Nations unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes et en particulier des femmes et des enfants, signé par la France le 12 décembre 2000 à Palerme, dont la ratification a été autorisée

par la loi n° 2002-1041 du 6 août 2002 [1]. Les mêmes engagements ont été pris par la France à l'égard de la convention européenne sur la lutte contre la traite des êtres humains, signée le 22 mai 2006 à Strasbourg et ratifiée par la loi n° 2007-1162 du 1er août 2007 [2]. Ces mêmes dispositions ont permis à la France de se mettre en conformité avec les dispositions de l'Union européenne contenues dans la décision-cadre 2002/629/JAI du 19 juillet 2002, contrairement à l'action commune 97/154 du 24 février 1997 relative à la lutte contre la traite d'êtres humains et l'exploitation sexuelle des enfants qui n'a pas reçu de transposition en France [3].

L'explication du retard de la France en matière de pénalisation de la traite des êtres humains se trouve sans doute dans l'appréhension purement interne qui était faite du phénomène, souvent assimilé à la prostitution et au proxénétisme. Or, dans ce dernier cas, le législateur français s'est engagé dans une voie répressive sans cesse accrue comme en témoignent les récentes évolutions du droit pénal en la matière. Le droit français n'interdit ni ne punit la prostitution en tant que telle, dès lors qu'elle est exercée par des personnes majeures et consentantes. La prostitution n'est donc pas une infraction pénale en France et ce, conformément au système abolitionniste de la prostitution mis en place par la loi du 13 avril 1946. En revanche, les manifestations ostentatoires de la prostitution, à savoir celles qui troublent l'ordre public et qualifiées de « racolage actif » ont depuis longtemps été punies et ce, d'autant plus depuis la loi no 2003-239 pour la sécurité intérieure, du 18 mars 2003, qui a renforcé cette répression en insérant dans le CP (livre II, titre 2), au sein du chapitre V « Des atteintes à la dignité de la personne », section 2 « Du proxénétisme et des infractions qui en résultent », un article 225-10-1 qui réprime également le délit de racolage passif. Désormais, le délit prévu par l'article 225-10-1 du CP englobe le racolage tant actif que passif en disposant que « le fait, par tout moyen, y compris par une attitude même passive, de procéder publiquement au racolage d'autrui en vue de l'inciter à des relations sexuelles en échange d'une rémunération ou d'une promesse de rémunération est puni de deux mois d'emprisonnement et de 3 750 euros d'amende ».

Contrairement à la prostitution, le proxénétisme et l'exploitation de la prostitution d'autrui ont toujours été réprimés très sévèrement (article 225-5 CP), conformément aux engagements pris par la France en 1960 en ratifiant la convention des Nations unies du 2 décembre 1949. La loi du 18 mars 2003 pour la sécurité intérieure a étendu le mécanisme d'incrimination et de sanction à l'égard du proxénète et du client d'une personne prostituée d'une particulière vulnérabilité (alinéa 2 de l'article 225-12-1 du CP). Autre illustration de la sévérité de la politique française à l'égard du proxénétisme, la loi du 4 mars 2002 relative à l'autorité parentale punit désormais le client d'une personne mineure prostituée et depuis la loi 2003-239, le client d'une personne particulièrement vulnérable (article 225-12-1 du CP).

Les évolutions successives de l'incrimination du proxénétisme, puis du racolage annonçaient l'étape suivante dans la répression en France de ces phénomènes par la prise

[1] *JORF*, n° 183, 7 août 2002.

[2] *JORF*, n° 177, 2 août 2007

[3] Action commune 97/154 du 24 février 1997 adoptée par le Conseil sur la base de l'article K.3 du traité sur l'Union européenne, relative à la lutte contre la traite d'êtres humains et l'exploitation sexuelle des enfants, *JO*, n° L 63, 4 mars 1997.

en compte de leur dimension internationale mise en exergue au niveau des instances internationales et européennes. Cette position s'illustre par les diverses ratifications des conventions des Nations unies et du Conseil de l'Europe déjà évoquées, comme d'ailleurs la mise en œuvre des instruments adoptés au sein de l'Union européenne et liés directement ou indirectement à la traite des êtres humains [4]. Tel est le cas notamment de la loi du 18 mars 2003 relative à la sécurité intérieure qui a anticipé les dispositions de la directive 2004/81 du 29 avril 2004 sur le titre de séjour des victimes de la traite en introduisant le principe de l'octroi d'une autorisation de séjour temporaire à l'étranger qui serait une victime de la traite d'êtres humains. Le chapitre VI du titre I du livre III du Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA), intitulé « Dispositions applicables aux étrangers ayant déposé plainte pour certaines infractions ou témoigné dans une procédure pénale », intègre deux articles L. 316-1 et L. 316-2 issus de la loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure qui a créé une procédure spécifique de délivrance d'une autorisation provisoire de séjour à l'étranger en situation irrégulière qui porte plainte contre une personne qu'il accuse d'avoir commis à son encontre les infractions de traite des êtres humains (articles 225-4-1 à 225-4-6 du CP) ou de proxénétisme (articles 225-5 à 225-10 du CP) ou qui témoigne dans une procédure pénale concernant une personne poursuivie pour ces mêmes infractions. Depuis l'adoption de cette loi est intervenue la directive 2004/81/CE du Conseil du 29 avril 2004 relative au titre de séjour délivré aux ressortissants de pays tiers qui sont victimes de la traite des êtres humains ou ont fait l'objet d'une aide à l'immigration clandestine et qui coopèrent avec les autorités compétentes. La loi n° 2006-911 du 24 juillet 2006 relative à l'immigration et à l'intégration [5], a modifié les articles L.316-1 et L.316-2 du CESEDA pour instaurer un dispositif compatible avec les dispositions de la directive 2004/81/CE et récemment complété par le décret n° 2007-1352 du 13 septembre 2007 [6], qui modifie les articles R 316-6 à R 316-10 de CESEDA.

Enfin, sans que le terme de « trafic » soit expressément mentionné en droit français, il n'en demeure pas moins que ce phénomène se trouve visé dans les dispositions intégrées dans l'article L 622-1 du CESEDA par la loi n° 2003-1119 du 26 novembre 2003 [7]. Désormais, la personne qui facilite ou tente de faciliter l'entrée,

---

[4] Si la décision-cadre 2001/220/JAI du 15 mars 2001 sur le statut des victimes n'a pas été transposée en tant que telle dans le droit français, c'est parce que l'essentiel de ses dispositions étaient déjà prévues dans le CP et le Code de procédure pénale (ci-après CPP). La France a également renforcé sa législation en modifiant l'article 227-23 du CP par le biais de la loi renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs, promulguée le 4 avril 2006 et publiée dans le *Journal officiel de la République française* du 5 avril 2006, pour transposer la DC 2004/68/JAI du 22 décembre 2003, sur la lutte contre l'exploitation sexuelle des enfants et la pédopornographie.

[5] *JORF*, n° 170, 25 juillet 2006.

[6] *JORF*, n° 214, 15 septembre 2007.

[7] Loi n° 2003-1119 du 26 novembre 2003 relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité, *JORF*, n° 274, 27 novembre 2003 p. 20136. Ce délit, prévu depuis l'entrée en vigueur de l'ordonnance du 2 novembre 1945, n'avait pas été modifié avant la loi n° 94-1136 du 27 décembre 1994 qui l'a mise en conformité avec les dispositions de la convention d'application de l'accord de Schengen du 19 juin 1990. La réécriture de cette

la circulation ou le séjour irréguliers d'un étranger s'expose à une peine de cinq ans d'emprisonnement et à une amende de 30 000 euros. Ce sont bien les acteurs du trafic qui sont visés ici : les passeurs et les intermédiaires, mais également les personnes qui hébergent un étranger sans titre de séjour, en toute connaissance de cause ainsi que les employeurs qui embauchent, conservent à leur service ou emploient en connaissance de cause un étranger dépourvu du titre de séjour. Cet article « fourre-tout » sanctionne depuis 2003 encore plus sévèrement le « trafic » d'êtres humains en prévoyant des peines d'emprisonnement de dix ans et des amendes allant jusqu'à 750 000 euros en cas de circonstances aggravantes. Des peines complémentaires sont également prévues (suspension de permis de conduire, confiscation de véhicules, interdiction professionnelle...) ainsi que la responsabilité des personnes morales dans les conditions prévues à l'article 121-2 du CP.

Restait dès lors à incriminer la traite des êtres humains dans son acception stricte. Le fondement international de l'incrimination de la traite des êtres humains en droit français étant posé, reste à évaluer la manière dont le législateur français a mis en conformité le droit interne avec les dispositions de la DC 2002/629/JAI du 19 juillet 2002 qui, dans les termes, ne pose aucune distorsion de transposition (2). L'application faite du nouveau texte n'a pas eu en revanche l'effet escompté en raison, notamment, de sa coexistence avec des instruments sur lesquels le juge avait pris l'habitude de se baser, préexistants mais néanmoins très proches dans leurs qualifications (3). Le dépôt de plusieurs propositions de lois déposées afin de compléter les nouvelles dispositions du CP confirme les lacunes de ces dernières et révèle les faiblesses de leur effectivité et de leur efficacité (4) malgré l'enjeu que présente pour les institutionnels, les praticiens et les ONG la définition d'une incrimination spécifique de la traite des êtres humains en droit pénal français (5).

2. La conformité formelle et substantielle de la transposition en droit français de l'incrimination de traite des êtres humains

La tentative, en janvier 2002, à l'initiative de l'Assemblée nationale de créer une infraction de traite des êtres humains et de renforcer le dispositif permettant de lutter contre les infractions pouvant être commises dans le cadre de la traite n'a pu aboutir faute de discussion au Sénat. Cette proposition de loi [8] avait notamment comme objectif de combler un vide juridique en prenant en compte la dimension internationale des réseaux se livrant à la traite des êtres humains, de remplir les engagements internationaux de la France, suite notamment à la ratification du protocole additionnel à la convention contre la criminalité transnationale organisée adoptée dans l'enceinte des Nations unies mais également d'anticiper l'adoption au sein de l'Union européenne de la proposition de décision-cadre sur la traite des êtres humains.

---

disposition en 2003 s'inscrit dans le cadre de la transposition de la directive 2002/90 et de la DC 220/946/JAI du 28 novembre 2002 définissant et réprimant l'aide à l'entrée, au transit et au séjour irréguliers ainsi que du protocole contre le trafic illicite des migrants, additionnel à la convention de Palerme.

[8] Proposition de loi renforçant la lutte contre les différentes formes de l'esclavage aujourd'hui, TA 765 ; Rapport d'information AN, n° 3459 du 12 décembre 2001.

Lorsque le ministre de l'Intérieur présente le 23 octobre 2002 au Sénat un projet de loi sur la sécurité intérieure, aucune disposition ne portait sur la traite des êtres humains. Reprenant la proposition de loi issue des travaux de la mission d'information sur les diverses formes de l'esclavage moderne, adoptée à l'unanimité par l'Assemblée nationale le 24 janvier 2002, le Sénat a proposé de compléter les dispositions du projet de loi par un chapitre additionnel introduisant des dispositions relatives à la traite des êtres humains. Le projet de loi est adopté à l'Assemblée nationale le 12 février 2003 et au Sénat le 13 février 2003 après rapport de la commission paritaire. La décision 2003-467 DC du Conseil constitutionnel du 13 mars 2003 confirme la constitutionnalité de la loi. La loi n° 2003-239 du 18 mars 2003 est publiée au *Journal officiel* du 19 mars 2003 et entre en vigueur dès ce jour.

L'infraction relative à la traite des êtres humains se trouve désormais définie par les articles 225-461 et s. du CP, section 1*bis* du chapitre V intitulé « Des atteintes à la dignité de la personne » du livre II, créée par la loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure [9], sans que pour autant référence soit faite à la DC 2002/629/JAI ou à sa transposition en droit français. La seule mention du texte de l'Union européenne se trouve dans la circulaire d'application de la loi n° 2003-239 [10].

La loi n° 2007-1631 du 20 novembre 2007 relative à la maîtrise, à l'intégration et à l'asile a complété l'incrimination définie en 2003 en élargissant la définition, trop restrictive, du délit de traite des êtres humains et en prévoyant que l'auteur de la traite peut avoir pour objectif de mettre les victimes à sa propre disposition, et non nécessairement à la disposition d'un tiers. Il s'agissait par là, d'une part, de renforcer la lutte contre l'esclavage moderne ou l'esclavage domestique et de mieux prendre en compte la situation des personnes qui en sont victimes et qui, dans la majorité des cas, sont des étrangers sans papiers résidant en France et terrorisés par leurs exploiteurs et, d'autre part, de permettre à la France de se mettre en conformité avec ses engagements internationaux, en particulier le protocole à la convention de Palerme du 15 novembre 2000 .

Selon les termes de l'article 225-4-1 du CP, la traite des êtres humains est ainsi définie comme « le fait, en échange d'une rémunération ou de tout autre avantage ou d'une promesse de rémunération ou d'avantage, de recruter une personne, de la transporter, de la transférer, de l'héberger ou de l'accueillir, pour la mettre à sa disposition ou à la disposition d'un tiers, même non identifié, afin soit de permettre la commission contre cette personne des infractions de proxénétisme, d'agression ou d'atteintes sexuelles, d'exploitation de la mendicité, de conditions de travail ou d'hébergement contraires à sa dignité, soit de contraindre cette personne à commettre

[9] D'autres textes complètent cette loi :
- la loi n° 2006-64 du 23 janvier 2006 qui insère un article 321-6-1 CP ;
- la loi n° 2004-204 du 9 mars 2004 qui insère un nouvel article 706-73, 5° CPP ;
- la loi n° 2003-239 déjà mentionnée qui complète l'article L 645-1 du code de l'action sociale et des familles.

[10] Circulaire n° CRIM 2003-07 E8/03-06-2003 NOR.

tout crime ou délit », répondant pour l'essentiel aux termes de l'article 1er de la DC du 19 juillet 2002 [11].

A. La conformité formelle des dispositions du Code pénal français quant aux actes matériels et aux moyens utilisés

1. Une définition de l'infraction en accord avec les termes de la décision-cadre

L'ensemble des actes matériels prévus à l'article 1er de la DC se trouvent couverts. L'article 225-4-1 du CP vise en effet le recrutement, le transport, le transfert, l'hébergement ou l'accueil. S'agissant de la passation ou du transfert de contrôle sur elle, le texte français parle plutôt de « mise à la disposition d'un tiers » qui est l'élément déterminant de l'infraction puisque c'est cette mise à disposition de la victime qui est sanctionnée.

Les moyens visés par la DC sont repris dans la législation française, mais alors que certains sont des éléments constitutifs de l'infraction de la traite, les autres constituent des circonstances aggravantes. Dans le premier cas de figure, « l'offre ou acceptation de paiements ou d'avantages pour obtenir le consentement d'une personne ayant autorité sur une autre » [article 1, par.1, a) à d) DC] peut se retrouver dans « l'échange d'une rémunération ou de tout autre avantage ou de promesse de rémunération ou d'avantage » énoncé à l'article 225-4-1 CP qui vise à qualifier l'incrimination de la traite. En revanche, les trois autres moyens sont classés dans les circonstances aggravantes mais dans une rédaction similaire et conforme à l'esprit des dispositions de la DC.

L'article 225-4-2, 2° du CP mentionne la vulnérabilité de la victime. Celle-ci constitue une circonstance aggravante dans les termes que nous verrons plus tard. L'article 225-4-2, 7° du CP reprend les cas énoncés aux a) et b) de la DC en érigeant en circonstances aggravantes « l'emploi de menaces, de contraintes, de violences ou de manœuvres dolosives visant l'intéressé, sa famille ou une personne étant en relation habituelle avec lui ». Deux observations doivent être effectuées quant à la transposition en France :

- d'une part, le texte étend ce moyen aux membres de la famille sans pour autant les définir, mais également à des membres non inclus dans le cercle familial dès

[11] La généralité donnée au terme de « traite » a été relevée par la doctrine. Ainsi, selon certains, « il faut en premier lieu souligner que le terme de traite prend ici une perspective que n'a pas le mot lui-même qui désigne le fait de transporter, l'action de faire venir. L'infraction est beaucoup plus générale puisqu'elle désigne toutes les étapes qui peuvent conduire à soumettre une personne à la prostitution, à la mendicité, au travail au noir, à la commission d'infractions (recrutement, transport, transfert, hébergement, accueil, mise à disposition d'un tiers). Il faut comprendre que le délit est donc constitué par la réalisation de l'une quelconque de ces étapes et qu'il n'est pas nécessaire pour que le délit soit caractérisé que l'ensemble des étapes ait eu lieu. C'est en cela que le terme de traite est pris dans un sens particulier en ce qu'il ne suppose pas nécessairement le déplacement de la personne », C. Chardonneau, P.-J. Pansier, « Présentation de la loi du 18 mars 2003 pour la sécurité intérieure : de la LSQ à la LSI », *GP*, 26-27 mars 2003.

lors qu'ils peuvent influencer le comportement de la victime de la traite des êtres humains ;

- d'autre part, l'expression « manœuvres dolosives » mérite d'être précisée. Loin d'être concise, il est permis d'y intégrer « la tromperie » ou « la fraude » de la décision-cadre. Il s'agit en tout cas du fait de tromper une personne pour l'amener à se soumettre à l'auteur de l'infraction. Cette circonstance risque d'ailleurs d'être remplie dans la quasi-totalité des cas.

L'article 225-4-2, 8° CP reprend le moyen de l'abus d'autorité de l'article 1, par. 1, c) en ajoutant la situation de la filiation légitime, naturelle ou adoptive lorsque l'infraction est commise par un ascendant de la victime.

Les objectifs d'exploitation tels que mentionnés dans l'article 225-4-1 du CP français sont plus étendus que ceux mentionnés dans la décision-cadre et dans les autres instruments internationaux. Ainsi à l'objectif commun d'exploitation du travail ou de prostitution d'autrui, les dispositions du CP français ajoutent celui de « contraindre cette personne à commettre tout crime ou délit ». Cette disposition vise à permettre de sanctionner les personnes qui, à leur seul profit, en contraignent d'autres, souvent mineures, à commettre des crimes ou des délits comme c'est le cas des groupes organisés de pilleurs d'horodateurs, tous mineurs, placés sous la férule de majeurs les ayant recrutés à cet effet.

Cette transposition élargie peut se comprendre dans le but de réprimer le plus largement possible des pratiques ancrées dans la réalité. C'est pourquoi une nouvelle extension de la définition des objectifs est revendiquée par des parlementaires français, suite notamment à un jugement du tribunal correctionnel de Bobigny du 2 février 2007, ayant retenu la qualification de traite des êtres humains dans le cadre d'un trafic de bébés bulgares. Deux propositions de lois ont ainsi été présentées afin d'intégrer ce comportement dans l'incrimination de traite des êtres humains. Une première proposition de loi visant à qualifier de traite d'être humain tout fait portant atteinte au principe d'inaliénabilité de la personne a été présentée par la parlementaire Michèle Tabarot à la commission des lois constitutionnelles [12]. Il s'agit d'insérer un second alinéa à l'article 225-4-1 du CP intégrant dans l'infraction de la traite la vente ou la tentative de vente d'une personne. La seconde proposition présentée par un groupe de parlementaires [13] vise à modifier l'article 225-4-1 du CP en intégrant dans le premier alinéa et après les mots « de la transférer », les mots suivants « de la vendre au travers d'un échange ou d'une transaction commerciale, ou de l'acquérir au travers d'un échange ou d'une transaction commerciale ». Les sanctions seraient quant à elles aggravées puisque de sept ans d'emprisonnement, la traite serait sanctionnée par dix ans d'emprisonnement, mais le montant de l'amende n'évoluerait pas. Quant aux sanctions prévues en cas de circonstances aggravantes, elles seraient portées à quinze ans d'emprisonnement et incluraient les personnes en situation irrégulière.

Le consentement de la victime n'est pas un fait justificatif en droit pénal français et, par conséquent, il n'efface pas le caractère délictueux de l'infraction. Le dispositif de l'article 225-4-1 du CP ne précise pas expressément que le consentement de la

[12] AN n° 3755 du 21 février 2007.

[13] AN n° 3721 du 15 février 2007.

victime soit sans effet sur la constitution de l'infraction de traite, à la différence de ce que prévoit le texte de la DC. Or, cette précision n'est pas nécessaire puisque, dès lors que les faits prévus par cet article sont caractérisés, le délit de traite est constitué, indépendamment de l'éventuel consentement ou non de la victime. La référence au consentement de la victime a été supprimée dans le texte final de la loi n° 2003-239, suite à l'amendement d'un parlementaire ayant fait valoir que cette précision, qui s'inspire de la définition de la décision-cadre, était inutile en droit français. En effet, comme l'écrivent Roger Merle et André Vitu ; « Les tribunaux n'ont nul besoin d'un texte pour affirmer (...) qu'en principe ni le consentement, ni la tolérance habituelle, ni le pardon de la victime, ne justifient l'infraction pénale. En effet, la répression n'est habituellement pas organisée dans le seul intérêt particulier de telle ou telle victime : elle protège l'intérêt général. Il importe peu dès lors qu'une personne ait accepté qu'une infraction soit commise à son détriment ; elle n'est pas seule en cause » [14].

Outre l'absence de prise en compte du consentement de la victime, les dispositions de l'article 15-3 du CPP permettent de ne pas subordonner les enquêtes et poursuites à la déclaration de la victime, et de permettre à toute victime de porter plainte sur le territoire français. En revanche, la législation interne exempte de peine la personne qui a tenté de commettre l'infraction visée lorsqu'elle avertit l'autorité administrative ou judiciaire, ce qui a permis d'éviter la réalisation de l'infraction et d'identifier, le cas échéant, les autres auteurs ou complices. La peine est réduite lorsque la déclaration vient de l'auteur ou du complice d'une des infractions visées (article 225-4-9 CPP introduit par la loi n° 2004-204 du 9 mars 2004).

Autre différence entre le droit interne et le texte de l'UE, la distinction opérée dans la DC concernant les enfants n'existe pas en droit français. Le délit de traite des êtres humains commis à l'égard d'un mineur est prévu dans le CP français comme hypothèse de circonstance aggravante stipulée à l'article 225-4-2. « L'enfant » tel que défini dans la décision-cadre devient le « mineur » dans la disposition du CP. Aucune définition n'étant spécifiée dans la loi n° 2003-239 du 18 mars 2003, c'est le droit commun interne qui s'applique et qui le définit comme l'enfant de moins de dix-huit ans. Un rapprochement doit être fait avec l'incrimination du proxénétisme concernant les mineurs. En règle générale, les mêmes sanctions sont prévues pour la traite des êtres humains comme pour le proxénétisme ; de même, l'infraction commise à l'encontre des mineurs constitue une circonstance aggravante. En visant expressément le mineur à l'article 225-4-2, 1° du CP alors que la personne vulnérable est visée au 2°, le texte évite de s'interroger sur la vulnérabilité du mineur. Il n'est donc pas nécessaire de démontrer qu'un mineur est une personne vulnérable pour accroître la répression dans le domaine de la traite. Une différence d'importance existe cependant entre les deux infractions puisqu'en vertu de l'article 225-7-1 du CP, « le proxénétisme est puni de quinze ans de réclusion criminelle et de 300 000 euros d'amende lorsqu'il est commis à l'égard d'un mineur de quinze ans ». Une telle distinction entre mineurs et une telle aggravation de la peine pour les mineurs de moins de quinze ans n'est pas prévue dans le cadre de la traite des êtres humains. Ainsi, contrairement à la répression du

[14] *Traité de droit criminel*, Paris, Cujas, 1988, p. 569.

proxénétisme, la traite des êtres humains concernant des mineurs de moins de quinze ans ne fait pas l'objet d'une répression plus sévère.

La tentative est punie des mêmes peines que la commission, même lorsqu'il ne s'agit que d'un délit puisque cela est spécifié à l'article 225-4-7. Lorsqu'elle est commise dans le cadre d'un crime, cette assimilation s'applique d'office. Le texte prévoit néanmoins une dérogation à l'article 225-4-9 du CP lorsque la personne, qui a tenté de commettre l'infraction, a averti l'autorité judiciaire ou administrative ce qui a permis d'éviter la réalisation de l'infraction.

En règle générale la complicité punissable est sanctionnée par les mêmes peines que l'auteur (article 121-7 du CP). L'article 225-4-9 introduit par la loi n° 2004-204 du 9 mars 2004 mentionne le complice qui, au même titre que l'auteur, peut voir sa peine d'emprisonnement divisée par deux si, en avertissant l'autorité compétente, il a permis de faire cesser l'infraction ou d'éviter la mort ou une infirmité permanente de la victime et a permis d'identifier les cas échéant les autres auteurs ou complices.

En revanche, aucune disposition ne porte sur l'instigation et la participation puisqu'en droit français elles ne sont pas incriminées à titre propre. L'instigation est en effet un cas de complicité et la participation permet, si elle est principale, de réprimer les auteurs ou co-auteurs et, si elle est accessoire, de punir les complices.

Mais le législateur français est allé plus loin en permettant de poursuivre les individus qui ne sont pas en mesure de justifier de leurs ressources alors qu'ils sont en relations habituelles avec des victimes de la traite. Les peines prévues à leur encontre sont de sept ans d'emprisonnement et de 200 000 euros d'amende.

2. Des sanctions effectives, proportionnées et dissuasives

Les sanctions prévues en droit français correspondent bien aux « canons » d'effectivité, de proportionnalité et de dissuasion de la législation de l'Union européenne.

La traite des êtres humains est punie de sept ans d'emprisonnement et de 150 000 euros d'amende (article 225-4-1 CP). En cas de circonstances aggravantes, l'infraction est punie de dix ans d'emprisonnement et d'un million et demi d'euros d'amende (article 225-4-2). Lorsqu'elle est commise en bande organisée, elle est sanctionnée de vingt ans de réclusion criminelle et de trois millions d'euros d'amende (article 225-4-3). Enfin, lorsqu'elle est commise en recourant à des tortures ou des actes de barbarie, l'infraction est punie de la réclusion criminelle à perpétuité et de quatre millions et demi d'euros d'amende (article 225-4-4). Ces peines sont calquées sur celles prévues en cas de proxénétisme, à la différence près que, pour cette seconde infraction, le fait que la victime soit un mineur de quinze ans aggrave encore plus la peine que lorsque la victime est simplement mineure. Sur l'échelle nationale des peines, ces sanctions présentent les caractéristiques requises de l'effectivité, la proportionnalité et la dissuasion.

Afin d'aboutir à une répression efficace de la traite des êtres humains, le législateur a défini une série de peines complémentaires s'appliquant à certaines infractions contenues dans le chapitre V sur les atteintes à la dignité des personnes, dont la traite des êtres humains.

Selon les articles 225-20, 225-21 et 225-25 du CP, ces sanctions visent les personnes physiques et consistent en :

- l'interdiction des droits civiques, civils et de famille ;
- l'interdiction d'exercer l'activité professionnelle ou sociale dans l'exercice ou à l'occasion de l'exercice de laquelle l'infraction a été commise ;
- l'interdiction de séjour ;
- l'interdiction d'exploiter, directement ou indirectement, les établissements ouverts au public ou utilisés par le public énumérés dans la décision de condamnation, d'y être employé à quelque titre que ce soit et d'y prendre ou d'y conserver une quelconque participation financière ;
- l'interdiction, pour une durée de cinq ans au plus, de détenir ou de porter une arme soumise à autorisation ;
- l'interdiction, pour une durée de cinq ans au plus, de quitter le territoire de la République ;
- depuis la loi n° 2006-399 du 4 avril 2006, l'interdiction d'exercer, soit à titre définitif, soit pour une durée de dix ans au plus, une activité professionnelle ou bénévole impliquant un contact habituel avec des mineurs ;
- l'interdiction du territoire français, soit à titre définitif, soit pour une durée de dix ans au plus, à l'encontre de tout étranger coupable de l'infraction de traite ;
- la confiscation de tout ou partie des biens des personnes coupables, quelle qu'en soit la nature, meubles ou immeubles, divis ou indivis.

Par ailleurs, l'article 225-4-5 du CP dispose que, lorsque le crime ou le délit commis ou devant l'être contre la personne victime de la traite est puni d'une peine d'emprisonnement supérieure à celle encourue au titre des dispositions des articles 225-4-1 à 225-4-3 du CP, l'auteur des faits de traite est passible de la sanction la plus lourde attachée aux crimes ou aux délits dont il a eu connaissance. A titre d'exemple, l'auteur de faits de traite des êtres humains, donc passible d'une peine de sept ans d'emprisonnement, mais qui commet ce délit à l'encontre d'une personne ultérieurement victime d'un viol, encourra la peine attachée au crime de viol, soit quinze ans de réclusion criminelle, tout comme l'auteur du viol.

Les dispositions françaises (article 225-4-2 CP) visant les circonstances exceptionnelles vont au-delà de ce que le texte de l'UE prévoit. Toutes les circonstances sont prévues [de a) à d)], bien que les termes varient obligatoirement et que les cas prévus soient toujours plus nombreux. Par exemple, lorsque l'article 3, par. 2, c) de la DC évoque le cas de l'infraction commise par recours à des violences graves ou ayant causé un préjudice particulièrement grave à la victime, l'article 225-4-2, 7° du CP vise quant à lui « l'emploi de menaces, de contraintes, de violences ou de manœuvres dolosives visant l'intéressé, sa famille ou une personne étant en relation habituelle avec lui ». Le cas de la vulnérabilité de la victime est également entendu dans un sens plus large en droit français, comme cela est spécifié plus bas.

La circonstance de la commission de l'infraction dans le cadre d'une « organisation criminelle » selon le texte de la DC ou de « bande organisée » selon l'article 225-4-3 du CP sanctionne plus sévèrement encore que les trois autres cas l'infraction.

Dans la législation française, les cas supplémentaires de circonstances aggravantes sont :

- la minorité de la victime ;
- la pluralité des victimes ;
- le fait que la victime se trouve lors de la commission de l'infraction hors du territoire de la République ou lors de son arrivée sur le territoire de la République ;
- le fait que l'infraction soit commise par un ascendant de la victime ou par une personne qui a autorité sur elle ou abuse de l'autorité que lui confèrent ses fonctions ;
- le fait que l'infraction soit commise par une personne appelée à participer, par ses fonctions, à la lutte contre la traite ou au maintien de l'ordre public.

Des différences existent donc entre les deux textes, le texte adopté dans le cadre de l'UE intégrant dans l'infraction de traite des êtres humains des éléments relevant de circonstances aggravantes dans les dispositions législatives françaises. Tel est le cas de la minorité de la victime ou encore de l'usage de la contrainte ou de menaces ou encore le cas de la vulnérabilité de la victime.

A ce propos, l'article 225-4-2, 2° vise l'hypothèse où l'infraction est commise à l'égard d'une personne dont la vulnérabilité est due, selon une interprétation commune, à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou un état de grossesse. Elle ne vise pas spécifiquement comme le fait la DC, les enfants n'ayant pas atteint la majorité sexuelle pour une infraction commise à des fins d'exploitation sexuelle. Pour pouvoir être invoquée, cette circonstance aggravante ne sera retenue que si la preuve que l'auteur de l'infraction a conscience de l'état de la victime est apportée. L'apparence de la victime suffit pour attester la connaissance par le délinquant de sa particulière vulnérabilité.

La responsabilité pénale des personnes morales a été introduite en droit français dans le nouveau CP, entré en vigueur le 1er mars 1994 même si cette reconnaissance était dans un premier temps partielle, les personnes morales n'étant responsables pénalement que dans les cas prévus par la loi ou les règlements, c'est-à-dire que dans les cas où le texte d'incrimination prévoyait expressément la responsabilité de la personne morale (principe de spécialité). Ces textes étaient très nombreux et peu cohérents. La loi n° 2004-204 du 9 mars 2004, dite « Perben II », a abandonné le principe de la spécialité au profit du principe de la généralité. A compter du 31 décembre 2005, les personnes morales sont responsables de toutes les infractions (principe de généralité), puisque les mots « et dans les cas prévus par la loi ou le règlement » sont supprimés de l'article 121-2 du CP.

Selon les termes de cette disposition, les personnes morales sont responsables pénalement des infractions commises, « pour leur compte, par leurs organes ou représentants ». La notion d'organe n'est pas définie par le CP, mais en vertu de la doctrine en droit des affaires, il s'agit d'organes collectifs ou individuels, englobant tout ensemble de personnes ou toute personne chargée par la loi ou les statuts de la personne morale de son administration, de sa direction ou de son contrôle. Les représentants sont des personnes ayant le pouvoir d'agir au nom de la personne morale, comme un gérant, un administrateur judiciaire ou provisoire. La notion « pour le compte de » la personne morale n'a pas non plus été définie, mais peut être entendue dans un sens large supposant qu'il en est ainsi lorsque l'infraction a été réalisée dans l'intérêt de la personne morale, qu'il s'agisse d'obtenir un gain ou un profit financier, de réaliser

une économie ou d'éviter une perte. Il est possible de retrouver dans ces termes bien que succincts les dispositions du paragraphe 1 de l'article 4 de la DC étudiée. En revanche, aucune disposition ne peut être rapprochée du paragraphe 2. Le paragraphe 3 est retranscrit à l'article 121-2-3 du CP ajouté par la loi n° 2000-647 du 10 juillet 2000 selon lequel la responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes faits. Enfin, concernant la notion de la « personne morale » telle que définie au paragraphe 4, l'article 121-2-1 du CP reconnaît la responsabilité pénale à celles-ci « à l'exclusion de l'Etat ». Concernant les autres personnes morales de droit public, elles sont responsables pour toute infraction à l'exclusion de celles commises dans l'exercice de prérogatives de puissance publique. Mais cette solution est exclusivement jurisprudentielle.

L'article 225-4-6 du CP stipule que « les personnes morales peuvent être déclarées responsables pénalement, dans les conditions prévues par l'article 121-2, des infractions prévues à la présente section. Les peines encourues par les personnes morales sont :

1° L'amende suivant les modalités prévues par l'article 131-38 ;
2° Les peines mentionnées à l'article 131-39 ».

Les articles 131-38 et 131-39 CP, auxquels il est fait référence, précisent les modalités de la répression. Le premier stipule en effet que le taux maximum de l'amende encourue par les personnes morales est égal au quintuple de celui prévu pour les personnes physiques et le second énumère les peines complémentaires pouvant frapper une personne morale :

- la dissolution ;
- l'interdiction, à titre définitif ou pour une durée de cinq ans au plus, d'exercer directement ou indirectement une ou plusieurs activités professionnelles ou sociales ;
- le placement, pour une durée de cinq ans au plus, sous surveillance judiciaire ;
- la fermeture définitive ou pour une durée de cinq ans au plus des établissements ayant servi à commettre les faits incriminés ;
- l'interdiction, à titre définitif ou pour une durée de cinq ans au plus, de faire appel public à l'épargne ;
- l'interdiction pour la même période d'émettre des chèques ;
- la confiscation de la chose qui a servi ou était destinée à commettre l'infraction ou de la chose qui en est le produit ;
- l'affichage de la décision prononcée ou la diffusion de celle-ci soit par la presse soit par tout autre moyen.

Une peine complémentaire est également prévue, au même titre que pour les personnes physiques. Il s'agit de la confiscation de tout ou partie des biens des personnes coupables, quelle qu'en soit la nature, meubles ou immeubles, divis ou indivis instituée à l'article 225-25 du CP.

Pour certains [15], les peines complémentaires applicables en matière de proxénétisme au titre de l'article 225-22 du CP auraient dû être étendues à la traite

[15] J. Amar, « Traite des êtres humains », *Jurisclasseur Droit pénal*, 2006.

des êtres humains. Faute de quoi, il est possible pour une société gérant un hôtel qui aurait participé à des faits de traite des êtres humains pour alimenter un réseau de prostitution de se faire confisquer ses biens et de garder sa licence de boissons ou de restaurant. De la même manière, il est regrettable pour les personnes physiques ou morales condamnées qu'elles ne soient pas tenues de rembourser les frais de rapatriement de la ou des victimes comme c'est prévu en matière de proxénétisme.

3. Divers

Sans entrer dans le détail, les règles de compétence paraissent avoir été correctement transposées. Par ailleurs, on notera que les travaux parlementaires [16] sur le projet de loi autorisant la ratification de la convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains ont mis en évidence la nécessité de modifier les dispositions législatives applicables actuellement afin de permettre aux juridictions françaises d'exercer leur compétence, s'agissant de faits commis à l'étranger par un Français ou une personne résidant habituellement sur le territoire français, sans que soit exigée la double incrimination des faits. Il est ainsi proposé de compléter dans ce sens l'article 225-4-1 du CP par un troisième alinéa. Cette modification législative permettra ainsi de reconnaître sans condition particulière la compétence des juridictions françaises pour les faits de traite des êtres humains commis à l'étranger.

Ainsi, le droit français semble être plutôt en conformité avec l'esprit de la CP. La seule entorse importante au texte porte sur la protection spécifique des victimes mineures. En règle générale, l'enfant n'est pas en tant que tel titulaire d'une protection spécifique en matière de traite des êtres humains, même si sa minorité constitue une circonstance aggravante de l'infraction.

B. Contrôle de conformité substantielle

Les dispositions manquantes concernent essentiellement la protection du mineur victime, ce que dénoncent d'ailleurs souvent les associations travaillant dans la lutte contre la traite des êtres humains. La vulnérabilité de la victime constitue un cas de circonstance aggravante, au même titre que la minorité de la victime sans pour autant que les deux notions soient rattachées l'une à l'autre. Pourtant, et essentiellement depuis la loi n° 98-468 du 17 juin 1998 relative à la prévention et à la répression des infractions sexuelles ainsi qu'à la protection des mineurs, le statut du mineur s'est trouvé profondément amélioré, anticipant les objectifs de la DC 2001/220/JAI qui n'a dès lors pas été transposée en droit français. Les articles 306 et 400 du CPP portent sur la procédure au moment de l'audience qui, en principe, doit être publique, sauf dérogations lorsque la publicité est dangereuse pour l'ordre ou les mœurs. L'accompagnement de l'enfant dans le cadre de la procédure est assuré par l'intervention d'associations spécialisées dans la lutte contre les sévices et maltraitances (articles 2.2 et 2.3 CPP, modifié par la loi n° 2004-1 du 2 janvier 2004 relative à l'accueil et à la protection de l'enfance). L'aide à la famille de la victime et l'accès aux informations pour la protection de ses intérêts sont également reconnus dans le CPP français.

[16] Rapport du Sénat n° 346 du 22 mars 2007, rapporteur M. Jean-Guy Branger.

3. Contrôle d'effectivité et examen de la mise en pratique du texte

Il s'avère difficile, à l'heure actuelle d'apprécier quantitavement le nombre de fois où la traite des êtres humains a véritablement été sanctionnée puisqu'à l'heure actuelle un seul jugement a été rendu sur la base des dispositions des articles 225-4-1 et suivants du CP. Des statistiques existent bien concernant des poursuites basées sur les articles 225-5 et suivants du CP sanctionnant le proxénétisme mais il est difficile de connaître la proportion de cas qui correspondraient aux faits correspondant à l'incrimination de traite des êtres humains.

L'absence de jurisprudence sur la base de l'article 225-4-1 du CP s'explique en grande partie par le fait que les juridictions françaises continuent à appliquer les lois contre le proxénétisme à la place de la clause concernant la traite des êtres humains dans les cas liés à la prostitution, d'une part en raison de l'habitude, et d'autre part parce que les peines sont similaires (y compris dans les cas de circonstances aggravantes).

A ce jour, une seule décision rendue a fait application de l'article 225-4-1 du CP. Il s'agit d'un jugement rendu par la 13e chambre du tribunal correctionnel de Bobigny qui a voulu rendre une décision exemplaire en appliquant le délit de « traite des êtres humains » pour la première fois et ce qui est le plus surprenant, pour des faits n'entrant pas directement dans la définition de l'incrimination retenue à l'article 225-4-1 du CP. Cette affaire portait sur un trafic de bébés bulgares, qui concernait une vingtaine d'enfants vendus entre 2001 et 2005 à des parents de la communauté tsigane française.

Confrontés pour la première fois à ce délit de « traite d'être humain » institué par la loi du 18 mars 2003 et inscrit à l'article 225-4 du CP, les juges ne disposaient en la matière d'aucune jurisprudence. Il leur a fallu se plonger dans les débats et les textes préparatoires du projet de loi afin d'interpréter la volonté du législateur. Il est ainsi apparu au tribunal que, contrairement à ce qui avait été soutenu en défense, la question du consentement des mères bulgares qui avaient vendu leur enfant ne devait pas entrer en ligne de compte. « Ce qui est puni, c'est de faire de la personne humaine, l'objet d'un commerce », a indiqué la présidente.

Ces difficultés d'application sont essentiellement liées au fait que d'autres incriminations déjà existantes dans la législation nationale étaient utilisées pour couvrir les faits définis dans l'incrimination de la traite des êtres humains. C'est le cas notamment du proxénétisme dont les peines ont été aggravées et mises au niveau de celles concernant la traite. Dès lors, les magistrats se basent toujours sur ces dispositions mieux connues. Le problème qui s'est posé en France est que la loi sur la sécurité intérieure adoptée le 18 mars 2003, par laquelle l'Etat a introduit le délit de traite des êtres humains, a aussi réintroduit le délit de racolage passif (article 225-10-1 CP). En l'absence de mécanismes d'identification des victimes de la traite des êtres humains, toutes les personnes se livrant à la prostitution sont susceptibles de faire l'objet d'une arrestation et d'une condamnation au motif de cette infraction.

Les termes posés dans la circulaire d'application de la loi sur la sécurité intérieure justifiant la réhabilitation des dispositions sur le racolage passif illustrent parfaitement l'approche paradoxale des pouvoirs publics. En disposant que ces nouvelles dispositions se justifient « d'une part, parce que le racolage passif est susceptible d'entraîner des troubles pour l'ordre public, notamment pour la tranquillité, la salubrité, et la sécurité

publiques, et, d'autre part, parce que la répression de ces faits prive le proxénétisme de sa source de profit et fait ainsi échec au trafic des êtres humains », il est permis de s'interroger sur la méthode utilisée par l'Etat pour à la fois prétendre lutter contre la traite des êtres humains, dans le respect des droits de la personne et en même temps les prendre pour cible de sa répression.

4. Contrôle de l'efficacité et de l'efficience du texte

Le rapport d'information de la mission d'information commune sur les diverses formes de l'esclavage moderne de l'Assemblée nationale dénonçait en 2001 [17] les textes répressifs incomplets et mal adoptés entraînant des résultats limités quant aux poursuites et aux difficultés de la justice. Ainsi que l'établissent les investigations menées par la Mission, l'incrimination de la traite des êtres humains manquait cruellement dans le droit pénal français.

En effet, la traite n'était réprimée en France, avant la loi de 2003, que de façon indirecte, par le biais d'infractions qui n'étaient pas conçues à cette fin et que certains appelaient des infractions « relais » comme le proxénétisme, les conditions de travail et d'hébergement contraires à la dignité humaine, ou l'aide à l'entrée et au séjour irréguliers d'un étranger sur le territoire. Or, ces incriminations « relais » pouvaient se révéler inadaptées ou incomplètes, diminuant ainsi l'efficacité de l'action répressive.

Le texte français était donc pris en vue de réaliser le même objectif que la DC de l'UE : lutter contre la traite des êtres humains, mais essentiellement dans la perspective de l'ordre public, et non dans le cadre d'une protection des victimes.

Face à la situation de recrudescence de ce phénomène en France, le ministère de l'Intérieur a d'ailleurs rétabli, dès le mois de mai 2002, une politique de lutte contre le proxénétisme et la traite des êtres humains. Les effectifs des services spécialisés ont été doublés ; des instructions ont été adressées aux responsables de police et de gendarmerie aux fins de réimplication des services dans ce domaine ; des dispositifs anti-prostitution ont été consolidés. De nombreuses initiatives ont été prises, notamment un accompagnement social des personnes prostituées et un programme d'accueil sécurisant financé par la direction générale de l'action sociale du ministère des Affaires sociales, du Travail et de la Solidarité…

Mais il est difficile de faire la part des choses entre ce qui relève de la traite des êtres humains à proprement parler et de la lutte contre l'exploitation de la prostitution, tant ces phénomènes sont proches et assimilés pour les pouvoirs publics. Ce qui est d'ailleurs illustré par l'absence de décisions judiciaires sur la base de l'article 225-4-1 du CP et, au contraire, par l'application des dispositions sanctionnant le racolage. Il apparaît ainsi que la loi sur la sécurité intérieure est plutôt utilisée pour réprimer la prostitution visible plutôt que pour protéger les victimes de la traite.

La priorité reste dans les faits donnée à la répression de la prostitution de rue. Ainsi dans la pratique, et selon un commentaire d'Amnesty International sur ce sujet, « une priorité est accordée à la répression de la prostitution de rue, au détriment de la protection des personnes soumises à la traite des êtres humains. Alors que les effectifs

[17] A. Vidalies, Rapport d'information, Assemblée nationale, XIe législature, 12 décembre 2001, n° 3459.

des forces de police spécialisées dans la répression de la prostitution ont fait l'objet d'un renforcement significatif, l'Office central pour la répression de la traite des êtres humains (OCRTEH), seul organe du ministère de l'Intérieur spécialisé dans la traite des êtres humains ne dispose que de trente officiers spécialisés pour enquêter sur les faits de traite et de proxénétisme » [18].

Certains auteurs [19] ont mentionné sinon le risque d'inconstitutionnalité du texte, du moins son incompatibilité avec la convention européenne de sauvegarde des droits de l'homme, en se basant sur plusieurs arguments. Tout d'abord, l'incrimination ne serait utile que parce qu'elle permet une répression accrue de comportements qu'il était déjà possible d'appréhender à travers d'autres dispositions du CP. Ensuite, les imprécisions terminologiques que contient le texte ne sont pas nécessairement en accord avec l'obligation du législateur, au nom du principe de légalité, de rédiger des textes clairs et précis. Enfin, s'agissant du principe de la nécessité et de la proportionnalité des peines, le caractère redondant de l'infraction devrait justifier des peines similaires au regard des autres modes de répression existants, ce qui n'est pas le cas [20].

5. La réception et la perception en France de la norme spécifique incriminant la traite des êtres humains

Au niveau des praticiens, les déclarations du vice-procureur au parquet de Paris lors d'un colloque en mars 2007 sont éloquentes : « (…) si effectivement on a peu appliqué le texte sur la traite des êtres humains, c'est parce qu'il y a d'autres textes aussi répressifs, voire plus, qui répriment les mêmes faits. Pour nous, ce texte est redondant avec d'autres textes, notamment ceux sur le proxénétisme. Le texte sur le proxénétisme est plus large que celui sur la traite des êtres humains. On nous reproche beaucoup, à nous Français, de ne pas appliquer ce texte-là. Mais ce qu'il y a derrière tout cela, c'est que nos textes sont beaucoup plus larges et que, dans d'autres pays nordiques, on ne réprime pas la prostitution ou le proxénétisme, dès lors qu'ils sont volontaires » [21]. Il ressort de cette déclaration que l'absence de jurisprudence en la matière n'est pas la conséquence d'un désintérêt des magistrats, mais elle s'explique par le fait que les poursuites se font sur la base d'autres textes, de même que par le degré peu élevé de connaissance de la DC du 19 juillet 2002, mais cela s'explique par le fait que les dispositions internes sont peu utilisées.

Des modules de formations ont pourtant été mis en place par différentes associations, comme le Comité contre l'esclavage moderne, le CCEM, en collaboration avec la Délégation aux Victimes du ministère de l'Intérieur et de l'Aménagement du territoire. Ces formations sont dispensées auprès des promotions de gardiens de la

---

[18] AMNESTY INTERNATIONAL, « Les violences faites aux femmes en France : une affaire d'Etat », 8 février 2006, http://web.amnesty.org/library/index/fraeur210012006.

[19] J. AMAR, *op. cit.*

[20] Cependant, le Conseil constitutionnel ne s'est pas prononcé à ce sujet dans sa décision n° 2003-467 DC du 13 mars 2003.

[21] A. PACCALIN, lors des débats dans le colloque du 13 mars 2007 « Lutte contre l'exploitation sexuelle. Police, justice et acteurs sociaux : quelle coopération ? », organisé par le Comité de coopération contre l'exploitation sexuelle,

paix dans les écoles de police françaises mais également à l'Ecole de Formation du Barreau de Paris.

Au niveau politique, le rôle d'impulsion revient aux parlementaires qui, ont, comme nous l'avons déjà rappelé, inséré les nouvelles dispositions sur la lutte contre la traite des êtres humains dans un amendement au projet de loi de 2003 sur la sécurité intérieure. Il nous faut cependant préciser que pour favoriser l'application de la loi du 18 mars 2003, une mesure réglementaire a été prise par le Gouvernement sur les conditions de délivrance d'un titre provisoire de séjour à un étranger qui dépose plainte contre une personne qu'il accuse d'avoir commis à son encontre les infractions visées aux articles 225-4-1 à 225-4-6 et 225-5 à 225-10 du CP ou témoigne dans une procédure pénale concernant une personne poursuivie pour ces mêmes infractions. Cette autorisation provisoire de séjour ouvre droit à l'exercice d'une activité professionnelle. Un décret en Conseil d'Etat n° 2007-1352 du 13 septembre 2007 [22] précise les conditions de l'admission au séjour, à la protection, à l'accueil et à l'hébergement des étrangers victimes de la traite des êtres humains et du proxénétisme et modifiant le Code de l'entrée et du séjour des étrangers et du droit d'asile dans sa partie réglementaire.

Les médias ont quant à eux couvert les travaux préparatoires de la loi du 18 mars 2003. Les débats ont été entamés avec le rapport parlementaire sur l'esclavage moderne, puis ont mis en évidence les débats ouverts de façon plus générale sur la prostitution et le devoir ou non de la sanctionner. Ils se sont également cristallisés sur la nécessité de créer un statut protecteur de la victime et l'obligation de les accueillir, de les héberger dans des structures spécialisées. Les associations se sont également souvent servi de la presse pour revendiquer l'arrêt des expulsions et la délivrance d'un titre de séjour pour toute personne s'engageant à sortir de la prostitution.

Le milieu associatif est en effet sans doute l'acteur le plus impliqué en pratique dans la lutte contre la traite des êtres humains. Essentiellement représenté par un collectif de vingt-deux organisations (le Collectif « Ensemble contre la traite des êtres humains), il demande que des améliorations soient apportées, notamment quant à la prise en charge des victimes de la traite, car même si elles peuvent se voir délivrer une carte de séjour temporaire lorsqu'elles déposent plainte, aucune modalité d'accompagnement de la victime n'est fixée par la loi (accès aux droits, à la santé, etc.). Selon de nombreuses ONG, l'objectif visé par ces dispositions est davantage l'ordre public que la lutte contre la traite. D'autres dénoncent le fait que lorsque les réseaux criminels internationaux « tombent », cela se fait au prix d'une fragilisation de la victime. Enfin, la loi sur la sécurité intérieure du 18 mars 2003 est difficilement applicable aux autres formes de traite dans la mesure où elle a été principalement pensée pour la répression des réseaux criminels de prostitution.

La frilosité avec laquelle les nouvelles dispositions du CP ont été perçues se traduit par la quasi-absence de doctrine sur la traite des êtres humains de manière spécifique. La problématique est davantage envisagée dans la perspective plus large de la dignité de la personne ou du droit des étrangers.

---

[22] *JORF*, 15 septembre 2007.

6. Conclusion

La DC 2002/629/JAI du 19 juillet 2002 sur la traite des êtres humains a imposé aux Etats membres d'incriminer ce phénomène, notamment dans les Etats où cette incrimination n'existait pas. C'est le cas de la France, dont la proposition de loi avait été écartée de l'ordre du jour, puis réinsérée dans la loi sur la sécurité intérieure de 2003 coïncidant ici avec la période de transposition du texte de l'Union européenne. Cependant, l'adoption de la DC s'inscrit dans un contexte plus vaste d'adoption de textes sur ce thème au vu de l'ampleur prise par le phénomène des réseaux de trafic des êtres humains. Il est dès lors difficile de vraiment déceler l'impact spécifique de ce texte sur le niveau de rapprochement des législations au sein de l'Union européenne. Il est également malaisé d'apprécier si elle conduit à un renforcement de la confiance mutuelle dans le secteur envisagé.

Il n'en reste pas moins que l'obligation de transposition de la DC 2002/629/JAI du 19 juillet 2002 pesant sur les Etats membres, et en particulier la France, a contraint certains d'entre eux à incriminer un phénomène dont l'ampleur croissante impose une réponse urgente. Si la réponse pénale donnée en droit français demeure encore peu effective, elle a au moins le mérite d'exister.

Annexe. Textes de loi

CODE PENAL

Section I*bis* DE LA TRAITE DES ETRES HUMAINS
(Loi n° 2003-239 du 18 mars 2003, article 32)

Article 225-4-1
Modifié par la loi n° 2007-1631 du 20 novembre 2007, article 22, *JORF*, 21 novembre 2007

La traite des êtres humains est le fait, en échange d'une rémunération ou de tout autre avantage ou d'une promesse de rémunération ou d'avantage, de recruter une personne, de la transporter, de la transférer, de l'héberger ou de l'accueillir, pour la mettre à sa disposition ou à la disposition d'un tiers, même non identifié, afin soit de permettre la commission contre cette personne des infractions de proxénétisme, d'agression ou d'atteintes sexuelles, d'exploitation de la mendicité, de conditions de travail ou d'hébergement contraires à sa dignité, soit de contraindre cette personne à commettre tout crime ou délit.

La traite des êtres humains est punie de sept ans d'emprisonnement et de 150 000 euros d'amende.

Article 225-4-2
Créé par la loi n° 2003-239 du 18 mars 2003, article 32, *JORF*, 19 mars 2003

L'infraction prévue à l'article 225-4-1 est punie de dix ans d'emprisonnement et de 1 500 000 euros d'amende lorsqu'elle est commise :

1° A l'égard d'un mineur ;
2° A l'égard d'une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou connue de son auteur ;
3° A l'égard de plusieurs personnes ;
4° A l'égard d'une personne qui se trouvait hors du territoire de la République ou lors de son arrivée sur le territoire de la République ;
5° Lorsque la personne a été mise en contact avec l'auteur des faits grâce à l'utilisation, pour la diffusion de messages à destination d'un public non déterminé, d'un réseau de télécommunications ;
6° Dans des circonstances qui exposent directement la personne à l'égard de laquelle l'infraction est commise à un risque immédiat de mort ou de blessures de nature à entraîner une mutilation ou une infirmité permanente ;
7° Avec l'emploi de menaces, de contraintes, de violences ou de manœuvres dolosives visant l'intéressé, sa famille ou une personne étant en relation habituelle avec lui ;
8° Par un ascendant légitime, naturel ou adoptif de la personne victime de l'infraction prévue à l'article 225-4-1 ou par une personne qui a autorité sur elle ou abuse de l'autorité que lui confèrent ses fonctions ;
9° Par une personne appelée à participer, par ses fonctions, à la lutte contre la traite ou au maintien de l'ordre public.

Article 225-4-3
Créé par la loi n° 2003-239 du 18 mars 2003, article 32, *JORF*, 19 mars 2003

L'infraction prévue à l'article 225-4-1 est punie de vingt ans de réclusion criminelle et de 3 000 000 euros d'amende lorsqu'elle est commise en bande organisée.

Article 225-4-4
Créé par la loi n° 2003-239 du 18 mars 2003, article 32, *JORF*, 19 mars 2003
L'infraction prévue à l'article 225-4-1 commise en recourant à des tortures ou à des actes de barbarie est punie de la réclusion criminelle à perpétuité et de 4 500 000 euros d'amende.

Article 225-4-5
Créé par la loi n° 2003-239 du 18 mars 2003, article 32, *JORF*, 19 mars 2003

Lorsque le crime ou le délit qui a été commis ou qui devait être commis contre la personne victime de l'infraction de traite des êtres humains est puni d'une peine privative de liberté d'une durée supérieure à celle de l'emprisonnement encouru en application des articles 225-4-1 à 225-4-3, l'infraction de traite des êtres humains est punie des peines attachées aux crimes ou aux délits dont son auteur a eu connaissance et, si ce crime ou délit est accompagné de circonstances aggravantes, des peines attachées aux seules circonstances aggravantes dont il a eu connaissance.

Article 225-4-6
Créé par la loi n° 2003-239 du 18 mars 2003, article 32, *JORF*, 19 mars 2003

Les personnes morales peuvent être déclarées responsables pénalement, dans les conditions prévues par l'article 121-2, des infractions prévues à la présente section. Les peines encourues par les personnes morales sont :

1° L'amende, suivant les modalités prévues par l'article 131-38 ;
2° Les peines mentionnées à l'article 131-39.

Article 225-4-7
Créé par la loi n° 2003-239 du 18 mars 2003, article 32, *JORF*, 19 mars 2003

La tentative des délits prévus à la présente section est punie des mêmes peines.

Article 225-4-9
Créé par la loi n°2004-204 du 9 mars 2004, article 12, *JORF*, 10 mars 2004

Toute personne qui a tenté de commettre les infractions prévues par la présente section est exempte de peine si, ayant averti l'autorité administrative ou judiciaire, elle a permis d'éviter la réalisation de l'infraction et d'identifier, le cas échéant, les autres auteurs ou complices.

La peine privative de liberté encourue par l'auteur ou le complice d'une des infractions prévues à la présente section est réduite de moitié si, ayant averti l'autorité administrative ou judiciaire, il a permis de faire cesser l'infraction ou d'éviter que l'infraction n'entraîne mort d'homme ou infirmité permanente et d'identifier, le cas échéant, les autres auteurs ou complices. Lorsque la peine encourue est la réclusion criminelle à perpétuité, celle-ci est ramenée à vingt ans de réclusion criminelle.

Décret n° 2007-1352 du 13 septembre 2007 relatif à l'admission au séjour, à la protection, à l'accueil et à l'hébergement des étrangers victimes de la traite des êtres humains et du proxénétisme et modifiant le code de l'entrée et du séjour des étrangers et du droit d'asile (dispositions réglementaires), *JORF*, n° 214, 15 septembre 2007, p. 15340, texte n° 17

NOR: MTSA0759989D

Le Premier ministre,

Sur le rapport du ministre de l'immigration, de l'intégration, de l'identité nationale et du codéveloppement et du ministre du travail, des relations sociales et de la solidarité,

Vu la directive 2004/81/CE du Conseil du 29 avril 2004 relative au titre de séjour délivré aux ressortissants de pays tiers qui sont victimes de la traite des êtres humains ou ont fait l'objet d'une aide à l'immigration clandestine et qui coopèrent avec les autorités compétentes ;
Vu le code de l'action sociale et des familles ;
Vu le code de l'entrée et du séjour des étrangers et du droit d'asile, notamment son article L. 316-1 ;
Vu le code pénal ;
Vu le code de procédure pénale, notamment son article 53-1 ;
Vu le code de la sécurité sociale, notamment son article L. 380-1 ;
Vu le code du travail, notamment ses articles L. 351-9 et R. 351-7 ;
Le Conseil d'Etat (section sociale) entendu,

Décrète :

Article 1
Au chapitre VI du titre Ier du livre III du code de l'entrée et du séjour des étrangers et du droit d'asile, sont insérées une section 1 comportant les articles R. 316-1 à R. 316-5 et une section 2 comportant les articles R. 316-6 à R. 316-10 ainsi rédigées :

Section 1
Admission au séjour des étrangers victimes de la traite des êtres humains et du proxénétisme coopérant avec les autorités judiciaires

Art. R. 316-1. – Le service de police ou de gendarmerie qui dispose d'éléments permettant de considérer qu'un étranger, victime d'une des infractions constitutives de la traite des êtres humains ou du proxénétisme prévues et réprimées par les articles 225-4-1 à 225-4-6 et 225-5 à 225-10 du code pénal, est susceptible de porter plainte contre les auteurs de cette infraction ou de témoigner dans une procédure pénale contre une personne poursuivie pour une infraction identique, l'informe :
1° De la possibilité d'admission au séjour et du droit à l'exercice d'une activité professionnelle qui lui sont ouverts par l'article L. 316-1 ;
2° Des mesures d'accueil, d'hébergement et de protection prévues à la section 2 du présent chapitre ;
3° Des droits mentionnés à l'article 53-1 du code de procédure pénale, notamment de la possibilité d'obtenir une aide juridique pour faire valoir ses droits.
Le service de police ou de gendarmerie informe également l'étranger qu'il peut bénéficier d'un délai de réflexion de trente jours, dans les conditions prévues à l'article R. 316-2 du présent code, pour choisir de bénéficier ou non de la possibilité d'admission au séjour mentionnée au deuxième alinéa.
Ces informations sont données dans une langue que l'étranger comprend et dans des conditions de confidentialité permettant de le mettre en confiance et d'assurer sa protection.
Ces informations peuvent être fournies, complétées ou développées auprès des personnes intéressées par des organismes de droit privé à but non lucratif, spécialisés dans le soutien aux personnes prostituées ou victimes de la traite des êtres humains, dans l'aide aux migrants ou dans l'action sociale, désignés à cet effet par le ministre chargé de l'action sociale.

Art. R. 316-2. – L'étranger à qui un service de police ou de gendarmerie fournit les informations mentionnées à l'article R. 316-1 et qui choisit de bénéficier du délai de réflexion de trente jours mentionné au cinquième alinéa du même article se voit délivrer un récépissé de même durée par le préfet ou, à Paris, par le préfet de police, conformément aux dispositions du deuxième alinéa de l'article R. 311-4. Ce délai court à compter de la remise du récépissé. Pendant le

délai de réflexion, aucune mesure d'éloignement ne peut être prise à l'encontre de l'étranger en application de l'article L. 511-1, ni exécutée.
Le délai de réflexion peut, à tout moment, être interrompu et le récépissé retiré par le préfet territorialement compétent, si l'étranger a, de sa propre initiative, renoué un lien avec les auteurs des infractions mentionnées au premier alinéa de l'article R. 361-1 du présent code, ou si sa présence constitue une menace grave pour l'ordre public.

Art. R. 316-3. – Une carte de séjour temporaire portant la mention « vie privée et familiale » d'une durée minimale de six mois est délivrée par le préfet territorialement compétent à l'étranger qui satisfait aux conditions définies à l'article L. 316-1 et qui a rompu tout lien avec les auteurs présumés des infractions mentionnées à cet article.
La même carte de séjour temporaire peut également être délivrée à un mineur âgé d'au moins seize ans, remplissant les conditions mentionnées au présent article et qui déclare vouloir exercer une activité professionnelle salariée ou suivre une formation professionnelle.
La demande de carte de séjour temporaire est accompagnée du récépissé du dépôt de plainte de l'étranger ou fait référence à la procédure pénale comportant son témoignage.
La carte de séjour temporaire est renouvelable pendant toute la durée de la procédure pénale mentionnée à l'alinéa précédent, sous réserve que les conditions prévues pour sa délivrance continuent d'être satisfaites.

Art. R. 316-4. – La carte de séjour temporaire « vie privée et familiale » délivrée dans les conditions prévues à l'article R. 316-3 peut faire l'objet d'une décision de retrait dans les cas suivants :

1° Si son titulaire a, de sa propre initiative, renoué un lien avec les auteurs des infractions mentionnées au premier alinéa de l'article R. 361-1 ;
2° Si le dépôt de plainte ou le témoignage de l'étranger est mensonger ou non fondé ;
3° Si la présence de son titulaire constitue une menace pour l'ordre public.

Art. R. 316-5. – En cas de condamnation définitive des personnes mises en cause pour les infractions mentionnées à l'article L. 316-1, une carte de résident peut être délivrée à l'étranger qui satisfait aux conditions prévues par les articles L. 314-1 et L. 314-3 à L. 314-7.

Section 2

Protection, accueil et hébergement des étrangers victimes de la traite des êtres humains et du proxénétisme coopérant avec les autorités judiciaires

Art. R. 316-6. – Pendant le délai de réflexion mentionné à l'article R. 316-2, l'étranger bénéficie des dispositions des premier, quatrième, cinquième et sixième alinéas de l'article R. 316-7. Les soins qui lui sont délivrés sont pris en charge dans les conditions prévues au deuxième alinéa de l'article L. 251-1 du code de l'action sociale et des familles.

Art. R. 316-7. – La carte de séjour temporaire « vie privée et familiale » délivrée dans les conditions prévues à l'article R. 316-3 ouvre droit à l'exercice d'une activité professionnelle et à la formation professionnelle, en application des dispositions de l'article L. 316-1.
L'étranger détenteur de cette carte de séjour temporaire peut également bénéficier :

1° De l'ouverture des droits à une protection sociale, dans les conditions mentionnées à l'article L. 380-1 du code de la sécurité sociale ; si l'étranger ne remplit pas les conditions prévues par cet article, les soins qui lui sont délivrés sont pris en charge dans les conditions prévues au deuxième alinéa de l'article L. 251-1 du code de l'action sociale et des familles ;
2° De l'allocation temporaire d'attente mentionnée au II de l'article L. 351-9 du code du travail ;
3° D'un accompagnement social destiné à l'aider à accéder aux droits et à retrouver son autonomie, assuré par un des organismes mentionnés au dernier alinéa de l'article R. 316-1 du présent code ;
4° En cas de danger, d'une protection policière pendant la durée de la procédure pénale.

Art. R. 316-8. – L'étranger titulaire d'une carte de séjour temporaire « vie privée et familiale délivrée dans les conditions prévues à l'article R. 316-3 bénéficie de l'accès aux dispositifs d'accueil, d'hébergement, de logement temporaire et de veille sociale pour les personnes défavorisées mentionnés au 8° du I de l'article L. 312-1 et à l'article L. 345-2 du code de l'action sociale et des familles, et notamment aux centres d'hébergement et de réinsertion sociale mentionnés au dernier alinéa de l'article L. 345-1 du même code.
Lorsque sa sécurité nécessite un changement de lieu de résidence, l'étranger peut être orienté vers le dispositif national d'accueil des victimes de la traite des êtres humains et du proxénétisme, mis en œuvre par voie de convention entre le ministre chargé de l'action sociale et l'association qui assure la coordination de ce dispositif.

Art. R. 316-9. – L'étranger titulaire d'une carte de séjour temporaire « vie privée et familiale délivrée dans les conditions prévues à l'article R. 316-3 qui souhaite retourner dans son pays d'origine ou se rendre dans un autre pays peut bénéficier du dispositif d'aide au retour financé par l'Agence nationale de l'accueil des étrangers et des migrations.

Art. R. 316-10. – Lorsque la victime des infractions mentionnées à l'article L. 316-1 est mineure, le service de police ou de gendarmerie informe le procureur de la République qui détermine les mesures de protection appropriées à la situation de ce mineur.

Article 2
I. – L'article R. 311-4 du code de l'entrée et du séjour des étrangers et du droit d'asile est complété d'un alinéa ainsi rédigé :
Un récépissé peut également être remis à l'étranger qui demande à bénéficier du délai de réflexion prévu aux articles R. 316-1 et R. 316-2 et qui est signalé comme tel par un service de police ou de gendarmerie ».
II. – A l'article R. 311-6 du même code, les mots : « ou à l'article L. 316-1 autorise » sont remplacés par les mots : « ou à l'article L. 316-1, ainsi que le récépissé mentionné au deuxième alinéa de l'article R. 311-4, autorisent ».

Article 3
Le ministre de l'immigration, de l'intégration, de l'identité nationale et du codéveloppement, la garde des sceaux, ministre de la justice, le ministre du travail, des relations sociales et de la solidarité, la ministre du logement et de la ville et la secrétaire d'Etat chargée de la solidarité sont chargés, chacun en ce qui le concerne, de l'exécution du présent décret, qui sera publié au Journal officiel de la République française.

Fait à Paris, le 13 septembre 2007.

Complément bibliographique

C. Cutajar, « La loi pour la sécurité intérieure, *Dalloz 2003*, chron., p. 1106.

C. Lienhard, « La loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure », *JCP*, G 2003, act. 185.

P. Mistretta, « La protection de la dignité de la personne et les vicissitudes du droit pénal », *JCP*, 2005/1, p. 15.

J.-E. Schoettl, « La loi « Perben II » devant le Conseil constitutionnel – Décision n° 2004-492 DC du 2 mars 2004 (loi portant adaptation de la justice aux évolutions de la criminalité) » (doctrine), *GP*, 106, 15 avril 2004.

J.F. Seuvic, « De la traite des êtres humains », *RSC*, 2003, p. 833.

G. Vaz Cabral, *La traite des êtres humains*, Paris, La Découverte, 2006.

Trafficking in human beings in Germany

Martin Böse

1. Introduction

In February 2005, the new provisions on human trafficking (para. 232 *et s.* of the German Penal Code – *Strafgesetzbuch* hereafter PC) entered into force. By enacting the new provisions, the German legislator implemented the framework decision of 19 July 2002 on combating trafficking in human beings [1]. The following contribution shall discuss whether the FD has been implemented properly. On the other hand, since the amendments have extended the scope of the offence of human trafficking and provide for severer penalties they have provoked criticism based on (*inter alia*) the principle of proportionality. In this respect, the FD is confronted with general objections to the harmonisation of criminal law in the European Union.

2. International and national legal framework

Before discussing the FD on combating trafficking in human beings and its implementation in national law one should take a closer look at the international and national legal framework. Apart from obligations deriving from the law of the European Union there are several international treaties obliging Germany to take legislative measures in order to combat the trafficking in persons. In particular, Germany has signed and ratified the UN Protocol to prevent, suppress and punish trafficking in persons supplementing the UN Convention of 12 December 2000 against transnational organized crime [2], the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention No. 182 of the

---

[1] *OJ*, No. L 203, p. 1.

[2] *Federal Law Gazette (Bundesgesetzblatt)*, 2005, part II, p. 954.

International Labour Organization – ILO) of 17 June 1999 [3] and the International Convention for the Suppression of the traffic in women and children of 18 May 1904, amended by the Protocol of 4 May 1949 [4].

The Council of Europe Convention on Action against Trafficking in Human Beings of May 2005 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography of 25 May 2000 to the Convention on the Rights of the Child of 20 November 1989 were signed on the 17th of May 2005 (European Convention) and on the 6th of September 2000 (Optional Protocol), but they have not yet been ratified; however, the ratification procedure is prepared concerning the Council of Europe Convention [5] and has been launched regarding the Optional Protocol to the Convention on the Rights of the Child [6].

German national law clearly distinguishes between trafficking in human beings (para. 232 *et s.* PC, see *infra*) and smuggling of human beings (para. 96, 97 of the Aliens Act – *Aufenthaltsgesetz*). In contrast to human trafficking smuggling of human beings covers all forms of inducing, aiding or abetting another person to enter the territory of the Federal Republic of Germany without complying with the necessary requirements for legal entry if the acts refer to more than one person (case) or if perpetrator receives or shall receive a benefit for his acts. The concept comes very close to Article 3, lit. a of the Protocol against the smuggling of migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organised Crime of 15 November 2000 [7] which covers all forms of procurement of the illegal entry of another person. However, like the provisions against trafficking in human beings, the abovementioned provisions are intended to protect illegal migrants against exploitation [8].

Since human trafficking is closely connected to prostitution and linked behaviours it should be noted that according to German law, prostitution (i.e. proposing services) as such is not illegal [9]. Nevertheless, in specific cases (prostitution in prohibited areas, youth-endangering prostitution), prostitution can constitute a criminal offence (para. 184a, 184b PC). Using services of a prostitute is not a criminal offence either under

---

[3] *Ibid.*, 2001, part II, p. 1290.

[4] *Ibid.*, 1972, part II, p. 1479, 1483.

[5] See also the reply of the German government to a question put by members of the German Parliament, *Document of the Parliament (Bundestags-Drucksache)*, No. 16/4266 p. 7 (No. 25); Protocol of the 147th session of the Parliament on the 5th of March 2008, Verhandlungen des Deutschen Bundestages – 16. Wahlperiode, p. 15536: The government will submit a draft for the ratification act in Summer 2008.

[6] See the draft of the Government, *Document of the Parliament (Bundestags-Drucksache*), No. 16/3440 and the report of the committee on legal affairs (Rechtsausschuss), *Document of the Parliament (Bundestags-Drucksache)*, No. 16/9644.

[7] See *Federal Law Gazette (Bundesgesetzblatt)*, part II, p. 1007.

[8] See the draft of the Government for the former para. 92a Aliens Act, *Document of the Parliament (Bundestags-Drucksache)*, No. 12/5683, p. 11; for a different view M. Böse, "Das Einschleusen von Ausländern: Teilnahme an Bagatellunrecht oder in hohem Maße sozialschädliches Verhalten ?", *ZStW*, 116, 2004, p. 680, 684 *et s*.

[9] See in particular the prostitution law of 20 December 2001, *Federal Law Gazette (Bundesgesetzblatt)*, part I, p. 3983.

German Criminal Law, but a draft for a criminal provision against the sexual abuse of victims of trafficking in human beings is discussed in the Parliament [10]. However, exploitation of prostitutes and procuration are criminal offences (para. 180a, 181a PC). The provisions against trafficking in human beings also include acts for the purpose of sexual exploitation (para. 232 PC, see *infra*).

3. Conformity of the internal transpositing measures to the Framework Decision

Germany transposed the FD with delay. The government submitted a draft for the implementation act on the 4th of May 2004 [11] which was adopted by the Parliament (Bundestag) on the 28th of October 2004 [12]. The Federal Council (*Bundesrat*) objected the adoption and appealed to the mediation committee on the 26th of November 2004 [13]. The committee confirmed the adoption by the Parliament [14]. The FD has finally been implemented by law of 11 February 2005 [15]; it has entered into force as from 19 February 2005. The main reason for the delay is the failure of the government to submit a legislative proposal in time [16].

In order to transpose the FD in national law the legislator adopted the para. 232-233a PC and abrogated the former provisions on trafficking in human beings (para. 180b, 181 PC) [17]. Furthermore, according to a new provision of the Code of Criminal Procedure (para. 154, sect. 2, *Strafprozessordnung*), the prosecutor can terminate criminal proceedings as far as infringements of the Aliens Act are concerned if the offender reveals a crime of human trafficking committed against him as a victim [18].

The implementation has lead to important changes in the criminal provisions on trafficking in human beings; the scope of application has been extended to labour (i.e. non-sexual) exploitation (para. 233 PC). Correspondingly, the legislator has classified the new offences as "crimes against personal freedom" (Chapter 18 of the PC) instead of (formerly) "crimes against sexual self-determination" (Chapter 13 of the PC). In contrast to the former provisions the new provisions cover not only prostitution, but all forms of sexual exploitation (e.g. pornography) [19]. The legislator has taken the opportunity to revise the former provisions on trafficking in human beings in

---

[10] See *Document of the Parliament (Bundestags-Drucksache)*, No. 16/1343; see also B. MERK, "Freierstrafbarkeit – ein kriminalpolitisches Dauerthema ?", *ZRP*, 2006, p. 250 *et s.*

[11] See *Document of the Parliament (Bundestags-Drucksache)*, No. 15/3045.

[12] *Document of the Federal Council (Bundesrat)*, No. 846/04.

[13] *Ibid.*, No. 846/04 (decision).

[14] *Ibid.*, No. 988/04.

[15] *Federal Law Gazette (Bundesgesetzblatt)*, 2005, part I, p. 239.

[16] See also the Member of Parliament *van Essen* (FDP), in the legislative process, Deutscher Bundestag – 15. Wahlperiode – 135th session – 28 October 2004, p. 12372.

[17] As a consequence, several provisions had to be revised (para. 6, No. 4, para. 126, sect. 1, No. 4, para. 138, sect. 1, para. 140, para. 181b, para. 181c, para. 231, para. 234, para. 261, sect. 1 PC and further provisions of the CCP – *Strafprozessordnung*).

[18] See also the critical remarks of B. THOMA, "Strafverfahren gegen Frauenhändler", *Neue Kriminalpolitik*, 2005, p. 52, 53.

[19] See *Document of the Parliament (Bundestags-Drucksache)*, No. 15/3045, p. 8.

general [20]. Furthermore, the new provisions cover preparatory acts (promotion of trafficking, para. 233a PC) without an act of exploitation being committed [21]. Finally, the legislator has adopted new provisions on aggravating circumstances (para. 232, sect. 3, para. 233, sect. 3 PC).

A. *Formal conformity*

1. *The incrimination of trafficking in human beings (Articles 1 and 2 of the FD)*

The legal concept of the German provisions on trafficking in human beings is based on a two-level-approach: para. 232 and para. 233 PC regulate sexual exploitation and labour exploitation as a criminal offence, i.e. getting another person to take up or continue in prostitution (or other sexual acts or labour) by exploiting the coercive situation or the helplessness of the victim. If the victim is under 21 years of age, the offence can be committed by getting the victim to take up or continue in prostitution, even without the victim being exploited (para. 233, sect. 1, sent. 2 PC) [22]. This exception notwithstanding [23], according to German Criminal Law trafficking in human beings is defined as an act of exploitation. If such an offence has been committed, any act of aiding and abetting (recruitment, transportation etc.) – the trafficking acts – can be punished according to the general provision on aiding and abetting (para. 27 PC).

Para. 233a PC regulates the promotion of exploitation (para. 232, 233 PC) – i.e. the trafficking acts – and does not stipulate that a crime of exploitation (para. 232, 233 PC) has been committed (or attempted). The provision covers recruiting, transporting, transferring, harbouring or receiving [24] another person, but does not explicitly include the exchange or transfer of control over the other person.

Thus, the two-level-approach means that the major offence is the exploitation (para. 232, 233 PC, i.e. human trafficking in the sense of the German concept) whereas the minor offence of promotion of human trafficking (para. 233a PC) covers preparatory and auxiliary acts.

With regard to the means referred to in the framework decision "coercion, force or threat, including abduction" (Article 1, sect. 1, lit. a) and "deceit or fraud" (Article 1, sect. 1, lit. b) are covered by para. 232, sect. 4, No. 1 and No. 2 and para. 233, sect. 3 PC (force, threat of appreciable harm, abduction, trickery) [25]. The means referred to in Article 1, sect. 1, lit. c of the FD ("abuse of authority or of a position of vulnerability...") is partly covered by para. 232, sect. 1 and para. 233, sect. 1 PC (abuse of a coercive situation or the helplessness) [26], but the national provisions are – as far as the abuse of helplessness is concerned – limited to cases of helplessness

---

[20] See *Ibid.*, p. 8; *Ibid.*, No. 15/4048, p. 12, 13.

[21] See *Ibid.*, No. 15/4048, p. 13.

[22] See H. TRÖNDLE/ T. FISCHER, *Strafgesetzbuch*, 54th ed., München, Beck Verlag, 2007, para. 232, para. 17.

[23] See in this regard *infra* (protection of children, notion of "child").

[24] In contrast to Article 1, para. 1 of the FD, the wording of para. 233a is not limited to *subsequent* reception.

[25] See *Document of the Parliament (Bundestags-Drucksache)*, No. 15/4048 p. 13.

[26] See *Ibid.*

associated with the person's stay in a foreign country [27]. On the other hand, the concept of helplessness goes far beyond "vulnerability which is such that the person has no real and acceptable alternative but to submit to the abuse involved" (Article 1, sect. 1, lit. c) [28]. The means mentioned in Article 1, sect. 1, lit. d of the FD ("payments or benefits to achieve the consent of a person having control over another person") is not explicitly covered by para. 232 and para. 233 PC [29].

As far as the exploitation purposes are concerned one must differentiate between para. 232 and para. 233 PC on the one hand and para. 233a PC on the other hand: para. 232 and para. 233 PC stipulate that the perpetrator exploits another person (except the cases covered by para. 232, sect. 1, sent. 2 PC, see *supra*), i.e. the exploitation purpose must have been accomplished [30]. However, since para. 233a PC refers to the offences in para. 232 and para. 233 PC any conduct with the purpose of exploitation in the meaning of those provisions is covered.

As has been mentioned above, the German provisions differentiate between sexual exploitation (para. 232 PC) and labour exploitation (para. 233 PC). para. 232 PC (exploitation by getting another person to take up or continue in prostitution or otherwise to engage in sexual acts) covers all forms of sexual exploitation in terms of Article 1, sect. 1 of the FD ("for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography") [31].

Para. 233 PC (exploitation in slavery, bondage, debt bondage or employment under conditions which are in striking disproportion to the conditions of other persons with an equivalent employment) differs from the requirements of Article 1, sect. 1 of the FD ("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"), but the scope of the national provision is supposed to include all forms of exploitation mentioned in the FD [32].

The wording of para. 232 and para. 233 PC does not state explicitly that the victim's consent is irrelevant with regard to the criminal responsibility of the perpetrator (Article 1, sect. 2 of the FD). There is no doubt that a consent of the victim that has been reached by means of Article 1, sect. 1, lit. a-c of the FD cannot lead to impunity of the perpetrator [33]. Therefore some scholars hold that para. 232 and para. 233 do not

---

[27] See also I. STAIGER, "Trafficking in Children for the Purpose of Sexual Exploitation in the EU", *European Journal of Crime, Criminal Law and Criminal Justice*, 2005, p. 603, 620.

[28] See F.C. SCHROEDER, "Das 37. Strafrechtsänderungsgesetz: Neue Vorschriften zur Bekämpfung des "Menschenhandels"", *NJW*, 2005, p. 1393, 1395.

[29] See in this regard *Document of the Parliament (Bundestags-Drucksache)*, No. 15/4048, p. 13, 14.

[30] See e.g. J. EISELE, *in* A. SCHÖNKE/H. SCHRÖDER, *Strafgesetzbuch*, 27th ed., München, Beck Verlag, 2006, para. 232, para. 16.

[31] See *Document of the Parliament (Bundestags-Drucksache)*, No. 15/3045, p. 8.

[32] See also *Ibid.*, p. 9, 10.

[33] J. EISELE, *in* A. SCHÖNKE/H. SCHRÖDER, *op. cit.* (note 30), para. 232, para. 29; U. HELLMANN, "Bekämpfung des Menschenhandels im Straf- und Strafprozessrecht – Die Rechtslage in Deutschland", *Menschen-Rechts-Magazin*, 2007, p. 50, 54.

require that the victim takes up prostitution etc. against his or her will [34]. Nevertheless, according to the prevailing legal opinion the perpetrator does not "get" another person to take up prostitution (para. 232) or an employment-relationship (para. 233) if the decision of the victim is not influenced by the perpetrator but based on the freewill of the victim [35].

Pursuant to Article 1, sect. 3 of the FD the legislator has adopted special provisions for the protection of minors and young adults. According to para. 232, sect. 1, sent. 2 and para. 233, sect. 1, sent. 2 PC one of the means referred to in Article 1, sect. 1, lit. a-d of the FD is not needed if the victim is under 21 years of age. In the first draft for the implementation of the FD the age limit was set to 18 years in order to avoid inconsistencies with the legalisation of the prostitution [36] [37]. During the legislative process the legislator changed the age limit to 21 years following the concept of the former para. 180b, sect. 2, No. 2 PC and taking account of the special need to protect young adult women, the most significant group of victims [38]. Thus, in para. 232 and para. 233 PC the legislator did not use the term "child" [39] and implemented Article 1, sect. 3 and 4 of the FD by referring directly to the age of the victim.

Article 2 of the FD is implemented by the general provisions of the PC: instigation is punishable according to para. 26 PC, aiding and abetting according to para. 27 PC. The attempt to commit an offence can be punished pursuant to para. 22, para. 23, sect. 1, para. 232, sect. 2, para. 233, sect. 2, para. 233a, sect. 3 PC.

2. *The sanctions (Articles 3-5 of the FD)*

The penalty provided for the "exploitation offences" (para. 232, sect. 1, para. 233, sect. 1 PC) is imprisonment from six months to ten years, it can (attempt, para. 23, sect. 2 PC) respectively must (aiding and abetting, para. 27, sect. 2, sent. 2 PC) be mitigated to imprisonment from one month to seven years and six months (para. 49, sect. 1, No. 2 and No. 3 PC) or a fine [40] (para. 47, sect. 2 PC).

---

[34] H. Tröndle/T. Fischer, *op. cit.* (note 22), para. 232, para. 12.

[35] Federal Criminal Court (*Bundesgerichtshof*), *Strafverteidiger-Forum (StraFo)*, 2007, p. 340; J. Eisele, *in* A. Schönke/H. Schröder, *op. cit.* (note 30), para. 232, para. 14, para. 233, para. 11.

[36] See the Law for the Regulation of the Legal Status of Prostitutes (*Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten*) of 20 December 2001, *Federal Law Gazette (Bundesgesetzblatt)*, part I, p. 3983.

[37] See *Document of the Parliament (Bundestags-Drucksache)*, No. 15/3045, p. 8.

[38] See *Ibid*., p. 12.

[39] According to the terminology in German Criminal Law, a child is a person under 14 years of age (see para. 176, sect. 1 PC; see also – as far as criminal responsibility is concerned – para. 19 PC).

[40] According to German criminal law a fine is imposed in daily rates that amount to at least 5 and, if the law does not provide otherwise, at most 360 full daily rates (para. 40, sect. 1 PC). The amount of the daily rate depends on the personal and financial circumstances of the perpetrator, as a general rule it is the average net income which the perpetrator has, or could have, in one day. A daily rate shall be fixed at a minimum of 1 and a maximum of 5,000 Euro (para. 40, sect. 2 PC).

The promotion of exploitation/trafficking in human beings (para. 233a PC) is punished by imprisonment from three months to five years. The penalty can (attempt, para. 23, sect. 2 PC) respectively must (aiding and abetting, para. 27, sect. 2, sent. 2 PC) be mitigated to imprisonment from one month to three years and nine months (para. 49, sect. 1, No. 2 and No. 3 PC) or a fine (para. 47, sect. 2 PC).

In comparison to other offences the scale of penalties seems to be sufficiently dissuasive and effective [41], in particular because a custodial sentence is obligatory and the maximum penalty goes even beyond the requirements of the FD for aggravating circumstances (para. 232 and para. 233 PC) or reaches at least a comparable dimension (para. 233a). The penalties entail extradition (Article 2, sect. 1 and sect. 2 FD on the European Arrest Warrant of 13 June 2002) [42].

However, the proportionality of the sanctions seems partly doubtful: scholars criticize that the custodial sentence for up to 10 years is inappropriate if the offender induces a person under 21 years of age to take up or to continue in prostitution (para. 233, sect. 1, sent. 2 PC) [43]. Besides, the fact that the offence applies to the abuse of work relationships without a personal or financial dependency as well as to slavery, servitude and dept bondage (para. 233, sect. 1, sent. 1 PC), meets with criticism [44]. In this regard the objections to the waiving of additional prerequisites in case of a victim under 21 years of age apply accordingly (para. 233, sect. 1, sent. 2 PC) [45].

The German legislator implemented the aggravating circumstances (Article 3, sect. 2 of the FD) in para. 232, sect. 3 and 4, para. 233, sect. 3 and para. 233a, sect. 2 PC; para. 232, sect. 3 and 4, para. 233, sect. 3 PC provide a sanction of imprisonment from one to ten years whereas para. 233a, sect. 2, No. 2 PC provides a custodial sentence from six months to ten years.

Para. 232, sect. 3, No. 2, para. 233, sect. 3, para. 233a, sect. 2, No. 2 PC implement Article 3, sect. 2, lit. a of the FD. These regulations assume that the offender *intended* with his act to expose the victim to a danger to his or her life [46]. Compared to Article 3, sect. 2, lit. a of the FD the national implementation does not comprise reckless acts. However, concerning para. 232 and para. 233 PC the FD's binding objectives are respected because para. 232, sect. 1 and para. 233, sect. 1 provide for a maximum penalty of imprisonment of up to ten years without aggravating circumstances being

---

[41] See also the reply of the German Government to a question put by Members of the German Parliament, *Document of the Parliament (Bundestags-Drucksache)*, No. 16/4266, p. 6 (No. 21).

[42] *OJ*, No. L 190, 18 July 2002, p. 1.

[43] M. Frommel/M. Schaar, "Einwände gegen den am 19.02.2005 neu gefassten Straftatbestand des Menschenhandels in § 232 Abs. 1 StGB", *Neue Kriminalpolitik*, 2005, p. 61, 62; H. Tröndle/T. Fischer, *op. cit.* (note 22), para. 232, para. 16; J. Eisele, *in* A. Schönke/H. Schröder, *op. cit.* (note 30), para. 232, para, 20.

[44] J. Eisele, *in* A. Schönke/H. Schröder, *op. cit.* (note 30), para. 233, para. 9; J.R. Eydner, "Der neue § 233 StGB – Ansätze zum Verständnis der Ausbeutung der Arbeitskraft", *NStZ*, 2006, p. 10, 13; F.C. Schroeder (note 28), p. 1396.

[45] J. Eisele, *in* A. Schönke/H. Schröder, *op. cit.* (note 30), para. 233, para. 13; H. Tröndle/T. Fischer, *op. cit.* (note 22), para. 233, para. 13; J.R. Eydner, *op. cit.* (note 44), p. 14.

[46] H. Tröndle/T. Fischer, *op. cit.* (note 22), para. 232, para. 23, para. 233, para. 16, para. 233, para. 7.

accomplished. Since this does not apply to para. 233a, sent. 2, No. 2 PC scholars suggest to interprete this provision in conformity with the framework decision by including the reckless causation of a danger to life [47].

By adoption of para. 232, sect. 3, No. 1, para. 233, sect. 3 and para. 233a, sect. 2, No. 1 PC, Article 3, sect. 2, lit. b of the FD has been transposed into national law. These regulations assume that the victim is a child, i.e. a person under fourteen years of age. The general premises of para. 232 and – as far as sexual exploitation is concerned – para. 233a PC cover acts committed for the purpose of sexual exploitation (see Article 3, sect. 2, lit. b of the FD). By including labour exploitation (para. 233 and para. 233a PC) the German legislator has gone beyond the scope of the framework decision's binding objectives.

The national legislator does not define "particularly vulnerable persons" (Article 3, sect. 2, lit. b of the FD). Furthermore, he decided, that, in accordance to para. 176 *et s*. PC, the age limit of sexual self-determination is fourteen years [48]. The age limit concerning the sexual self-determination of the national sexual offences is non-uniform (see para. 174 and para. 182 PC: sixteen years of age). Therefore some authors raise objections against the compatibility of the national law with the FD because the legislator limits the scope of application of the provisions against human trafficking [49]. Accordingly para. 233a, sect. 2, No. 1 PC is supposed to be incompatible with the FD [50].

Article 3, sect. 2, lit. c of the FD has been implemented in para. 232, sect. 3, No. 2, sect. 4, No. 1, para. 233, sect. 3 and para. 233a, sect. 2, No. 1 and No. 2 PC. The terms "serious violence" / "caused particularly serious harm" have been replaced by "physical serious abused".

Para. 232, sect. 3, No. 3, para. 233, sect. 3 and para. 233a, sect. 2, No. 3 PC that transpose Article 3, sect. 2, lit. d of the FD into national law presuppose that the offender commits the act as member of a gang which has combined for the continued commission of such acts. The formation of a criminal organisation is not necessary [51]. Thus, the national legislator goes beyond the scope of the FD's binding objectives again.

As far as liability of and sanctions on legal persons (Articles 4-5 of the FD) are concerned, it has to be mentioned that German law does not provide for criminal liability of legal persons in the PC. The only "criminal" liability of legal persons is provided for by the Regulatory Offences Act (*Ordnungswidrigkeitengesetz*). According to this provision the court can impose administrative fines (up to 1 Mio. €) on a legal person in case of a criminal offence. Nevertheless, the fine is not a criminal sanction *stricto sensu*.

---

[47] J. Eisele, *in* A. Schönke/H. Schröder, *op. cit.* (note 30), para. 233a, para. 8; see also *Document of the Parliament (Bundestags-Drucksache)*, No. 15/4048, p. 12.

[48] *Document of the Parliament (Bundestags-Drucksache)*, No. 15/4048, p. 12.

[49] I. Staiger, *op. cit.* (note 27), p. 622.

[50] This does not apply to para. 232, 233 PC because the maximum penalty (10 years) is still higher than stipulated by Article 3, para. 2, lit b. of the FD (see *supra*).

[51] See H. Tröndle/T. Fischer, *op. cit.* (note 22), para. 244, para. 18.

Since para. 30 Regulatory Offences Act applies to criminal offences committed on behalf of a legal person in general, a transposition of Articles 4 and 5 of the FD into internal law has not been necessary. Apart from the fine pursuant to para. 30 Regulatory Offences Act the national law does not provide for other sanctions mentioned in Article 5 of the FD. According to para. 73 *et s*. PC, the provisions on forfeiture and confiscation also apply to legal persons, in particular the court can order the forfeiture of the benefits derived from the offence (para. 73, sect. 3 PC). In my opinion, it is questionable whether an administrative fine is sufficiently dissuasive if a crime has been committed on behalf of the legal person, but this is a topic which needs to be discussed in general.

3. Jurisdiction and prosecution (Article 6 of the FD)

The provisions on jurisdiction and prosecution (Article 6 of the FD) are implemented in the general part of the PC. In general, German Criminal Law applies to acts committed domestically (principle of territoriality – para. 3, 9 PC).

Active personal jurisdiction (Article 6, sect. 1, lit. c of the FD) follows from para. 7, sect. 2, No. 1 PC, whereby German criminal law shall apply to acts which were committed abroad if the act is punishable at the place of its commission or if the place of its commission is subject to no criminal law enforcement and if the perpetrator was a German at the time of the act or became one after the act. Jurisdiction over legal persons (Article 6, sect. 1, lit. c of the FD) cannot be established on the basis of active personality because the jurisdiction is limited to acts committed domestically (para. 5 Regulatory Offences Act) and legal persons are not covered by the concept of personality in terms of para. 7 PC [52].

Furthermore, German criminal law applies to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or if the place of its commission is subject to no criminal law enforcement (passive personal jurisdiction – para. 7, sect. 1 PC). As far as offences pursuant to para. 232, para. 233 and para. 233a PC are concerned, German Criminal Law is applicable to acts committed abroad regardless of the law of the place of their commission (universal jurisdiction – para. 6, No. 4 PC).

Since the principle of universal jurisdiction applies to the offences of human trafficking regardless of the place of commission, the German government did not consider a reservation according to Article 6, sect. 2 and 3 of the FD to be necessary. However, with regard to the sanctioning of legal persons (Article 6, sect. 1, lit. c of the FD) such consideration does not apply (see *supra*).

4. Protection of and assistance to victims (Article 7 of the FD)

Investigations into and prosecutions of trafficking in human beings do not depend on the report or accusation by a victim (Article 7, sect. 1 of the FD). The offences referred to in para. 232, 233, 233a CP are prosecuted *ex officio*.

---

[52] See Higher Regional Court (Oberlandesgericht) Stuttgart, *NStZ*, 2004, p. 402, 403; K. AMBOS, *in* W. JOECKS/K. MIEBACH (ed.), *Münchener Kommentar zum Strafgesetzbuch*, vol. 1, 1st ed., München, Beck Verlag, 2003, para. 7, para. 23.

If one of the abovementioned offences has been committed against a child, the general provisions of the Code of Criminal Procedure (*Strafprozessordnung*) (hereafter CCP) on the protection of children in criminal proceedings apply. In particular, according to para. 241a CCP the examination of witnesses under 16 years of age shall be conducted solely by the presiding judge. Furthermore, the court may order that the defendant leaves the courtroom during an examination if, on examination of a person under sixteen years of age as a witness in the defendant's presence, considerable detriment to the well-being of such witness is to be feared or if an examination of another person as a witness in the defendant's presence poses an imminent risk of serious detriment to that person's health (para. 247, sent. 2 CCP). Finally, German Law provides for a video examination (para. 247a CCP; see also para. 168e CCP).

The German legislator has not taken special measures to implement Article 7, sect. 3 of the FD but the CCP contains general provisions on the standing of victims in criminal proceedings which have been reformed by law of 24 June 2004 [53] [54]. The amendments have taken account of the FD of 15 March 2001 on the standing of victims in criminal proceedings [55] [56]. In particular, the victim has the right to

– *information* (para. 406d CCP),
– *access to records* (para. 406e CCP),
– *support* (para. 406f CCP).

The victims shall be informed about their rights and the services to which they can turn for support (para. 406h CCP).

Finally, it should be mentioned in this context that the directive 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 [57] has been implemented by law of 19 August 2007 [58]; it has entered into force as from 28 August 2007.

5. Final assessment

According to the German traditional concept, the criminal provisions on trafficking in human beings (para. 232 and para. 233 PC) fall short of the intention set out in the framework decision, because the main focus of the FD is the fight against the "trade with human beings, which is undertaken for the purpose of exploitation". The structure of para. 232 and para. 233 PC deviates from this focus. The German legislator changed the "*Absichtsdelikte*" ("for the purpose", Article 1, sect. 1 of the FD) into "*Erfolgsdelikte*" (getting another person to take up prostitution etc.), i.e. the purpose of the criminal act (exploitation) has to be achieved. So, the focus of the

[53] *Federal Law Gazette (Bundesgesetzblatt)*, 2004, part I, p. 1354.

[54] See in this regard U. Hellmann, *op. cit.* (note 33), p. 58 *et s*.

[55] *OJ*, No. L 82, p. 1.

[56] See the explanatory statement in the draft, *Document of the Parliament (Bundestags-Drucksache)*, No. 15/1976, p. 1, 7.

[57] *OJ*, No. L 261, p. 19.

[58] *Federal Law Gazette (Bundesgesetzblatt)*, 2007, part I, p. 1970.

German provisions is on the exploitation whereas the FD concentrates on the fight against trade with persons [59].

Nevertheless, trafficking in human beings in terms of Article 1 of the FD is covered by para. 233a PC. This provision does not imply that the act of trafficking in human beings (para. 232 or para. 233 PC) has to be accomplished [60], but para. 233a, sect. 1 PC presupposes that the act of promotion refers to a concrete exploitation offence (para. 232 or para. 233 PC), i.e. to a certain victim, a certain kind of exploitation etc. This requirement might lead to the impunity of the promoter [61]. A similar problem arises for trafficking acts committed after the exploitation has been accomplished so that promotion is no longer possible [62]. Furthermore, there are minor shortcomings in the transposition of Article 1, sect. 1, lit. c and d, Article 1, sect. 2 of the FD (see *supra* 1.), Article 3, sect. 2, lit. a and b of the FD (see *supra* 2.). Regardless of these deviations, most of the requirements of the FD are implemented properly [63].

B. Substantive conformity

Concerning acts of Article 1, sect. 1 of the FD ("exchange or transfer of control") which are not explicitly mentioned in para. 233a PC, they are covered by the term "transfer" [64]. The same applies to the means referred to in Article 1, sect. 1, lit. d of the FD ("payments or benefits to achieve the consent of a person having control over another person"). The legislator held that Article 1, sect. 1, lit. d of the FD implies that the control of the person getting the payment or benefit is based on one of the situations of Article 1, sect. 1, lit. a to c of the FD [65]. The problems resulting from Article 1, sect. 2 of the FD (relevance of the victim's consent) can be solved by interpretation in conformity with the obligations arising from Article 34, sect. 2, sent. 2, lit. b EU [66]. This might also be a possible solution for the improper implementation of Article 3, sect. 2, lit. a of the FD [67]. Regarding Article 3, sect. 2, lit. b of the FD which is not fully implemented, human trafficking in children is also covered by para. 236, sect. 1, sect. 3, No. 2 PC but this provision applies only to a limited circle of perpetrators (persons responsible for the well-being of these children, e.g. the parents) [68].

Finally, it has to be stated that most of the requirements of the FD are implemented in national law. The differentiation between exploitation offences (para. 232, para. 233 PC) and the promotion of these offences (para. 233a PC) is due to the traditional

[59] J. Eisele, *in* A. Schönke/H. Schröder, *op. cit.* (note 30), para. 232, para. 6; I. Staiger *op. cit.* (note 27), p. 603.

[60] H. Tröndle/T. Fischer, *op. cit.* (note 22), para. 233a, para. 3; in this regard, the objections to para. 233a are not founded, see I. Staiger, *op. cit.* (note 27), p. 621.

[61] F.C. Schroeder *op. cit.* (note 28), p. 1396; see also J. Renzikowski, "Die Reform der Straftatbestände gegen Menschenhandel", *JZ*, 2005, p. 879, 882.

[62] J. Renzikowski, *op. cit.* (note 61), p. 883.

[63] U. Hellmann, *op. cit.* (note 33), p. 52.

[64] J. Eisele, *in* A. Schönke/H. Schröder, *op. cit.* (note 31), para. 233a, para. 2, 4; J. Renzikowski, *op. cit.* (note 61), p. 883.

[65] See *Document of the Parliament (Bundestags-Drucksache)*, No. 15/4048, p. 13, 14.

[66] See U. Hellmann, *op. cit.* (note 33), p. 54.

[67] See J. Eisele, *in* A. Schönke/H. Schröder, *op. cit.* (note 30), para. 233a, para. 7.

[68] I. Staiger, *op. cit.* (note 27), p. 619.

concept of human trafficking in German criminal law (human trafficking as a form of exploitation) to which the German legislator still adheres [69]. The reason for the incomplete transposition of Article 3, sect. 2, lit. b of the FD (para. 233a, sect. 2, No. 1 PC) is the varying concept of sexual majority in German Criminal Law (see *supra* 3.A.1.); the legislator has referred to the offence of child abuse (para. 176 PC). The remaining shortcomings are of minor importance; in this regard, special reasons for the incomplete transposition into national law cannot be identified.

4. Legal practice

In 2006, 762 cases of human trafficking and sexual exploitation (para. 232 PC), 78 cases of human trafficking and labour exploitation (para. 233 PC), 49 cases of (promotion of) human trafficking for the purpose of sexual exploitation (para. 233a PC) and 3 cases of (promotion of) human trafficking for the purpose of labour exploitation (para. 233a PC) have been reported [70].

As far as human trafficking for the purpose of sexual exploitation is concerned, 353 investigative proceedings were terminated in 2006. The statistics of condemnations in 2006 is not available yet.

The main focus of the prosecution is on human trafficking for the purpose of sexual exploitation, i.e. prostitution (see the statistics, *supra*); despite a slight increase of the number of proceedings, pursuant to the assessment of the Federal Police Office (*Bundeskriminalamt*) the dimension of human trafficking in Germany is still limited [71].

As far as human trafficking for the purpose of labour exploitation is concerned the courts and the prosecution authorities still have very little practical experience, but the number of proceedings is expected to increase. Up to now, offences of labour exploitation have been committed in the hotel and catering industry and in the field of private housekeeping [72].

With regard to the offences of human trafficking for the purpose of labour exploitation, the small number of cases might be attributed to the fact that the criminal provisions (para. 233, 233a PC) have been introduced recently and need some time to work in practice [73].

From the perspective of the police authorities it is held that specific difficulties in investigating human trafficking result from the legalisation of prostitution so that the police cannot take investigative measures, but has to establish that the victim engages in prostitution against her will [74]. Similar problems might arise from the accession

---

[69] See in this regard *Document of the Parliament (Bundestags-Drucksache)*, No. 15/3045, p. 6.

[70] See Bundeskriminalamt (ed.), Crime Statistics (Polizeiliche Kriminalstatistik) 2006, Wiesbaden 2007, p. 34, 35.

[71] See Bundeskriminalamt (ed.), Lagebericht Menschenhandel (situation report human trafficking) 2006, Wiesbaden 2007, p. 3, 10.

[72] See *Ibid.*, p. 9, 10.

[73] See *Ibid.*, p. 10.

[74] See W. Schmidbauer, “Das Prostitutionsgesetz zwischen Anspruch und Wirklichkeit aus polizeilicher Sicht”, *NJW*, 2005, p. 871, 872.

of new Member States and the right of their nationals to enter the territory of other Member States [75]. On the other hand, criminal provisions are not to be adopted to facilitate police investigations; furthermore, it is still possible to take investigative measures against the perpetrator, e.g. by the financial authorities for the purpose of tax control [76]. Despite the fact that in 2006 40 % of the proceedings were initiated by an application of the victim [77], it is still necessary to encourage and support the victims by legislative and financial measures, e.g. contact points and information centres [78].

5. Effectiveness and proportionality

A significant effect of the new provisions on human trafficking cannot be established because of the short period of time since the para. 232, 233, 233a PC have entered into force. In comparison to the former provisions the numbers of reported cases are still on a similar level. As far as human trafficking for the purpose of sexual exploitation (para.180b, 181 PC, para. 232 PC) is concerned, from 2001 to 2006, 746 cases (2001), 827 cases (2002), 850 cases (2003), 820 cases (2004), 699 cases (2005) and 712 cases (2006) have been reported [79]. A specific effect might have been caused by the protection of persons under 21 years of age: this appears from the fact that victims from the Czech Republic were in most cases older than 21 years and it is supposed that the perpetrators recruited those persons in order to avoid criminal responsibility according to the new para. 232, sect. 1, sent. 2 PC [80]. Since the effects of the new provisions are far from being quite clear it is hard to say whether the objectives of the FD could be fulfilled by less restrictive means.

On the other hand, the implementation raises doubts on the proportionality of the new provisions. At first, in certain cases, the criminal sanctions provided for in para. 232-233a PC are disproportionate. For instance, a person who gets another person under 21 years of age to take up or continue in prostitution (without exploiting the victim, see above 3.A.1.) is punished by imprisonment from six months to ten years (para. 232, sect. 1, sent. 2 PC). The provision contradicts the legalisation of prostitution [81] because a sanction for getting another person to take up a legal activity

---

[75] See BUNDESKRIMINALAMT (ed.), Lagebericht Menschenhandel…, *op. cit.*, p. 10.

[76] J. RENZIKOWSKI, "An den Grenzen des Strafrechts – Die Bekämpfung der Zwangsprostitution", *ZRP*, 2005, p. 213, 217; see also M. FROMMEL, "Die Reform der Strafbarkeit von Menschen- und Frauenhandel aus kriminologischer Sicht", *Neue Kriminalpolitik*, 2005, p. 57, 60.

[77] See BUNDESKRIMINALAMT (ed.), Lagebericht Menschenhandel *op. cit.*, p. 4.

[78] J. RENZIKOWSKI, *op. cit.* (note 76), p. 217; B. THOMA, *op. cit.* (note 18), p. 53, 54.

[79] See BUNDESKRIMINALAMT (ed.), Crime Statistics (Polizeiliche Kriminalstatistik) 2006, Wiesbaden, 2007, p. 34; Crime Statistics (Polizeiliche Kriminalstatistik) 2005, Wiesbaden, 2006, p. 33, 35; Crime Statistics (Polizeiliche Kriminalstatistik) 2004, Wiesbaden, 2005, p. 34; Crime Statistics (Polizeiliche Kriminalstatistik) 2003, Wiesbaden 2004, p. 34; Crime Statistics (Polizeiliche Kriminalstatistik) 2002, Wiesbaden, 2003, p. 32.

[80] See BUNDESKRIMINALAMT (ed.), Lagebericht Menschenhandel…, *op. cit.*, p. 6, 7.

[81] See the Law for the Regulation of the Legal Status of Prostitutes (*Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten*) of 20 December 2001, *Federal Law Gazette (Bundesgesetzblatt)*, part I, p. 3983.

is inadequate [82]. The correspondent provision on labour exploitation (para. 233, sect. 1, sent. 2) gives rise to similar criticism (see *supra*, 3.A.1.). Furthermore, the exploitation by employment under conditions which are in striking disproportion to the conditions of other persons with an equivalent employment (para. 233, sect. 1, sent. 1 PC) is also covered by the offence of usury (para. 291 PC: imprisonment of not more than three years or a fine). The aggravated sentence in para. 233, sect. 1, PC is not comprehensible. Since the new provisions cover non-exploiting acts that cannot be qualified as trafficking in human beings and the punishment of these acts is based on the mere presumption that persons are exploited, they are also regarded as an impediment to the rights of the defence and the right to a fair trial [83].

6. Reception and perception

During the legislative process the majority of practitioners have welcomed the new provisions, but some of them expressed the view that the new legislation would fall too short and called for extended investigative powers (e.g. surveillance of telecommunication) [84]; others criticised the impunity of "suitors" [85]. In principle, the DJB (*Deutscher Juristinnenbund*) has welcomed the implementation, but has also criticised shortcomings of the draft of the implementation act [86]. In the end, most of the critical remarks during the parliamentary process were taken into account by the legislator, except some minor issues like e.g. the introduction of further aggravating circumstances such as carrying or using a gun or a weapon.

The newly adopted offence of trafficking in human beings (para. 232 CP) has been object of two judgments [87] of the Federal Court of Justice (*Bundesgerichtshof*). The Court does not mention the FD, but it has referred to the FD on the standing of victims in criminal proceedings [88] several times [89].

As far as the reaction of politicians is concerned, the implementation act has been welcomed by all political parties [90]. Nevertheless, the opposition has criticised the inconsistency of the new provisions within the criminal legal system and the impunity

---

[82] See M. Frommel/M. Schaar, *op. cit.* (note 43), p. 62; H. Tröndle/T. Fischer, *op. cit.* (note 22), para. 232, para. 17.

[83] F.C. Schroeder, *op. cit.* (note 28), p. 1394.

[84] The surveillance of telecommunication was only permitted in order to prosecute aggravated cases of human trafficking (para. 232, sect. 3 to sect. 5 and para. 233, sect. 3 PC). In the meantime the German legislator has extended the scope of this competence to offences of human trafficking in general (para. 232 to 233a PC), see para. 100a, sect. 2, No. 1, lit. i CCP.

[85] See the summary of the opinions of the legal experts invited to the hearing of the committee on legal affairs (*Rechtsausschuss*) in June 2004 (www.bundestag.de).

[86] Opinions (*Stellungnahmen*) of 17 March 2004 and 3 May 2004 (www.djb.de).

[87] Federal Criminal Court (*Bundesgerichtshof*), Decision of 18 April 2007, 2 StR 571/06; Decision of 7 March 2006, 2 StR 555/05.

[88] *OJ*, No. L 82, 22 March 2001, p. 1.

[89] Federal Criminal Court (*Bundesgerichtshof*), Judgment of 23 April 2007, GSSt 1/06; Judgment of 27 July 2005, 1 StR 78/05; Judgment of 11 January 2005, 1 StR 498/04.

[90] See the discussion in the Parliament (*Bundestag*), Deutscher Bundestag – 15. Wahlperiode – 135th session – 28 October 2004, p. 12369 et s.

of suitors [91]. In reaction to this criticism, the Federal Council has presented a proposal for a reform of the provisions against human trafficking. According to the draft, the penalties shall be aggravated, "suitors" shall be punished and the procedural measures to prosecute those crimes shall be extended (surveillance of telecommunication, impunity for principal witnesses) [92].

Other politicians called for additional measures for the protection of the victims [93]. The NGO "KOBRA" (Zentrale Koordinierungs- und Beratungsstelle für Opfer von Frauenhandel – coordination and information centre for victims of trafficking in women) also expressed the view that, without a better protection of victims in criminal proceedings, the fight against trafficking in human beings would not be significantly improved by the new legislation [94].

The reception in legal literature is positive and critical as well. The new concept of the criminal provisions against human trafficking has been welcomed because the legislator reformulated the vague and complex offence of human trafficking [95]. Nevertheless, the integration of the reformulated offences in the chapter on "crimes against personal freedom" has been criticised as far as sexual exploitation is concerned [96]. Additional critical remarks refer to technical details of the wording of the new provisions [97].

As far as the content of the new provisions is concerned, scholars criticise that the offences cover also acts that should not be punished according to para. 232 *et s.* PC (see *supra* 5., with regard to the principle of proportionality) [98]. Some scholars raise fundamental objections to the new provision maintaining that the situation of the victims can be improved by civil law instruments [99].

7. Conclusion

In general, the approximation of criminal law enhances the protection of legal interests by criminal law because it hinders the perpetrators from taking advantages of legal diversity by chosing the most "convenient" legal system; besides, harmonisation

---

[91] See the Members of Parliament *S. Kauder* (CDU/CSU), p. 12370, 12371 (note 72) and *U. Granold* (CDU/CSU), p. 12374.

[92] See *Document of the Parliament (Bundestags-Drucksache)*, No. 16/1343; see *supra* note 83.

[93] See Member of the Parliament *Schwewe-Gerigk* (Bündnis 90/ DIE GRÜNEN), p. 12371.

[94] See the summary of the opinions of the legal experts invited to the hearing of the committee on legal affairs (*Rechtsausschuss*) in June 2004 (www.bundestag.de).

[95] J.R. Eydner, *op. cit.* (note 44), p. 11; J. Renzikowski, *op. cit.* (note 61), p. 879, 885.

[96] J. Renzikowski, *op. cit.* (note 61), p. 879; F.C. Schroeder, *op. cit.* (note 28), p. 1395; but see also the different view of U. Hellmann, *op. cit.* (note 33), p. 51.

[97] F.C. Schroeder, "Gesetzestechnische Fehler im 37. Strafrechtsänderungsgesetz", *GA*, 2005, p. 307 *et s*.

[98] See also with regard to impunity if the perpetrator abandons the offence: J. Renzikowski, *op. cit.* (note 55), p. 882.

[99] M. Frommel, *op. cit.* (note 76), p. 59 *et s*.; see also M. Frommel/M. Schaar, *op. cit.* (note 43), p. 63.

facilitates the cooperation in criminal matters because the cooperation is based on parallel (or at least similar) criminal law provisions [100].

As far as the FD is concerned, a positive effect on the fight against human trafficking has not been established yet. With regard to human trafficking, the possibility to avoid criminal responsibility should not be overestimated because, in general, the offence has to be – at least partially – committed within the territory of the Member States in which the victim shall be exploited. Nevertheless, the age of the victims from the Czech Republic (see *supra* 5.) suggests that the definition of criminal offences does influence the behaviour of criminals. On the other hand, harmonisation plays an important role for the cooperation in criminal matters with regard to transnational crime such as human trafficking.

Nevertheless, these positive effects of harmonisation are limited because the FD defines a minimum standard of criminal protection, i.e. the Member States may go beyond the requirements of the FD by adopting additional criminal offences or extending their scope. As a consequence, the FD cannot fulfil a "shield function" by protecting the individual from being punished for acts not covered by the FD and by hindering uneven criminal prosecution in the different Member States.

Since human trafficking is one of the categories mentioned in Article 2, sect. 2 of the FD on the European Arrest Warrant, there is no control of the double criminality requirement in extradition proceedings (para. 81, No 4 Law on International Assistance in Criminal Matters – Gesetz über die Internationale Rechtshilfe in Strafsachen) but the court has to examine whether the act of the accused person is covered by the "European" concept of human trafficking which is defined by the FD [101]. In this regard, one might say that the FD strengthens the mutual trust in the fact that each Member State punishes offences covered by the FDs and guarantees a minimum standard of protection of the victims. Nevertheless, the fact that Member State may go beyond this minimum is still a possible reason for mutual distrust because Member States might assume that the other Member States do not observe the constitutional limits of criminal law derived from the fundamental rights of the individual.

Correspondingly, the impact of the FD on the level of protection of human rights is positive and negative as well. On the one hand, the new offences against trafficking in human beings strengthen the protection of human rights of potential victims, especially women and children. Insofar, the FD contributes to the aim of an area of freedom, security and justice, in particular because it enhances a closer cooperation in criminal matters. On the other hand, the concept of the criminal offence covers acts that are not to be punished or at least not punished in that way (see *supra* 3. B. and 5.). Thus, with regard to the defendant there is a negative impact of the FD and of its implementation in national law on the level of protection of human rights.

Although the legislator tried to adopt a consistent system of offences against human trafficking, the FD and its implementation affect the internal balances of national

---

[100] See A. Weyembergh, "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme", *CMLR*, 2005, p. 1567, 1574 *et s*.

[101] See M. Böse, *in* H.Grützner/P. G. Pötz, *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed., Heidelberg, C.F. Müller Verlag (February 2008), para. 81 IRG, para. 15, 48, 49.

criminal law under certain aspects. At first, the notion of a child (person under 18 years of age) differs from German Criminal Law [102]. Secondly, the requirements with regard to criminal sanctions (Article 3, sect. 2 of the FD) do not take into account that according to German Law, the punishment for aiding and abetting shall be mitigated (para. 27, sect. 2, sent. 2 PC). Thirdly, there is no criminal offence that provides for a maximum custodial sentence of eight years (Article 3, sect. 2 of the FD). So, the legislator had to provide for a sentence of imprisonment to a maximum of 10 years in order to comply with the sanctioning levels of the national criminal law system. That means: the legislator can avoid inconsistencies only by adopting criminal provisions which go beyond the minimum standard of the FD and by creating an imbalance between security (minimum standard) and freedom (criminal law as *ultima ratio*).

Notwithstanding the fact that the main objective of the FD is an effective protection of human rights by criminal law ("sword" function) the European legislator merely considers [103], but does not define the limits of criminal law derived from the principle of proportionality (criminal law as *ultima ratio*) and the fundamental rights of the individual ("shield function"). As a consequence of the binding nature of the framework decisions, the national legislator is relieved of the burden to give reasons for the adoption of a criminal provision; he is only free to decide whether he will go beyond the minimum standard of protection by criminal law, in particular to avoid inconsistencies in the national legal system. These factors can lead to an imbalance between "security" and "freedom" (Article 29 EU) [104]. These developments also affect the principle of legality. The democratic legitimation of criminal law provisions can be doubted if the national legislator is bound by a legal instrument which lacks a sufficient democratic legitimacy on the European level because the Parliament is merely consulted (Article 39, sect. 1 EU) [105]. Nevertheless, it is up to the Member States to ensure that the national parliament has a significant influence on the adoption of framework decisions. Thus, the democratic deficit can be reduced by Parliamentary reservations and – if necessary – a "veto" based on the requirement of unanimity (Article 34, sect. 2 EU) [106]. In this respect, it must be appreciated that, if it enters into force, the Treaty of Lisbon [107] would strengthen the European Parliament's legislative powers in the field of cooperation in criminal matters [108] and provide for the participation of national Parliaments in the legislative process at the European

[102] See the critical remarks by F.C. Schroeder, *op. cit.* (note 28), p. 1394 (note 4).

[103] See consideration (7); see also Article 3, sect. 1.

[104] See the general criticism of P.A. Albrecht, "Europäischer Strafrechtsraum: Ein Alptraum?", *ZRP*, 2004, p. 1 *et s*.

[105] B. Schünemann, "Fortschritte und Fehltritte in der Strafrechtspflege der EU", *GA*, 2004, p. 193, 200.

[106] See in this regard Judge Lübbe-Wolff, dissenting opinion on the implementation of the European Arrest Warrant, published in: *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 113, p. 327, 337; M. Böse, *op. cit.* (note 101), Vor para. 78, para. 5.

[107] *OJ*, No. C 306, 2007, p. 1.

[108] See the application of the codecision procedure according to Article 82, 83, 85, 87, 88 and Article 294 of the (new) Treaty on the Functionning of the European Union.

level [109]. However, it remains to be seen whether the democratic deficit of the European Union can be resolved by such new procedural safeguards.

[109] See Article 69 of the (new) Treaty on the Functionning of the European Union.

Annex. Para. 232-233a of the German PC

Original version

Para. 232 – Menschenhandel zum Zweck der sexuellen Ausbeutung

(1) Wer eine andere Person unter Ausnutzung einer Zwangslage oder der Hilflosigkeit, die mit ihrem Aufenthalt in einem fremden Land verbunden ist, zur Aufnahme oder Fortsetzung der Prostitution oder dazu bringt, sexuelle Handlungen, durch die sie ausgebeutet wird, an oder vor dem Täter oder einem Dritten vorzunehmen oder von dem Täter oder einem Dritten an sich vornehmen zu lassen, wird mit Freiheitsstrafe von sechs Monaten bis zu zehn Jahren bestraft. Ebenso wird bestraft, wer eine Person unter einundzwanzig Jahren zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Satz 1 bezeichneten sexuellen Handlungen bringt.
(2) Der Versuch ist strafbar.
(3) Auf Freiheitsstrafe von einem Jahr bis zu zehn Jahren ist zu erkennen, wenn 1. das Opfer der Tat ein Kind (§ 176 Abs. 1) ist,
2. der Täter das Opfer bei der Tat körperlich schwer misshandelt oder durch die Tat in die Gefahr des Todes bringt oder
3. der Täter die Tat gewerbsmäßig oder als Mitglied einer Bande, die sich zur fortgesetzten Begehung solcher Taten verbunden hat, begeht.
(4) Nach Absatz 3 wird auch bestraft, wer
1. eine andere Person mit Gewalt, durch Drohung mit einem empfindlichen Übel oder durch List zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Absatz 1 Satz 1 bezeichneten sexuellen Handlungen bringt oder
2. sich einer anderen Person mit Gewalt, durch Drohung mit einem empfindlichen Übel oder durch List bemächtigt, um sie zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Absatz 1 Satz 1 bezeichneten sexuellen Handlungen zu bringen.
(5) In minder schweren Fällen des Absatzes 1 ist auf Freiheitsstrafe von drei Monaten bis zu fünf Jahren, in minder schweren Fällen der Absätze 3 und 4 ist auf Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu erkennen.

Para. 233 – Menschenhandel zum Zweck der Ausbeutung der Arbeitskraft

(1) Wer eine andere Person unter Ausnutzung einer Zwangslage oder der Hilflosigkeit, die mit ihrem Aufenthalt in einem fremden Land verbunden ist, in Sklaverei, Leibeigenschaft oder Schuldknechtschaft oder zur Aufnahme oder Fortsetzung einer Beschäftigung bei ihm oder einem Dritten zu Arbeitsbedingungen, die in einem auffälligen Missverhältnis zu den Arbeitsbedingungen anderer Arbeitnehmerinnen oder Arbeitnehmer stehen, welche die gleiche oder eine vergleichbare Tätigkeit ausüben, bringt, wird mit Freiheitsstrafe von sechs Monaten bis zu zehn Jahren bestraft. Ebenso wird bestraft, wer eine Person unter einundzwanzig Jahren in Sklaverei, Leibeigenschaft oder Schuldknechtschaft oder zur Aufnahme oder Fortsetzung einer in Satz 1 bezeichneten Beschäftigung bringt.
(2) Der Versuch ist strafbar.
(3) § 232 Abs. 3 bis 5 gilt entsprechend.

Para. 233a – Förderung des Menschenhandels

(1) Wer einem Menschenhandel nach § 232 oder § 233 Vorschub leistet, indem er eine andere Person anwirbt, befördert, weitergibt, beherbergt oder aufnimmt, wird mit Freiheitsstrafe von drei Monaten bis zu fünf Jahren bestraft.

(2) Auf Freiheitsstrafe von sechs Monaten bis zu zehn Jahren ist zu erkennen, wenn
1. das Opfer der Tat ein Kind (§ 176 Abs. 1) ist,
2. der Täter das Opfer bei der Tat körperlich schwer misshandelt oder durch die Tat in die Gefahr des Todes bringt oder
3. der Täter die Tat mit Gewalt oder durch Drohung mit einem empfindlichen Übel oder gewerbsmäßig oder als Mitglied einer Bande, die sich zur fortgesetzten Begehung solcher Taten verbunden hat, begeht.
(3) Der Versuch ist strafbar.

English version

Para. 232 – Human trafficking for the purpose of sexual exploitation

(1) Whoever, by exploiting a coercive situation or the helplessness associated with the person's stay in a foreign country, gets another person to take up or continue in prostitution or otherwise to engage in sexual acts, whereby the person is being exploited, which the person commits on or in front of the perpetrator or a third person or allows to be committed on the person by the perpetrator or a third person, shall be punished with imprisonment from six months to ten years. Whoever gets a person under twenty-one years of age to take up or continue in prostitution or otherwise to engage in sexual acts mentioned in sentence 1, shall be similarly punished.
(2) An attempt shall be punishable.
(3) Imprisonment from one year to ten years shall be imposed if
1. the victim of the act is a child (para. 176, sect. 1),
2. the perpetrator seriously physically maltreats the victim or places the victim in danger of death while committing the offence or
3. the perpetrator commits the offence professionally or as a member of a band which has combined for the continued commission of such offences with the participation of another member of the gang.
(4) According to sect. 3 shall also be punished whoever
1. with force, threat of appreciable harm or trickery induces another person to take up or continue prostitution or otherwise to engage in sexual acts mentioned in sect. 1 or
2. with force, threat of appreciable harm or trickery seizes another person in order to coerce him or her to take up or continue prostitution or otherwise to engage in sexual acts mentioned in sect. 1.
(5) In less serious cases under section (1) imprisonment from three months to five years shall be imposed, In less serious cases under section (3) and (4) imprisonment from six months to five years.

Para. 233 – Human trafficking for the purpose of labour exploitation

(1) Whoever, by exploiting a coercive situation or the helplessness associated with the person's stay in a foreign country, places another person in slavery, bondage or debt bondage or gets another person to take up or continue in an employment under conditions which are in striking disproportion to the conditions of other persons with an equivalent employment, shall be punished with imprisonment from six months to ten years. Whoever places a person under twenty-one years of age in slavery, bondage or debt bondage or gets this person to take up or continue in an employment mentioned in sentence 1, shall be similarly punished.
(2) An attempt shall be punishable.
(3) Para. 232 sect. 3 to sect. 5 shall apply accordingly.

Para. 233a – Promotion of human trafficking

(1) Whoever abets the commission of human trafficking under para. 232 or para. 233 by recruiting, transporting, transferring, harbouring or subsequently receiving another person, shall be punished with imprisonment from three months to five years.
(2) Imprisonment from six months to ten years shall be imposed if
1. the victim of the act is a child (para. 176, sect. 1),
2. the perpetrator seriously physically maltreats the victim or places the victim in danger of death while committing the offence or
3. the perpetrator commits the offence with force or threat of appreciable harm or professionally or as a member of a band which has combined for the continued commission of such offences with the participation of another member of the gang.
(3) An attempt shall be punishable.

The FD on combating trafficking in human beings

Evaluating its fundamental attributes as well as its transposition in Greek criminal law

Maria Kaiafa-Gbandi, Nikolaos Chatzinikolaou, Athina Giannakoula, Théodor Papakyriakou [1]

1. Introduction

The European Union has admittedly been on a path towards more elaborate modes of unification. Such process inexorably encroaches on the domestic law of its Member States, at least as regards those fields that are within the Union's competence. One of these fields, of particular relevance to criminal law, is the area of freedom, security and justice, aiming at a high level of protection to EU citizens. Truth be told, it is only reasonable for a Union without internal borders to aspire to some balance between free movement of persons on the one hand and effective crime control on the other. The latter, however, has to be achieved through respect for the rule of law.

Over the last few years, achieving an area of freedom, security and justice under Articles 29 *et s.* of the TEU has relied on FDs. Indeed, multilateral conventions have proved unfit to ensure the approximation of Member States' legislation, owing in large part to the delay in terms of the ratification process. In addition, the Union's focus is currently shifting to directives, which will take prevalence in the field of criminal law once the Treaty of Lisbon (amending the TEU) enters into force and the three pillars merge.

It thus becomes imperative to evaluate the function of FDs in the context of European Criminal Law, as well as assess their impact on the domestic criminal law of Member States. Suffice it to say that FDs have evolved in an institutional environment of particular traits such as: democratic deficit, lack of fundamental rights' institutional protection, as well as abuse of powers in the EU's effort to interfere with the domestic

[1] The authors wish to thank Y. Naziris for his contribution to the translation of the text in English. The study reflects the state of bibliography and Greek law as of May, 2008.

criminal law of its Member States [2]. On the other hand, such interference is liable to gradually impinge on fundamental principles of criminal law to such an extent as to reshape domestic legal systems. Accordingly, any attempt to evaluate European criminal law at an interstate level must necessarily take into account all the above parameters. This has been the main concern of the present national report. In that sense, the evaluation is broadened in terms of both the criteria employed and its object. Formal and substantive conformity of national legislations to the provisions of the FD only forms part of this evaluation. First and foremost, it is essential to assess the quality of the FD itself under the prism of rule-of-law principles and crime prevention concerns. Such assessment will then allow a better understanding of possible deviations traced in domestic legislations.

The FD on trafficking in human beings is admittedly an excellent example of an attempt to evaluate the function of European criminal law. Firstly, because it endeavors to protect very important legal interests of the individual, which ought to be the Union's main focus; secondly, because its very subject-matter spans over both substantive and procedural law, thus allowing for comprehensive analysis.

A thorough understanding of the provisions incorporating the FD on trafficking in human beings in the Greek legal order requires knowledge of various provisions of Greek law, both regarding general criminal law matters (e.g. fundamental principles, classification of crimes, types of sanctions) and issues pertaining to addressing trafficking-related problems (e.g. illegal immigration, prostitution). Hence, the present report shall begin by offering an overview of these issues.

A. *Basic features of Greek substantive criminal law*

1. *Classification of criminal offences*

The Greek CC (hereafter CC) classifies crimes in three categories: felonies, misdemeanors, and transgressions. Each crime is labeled depending on the penalty prescribed for it, notwithstanding any applicable mitigating circumstances. Accordingly, Article 18 CC provides that a felony is an unlawful act punishable by imprisonment of five to twenty years (long term imprisonment) or life imprisonment; a misdemeanor is an unlawful act punishable by imprisonment of ten days to five years (short term imprisonment), pecuniary fine of 150 € to 15,000 €, or juvenile detention; a transgression is an unlawful act punishable by imprisonment of one day to one month (detention) or a pecuniary fine of 29 € to 590 €.

All crimes committed by juveniles are thus classified as misdemeanors.

Keeping this classification in mind is of aid in applying substantive criminal law in terms of:

- *Requisite* mens rea*:* Felonies are only punishable when committed with intent; the same rule applies to misdemeanors unless the law specifically provides for an exception; on the other hand, transgressions are punishable when committed either with intent or negligently, unless the law expressly confines their *mens rea* to intent (Article 26 CC).

[2] M. Kaiafa-Gbandi, *To Poiniko Dikaio stin Evropaiki Enosi*, Thessaloniki, Sakkoulas Publications, 2003, p. 16 *et s*.

- *Statutory limitations*: The period of statutory limitation varies according to the type of offence: 20 years for felonies punishable with life imprisonment, 15 years for other felonies, 5 years for misdemeanors, 1 year for transgressions. The statute of limitation is tolled upon referral of the case to court*;* such tolling may generally not last for more than 5, 3, or 1 year(s) depending on the nature of the offence as a felony, misdemeanor or transgression, respectively (Articles 111 and 113 CC). An exception was recently introduced in paragraph 6 of Article 118 CC (added by Statute No. 3625/2007). Under it, the statute of limitation for a number of offences against minors (several of which are trafficking-related) [3] shall be tolled until one or three years after the victim has reached the age of majority (depending on whether the offence is a felony or a misdemeanor).
- *Prosecution*: In the event of a felony or a transgression, charges are normally pressed by the State Prosecutor *proprio motu*. While this is also the standard procedure for misdemeanors, the law requires the injured party to press charges in a number of cases. When it comes to trafficking in human beings or sexual exploitation of children (see *infra)*, charges are always pressed by the State Prosecutor *proprio motu*.

The above distinction between the three categories of crimes is also vital for determining the scope of application of criminal laws *ratione loci*, circumscribing *recidivism*, granting *probation*, etc. In the field of *criminal procedure*, different crimes are treated differently in practically every stage of the prosecution (pressing of charges, restraining orders, arraignment, referring the case to court, appellate procedure, etc.).

The bulk of cases that ever make it to court involve misdemeanors. According to data from the National Statistical Agency, 73,161 persons were convicted in 2003, of which 69,622 were punished with short-term imprisonment (63,107) or a pecuniary fine (6,515), whereas only 360 were punished with long-term (348) or life imprisonment (12). While it is true that short-term imprisonment can also be imposed to felons if mitigating circumstances apply, that does not detract from the statistical prevalence of misdemeanors; indeed, the same data indicates that 43,808 of the persons sentenced to short-term imprisonment had to serve no more than 3 months, which in turn suggests that the respective cases involved nothing more than a misdemeanor.

Other classifications of crime are either suggested or presupposed in the general part of the Greek CC: thus, the CC knows of acts and omissions (Article 15), crimes committed with intent or negligence (Articles 26 *et s*.), crimes resulting in more serious harm than intended (Article 29), etc.

---

[3] These are the offenses proscribed in Articles: 323A (trafficking in human beings), 324 (abduction of minors), 336 (forcible rape), 338 (non-forcible rape), 339 (statutory rape), 342 (sexual abuse of minors), 343 (sexual assault by abuse of authority), 345 (incest), 346 (lewd or lascivious conduct between relatives), 347 (sexual intercourse between males), 348 (facilitating sexual intercourse of others for profit), 348A (child pornography), 349 (pandering), 351 (sexual trafficking), and 351A (remunerated intercourse with a minor).

2. Typology of criminal sanctions

Despite its idiosyncrasy, the Greek sanction system can be regarded as a "dualistic" or "two-track" one, its two "tracks" being *penalties* and *measures of reform and security*. Still, much of the drive favoring reform over retribution – underlying not only particular norms but the very "dualistic" system as a whole – has waned in practice. A case in point are the provisions on recidivism (Articles 88 *et s*. CC), which are consistently being ignored by criminal courts, not to mention the fact that the overall application of "measures of reform and security" has not lived up to the original expectations that led to their adoption.

Notwithstanding criticism of this sort, the distinction between penalties and measures of reform and security is not without merit: for instance, it is crucial to note that the principle of non-retroactivity of sanctions does not apply to the latter (Article 4 CC).

The *death penalty* was prescribed for certain grave felonies until the early nineties, although it had last been enforced in 1972. As a result of multiple statutory amendments, it was finally abolished for non-military crimes; in fact, Article 7, para. 3 of the Constitution (as amended in 2001) currently proclaims that the death penalty may only be prescribed for crimes committed in time of war in relation thereto. Subsequently, Greece ratified Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances, which supersedes the pertinent provisions in the Greek Military Code (ratification took place by virtue of Statute No. 3289/2004). As a result, the death penalty has been abolished for all crimes, including the ones committed in time of war.

Custodial sanctions under Greek law are: long-term imprisonment, short-term imprisonment, juvenile detention, psychiatric detention, and detention (Article 51 CC):

- *Long-term imprisonment* is the maximum sentence prescribed and can only be imposed to felons: long-term imprisonment can be imposed for a fixed term (between 5 and 20 years) or for life (Article 52 CC). The CC also provides for indefinite imprisonment (Articles 90 *et s*. CC), which is rarely imposed in actual practice.
- *Short-term imprisonment* is imposed for a fixed term of 10 days to 5 years (Article 53 CC). As noted above, short-term imprisonment constitutes the hub of crime policy in Greece, at least in terms of its frequent imposition. It is of note that the actual incarceration of a person convicted for misdemeanor poses the exception rather than the rule: this is due to ever-expanding alternatives to imprisonment, such as probation, day-fines, or community service, owing their existence to prison overpopulation.
- *Juvenile detention* can only be imposed for crimes committed by persons aged 13 to 18. In 2003, the provisions of the CC on juveniles were amended to the effect that the judge now has to specify a fixed period for the detention of each convicted juvenile (Article 127, para. 2). Such period (ranging from 6 months to 20 years) will depend on the penalty prescribed for the same offence when committed by an adult (Article 54 CC).

- *Psychiatric detention*, applicable to "dangerous" offenders of diminished mental capacity (Article 38 CC), is rarely imposed in actual practice; the same goes as regards *detention* for transgressions (Article 55 CC).

The above custodial penalties are mitigated in the presence of certain circumstances, such as attempt (Article 42 CC*)*, indirect aiding or abetting (Article 47 CC), and, notably, mitigating circumstances (Article 84 CC*).* Thus, the penalty for a felony can be reduced to a minimum of 2 years (or even 1 year under another proposed reading of the law), as opposed to 5 years which is the minimum period of imprisonment prescribed for felonies. On the other hand, the CC provides for aggregation of penalties in the event of concurrent offences (Articles 94 *et s*. CC): for instance, the penalty imposed to a person convicted of multiple misdemeanors can extend to imprisonment of up to 10 years, as opposed to 5 years which is the maximum period of imprisonment for each misdemeanor. It then follows that, despite the delineation of custodial penalties, there is a "middle ground" ranging from 2 to 10 years that could potentially correspond to either felonies or misdemeanors. Even in these cases, labeling a crime as felony or misdemeanor does retain its significance in matters such as statutory limitations. Finally, the nature of the sentence imposed (long-term or short-term imprisonment) is crucial in matters such as statutory limitation for the penalty itself, *parole* (which can be granted after the convict serves a minimum time of 3/5 if sentenced to long-term imprisonment or 2/5 if sentenced to short-term imprisonment under Article 105 CC), etc.

The imposition of *pecuniary fines* is becoming more and more prevalent: as regards misdemeanors, a fine can range from 150 € to 15,000 € (subject to adjustment in the special part of the CC or other criminal statutes, particularly affecting the maximum amount imposable); as regards transgressions, fines constitute the most common form of punishment, ranging from 29 € to 590 € (Article 57 CC). The fine imposed is aggregated by about 92 % in the form of surcharges *pro bono.* Failure to disburse these surcharges amounts to non-compliance with the sentence itself. It is thus evident that the actual fines imposed are almost double compared to the amount provided for each crime.

The most important *collateral sanctions* are deprivation of political rights (Articles 59 *et s*. CC) and forfeiture (Article 76 CC), the latter sometimes being imposed as a measure of security. Both these sanctions are applicable to felonies and misdemeanors alike. Other collateral sanctions such as disability to exercise a given profession (Article 67 CC) or heralding the judgment (Article 68 CC) are of lesser practical significance.

The Greek CC provides for such *measures of reform and security* as confinement of persons suffering from mental illness (Article 69), placement of drug addicts and alcoholics into recovery and treatment centers (Article 71), corrective labor (Article 72), prohibition of residence in a given place or territory (Article 73), and judicial expulsion of aliens (Article 74). As previously noted, forfeiture can be imposed either as a collateral sanction or as a security measure.

The idiosyncrasy of the Greek sanction system, of which word was made earlier, consists in that the above measures either complement or substitute penalties. In any

event, their application usually pivots on the custodial sentence prescribed for each crime.

A good portion of criminal law publicists have reservations regarding the distinction between penalties and other measures; they suggest that, in reality, the so-called "measures of reform and security" are penalties under a different tag. Some of these reservations have occasionally found their way into case-law.

Of the measures cited above, the ones that are actually being enforced are: the confinement of the mentally ill, forfeiture, and judicial expulsion. The latter's occurrence has lately been on the rise, leading to a number of issues related to aliens' detention prior to expulsion; in fact, certain rules governing probation and parole tend to facilitate the imposition of this measure. The other measures were practically never applied, either due to lack of resources or as a result of constitutional constraints (as in the case of corrective labor). Besides, the placement of drug addicts and alcoholics in treatment centers has been fully supplanted by the meticulous provisions of the Code of Statutes on Narcotic Substances.

A novel measure (*prima facie* classifiable among measures of reform and security) was recently introduced by Statute No. 3625/2007 (see new Article 352A). Under it the sentencing court may order subjection to a therapeutic program in case of conviction for any offence involving sexual abuse or exploitation of a minor. The said measure is only applicable with the convict's consent.

The eighth chapter of the CC's General Part concerning the *treatment of juveniles* was amended by virtue of Statute No. 3189/2003.

In addition to juvenile detention, which is the gravest sanction imposable to minors aged 13 to 18, the juvenile judge may choose to order a number of reform and curative measures. Reform measures (Article 122 CC) comprise either "sanctions" not involving a major change in the minor's life (e.g. a warning, conciliation with the victim) or "pedagogical" procedures (as per the CC), involving some sort of guardianship (e.g. placement in a juvenile institution, community service). The enumeration is not restrictive; therefore, a juvenile judge may impose additional measures not cited therein (Article 122, para. 2 CC). Curative measures, mainly intended for minors who are mentally ill or abuse drugs, are provided for under Article 123 CC.

If the offender is aged 8 to 13, the juvenile judge may only order reform or curative measures, irrespective of the gravity of the offence. When it comes to offenders aged 13 to 18, juvenile detention can be imposed but only as a last resort, i.e. when reform or curative measures are deemed insufficient (Articles 126-127 CC). The judge will normally resort to juvenile detention if the minor commits an offence that would be labeled a felony if committed by an adult or in the case of persistent juvenile offenders.

Problems have arisen regarding the provision enabling the release of aliens convicted to juvenile detention, on condition of immediate judicial expulsion (Article 129, para. 5 CC), as expulsion is not among the sanctions threatened against juveniles.

The main objective of the recent reform of juvenile law was to reinforce welfare provisions on the treatment of juvenile offenders. Be that as it may, certain publicists

are concerned about the fact that the suppressive nature of juvenile sanctions tends to be overlooked, which ultimately tends to discount due process rights of minors.

The Greek correctional system has been undergoing acute overpopulation problems for the last 20 years. Combined with the extensive criminalization of common infractions (such as tax and social insurance evasion), these problems have brought about the expansion of alternatives to custody such as *probation* (Articles 99 *et s*. CC) and conversion to day-fines or community service (Article 82 CC). These alternatives can be applied *in lieu* of short-term imprisonment not exceeding 3 years. Although supervised probation was recently introduced for terms of imprisonment between 3 and 5 years (Article 100A CC), the pertinent provisions have yet to be implemented in practice due to lack of resources.

Probation can be mandatory or discretionary, depending on the term of imprisonment imposed. The basic prerequisite to grant probation is the absence of previous conviction of the offender to imprisonment of over 6 months. The judgment granting probation will also specify a probation period of no less than 3 and no more than 5 years; any conviction for a felony or misdemeanor during that period will amount to breach of the probation. Conversion of the sentence to a day-fine is normally opted for by criminal courts in the absence of the necessary prerequisite to probation (absence of previous conviction); on the other hand, community service has rarely been applied in actual practice. Of unique – albeit problematic – nature are the provisions regarding probation on condition of judicial expulsion, applicable to alien offenders (Article 99, para. 2-5 CC): such type of probation does not hinge on the above prerequisites, applies to imprisonment of up to 5 years, and is not subject to any probation period. The obvious aim of these provisions is to help depopulate prisons.

Other alternatives, introduced by different legislative acts, have rendered the actual detention of persons convicted to short-term imprisonment a rarity. For instance, Article 82, para. 2 CC provides for the possibility of buying out up to 2 years of a partially-served imprisonment term (provided it was more than 2 years and ½ thereof has been served).

Of similar weight is the expansion of *parole* (Articles 105 *et s.* CC). The minimum time served to be eligible for parole varies according to the penalty imposed (2/5 for short-term imprisonment, 3/5 for long-term imprisonment, 20 years for life imprisonment); the sole factor to be evaluated by the judge in granting parole is the behavior displayed by the convict during the time served (Article 106 CC). The gravity of the offence or the convict's criminal record are thus not to be evaluated when deciding to grant parole. Combined with the provisions on voluntary prison labor (which abbreviate the minimum time served before parole), a convict can be released on parole after serving 1/3 of the sentence. In the case of life imprisonment, the minimum time served before applying for parole can be chopped down to 16 years. In contrast, exceptions to parole do apply, the most important one being introduced quite recently for persons convicted to long-term imprisonment for drug trafficking.

3. *Age of criminal majority*

The 2003 amendment of juvenile law set the age of criminal majority to 18 years (Article 121, para. 1 CC), thus tuning the CC to what already applied in private law.

If an offender who was younger than 18 at the time of the act is already an adult by the time of trial, the court may at its discretion impose the respective sentence prescribed for adults, mitigated according to Article 83 CC (Article 130 CC); likewise for offenders who – albeit minors at the time of conviction – are already adults by the time their sentence is to be carried out (Article 131 CC).

Sentences imposed to offenders who are younger than 21 at the time of the act ("young adults" as per Article 133 CC) are subject to mitigation at the sentencing court's discretion.

4. The distinction between trafficking and smuggling in human beings

Human trafficking as a social phenomenon is first and foremost associated with illegal immigration. *Trafficking* and *smuggling* in human beings are proscribed as two distinct offences in Greek law. Nonetheless, distinguishing between the two has proved to be a rather arduous task, owing in large part to the ambiguity surrounding these two types of conduct at an international level.

Article 88, para. 1 and 2 of Statute No. 3386/2005, reiterating earlier formulations for the most part, is the *core provision on smuggling* in human beings. Under it any person who arranges or otherwise assists the illegal entry of non-EU nationals into Greek territory (including – but not limited to – transporting them) shall be punishable with imprisonment of at least 1 year and a pecuniary fine per immigrant; if the above acts resulted in death of the immigrant, the penalty is life imprisonment plus a pecuniary fine.

The said Statute also proscribes certain "accessorial" crimes, such as employing immigrants not holding a residence permit (Article 86), assisting illegal residence (Article 87, para. 6), illegal possession or use of passports or other travel documents (Article 87, para. 7), etc. In fact, under a recent amendment, these acts shall incur long-term imprisonment if committed "*in the context of a criminal organization*" (see Article 87, para. 5 of Statute No. 3386/2005 – as amended by Statute No. 3536/2007 – in conjunction with Article 187 CC).

Certain types of trafficking are proscribed, *inter alia*, in Articles 323, 323A, and 351 CC [4].

Article 323 CC proscribes the absolute deprivation of a person's liberty by means of, among other things, capture, purchase or sale, as well as assisting such conduct; the common denominator of these acts is the treatment of the victim as a slave. Article 323A CC proscribes every other form of trafficking save for sexual trafficking, the latter being dealt with in Article 351 CC. Among the types of conduct proscribed under Article 323A CC are the transportation into or within the country by means of violence, coercion or deception.

These elements are also traced in the *actus reus* of sexual trafficking (Article 351 CC), which is essentially trafficking with a special intent of sexual exploitation.

A qualified (yet unintelligible) form of this offence is proscribed under paragraph 4, section (c) of Article 351 CC, applicable if trafficking is related to "the victim's illegal entry into, stay or exit from the country"; under these circumstances,

[4] For further analysis of the elements of these crimes see *infra* 2.B.1.

the penalty is imprisonment of 10 years or more, as well as a pecuniary fine of 50,000 € to 100,000 €.

It artlessly follows that the same conduct will often come within the scope of multiple provisions; combined with the fact that the penalties provided for in these provisions fail to indicate any particular hierarchy of the various offences, one easily concludes that smuggling and trafficking are not systematically evaluated in a clear way by the law, as it currently stands.

5. *The law on prostitution and prostitution-related conduct*

Human trafficking is also closely associated with prostitution. *Prostitution* is not *per se* a criminal offence under Greek law. However, non-compliance to legal requirements for the exercise of prostitution may bring about the imposition of criminal sanctions.

Such requirements comprise obtaining a license to exercise prostitution (Article 1 of Statute No. 2734/1999), passing regular medical examinations (Article 2 of Statute No. 2734/1999), and abiding by the standards regarding the premises used (Articles 3 and 4 of Statute No. 2734/1999).

Exercising prostitution in disregard of the above requirements is punishable with imprisonment of no less than 10 days and no more than 2 years (Article 5, para. 1 of Statute No. 2734/1999). STD-positive persons who knowingly exercise prostitution are punishable with imprisonment of no less than 10 days and no more than 1 year, regardless of whether the disease was actually transmitted to another or not (Article 5, para. 2 of Statute No. 2734/1999).

Although prostitution is not a criminal offence *per se*, *publicly inciting others to sexual acts through indecent gestures or obscenity* is punishable with imprisonment of up to 3 months (Article 5, para. 4 of Statute No. 2734/1999). Greek law also proscribes *a number of acts adjacent to prostitution*. Making use of a prostitute's services is not among these acts (even if the client is aware of non-compliance to the requirements on the part of the prostitute), however it is, under exceptional circumstances (see *infra*).

The following overview does not cover the particular types of sexual trafficking under Article 351 CC. These will be scrutinized further below, as they are closely related to the FD which forms the subject matter of the present study. That being said, it is clear that, to the extent sexual trafficking entails a special intent of sexual exploitation, it can be classified as a prostitution-related offence.

To begin with, the law proscribes *the lease of one's premises to a prostitute not possessing a license*, as well as *the use of such premises*. Such act is punishable with imprisonment from 10 days to 2 years (Article 5, para. 1(f) of Statute No. 2734/1999). The same penalty is prescribed for non-compliance of the premises with legal standards (minimum distance from schools, playgrounds, etc.).

Another category of proscribed offences comprises the so-called *quasi-accessorial acts to prostitution*, which are punishable irrespective of the possession of a license or compliance to other requirements on the part of the prostitute.

These are:

- Soliciting customers for a prostitute, punishable with imprisonment of up to 1 year (Article 5, para. 3 of Statute No. 2734/1999).

- Facilitating sexual intercourse of others for profit [5], punishable with imprisonment of up to one year (Article 348, para. 1 CC). This particular offence does not necessarily involve sexual intercourse with a prostitute.
- The above act is punishable with imprisonment of no less than 10 days and no more than 3 years if committed deceitfully, even if the offender did not act for profit.
- Pandering, punishable with imprisonment of no less than 18 months and no more than 5 years (Article 349, para. 3 CC). The *actus reus* of this offence entails soliciting women who have never exercised prostitution in the past to perform acts of prostitution. Pandering by a public servant may constitute an aggravating circumstance.
- Benefiting from a prostitute, punishable with imprisonment of no less than 6 months and no more than 3 years (Article 350 CC). The perpetrator of this offence is a male who sustains himself with the income earned by a female prostitute.

A third category of offences comprises acts of *soliciting or assisting the prostitution of minors*. The victims of these crimes are persons under the age of 18, unless the law sets a different age-limit to introduce a particular offence or an aggravating circumstance to the offences of the previous category.

- Attempting to facilitate sexual intercourse with a minor through the press (or through other means) for profit is punishable with imprisonment of no less than 10 days and no more than 5 years, as well as a pecuniary fine of 10,000 € to 100,000 € (Article 348, para. 3 CC). As already noted, this type of offence does not necessarily involve sexual intercourse with a prostitute.
- Procuring/soliciting minors to perform acts of prostitution, as well as assisting or harboring the prostitution of minors is punishable with imprisonment of 5 to 10 years and a pecuniary fine of 10,000 € to 50,000 € (Article 349, para. 1 CC). The penalty is imprisonment of up to 20 years plus an increased pecuniary fine in the presence of aggravating circumstances provided for under Article 349, para. 2 CC; these are: the minor was younger than 15; deceitful means were employed; the offender was a family member or supervisor of the minor; the offender abused his capacity as a public servant to commit the above acts.
- Article 323B CC (recently added to the chapter of offences against personal liberty by virtue of Statute No. 3625/2007) proscribes a novel form of facilitating child prostitution, namely “sex tourism”. Such practice entails the organization, funding, etc. of trips aiming at the facilitation of lewd or lascivious conduct with minors, and is now punishable with imprisonment of up to 10 years. As with other types of conduct described above, this particular offence does not require the actual exercise of prostitution on a minor’s part.
- Engaging in remunerated sexual intercourse with a minor is proscribed under Article 351A CC when committed by an adult: the penalty is imprisonment of 1 to 5 years and a pecuniary fine of 10,000 € to 50,000 € if the victim is 15 to

[5] A “gainful purpose” is frequently required disjunctively with the element of “professional commission” of a given offense under Greek law. The term “for profit” in the present report shall hereafter be used so as to denote either of these elements.

18 years old, imprisonment of 5 to 10 years and a pecuniary fine of 50,000 € to 100,000 € if the victim is 10 to 15 years old, or imprisonment of no less than 10 years and a pecuniary fine of 100,000 € to 500,000 € if the victim is younger than 10. If the act proscribed under Article 351A CC resulted in the death of the minor, the offender shall be sentenced to life imprisonment. Although the said provision does not confine its application in cases of prostitution (thus protecting childhood in a number of circumstances), it in effect also targets the clients of minors who exercise prostitution. Until recently there was only one other provision targeted at clients, namely that contained in Article 351, para. 3 CC (see *infra*). After the introduction of Article 323B in the CC, those who travel to engage in sexual intercourse with minors are punishable with imprisonment of at least one year, even absent actual intercourse. One must not fail to note that the age of consent under Greek law is 15, and statutory rape is proscribed accordingly under Article 339 CC; likewise, sexual abuse of a minor by an adult who was responsible for supervising them is proscribed under Article 342 CC even absent remuneration. At any rate, one can only be skeptical *vis-à-vis* Article 351A CC (added by virtue of Statute No. 3064/2002), which provides for disproportionate penalties compared to the other provisions cited.

Finally, a fourth category of offences is introduced under Article 86, para. 5 of Statute No. 3386/2005. This provision provides for a *qualified form of the offence of employing immigrants not possessing a residence permit*, *if committed with the intent of procuring prostitution*. The penalty for such act is imprisonment of no less than 2 years and a pecuniary fine of no less than 6,000 €. If the victim is a minor, the offence is a felony, punishable with imprisonment of up to 20 years (depending on the exact age of the victim, the means used or the status of the offender).

All the offences outlined above can be charged *proprio motu* by the State Prosecutor, i.e. the victim need not press charges. In the event of a conviction for any of the crimes proscribed under Articles 348 (facilitating sexual intercourse of others), 349 (pandering) or 350 (benefiting from a prostitute) CC, the sentencing court may order community service, or prohibition of residence to a given place or territory in addition to the penalties prescribed for each crime (Article 352 CC). As previously mentioned, such measures are rarely ordered in actual practice. In the case of alien offenders, the sentencing court may order expulsion (which is quite frequently the case). Moreover, Article 11, para. 6 of Statute No. 3064/2002 provides that a final judgment convicting a person of any offence among the ones proscribed under Articles 348A, 349 or 351 CC, committed in the context of one's business, shall lead to suspension of its operation for a period of 1 to 3 years; such measure is enforced by the District Secretary, who can even decide to revoke the business license under certain circumstances. Statute No. 3625/2007 recently introduced a broad array of administrative sanctions against legal persons involved in the aforementioned activities. These sanctions are further scrutinized below. Finally, Article 12 of Statute No. 3064/2002, as well as Articles II *et s*. of Statute No. 3625/2007, provide for assistance to the victims of the offences

proscribed under Articles 349, 351 and 351A CC [6]; Article 13 of the said Statute provides for repatriation of those of the victims who are illegally in the country.

The above overview leads to the following *conclusions* about Greek law:

i. Prostitution is not a punishable offence *per se*, unless exercised in disregard of legal requirements.
ii. Intermediating prostitution, soliciting customers for a prostitute, assisting prostitution, pandering, as well as benefiting from acts of prostitution are punishable offences (based on the elements outlined above for each particular offence), regardless of whether legal requirements for the exercise of prostitution have been met or not. There are particular provisions on procuring/soliciting/assisting the prostitution of minors or third-country nationals who do not possess a residence permit.
iii. Making use of the services of prostitutes does not constitute a punishable offence, even if the prostitute does not hold a license. In contrast, it is illegal to knowingly make use of the services of minors or victims of trafficking who engage in acts of prostitution.

B. Other international and European instruments related to trafficking in human beings

A thorough appraisal of the impact of international and EU law – beyond FD 2002/629/JHA – on the Greek criminal justice system must take into account the following considerations.

Greece became on 13 December 2000, a signatory party to the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UN Convention of 12 December 2000 against transnational organized crime. It has also been a signatory party to the Council of Europe Convention on Action against Trafficking in Human Beings of May 2005, since 17 November 2005. However, the Greek Parliament has yet to ratify these two international legal instruments.

Concerning other EU instruments directly or indirectly related to trafficking in human beings, it is worth noting that Greece has incorporated the Joint Action 97/154/JHA concerning action to combat trafficking in human beings and sexual exploitation of children. The provisions of the said Joint Action concerning trafficking ceased to apply by virtue of Article 9 of the FD, while its remaining provisions ceased to apply in 2004, by virtue of Article 11 of the FD on combating the sexual exploitation of children and child pornography. Only one of these two FD, namely the one on trafficking, had already been adopted by the time Statute No. 3064/2002 was being debated in the Parliament. Hence, what the Statute did (as per its explanatory report) was to largely incorporate the provisions of the FD, along with those provisions of the Joint Action which concerned sexual exploitation of children and child pornography.

On the contrary, the FD 2001/220/JHA on the standing of victims in criminal proceedings has yet to be incorporated into Greek legislation. A preparatory committee

[6] For a description of the exact form such assistance can take see *infra*, under 2.B.5.

(appointed by virtue of Ministerial Decree 28890/20 March 2006, *Official Journal* B 382/28 March 2006) has been tasked with finalizing a draft statute to that effect.

Nonetheless, it is noteworthy that Statute No. 3500/2006 "On the combating of family violence" introduced criminal mediation into Greek law for the first time, albeit confining its application to the victims of family violence. As regards Articles 11-14 of the Statute (providing for criminal mediation), the explanatory report notes in particular that Greece "is bound to comply with the EU FD of 15 March 2001 on the standing of victims in criminal proceedings (…), Article 10 of which requires Member States to introduce criminal mediation by 22 March 2006 at the latest".

A preparatory committee (appointed by virtue of Ministerial Decree 156613/15.12.2004, *Official Journal* B 1982/31 December 2004, as amended by MD 32459/2005, *OJ* B 483/2005 and MD 67611/2005, *OJ* B 1015/2005) has been tasked with finalizing a draft statute to bring domestic legislation into line with FD 2004/68/JHA on combating the sexual exploitation of children and child pornography. That notwithstanding, it is to be noted that both Statute No. 3064/2002 (which incorporated Joint Action 97/154/JHA into the domestic legislation) and the Greek CC – as recently amended by Statute No. 3625/2007 – do proscribe sexual exploitation of children and child pornography. In fact, the explanatory report to Statute No. 3625/2007 states that Greek law is thereby brought in line with the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as with FD 2004/68/JHA.

Directive 2004/81/EC 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 was incorporated into Greek legislation by virtue of Statute No. 3386/2005 on "the entry, stay and social integration of third-country citizens in Greece". According to the explanatory report to this statute: "Chapter 8 (entitled "Granting and renewal of residence permits to victims of trafficking in persons") purports to comprise a comprehensive set of rules on the protection of and assistance to victims as a corollary to combating trafficking in persons along the lines of Council Directive 2004/81/EC of 29 April 2004 (…)". Some of the provisions of Statute No. 3386/2005 were amended by virtue of Article 11 of Statute No. 3536/2007. According to the explanatory report to the latter, "Article 11, para. 2 and 3 brings Greek law into line with Council Directive 2004/81/EC "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, when cooperating with the competent authorities"; these amendments shall be effective immediately, without a need to issue a Presidential Decree".

Besides Greece is a signatory party to a number of multilateral conventions [7] and bilateral treaties [8].

[7] (a)The Convention to Suppress the Slave Trade and Slavery of 25 September 1926, as well as the Protocol amending it of 23 October 1953, signature: on 4 July 1930, and the respective Protocol on 12 December 1955, (b) The European Convention on Human Rights of 4 November 1950, which proscribes slavery and forced labor under Article 4, ratification by virtue of Statute No. 2329/1953, (c) The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 September 1956, signature on 13 December 1972), (d) The International Covenant on Civil and Political Rights of 16 December 1966, which stipulates under Article 8 that "No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude. No one shall be required to perform forced or compulsory labor", ratification by virtue of Statute No. 2462/1997, (e) The UN Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, which stipulates under Article 6 that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women", ratification by virtue of Statute No. 1342/1983 and of its Optional Protocol of 6 October 1999 was ratified by virtue of Statute No. 2952/2001, (f) The UN Convention on the Rights of the Child of 20 November 1989, which stipulates under Article 35 that "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form", ratification by virtue of Statute No. 2101/1992, (g) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000, ratification by virtue of Statute no 3625/2007, (h) ILO Convention No. 182 of 1 June 1999 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Article 3 of the said Convention classifies the sale and trafficking of children among the "worst forms of child labor", ratification by virtue of Statute No. 2918/2001, (i) The Protocol against the Smuggling of Migrants by Land, Air and Sea of 15 November 2000, supplementing the UN Convention against Transnational Organized Crime, signature on 13 December 2000, (j) The Europol Convention (including its subsequent amendments), among other things, this Convention authorizes Europol to operate in the direction of combating trafficking in human beings ratification by virtue of Statutes Nos. 2605/1998, 3002/2002, 3294/2004 and 3295/2004.

[8] (a) Treaty with the Government of the Republic of Albania of 27 February 2006 to protect and assist the victims of trafficking in children. This Treaty provides for temporary foster care for the duration of the child's stay in Greece, as well as enables Greek authorities to oversee the child's progress after repatriation, in the interest of achieving reunification with the family and integration in the Albanian society, not yet ratified (b) Treaty with the Government of Ukraine of 24 August 2001 to combat terrorism, illegal drug trafficking, organized crime and other forms of crime. This Treaty promotes the cooperation to suppress crimes against life, fundamental rights and personal liberty, as well as provides for specific measures to combat the illegal smuggling of migrants across borders, ratification by virtue of Statute No. 3158/2003, (c) Treaty with the Government of the Turkish Republic of 8 November 2001 to suppress crime (in particular terrorism, organized crime, illegal drug trafficking, and illegal migration), ratification by virtue of Statute No. 3030/2002.

2. The transposition of the FD on combating trafficking in human beings in Greek criminal law – appraisal of formal and substantive conformity

A. General remarks

The substantive content of the FD 2002/629/JHA was incorporated into the Greek legal order by virtue of Statute No. 3064/2002 entitled "Combating trafficking in persons, sexual abuse, child pornography, financial exploitation of sexual life in general, and provision of assistance to the victims of such crimes" (hereafter: Statute No. 3064/2002).

The draft of the said Statute was submitted to Parliament on 24 July 2002 (the pertinent explanatory report having been signed by the ministers responsible on the day before). Statute No. 3064/2002 was passed on 2 October 2002. According to Article 14, it would come into force on the day of publication in the *Official Journal*, which took place on 15 October 2002 [9].

The draft of Statute No. 3064/2002 was originally submitted for discussion on 12 December 2001, i.e. prior to the adoption of the FD (1 August 2002) [10]. Such temporal configuration reveals that it was not in fact the FD which prompted the initiative for this Statute. Rather, the explanatory report to the Statute clarifies that the goal was to align Greek law with *a number* of binding international documents on trafficking in human beings (in particular women and children), and child pornography. By the same token, such alignment represented an opportunity to update the provisions of the CC on sexual abuse and financial exploitation of another's sexual life [11]. For the foregoing reasons, Statute No. 3064/2002 introduced or amended certain provisions not deriving from the FD, such as Article 348A CC on producing or transmitting pornographic material involving children (recently amended by Statute No. 3625/2007), Article 349 CC on soliciting or assisting the prostitution of minors, and Article 351A CC on engaging in remunerated sexual intercourse with a minor.

At any rate, the explanatory report to Statute No. 3064/2002 explicitly states that the original draft also intended to make Greek law conform to "the obligations arising out of paragraph 22 of the Presidency Conclusions issued during the Tampere European Council of 15 and 16 October 1999", while keeping track of "the proposal for a FD on combating trafficking in human beings".

The incorporation of the substantive content of Articles 1 to 3 of the FD into Greek law took place by virtue of the introduction of a new offence under Article 323A CC ("Trafficking in human beings"), as well as the extensive amendment of Article 351 CC ("Sexual trafficking"). Article 8(h) CC was updated in accordance with Article 6 of the FD (thus establishing universal jurisdiction over trafficking in human beings). Furthermore, trafficking was added to the enumeration contained in Article 1 of Statute No. 2331/1995 on the prevention and suppression of money laundering, as well as to that of Article 187, para. 1 CC defining a "criminal organization".

---

[9] *OJ*, No. A 248, 15 October 2002.

[10] That was the date of publication of the FD in the *OJ*, see Article 11 of the FD.

[11] The last extensive amendment of these provisions had taken place by virtue of Statute No. 1419/1984.

Finally, Article 12 of Statute No. 3064/2002, in conjunction with Ministerial Decree 233/2003, incorporated Article 7 of the FD (concerning the nature of assistance tendered to victims of trafficking), while Articles II *et s*. of Statute No. 3625/2007 introduced provisions regarding protection and assistance to minors victimized by trafficking.

Greek law contained provisions to suppress trafficking as well as sexual or labor exploitation of human beings – in particular those belonging to vulnerable groups, such as women and children – even before Statute No. 3064/2002. Depending on the case, courts could resort to a number of provisions (not counting those embodied in labor law or the legislation on the status of aliens), namely: Article 322 CC ("Kidnapping"), Article 323 CC ("Slavery"), Article 324 CC ("Abduction of minors"), Article 327 CC ("Abduction of women"), Article 328 CC ("Willful abduction of minors"), Article 336 CC ("Forcible rape"), Article 338 CC ("Non-forcible rape"), Article 339 CC ("Statutory rape"), Article 342 CC ("Sexual abuse of minors"), Article 343 CC ("Sexual assault by abuse of authority"), Article 347 CC ("Sexual intercourse between males"), Article 349 CC ("Pandering"), Article 350 CC ("Benefiting from a prostitute"), Article 351 CC ("Sexual trafficking"), and Article 409 CC ("Non-prevention of begging by a minor") [12]. Still, the scope of some of these provisions only extended to the gravest forms of trafficking in human beings (e.g. enslaving the victim [13] or placing the victim in captivity) [14]; other provisions focused on the exploitation of the victims *per se* (e.g. soliciting them to perform acts of prostitution or forced labor) rather than the act of trafficking [15], while others – though broader – still fell short of addressing the full span of trafficking [16]. It is noteworthy that, despite all these provisions, trafficking or sexual exploitation of minors were prosecuted once in a blue moon [17]. Besides, the law did not provide for comprehensive measures to protect and support the victims of these acts. On the contrary, Statutes Nos. 3064/2002 and 3625/2007 cracked down on trafficking or deprivation of liberty preceding forced labor or sexual exploitation, raised penalties, and established the legal framework to protect victims along the lines of the FD. If anything, these changes do show up the actual dimensions of trafficking on a symbolic level. On the other hand, introducing wholly new provisions where the amendment of already existing ones could have been adequate [18], did not particularly promote cohesion. Hence, one could speak of extensive – thus noteworthy – changes,

---

[12] For further analysis see E. Symeonidou-Kastanidou *in* E. Symeonidou-Kastanidou (ed.), *O neos nomos 3064/2002 gia tin emboria anthropon*, Thessaloniki, Sakkoulas Publications, 2003, p. 29 *et s*.; Ch. Kosmides, *id*., p. 60 *et s*.

[13] See Article 323 CC ("Slavery").

[14] See Article 322 CC ("Kidnapping").

[15] See, e.g., Article 336 ("Forcible rape"), 339 ("Statutory rape"), and 349 ("Pandering") CC.

[16] *Cf.* the previous version of Article 351 CC ("Sexual trafficking"), which merely prescribed imprisonment of 1 to 3 years.

[17] E. Symeonidou-Kastanidou, *op. cit*., p. 32; A. Charalabakis, "Vasikoi provlimatismoi os pros tin antimetopisi tou diasynoriakou eglimatos apo to Poiniko Dikaio", *PChr*, 2002, p. 97 *et s*.

[18] *See* E. Symeonidou-Kastanidou, *op. cit*., p. 35; G. Demetrainas, *id*., p. 137, 139.

whose main purpose was to epitomize the willingness of the Greek State to combat trafficking (as evidenced by the penalties prescribed and the rules on jurisdiction, which are appraised below), rather than to fill particular gaps. From a qualitative perspective, one should unreservedly applaud the introduction of provisions to protect and assist victims of trafficking.

B. Formal conformity

1. Offences (Articles 1 and 2 FD)

a. Material acts

Statute No. 3064/2002 incorporated the substantive content of Article 1 of the FD by adding Article 323A ("Trafficking in persons") in the CC, as well as by replacing Article 351 CC ("Sexual trafficking"). The former covers trafficking for forced labor [19], while the latter is confined to trafficking for sexual exploitation.

Articles 323A and 351 CC tag along Article 1 of the FD in that they require one element from each among three groups pertaining to: "material acts", "means used", and "exploitation purposes". On the other hand, the Greek CC departed from the FD in that it opted for including the two types of trafficking in two distinct provisions [20] under two distinct chapters [21].

The following table portrays these counterparts:

FD	*Articles 323A and 351 CC**
recruitment	[hires]
transportation	transports, [relocates]
transfer	[hands over with or without benefits]
harbouring	harbors, [detains]
(subsequent) reception	receives
exchange	[hands over with benefits] / [receives]
transfer of control	[hands over with or without benefits]

* The terms within brackets are only employed in the CC, aiming at the incorporation of those terms in the FD which are not repeated verbatim in Greek law.

As regards the "material acts" described in the law, Articles 323A and 351 CC – though not quoting the language of the FD verbatim – in fact go beyond what is required by the FD. Specifically, as regards the acts of "transportation", "harboring", and "reception", the terms employed under Greek law are identical to those in the FD. The term "exchange" (appearing in the FD) corresponds to such terms as "hand

[19] This Article also proscribes organ trafficking, as well as the recruitment of minors for use in warfare. These types of conduct are not scrutinized below, as they derive from international instruments escaping the object of the present report.

[20] On the history of how the two forms of trafficking ended up being dealt with under a single provision in the FD see, *inter alia*, EU Council Doc. 8111/01 DROIPEN 34 MIGR 35.

[21] Trafficking for forced labor was included among the "offenses against personal liberty" (Chapter 18 CC), while sexual trafficking was included among the "offenses against sexual self-determination and offenses of financial exploitation of sexual life" (Chapter 19 CC).

over with benefits" and "receive". Likewise, "recruitment", "transfer", and "transfer of control" correspond to such terms as "hire" and "hand over with or without benefits".

b. Means employed

Not unlike "material acts", Articles 323A and 351 CC essentially describe the "means" of trafficking in similar fashion as the FD.

As regards coercive means, "*the use of coercion*, *force or threat*, *including abduction*" as per Article 1, para. 1(a) of the FD has been reiterated in the CC ("use of force, threat or other forms of coercion"). While "abduction" is not expressly cited either in Article 323A or 351 CC, "the use of force or threat" must be read as to encompass it. Besides, "abduction" can potentially fall within the scope of pre-existing provisions under the Greek CC, such as those contained in Articles 322 ("Kidnapping"), requiring the additional element of depriving the victim of the protection of the State [22], Article 324 ("Abduction of minors") [23], as well as Articles 327 ("Abduction of women") [24] and 328 ("Willful abduction of minors") [25], the latter two confining their scope to female victims.

The same goes with respect to "*abuse of authority*" as per Article 1, para. 1(c) of the FD. In fact, the terms "imposition of authority" or "abuse of authority" appear disjunctively in Greek law, thus broadening the scope of the respective offences.

Finally, Greek law remains faithful to the wording of the FD regarding "*the use of deceit or fraud*" as per Article 1, para. 1(b). Specifically, Articles 323A and 351 CC both provide for "obtaining consent of the victim with deceitful means" (under para. 2). Though verbally not identical, the two terms do actually denote the same conduct.

---

[22] Article 322 CC: "Any person who arrests, abducts or unlawfully detains another by means of deceit, force or threat of force to the effect that the victim is deprived of the protection of the State (…) is punishable with long-term imprisonment. If any of the above acts was carried out with the intent of coercing the victim or a third party into an act or an omission, it shall be punishable (…) (b) with imprisonment of no less than 10 years (…)".

[23] Article 324 CC: "1. Any person who either removes a minor from his/her parents' or guardian's custody or supports a minor's fleeing from such custody is punishable with short-term imprisonment (…); 2. If the minor is younger than 14, the penalty for the above acts shall be imprisonment of 5 to 10 years (…) If the offender acted for profit or with the intent to engage the minor in depraved acts (…) the penalty shall be imprisonment of 5 to 10 years. 3. If the offender acted with the intent to collect ransom or coerce, the penalty shall be imprisonment of 5 to 20 years (…)".

[24] Article 327 CC: "Any person who abducts or unlawfully detains (…) a female against her will, a female of diminished mental capacity or a female otherwise incapable of giving consent, (…) with the intent to sexually abuse her (…) is punishable with imprisonment of 5 to 10 years; 2. This offense shall only be prosecutable if the injured party presses charges".

[25] Article 328 CC: "Any person who abducts or detains a minor female with her consent, but without the consent of her lawful guardians, with the intent to (…) engage her in sexual acts, is punishable (…) with short-term imprisonment. 2. This offense shall only be prosecutable if the injured party or her guardians press charges".

On the other hand, one discerns some divergence between the CC and Article 1, para. 1(c) (ii) and (d) of the FD regarding the means employed. Specifically, Articles 323A and 351 CC did not expressly take account of elements such as "abuse of a position of vulnerability, which is such that the [victim] has no real and acceptable alternative but to submit to the abuse involved" or "payments or benefits are given or received to achieve the consent of a person having control over [the victim]".

All the same, paragraph 2 of both Articles of the CC provides for "*luring* the [victim] with pledges, offerings, payments or other benefits aimed at *taking advantage of the [victim's] vulnerable position*". Besides, it has already been noted that both Articles provide for both "abuse" and "imposition of authority" as means of committing the offence. Such elements are ample to satisfy the requirement of the FD alluding to "*abuse of position of vulnerability*". And indeed, the FD aims at tackling precisely those types of conduct by such language; these include: "debt bondage" or other forms of exploiting physical or mental or socio-economic vulnerabilities of the victim which typically entail either luring the victim with pledges, payments or other benefits (e.g. a pledge of debt release), or coercing the victim. Accordingly, it is hardly imaginable how a particular act can possibly come under the FD while at the same time escaping the scope of Greek law. Adding to the picture, it is noteworthy that the FD suggests a position of such vulnerability that in fact deprives the victim of any other alternative, whereas Greek law merely alludes to "taking advantage of the victim's vulnerable position" (by means of benefits, etc.) without any reference to lack of other alternatives; likewise as regards the element of "abuse of authority" under paragraph 1 of the Greek provisions, which is not associated with the lack of other "acceptable alternatives".

It is of note that clarifying the notion of "abuse of a vulnerable position" by itemizing the means to these ends (pledges, offerings, etc.) is anything but redundant. In contrast to "abuse of authority", which is quite precise as it connotes dominance or control over the victim, the notion of "abuse of a vulnerable position" *per se* is lacking in perspicuity as to both its components ("abuse"/"vulnerable position"); the additional element of absence of "a real and acceptable alternative" to the victim is not of particular aid in lifting such ambiguity.

A similar line of argumentation regarding the means employed leads to the conclusion that, despite verbal discrepancies, Greek law has in effect encompassed the substantive content of Article 1, para. 1(d) of the FD [26]. And indeed, the latter appears to focus on cases where benefits are conferred to third persons (e.g. parents or other family members of minors), who shall in turn transfer control of the victim to the trafficker. In those same cases, however, there will normally be coercion or deception of the victim prior, contemporaneous or subsequent to the trafficker getting hold of them ("material act"); thus, at least one of the "means" described in Articles 323A and 351 CC will be present (along with the "material act" of receiving the victim). Besides, assuming the trafficker obtains the consent of the person in control

[26] It is worth noting that the original proposal for a FD did not provide for that particular means of trafficking: see Articles 1 and 2 of the proposal, COM (2000) 854 final/2, *OJ*, No. C 62 E, 27 February 2001, p. 324.

of the victim (e.g. parent), who in turn transfers such control, "abuse of authority" of that latter person will already have occurred in the process; accordingly, the person initiating the transaction will be guilty of procuring the commission of such offence or, in any event, of "imposing authority" of his own while *de facto* assuming control over the victim. Lastly, another interpretative approach would be to maintain that the *victim* and the *person lured* can be two different persons under the law; thus, the trafficker would be guilty of receiving the victim by "luring" his/her guardian to transfer control over him/her (e.g. by offering money to the destitute teenage mother of the victim).

The following table portrays the counterparts in terms of the "means employed":

FD	*Articles 323A and 351 CC**
coercion	other means of coercion
force	force
threat	threat
abduction	other means of coercion
deceit fraud	obtaining consent with deceitful means
abuse of authority	imposition or abuse of authority
abuse of a position of vulnerability (= a person has no real and acceptable alternative but to submit to the abuse involved)	[luring with pledges, offerings, payments or other benefits as means to exploit vulnerable position]
payments or benefits, given or received, to achieve the consent of a person in control over another person	[luring with pledges, offerings, payments or other benefits as means to exploit vulnerable position], [imposition of authority], [abuse of authority]

* The terms within brackets are only employed in the CC, aiming at the incorporation of those terms in the FD (pertaining to the "means employed") which are not repeated verbatim in Greek law.

c. *Exploitation purposes*

Trafficking *for forced labor* as described under Article 1, para. 1 of the FD is fully embraced in Article 323A CC (specifying the pertinent requisite intent). Compared to the former, the latter is more succinct, as it simply speaks of "exploitation of labor" [27]. Such *broad* language indeed takes in every particular type mentioned in the FD ("exploitation of (…) labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude (…)"). With respect to trafficking of slaves, one can also have recourse to Article 323 CC, which prescribes a more severe penalty (imprisonment of 5 to 20 years) as opposed to Article 323A, para. 1 CC [28].

[27] Article 323A also provides for organ trafficking and trafficking with the purpose of recruiting a minor for warfare when committed by using the same "means".

[28] That is not true when it comes to qualified forms of the offense proscribed under Article 323A CC.

On the contrary, trafficking *for sexual exploitation* as described under Article 1, para. 1 of the FD is not fully embraced in Article 351 CC. Truth be told, the latter is narrower in that it requires that the offender act *for profit* under paragraph 6 [29], while the former appears to extend to acts not carried out for profit [30]. Thus, acts of transportation, harboring, handing over or reception of persons which are carried out for the purpose of sexual gratification of the offender himself (or his friends for that matter), do not fall within the ambit of Article 351 CC as it currently stands.

The following table portrays the counterparts in terms of the offender's "purposes":

FD	*Articles 323A and 351 CC*
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	for the purpose of exploitation of the victim's labor by the offender or a third person (Article 323A CC)
for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography	for the purpose of sexual exploitation of the victim by the offender or a third person, i.e. [the purpose] to engage the victim in lewd or lascivious acts; or to use the victim's body, voice or image to perform actual or simulated acts of this sort; or to engage the victim in labor or services aimed at eliciting sexual stimulation for profit (Article 351 CC)

d. Relevance of the victim's consent (Article 1, para. 2 FD)

Neither Statute No. 3064/2002 (incorporating the FD into Greek legislation) nor Articles 323A and 351 CC contain such broad provisions as the one contained in Article 1, para. 2 of the FD. However, what might appear to be a discrepancy at first sight is not necessarily of great consequence. Specifically:

– As regards the two primary means described under paragraph 2 of Articles 323A and 351 CC, i.e. "*obtaining consent*" on the one hand and "*luring*" (i.e. exploiting a vulnerable position by means of pledges, etc.) on the other, lack of genuine consent on the victim's part is hinted at by the plain letter of the law; and indeed,

---

[29] Article 351 CC: "6. Sexual exploitation as per the above paragraphs means one of the following acts committed for profit: engaging in lewd or lascivious acts with the victim, using the body, voice, or image of the victim to perform actual or simulated acts of this sort or engaging the victim in labor or services aimed at eliciting sexual stimulation".

[30] Indeed, those EU documents confining their scope to sexual exploitation for profit do so *expressly* (e.g. by including such language as "sexually exploiting *for gainful purposes*"), see esp. Title I B (a) and (c) of Joint Action 97/154/JHA of 24 February 1997, *OJ*, No. L 63 of 4 March 1997, p. 2 *et s*. Similarly, Council FD 2004/68/JHA of 22 October 2003 on combating the sexual exploitation of children and child pornography (*OJ*, No. L 13 of 20 January 2004, p. 44 *et s*.), proscribes "*profiting from a child*" as one among many ways of "*otherwise exploiting a child*".

proving "consent" on the part of the victim could not possibly be invoked as a defense, when its very presence is an element of the offence.

- As regards the first category of "means" described under paragraph 1 of Articles 323A and 351 CC, namely violence, threat or other coercive means, any clause specifically declaring the irrelevance of consent would be superfluous, as the very use of these "means" *cancels out any presumed consent* on the victim's part: put differently, any person acting or tolerating acts of others under force or threat of force is by definition "*coerced*", and cannot be considered to have given "*free consent*". Therefore, there can be no question as to whether consent is relevant when it comes to means of this type.

Finally, these observations are also of relevance as regards the last two "means" described under Articles 323A and 351 CC, i.e. imposition or abuse of authority. However, even assuming this were not true in all cases, there is another reason indicating the irrelevance of consent under such circumstances. The CC recognizes valid consent inasmuch as the acts covered by it do not contradict *public morals* (Article 308, para. 2 [31]). Given that trafficking of persons based on imposition or abuse of authority indubitably defies public morals, any perceived "consent" on the victim's part will in any event not be recognized under the law.

The same conclusion would be arrived at even if one were to have recourse to the purpose of exploitation as opposed to the means employed: whether the trafficker acted with the intent to exact forced labor or to sexually exploit the victim, any perceived consent will definitely contradict public morals (thus being irrelevant under the law), inasmuch as the means described under Articles 323A and 351 CC have been employed.

e. Means required when the victim is a child (Article 1, para. 3 FD)

Neither Statute No. 3064/2002 (incorporating the FD into Greek legislation) nor Articles 323A and 351 CC contain a similar provision to that of Article 1, para. 3 of the FD. Therefore, the CC requires that the offender employ one or more of the means restrictively enumerated, even when the victim is a minor.

Nonetheless, such discrepancy does not necessarily impede the application of the law, given that minors are normally "in a vulnerable position", thus being subject to "luring". Besides, both Article 323A and Article 351 CC provide for qualified forms of the respective offences when the victim is a minor (doubling the penalty prescribed).

f. The definition of the term "child" (Article 1, para. 4 FD)

The term "child" is no longer employed in Greek law. Articles 323A and 351 CC, as well as other provisions in the Special Part of the CC classifying victims according to age, adopt the term "*minor*" to denote persons younger than 18 [32] (unless otherwise

[31] See Article 308 CC: "1. Any person who intentionally inflicts bodily harm to another is punishable with imprisonment of up to 3 years. (…). 2. Such bodily harm is not punishable if inflicted with the victim's consent, provided that the act does not contradict public morals".

[32] For the purposes of Chapter 8 of the CC (governing criminal liability of juveniles), the term "minor" refers to persons between 8 and 18 years old.

specified). Thus, Article 1, para. 4 of the FD can be deemed to have been embraced by the CC.

g. Instigation, aiding, abetting and attempt (Article 2 FD)

No particular provisions had to be adopted to incorporate the substantive content of Article 2 of the FD. The criminalization of attempt and complicity to acts of trafficking in human beings is achieved through the pertinent provisions in the General Part of the CC [attempt (Articles 42 *et s*. CC), accessorial liability (Articles 46 *et s*. CC)] in conjunction with Articles 323A and 351 CC.

In fact, Greek law appears to have expanded the scope of protection by providing for imprisonment of 6 months to 5 years against any person *knowingly receiving labor or sexual services from a victim of trafficking* under Articles 323A, para. 3 and 351, para. 3 CC, even if the beneficiary of such services did not employ any among the means of trafficking, and regardless of whether he acted for profit or not.

Thus, the law seems to proscribe a quasi-accessorial act to trafficking in an apparent effort to moderate demand of forced labor or sexual services, which largely propagates trafficking.

Despite voices advocating for further expansion of these provisions so as to also cover cases where the recipient of services acts with *dolus eventualis*, the above provisions are liable to create more problems than they solve [33]. Of course, one might often link the "client" to the harm engendered by trafficking itself (thus to violation of personal liberty or sexual self-determination), particularly when his acts tend to protract or contribute in the exploitation of the victim (as in the case of a victim who is forced to engage in sexual acts with "clients").

Still, establishing criminal liability of a person based on essentially subjective criteria (awareness that the services are offered by a victim of trafficking) could potentially lead to the prosecution of a good portion of the general population based on circumstantial evidence. For instance, a recent raid by police forces against a band of traffickers led to the arrest of a total of 73 persons, most of which were clients. As the investigation progressed, it became clear that the actual traffickers were no more than 11 [34].

Therefore, certain publicists [35] correctly point out that crime policy of this sort not only fails to combat organized crime (including trafficking), but in fact help inflate actual crime rates to the detriment of vulnerable groups.

2. Sanctions (Article 3 FD)

a. General remarks concerning the type and gravity of sanctions provided for

The penalty prescribed for the offences under Articles 323A and 351 CC is imprisonment of 5 to 10 years and a pecuniary fine of 10,000 € to 50,000 €. In the

---

[33] See G. DEMETRAINAS, *in* E. SYMEONIDOU-KASTANIDOU (ed.), *O neos nomos 3064/2002…*, *op. cit.*, p. 144 *et s*.

[34] See the weekly *Kyriakatiki Eleftherotypia* of 15 July 2007.

[35] N. PARASKEVOPOULOS, "I mideniki anochi tis porneias", *in* ID., *Oi pleiopsifies sto stochastro*, Athens, Pataki Publications, 2003, p. 46 *et s*.

event of aggravating circumstances under paragraph 4 of the said Articles [36], the penalty is imprisonment of 10 to 20 years and a pecuniary fine of 50,000 € to 100,000 €. If the offences of Articles 323A, para. 6 CC (added by Statute No. 3625/2007) and 351, para. 5 CC resulted in death of the victim ("deadly trafficking"), the penalty is life imprisonment.

Thus, the penalties prescribed are quite severe. Considering that Statute No. 3064/2002 reinforced the overall criminal protection of personal liberty and – in particular – sexual self-determination, one reaches the conclusion that the penalties in question are analogous to those typically prescribed for felonies in the CC.

Nevertheless, one must proceed to a reasonable balancing of the harm caused by each offence with the penalty prescribed for it. Such balancing gives rise to serious doubts as to whether the former are proportionate to the latter.

Articles 323A and 351 CC apparently proscribe earlier stages of the criminal conduct in accordance with the FD: thus, achieving the purpose of trafficking (i.e. forced labor or sexual exploitation) is no longer an element of the crime. This is premised on the same thoughts underscored in section 3 of the preamble to the FD, declaring that "trafficking in human beings comprises serious violations of fundamental human rights and human dignity". Yet the language selected to describe the offences is so broad as to extend to acts that can hardly be classified as "serious violations" of this sort [37] .

It is of course true that equally severe penalties are prescribed for certain acts adjacent to trafficking. However, all these acts entail tangible *harm* to the victims, as in the case of pandering (Article 349 CC), punishable with imprisonment of up to 10 years if the victim is a minor. At the same time, trafficking in minors (Article 351, para. 4-a CC) is punishable with imprisonment of no less than 10 years and a pecuniary fine of 50,000 € to 100,000 € regardless of whether any form of sexual exploitation has taken place. One might of course argue that trafficking is harmful to the minor's personal liberty. Even so, harm to personal liberty would justify a stricter penalty only if combined with harm to sexual self-determination, not mere *intent* to cause such harm.

In conclusion, the penalties prescribed for the offences in question are dissuasive enough, but not necessarily proportionate to the goal they purport to serve.

Lastly, it should be mentioned that Greek criminal law is generally on the strict side as regards penalties prescribed. This is why publicists are constantly calling for their moderation, as well as for an extensive reform of the sanction system [38].

b. Aggravating circumstances (Article 3, para. 2 FD)

Articles 323A and 351 CC both provide for maximum imprisonment of 10 years, thus going beyond the FD (calling for maximum imprisonment of at least 8 years).

---

[36] For further analysis see *infra*.

[37] See *infra*, under 4.B.

[38] T. Tzannetaki, "Pathologia tou ischyontos systimatos poinon tou Poinikou Kodika – Skepseis kai protaseis gia mia ek vathron anatheorisi tou sto plaisio tou schediou tou neou Poinikou Kodika", *PChr*, 2006, p. 590 *et s.*

Thus, there can be no question as to whether Article 3, para. 2 of the FD has been incorporated adequately.

Moreover, the CC provides for a number of aggravating circumstances: some of them evolve around a particular vulnerability of the victim (minors, persons of diminished mental capacity, illegal immigrants); others evolve around the status of the offender (relatives, guardians, tutors, public servants) or the extent of harm caused (trafficking which resulted in death or grave bodily harm) or the professional manner in which the offence is committed. All the above aggravating circumstances lead to imprisonment of 10 to 20 years (and a pecuniary fine of 50,000 € to 100,000 €) save for deadly trafficking (Articles 323A, para. 6 and 351, para. 5 CC), which is punishable with life imprisonment.

Some of the above aggravating circumstances only appear in the Greek CC, not in the text of the FD (e.g. commission of the offence by a relative or public servant, or in a professional fashion); others correspond to the ones envisaged in the FD (e.g. particular vulnerability of the victim as in the case of minors or trafficking resulting in grave bodily harm under Article 3, para. 2-b and -c of the latter). On the other hand, the FD (under Article 3, para. 2-a, -c and -d) does provide for certain aggravating circumstances that have not been introduced in Greek law (e.g. the offence has deliberately or by gross negligence endangered the life of the victim; the offence has been committed by use of serious violence; or the offence has been committed within the framework of a criminal organization). In the event of this latter type of "aggravating circumstances", the offender will be punishable with the basic penalty for trafficking under Greek law. Still, it must be mentioned that this type of conduct will normally come under the provisions of the CC on exposure/abandonment (Article 306), participation in a criminal organization (Article 187, para. 1), etc. The offender will thus incur an aggregated sentence for concurrent offences. The following table illustrates terminological counterparts *à propos* aggravating circumstances:

FD	*Articles 323A and 351 CC**
the offence has deliberately or by gross negligence endangered the life of the victim	
the offence has been committed against a victim who was particularly vulnerable; a victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography	the act is committed against a minor (Articles 323A, para. 4-a and 351, para. 4-a CC) [the act is committed against a person of diminished mental capacity (Article 351, para. 4-a CC)] [the act is related to the illegal entry, stay or exit in or from the country (Article 351, para. 4-a CC)]
the offence has been committed by use of serious violence or has caused particularly serious harm to the victim	the act resulted in grave bodily harm of the victim (Articles 323A, para. 4-d and 351, para. 4-f CC)

FD	*Articles 323A and 351 CC**
the offence has been committed within the framework of a criminal organization as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein	
	the act was committed by an ancestor against a descendant by consanguinity or affinity or by a foster parent, a spouse, a tutor, or a permanent or provisional guardian of the victim (Article 351, para. 4-b CC)
	the act was committed in professional fashion (Articles 323A, para. 4-b and 351, para. 4-d CC)
	the act was committed or assisted by a public servant on duty or by abuse of authority (Articles 323A, para. 4-c and 351, para. 4-e CC)
	the act resulted in death of the victim (Articles 323A, para. 6 and 351, para. 5 CC)

* The phrases within brackets correspond to their respective counterparts under the FD.

3. *Liability of legal persons and sanctions (Articles 4 and 5 FD)*

a. *Non-recognition of criminal liability of legal persons as a rule under Greek law*

Contrary to other fields of Greek law (such as civil or administrative law), Greek criminal law does not accept legal persons as subjects of law capable of assuming *criminal* responsibility (following the maxim "*societas delinquere non potest*"). Such legal position was originally developed in *criminal law doctrine* in accordance with its defining attributes. Indeed, the attribution of criminal liability is based on a number of *ontological* requirements (such as act, guilt, ability to grasp the punitive character of a prescribed penalty), most of which are charted in the Constitution. Under the prevailing view, however, legal persons are mere *fictions of the law*, hence cannot *act* or *bear guilt* in a criminal law sense, while they are also not susceptible to the preventative or retributive functions of criminal sanctions, not to mention policy arguments against recognition of criminal liability of legal persons.

That being said, legal persons are subject to *administrative* sanctions under Greek law. These are imposed at first instance by organs of the Administration or administrative courts, in accordance with the principles of *administrative* law and procedure. They are usually pecuniary in nature (e.g. fines) and are calculated based on variables laid out in the law (e.g. a given fine can be the equivalent of the unlawful benefit garnered multiplied by three). Depending on the nature and/or gravity of the infraction, administrative sanctions can consist in rescindment or restrictions of (financial) benefits (e.g. termination of State contracts, ineligibility to participate in

public projects, exclusion from subsidies or loans, freezing of assets or bank accounts, suspension), or even dissolution of the legal person.

b. Recognition of liability of legal persons for trafficking and related offences

Legal persons are not recognized as actors in the field of trafficking in human beings either. Hence, *criminal* responsibility for such offences (even after Statute No. 3064/2002) shall only be attributed to natural persons committing or assisting any act proscribed in Articles 323A or 351 CC, even when they are acting in the name or on behalf of a legal person. Legal persons involved in cases of trafficking shall only incur administrative sanctions.

Statute No. 3064/2002 introduced a special administrative sanction which can also be imposed to legal persons due to its nature. Specifically, Article 11, para. 6 provides for suspension of business operations (for a period of 1 to 3 years) or revocation of license if the offence proscribed in Article 351 CC (not the one proscribed under Article 323A) [39] was committed in its premises. Revocation of the license requires final conviction; until then *suspension* is the only sanction applicable. The organ competent to enforce this sanction is the District Secretary of the business's district. The said sanction corresponds in principle to the one provided for under Article 5(e) of the FD; nonetheless, it has a broader field of application than the latter, in that it can be imposed even in case of absence of involvement of any person among the ones listed in Article 4 of the FD.

Still, Article 11, para. 6 of Statute No. 3064/2002 stopped short of fully incorporating Articles 4 and 5 FD, a conclusion affirmed by a number of publicists. This is precisely why Statute No. 3625/2007 recently introduced a novel provision to exhaustively regulate liability of legal persons involved in human trafficking and related offences, including offences against the personal liberty of minors (Articles 323A, para. 4(a) and 324 CC), offences against sexual self-determination (Articles 336, 338, 339, 342, 343, 345, 346, and 347 CC), as well as offences entailing financial exploitation of sexual life (Articles 348A, 349, 351, and 351A CC). Specifically, Article IV of the said Statute provides for a number of administrative sanctions (such as fines, revocation of license, and exclusion from public subsidies) to be imposed disjunctively or cumulatively against private legal persons, when either of the aforementioned offences are committed on their behalf or to their benefit. The conditions and the severity of the sanctions (which are to be imposed by the local prefect) vary, depending on the position of the offender in the legal person or his relation thereto. Specifically:

- If the aforementioned offences are *committed on behalf of a legal person by one of its managers* (i.e. a person authorized to represent the legal person or retaining decision-making power or exercising control within the legal person either single-handedly or as a member of a collective body), then the sanctions are: a) Suspension of the license of the legal person to conduct the specific type of business for a period of 1 month to 2 years or; b) Exclusion of the legal person

[39] This particular sanction can also be imposed in the event of either of the offenses prescribed in Articles 348A ("Child pornography") or 349 CC ("Pandering").

from public subsidies, grants or projects for a period of 1 month to 2 years; c) Administrative fine of 20,000 € to 3,000,000 €; d) Revocation of license (or prohibition of business practice) in the event of multiple offences.

- If the aforementioned offences are *committed on behalf of a legal person by a lower-ranking employee whose actions were negligently overlooked by a manager*, then the sanctions are: a) Suspension of the legal person's license (or suspension of the business's operation) for a period of 10 days to 6 months; b) Exclusion of the legal person from public subsidies, grants or projects for a period of 10 days to 6 months; c) Administrative fine of 10,000 € to 1,000,000 €.
- The abovementioned sanctions outlined can be imposed even if the offences are *committed to the benefit of a legal person by someone not directly affiliated to it*. The fact that the law requires no particular connection between the offender and the legal person admittedly renders the said provision vague, to say the least.

Whether these sanctions are imposed disjunctively or cumulatively shall indicatively depend on such factors as the gravity of the offence, the offender's *mens rea*, the financial status of the legal person involved, and the overall circumstances. These provisions, albeit not faithfully transposing Articles 4 and 5 FD, delineate the liability of legal persons in a manner exceeding the latter's requirements as regards *sexual trafficking* [40].

Still, the above sanctions are not the only ones imposable to legal persons. It has already been noted that Articles 323A and 351 CC are both part of the enumeration of Article 1 of Statute No. 2331/1995 ("core offences" of the legislation on money laundering) even after the latter's amendment by virtue of Statute No. 3424/2005. This enables the imposition of sanctions to legal persons engaging in attempts to legalize proceeds of trafficking in human beings according to Article 8 of Statute No. 2928/2001 in conjunction with Articles 1 and 2 of Statute No. 2331/1995. Specifically, *if a legal person or business derives profit from the legalization of proceeds of trafficking with the knowledge of one or more persons in charge*, the legal person or business shall incur one or more of the following sanctions (imposable by virtue of a joint decision of the Minister of Justice and the Minister competent in each case, following a recommendation by the Committee established under Article 7 of Statute No. 2331/1995): a) the equivalent of the benefit garnered multiplied by three to ten times in the form of an administrative fine (if the benefit garnered is unspecified, the fine can range from 29,347.0286 € to 2,934,702.8613 €); b) suspension for a period of 1 month to 2 years or revocation of license (in the event such license was not required, prohibition of business practice); c) temporary or permanent exclusion of the business from public subsidies or grants or public projects. Furthermore, Article 8, para. 2 of Statute No. 2928/2001 provides for an administrative fine of up to double the benefit garnered or temporary exclusion from public subsidies, etc. for a period of up to 6 months if the persons in charge of the legal person were *negligently unaware* of the origin of the profits. Lastly, Article 8, para. 3 of Statute No. 2928/2001 provides that the gravity of the offence, the assets of the legal person and the overall circumstances

[40] As regards trafficking for forced labor, the above sanctions are only imposable if the victim is a minor (Article 323A, para. 4(a) CC).

of each particular case shall be taken into consideration in deciding to impose one or more of the above sanctions.

Taking into account these provisions (particularly the most recent ones under Statute No. 3625/2007), it would be safe to conclude that Greek law has largely conformed to the normative content of the FD regarding liability of legal persons. What is missing, however, is a set of provisions regulating their responsibility in cases of trafficking for forced labor against adults.

4. Jurisdiction and prosecution (Article 6 FD)

Greek law recognizes every established *title – principle of jurisdiction*: territoriality (Article 5 CC), active personality (Article 6 CC), passive personality (Article 7 CC), and universality (Article 8 CC).

Article 8 CC – as amended by Article 11, para. 2 of Statute No. 3064/2002 and Article II, para. 1 of Statute No. 3625/2007 – provides that: "Greek criminal law shall apply to the following acts, regardless of the law of the locus of the offence or the nationality of the offender: (…) g) slavery, *trafficking in human beings*, *sexual trafficking* or engaging in remunerated sexual intercourse with a minor, organizing travels as a means to facilitate sexual intercourse or lewd and lascivious conduct with minors or child prostitution".

It follows that Greek law treats the crimes of the FD in the vein of international crimes, recognizing *universal jurisdiction* for them. Into the bargain, the territoriality principle (Article 5 CC) provides for the application of Greek laws to every act committed on Greek territory regardless of the offender's nationality. Thus, it becomes patent that Greece has expanded its jurisdiction over trafficking-related crimes to the broadest scope possible, enabling their prosecution even in case of absence of any *nexus* with the *locus*, the victim or the offender.

By extending universal jurisdiction over the crimes in question, Greece *waived the possibility referred to in Article 6*, *para. 2 of the FD*, thus exceeding the latter's requirements regarding criminal jurisdiction.

Still, there are reservations concerning the constant extension of universality, which is liable to spawn multiple prosecutions of the same offence, thus endangering fundamental due process rights of the defendant, such as equality of arms. This observation is all the more of the essence in the context of the EU, which purports to create a common area of freedom, security and *justice*. The EU appears to be aware of these hazards, hence the adoption of soft law provisions to prevent multiple prosecutions of the same offence [41]. Question then arises as to the particular goal such provisions need to serve (e.g. should they be confined in addressing probative issues or attempt to improve the position of the defense?). Certain publicists aptly suggest that the *non bis in idem* principle (precluding multiple convictions for the same act)

[41] See, among many others, Article 10 of FD 2005/222/JHA of 24 February 2005 on attacks against information systems.

needs to be coupled with a novel right of the defense to guarantee that the same act shall not be *prosecuted* more than once [42].

In light of these thoughts, the decision of the Greek State to waive the possibility of Article 6 of the FD has been an ill-advised one.

5. Protection of and assistance to victims (Article 7 FD)

Greek law confers special status to victims of trafficking.

Every trafficking-related offence is prosecutable proprio motu by the State Prosecutor under Greek law. Hence, prosecution or investigation of these crimes is not dependent on the victim pressing charges. This is also the case as regards the offences of benefiting from the victim's labor or sexual services. Thus, Greek law fully abides by Article 7, para. 1 of the FD.

Obviously, however, the victim's testimony (though not compulsory) will normally constitute the principal – if not the exclusive – piece of evidence, which shall be freely evaluated under Article 177 of the Greek CCP hereafter CCP).

According to Article 12 of Statute No. 3064/2002, the State shall offer special protection to victims of the offences proscribed in, *inter alia*, Articles 323A and 351 CC, if their life, health, personal liberty or sexual self-determination is in grave danger. In addition, the said Article provides for assistance in terms of lodging, food services and health care (including counseling) for as long as necessary, as well as legal aid and the right to an interpreter.

The particulars of such protection and assistance are itemized in Presidential Decree No. 233/2003. To begin with, the Annex to the said Presidential Decree lists the public agencies responsible for the implementation of these measures; these agencies are free to enter into contracts with NGOs or other Organizations (Article 3). They are also entitled to request cooperation from law enforcement agencies (Article 4).

The Presidential Decree also provides for measures to facilitate access of victims to the public education system (Articles 5-6), as well as ensure health care and insurance for them (Article 7); Joint Decision No. 139491/2006, issued by the Minister of Finance and the Minister of Health and Welfare, addresses the details of that latter provision.

Lastly, the Presidential Decree provides for a standing committee to oversee the implementation of the above measures (Article 9); among its tasks are issuing various implementing acts, gathering statistical data, as well as suggesting further improvements.

These provisions apply not only to minors but to victims of trafficking in general, with the exceptions of Article 5 (concerning access of minors to the public education system) and Article 6, para. 2 (concerning professional education of victims over 15 years old). It is noteworthy that victims of trafficking under the age of 23 may enroll

---

[42] *See* B. Schünemann (ed.), "Die Grundlagen eines transnationalen Strafverfahrens", *in* Id. (ed.), *A Programme for European Criminal Justice*, München, 2006, p. 100 *et s*., 106 *et s*.; H. Füchs, "Zuständigkeitsordnung und materielles Strafrecht", *in* B. Schünemann (ed.), *Ein Gesamtkonzept für die europäische Strafrechtspflege*, p. 112 *et s*.; N. Bitzilekis, M. Kaiafa-Gbandi, E. Symeonidou-Kastanidou, "Alternativüberlegungen zur Regelung transnationaler Strafverfahren in der EU", *in Ibid*., p. 250 *et s*.

in technical colleges or career schools free from limitations on maximum number of students.

Furthermore, the Greek Constitution requires that criminal trials be public (Article 93, para. 2). Exceptions to such rule are recognized if the court decides that *trial in camera* is necessary to preserve the parties' right to privacy or to prevent damaging public morals. It is debatable whether the above Article of the Constitution calls for respect of indirect publicity as well (i.e. through the press). Under the current statutory regime, representatives of the press may not use recording devices in the courtroom unless such use is specifically authorized by the court.

Another exception to publicity is introduced in Article 330 CCP as recently amended by virtue of Statute No. 3090/2002. The said Article essentially reiterates the abovementioned constitutional rule but adds an important clarification: under it, *trial in camera* shall be mandatory if publicity exposes the victim (especially if the victim is a minor) of a sexual offence to psychological suffering or public humiliation.

Truth be told, the wording of this Statute only covers sexual trafficking. However, a court trying other forms of trafficking retains the right to order closure based on Article 93, para. 2 of the Constitution and Article 330 CCP.

Article 11, para. 3 of Statute No. 3064/2002 amended the definition of a criminal organization under Article 187 CC so as to include acts of trafficking (under Articles 323A and 351 CC) among its core offences. As a result, the *victim/witness protection program* provided for in Article 9 of Statute No. 2928/2001 is also applicable to victims of trafficking committed in the context of a criminal organization. This program allows to, among other things, obtain testimony from the victim without disclosing his/her identity both at the pre-trial and trial stages. However, if the prosecutor or a party pleads a claim for disclosure of the true identity of the victim, the court is bound to comply. In addition, the court may at all times order such disclosure *proprio motu*. In any event, paragraph 4 states that testimony from an undisclosed victim/witness shall not *per se* constitute ample evidence to convict the defendant.

On this same subject, it is useful to cite the following provisions of the Greek CCP:

- Article 221(a), stating that witnesses below the age of 18 testify without an oath;
- Article 350, stating that witnesses shall not communicate with any person that bears a direct interest in the trial.

Statute No. 3625/2007 recently brought about significant *changes in the field of child protection*. In addition to the ratification of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography [43], the said Statute also attempted to bring Greek law into line with FD 2004/68/JHA, thus improving the treatment of minors who become victims of trafficking (currently identified as "particularly vulnerable" victims under Greek law). Aside from the novel provision on statute of limitations [44], Statute No. 3625/2007 brought about the following changes:

---

[43] See *supra*, under 1.B.

[44] See *supra*, under 1.A.1.

- Article 352A was added to the CC, regulating psychological treatment to offenders and victims of crimes against sexual self-determination and crimes entailing financial exploitation of sexual life. Under the new provision, minors who become victims of *inter alia* sexual trafficking (but not victims of trafficking for forced labor) shall undergo physical and psychological evaluation to determine whether therapeutic treatment is called for. In addition, paragraph 4 enables the adoption of such measures as dislodgement of the offender, temporary placement of the minor in a safe environment, prohibition of communication with the offender, etc.
- Article 352B was added to the CC, proscribing the practice of publicizing any information that might lead to disclosure of the identity of a minor who has become victim of trafficking. Such conduct is now punishable with imprisonment of up to 2 years.
- Article 226A was added to the CCP, mandating the appointment of a child psychologist or child psychiatrist (or in any event psychologist or psychiatrist) to prepare a victim of trafficking for testimony and be present during testimony. Such expert will cooperate with prosecutorial authorities and prepare a report regarding the minor's mental and psychological state.
- Article 226A also requires a recording of the minor's testimony (an electronic one, "if possible", that will be a substitute for the minor's presence in subsequent stages). The same article precludes the minor's presence in court in cases of *inter alia* trafficking. Specifically, the victim's presence is only permitted if the victim has reached the age of 18 by the time the case is brought to court (paragraph 4). If that condition is not fulfilled, the victim's presence shall be substituted by the written or electronic recording of the testimony obtained at the pre-trial stage (paragraphs 3 and 4). At the same time, the law provides for oral testimony of the victim outside the court, obtained without the defendant's presence. Such procedure appears to be incompatible with Article 6 of the European Convention of Human Rights [45].
- Under Article V of the new Statute, the interrogation and trial of the offences proscribed in *inter alia* Articles 323A, para. 4 and 351 CC [when committed against minors] shall be completed within 2 years from their exposure. This is a quite ambitious provision, considering the tardiness inherent in the Greek criminal justice system. Inasmuch as the said provision is not accompanied by an exception to statute of limitations and no sanctions are provided for in case of non-compliance thereto, one can only expect that it will soon become moot, as has been the case with similar provisions in the past.
- Article VI of the new Statute has significantly improved the status of minors who become victims of trafficking in terms of access to legal aid, by providing stand-in counsel to minors, as well as by requiring the defendant to pay for civil court expenses in advance. Lastly, Article III, para. 1 of the new Statute confers "civil

[45] See the pertinent Report of the Scientific Service of the Parliament regarding this particular provision.

party" rights to minors who are victims of trafficking even if they decide not to follow standard procedure apposite to a "civil party" under the law.

In addition, the following initiatives have been adopted to ensure *proficiency of those who are tasked to assist the victims*.

In 2002, an anti-trafficking sub-unit was established under the auspices of the Department of Public Safety. Anti-trafficking sub-units have also operated within the Athens and Thessaloniki Subdivisions since 1 November 2003; the evaluation of their work led to the creation of 13 more sub-units throughout the country, which have been operational since 29 December 2005. Moreover, a Subdivision on Combating Trafficking in Human Beings was created in Thessaloniki by virtue of Presidential Decree 48/2006 (under the auspices of the Division on Combating Organized Crime). According to Article 12(c) of the said Presidential Decree, this Subdivision is tasked with combating trafficking in human beings, crimes against sexual self-determination, child pornography, and the exploitation of sexual life in general, as well as with offering direct protection and assistance to the victims of such acts.

According to a statement of the Ministry of Internal Affairs, the Police Academy has included the subject of trafficking in human beings in the curriculum of both undergraduate and graduate programs.

According to another statement of the Ministry, a special guide/questionnaire was prepared and translated into 13 languages to be handed out to victims of trafficking. This guide was transmitted to all pertinent agencies, along with instructions regarding the new legislative framework on trafficking, as well as procedures to identify victims and cooperate with other departments. In December 2004, police departments received a document containing routine questions to facilitate interrogation in trafficking cases.

Furthermore, the "Hellenic International Development Cooperation Department" (also known as "Hellenic Aid") is playing a vital role in this field also under the auspices of the Ministry of Foreign Affairs [46]. Besides, awareness of these issues is not only nurtured at an academic level but is also fostered by the General Secretariat for Gender Equality, as well as various NGOs [47].

Apart from these rules, Greece has incorporated EU norms concerning protection of victims from expulsion and granting of residence permit into its domestic legislation [48].

Apart from the measures cited above, no other provisions have been adopted to incorporate Article 4 of the FD 2001/220/JHA (standing of victims in criminal proceedings) regarding the families of minors who become victims of trafficking (Article 7, para. 3 FD).

Following these observations, one arrives at certain *conclusions*:

---

[46] See *infra*, under 5.B.

[47] See *infra*, under 5.B/5.D.

[48] 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 national authorities.

i. Greek law fully abides by Article 7, para. 1 of the FD (dictating that investigation or prosecution of trafficking offences shall not be dependent on the report or accusation made by the victim).
ii. Special protection and assistance is afforded to victims of trafficking, especially minors (governing access to public education, exceptions to statute of limitations, therapeutic treatment, protection of privacy throughout criminal proceedings under threat of criminal sanctions, as well as procedural rights, including direct access to legal counsel).
Although trials are generally public, the court may order closure if it deems it necessary to prevent suffering or humiliation of the victim (especially if the latter is a minor) [49]. Such possibility is confined to sexual trafficking alone. However, the court may order closure in other cases of trafficking as well, based on general rules pertaining to public morals or the privacy of parties to the case.
Victims of trafficking may testify without disclosing their identity, provided the offence in question was committed in the context of a criminal organization. Nevertheless, revealing the true identity of the witness shall be mandatory if the Prosecutor or any party to the case so request. In any event, testimony of an undisclosed witness shall not *per se* sustain conviction.
Certain initiatives have been adopted (with the cooperation of NGOs) to ensure continuing training of those who are tasked with assisting the victims. As already noted, Article 226A CCP (added by Statute No. 3625/2007) ensures the support of minors by child psychologists and child psychiatrists throughout the proceedings.
iii. No provision has been adopted to incorporate Article 4 of FD 2001/220/JHA concerning the families of minors who become victims of trafficking.

6. Concluding observations regarding formal conformity of Greek law to the provisions of the FD

The above review demonstrates that *the bulk of provisions contained in the FD have been incorporated* in Greek legal order. In fact, Greek law has exceeded EU requirements in a number of issues, such as penalties prescribed (which top those envisaged in the FD, and can even reach 20 years or life imprisonment if aggravating circumstances apply), as well as jurisdiction over trafficking (which can also be based on the universality principle under Greek law).

As regards the *part of the FD concerning suppression of trafficking in human beings* (i.e. proscribed conduct/sanctions), one discerns on the one hand some minor discrepancies in terms of the language employed; on the other, certain provisions of the FD have not been incorporated into Greek law.

[49] The presence of minors who become victims of trafficking has in effect been precluded by virtue of the amendments recently brought about by Statute No. 3625/2007 (see *supra*, under 2.B.5.).

To begin with, the fact that Articles 323A and 351 CC do not expressly provide for certain "means" of trafficking [50] or declare the irrelevance of the victim's consent [51] is immaterial, as proper reading of these Articles is ample to bring them in line with the FD. Thus, one cannot speak of "formal shortcomings" in that respect.

The same goes as regards the requirement that at least one of the means of trafficking described under Greek law be present even when the victim is a minor [52].

Nonetheless, the scope of sexual trafficking under 351 CC appears narrower than that of the FD: unlike the latter, the former requires that the act be committed for profit [53].

As regards legal persons, lack of a provision establishing their *criminal* responsibility cannot be deemed to constitute a "shortcoming". Indeed, a proper reading of the FD indicates that it merely requires Member States to adopt effective, proportionate and dissuasive sanctions against legal persons, whether criminal or administrative in nature. The fact that Greek law only provided for *administrative* sanctions against legal persons is thus within the letter of the FD. In point of fact, the administrative sanctions provided for legal persons after the introduction of Statute No. 3625/2007 can be classified as both effective and dissuasive in terms of nature, severity, and scope of application (the latter being broader than that of the FD, in that it covers acts of third persons even deprived of any direct responsibility of the legal person's management). Still, certain types of trafficking in human beings are left unregulated [54].

As regards the *provisions concerning protection of the victims*, it is true that neither Statute No. 3064/2002 nor other legislative acts introduced until recently specific measures for minors. Nonetheless, minors can artlessly be treated in the vein of "particularly vulnerable" victims under the current statutory regime; hence, no "shortcomings" appear in this field. Such conclusion is reinforced by the measures introduced with Statute No. 3625/2007 (see *supra*), specifically aimed at the protection of minors who become victims of trafficking or trafficking-related offences.

On the issue of continuing education/training of persons entrusted with assisting the victims, the various initiatives mentioned above do not derive from statutory provisions. Determining whether such lack of statutory provisions amounts to a "shortcoming" depends on the extent to which EU norms in the field can be considered binding. For instance, assuming ECJ case-law on transposing directives (stating

[50] As noted above, Articles 323A and 351 CC do not expressly include "abuse of a position of vulnerability [which is such that the victim] has no real and acceptable alternative but to submit to the abuse involved" or "payments or benefits, given or received, to achieve the consent of a person in control over another person" among the means of trafficking.

[51] As noted above, Articles 323A and 351 CC do not contain a clause declaring that the victim's consent is generally irrelevant in the event one of the means provided for is employed.

[52] As noted above, Articles 323A and 351 CC require the use of at least one of the means provided for therein, even if the victim is a minor, see *supra*, under 2.B.1.

[53] As noted above, the gainful purpose of the offender is a defining attribute of sexual exploitation under Article 351, para. 6 CC, see *supra*, under 2.B.1.

[54] See *supra*, under 2.B.3.

that conforming thereto in practice is not enough but for the adoption of binding legislative measures) were relevant here, then there is indeed a "shortcoming" to be jotted down [55]. On the other hand, assuming Article 7, para. 2 of the FD calls for the adoption of permanent measures yet not necessarily legislative in nature, the conclusion would be that Greece has actually abided by the obligations emanating from the FD (that legislative measures are not required by Article 7, para. 2 FD is also compatible with Article 14 of FD 2001/220/JHA on the standing of victims in criminal proceedings, which binds Member States to "encourage initiatives (…) through its public services" towards achieving "suitable training" of the personnel in contact with the victims).

Finally, there is a formal "shortcoming" regarding Article 4 of FD 2001/220/JHA concerning the families of minors who become victims of trafficking [56].

C. *Substantive conformity*

1. *Other provisions of Greek law compensating for formal shortcomings in the transposition of the FD*

The fact that certain "formal shortcomings" are spotted in terms of the transposition of certain provisions of the FD does not necessarily connote *substantive discrepancy* between Greek law, on the one hand, and EU law, on the other. Indeed, some of these shortcomings are atoned for – at least in some measure – through other provisions under Greek law, generating what can be termed "*indirect transposition*" [57].

As regards the "*indirect*" incorporation of Article 1, para. 3 of the FD, it is important to mention Article 324 CC, which proscribes the mere *taking* of a minor from his/her parents or guardian, or even *supporting a runaway minor*. If these acts are committed for profit or with the purpose of engaging the minor in depraved acts (among which acts pertaining to sexual abuse) they shall incur imprisonment of 5 to 10 years; if the offender aimed at collecting ransom or coerce a person, the penalty is imprisonment of 5 to 20 years. In this sense, offences against minors are punishable under Greek law even in case of absence of the "means" provided for in the FD ("taking" or "supporting a runaway minor" will normally entail acts of "transportation", "harboring" or "reception"). Combined with the proper interpretation of Articles 323A and 351 CC (see *supra* on treating minors in the vein of persons "in a vulnerable position"), one can safely conclude that Article 1, para. 3 of the FD is reflected in domestic law from a substantive point of view.

This conclusion is affirmed if one looks at the various offences proscribed under Greek law for cases in which the initial purpose of sexual abuse of a minor materializes (hence generating principal or accessorial liability of the trafficker which concurs

---

[55] It is noteworthy that a similar obligation emanates from the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (recently ratified by virtue of Statute No. 3625/2007).

[56] See *supra*, under 2.B.5.

[57] In any event, it is necessary to note that the existence of formal or substantive shortcomings in the domestic law of a given member-State should not invariably lead to the conclusion that trafficking is not adequately regulated or the TEU is not respected (for further discussion *see infra*, under 6.D. *et s.*).

with liability for trafficking itself). These offences include: Article 339 CC ("Statutory rape"), proscribing sexual intercourse with a minor or deception of a minor with such purpose (constituting a felony if the victim is less than 13 years old or a misdemeanor if the victim is 13 to 15) [58]; Article 349 CC ("Pandering"), providing for the felony of procuring, soliciting, harboring or assisting the prostitution of minors [59]; and Article 351A CC ("Remunerated sexual intercourse with a minor"), proscribing the act of engaging in sexual intercourse with a minor or engaging minors in intercourse with each other for money (constituting a felony if the victim is less than 15 years old or a misdemeanor if the victim is 15 to 18 years old) [60].

While Article 351 CC requires that the offender act with "gainful purposes", other offences of similar gravity do not require this element (although they typically require additional elements pertaining to the breach of personal liberty). These offences, which may apply depending on the victim (minors, women) or the means employed (deceit, force or threat or force), include [61]: Article 322 CC ("Kidnapping") [62], Article 324 CC ("Abduction of minors") or Article 327 CC ("Abduction of women") [63]. Moreover, it must be recalled that Greek law provides for several types of offences against sexual self-determination (e.g. rape under Article 336 CC) or sexual exploitation (e.g. pandering of minors under Article 349, para. 1 and 2 CC). These provisions do not require the element of "gainful purposes" either; however, unlike 351 CC, they entail

[58] Article 339 CC: "1. Any person who engages in sexual intercourse with a minor younger than 15 or deceives a minor younger than 15 into engaging in such act with a third person shall incur any of the following penalties unless his conduct falls within the scope of Article 351A CC: a) if the victim was less than 10 years old, the penalty shall be imprisonment of 10 to 20 years; b) if the victim was 10 to 13 years old, the penalty shall be imprisonment of 5 to 10 years; c) if the victim was 13 to 15 years old, the penalty shall be imprisonment of 10 days to 5 years (…)".

[59] Article 349 CC: "1. Any person who procures, solicits, harbors or assists the prostitution of minors is punishable with imprisonment of 5 to 10 years and a pecuniary fine of 10,000 € to 50,000 €. 2. The penalty shall be imprisonment of 5 to 20 years and a pecuniary fine of 50,000 € to 100,000 € if: a) the act was committed against a minor younger than 15; b) the act was committed with deceitful means; c) the act was committed by an ancestor against a descendant by consanguinity or affinity or by a foster parent, a spouse, a tutor, or a permanent or provisional guardian of the victim; d) the act was committed or assisted by a public servant on duty or by abuse of authority".

[60] Article 351A CC: "Any adult person who engages in remunerated sexual intercourse with a minor or remunerates minors to engage in sexual intercourse in the presence of himself or another adult shall incur either of the following penalties: a) imprisonment of no less than 10 years and a pecuniary fine of 100,000 € to 500,000 € if the victim is younger than 10; b) imprisonment of 5 to 10 years and a pecuniary fine of 50,000 € to 100,000 € if the victim is 10 to 15 years old; or c) imprisonment of 1 to 5 years and a pecuniary fine of 10,000 € to 50,000 € if the victim is 15 to 18 years old (…)".

[61] For the text of these offenses see *supra*, under the respective footnotes.

[62] This offense requires the additional element of "depriving the victim of the protection of the State".

[63] Some of these provisions, albeit not containing "gainful purposes" as en element of the respective crimes, treat it as an aggravating circumstance: see paragraphs 2 and 3 of Article 324 CC.

actual breach of the victim's sexual self-determination, as opposed to mere intent to bring about such breach. To sum up, Article 351 CC does not fully correspond to the definition of sexual exploitation under Article 1 of the FD; those cases which escape the former can potentially fall within the scope of other provisions in the CC if certain additional requirements apply, which do not always correspond to the FD.

It then follows that Greek law does not fully compensate for the discrepancy noted above.

As regards sanctions to legal persons, Greek law essentially conforms to the FD. Nevertheless, it has already been pointed out that the existing grid of administrative sanctions does not cover every form of trafficking in human beings.

Non-incorporation of Article 7, para. 3 FD verbatim is partly compensated by Article 47, para. 2 of Statute No. 3386/2005; the latter (deriving from Article 10-c of Council Directive 2004/81/EC of 29 April 2004) covers *unaccompanied* minors from third countries who are presumed to have been victims of trafficking. According to this provision, law enforcement or prosecutorial authorities shall make every effort to trace the family of these minors, as well as provide them legal representation in every stage including court procedures. Hence, the obligation to inform the family of an unaccompanied minor under Article 4, para. 1 of FD 2001/220/JHA is fulfilled, inasmuch as providing legal representation to the family by definition entails access to the type of information envisaged under the said provision. Given that the majority of minors who become victims of trafficking arrive unaccompanied from third countries, it is evident that the requirement of information is fulfilled for the most part. Still, there remains a gap as regards minors who are not from third countries or cannot be classified as unaccompanied.

A number of provisions in the CCP reflect Article 4, para. 2 of FD 2001/220/JHA, requiring that "victims who have expressed a wish to this effect be kept informed" of the issues listed therein. Specifically, Greek criminal procedure confers to the victim of any offence the right to be informed of the outcome of their complaint [64], including progress of the case during the pre-trial stage [65]. In addition, any victim is entitled to intervene as "civil party", thus obtaining the right to submit briefs or requests, appeal pre-trial rulings and judgments, etc. In the case of minors, the right to intervene as "civil party" could until recently only be exercised on their behalf by their lawful representatives, i.e. normally the parent(s) exercising custody; based on a recent amendment of the CCP (see Article 108A), any minor who is a victim of trafficking shall be granted the rights apposite to a "civil party" without a need to follow standard procedures applicable to victims. Therefore, non-incorporation of Article 7, para. 3 FD verbatim is fully compensated, at least as regards the part coinciding with Article 4, para. 2 and 4 of FD 2001/220/JHA.

On the contrary, there is no provision in Greek law to compensate for non-incorporation of Article 4, para. 3 and 4 of FD 2001/220/JHA (on informing the families of minors identified as victims of trafficking of the convict's release); truth be told, such possibility does not exist under Greek law either for victims or their families.

[64] Article 48 CCP.

[65] Article 308, para. 2 CCP.

One might have recourse to the pertinent provision of Statute No. 3625/2007 (cited above), enabling displacement of the offender and prohibition of communication with the victim. Even that provision, however, did not introduce a clear-cut obligation of notification regarding the convict's release. It then follows that non-incorporation of Article 7, para. 3 FD constitutes a substantial shortcoming in this regard.

2. Possible reasons for failure to incorporate certain provisions of the FD

With respect to the few provisions of the FD that have not been incorporated (either directly or indirectly) in Greek law, it is useful to make the following observations.

The explanatory report to Statute No. 3064/2002 does not provide any particular justification for the inclusion of "*gainful purposes*" as an element of sexual trafficking under Article 351 CC, nor does this element owe its existence to any constitutional requirement. Besides, it was already present in the original draft of the said Statute, hence its introduction cannot be attributed to parliamentary organs redrafting the text either.

Attempting to offer a plausible explanation of such discrepancy turns out the following conclusions:

- First of all, Greek law only seems to proscribe sexual exploitation offences if the offender acts for "gainful purposes" (unless other circumstances are present, e.g. the victim is a minor). The title of Chapter 19 of the CC speaks for itself, as it alludes to "offences of financial exploitation of sexual life". Thus, including the element of "gainful purposes" in Article 351 CC was consistent with the overall treatment of sexual exploitation under the said chapter.
- What is more, trafficking in human beings – typically committed in the context of organized crime – rarely disassociates itself from profitable purposes. In this sense, the discrepancy in question could be interpreted as an effort to confine Article 351 CC into the limits absolutely necessary to drastically combat serious cases of sexual trafficking. Whether adding an extra element to the *mens rea* of the offence was the proper way to achieve this goal, is a different matter though.

Assuming one were to adopt the (erroneous) position that the FD requires Member States to recognize *criminal* responsibility of legal persons, Greek law had a good reason not to conform to such "obligation". As stated above, introducing criminal responsibility of legal persons would run contrary to constitutional principles (such as the principle of fault), thus subverting doctrinal foundations of Greek criminal law. When it comes to administrative sanctions, however, one can hardly explain why Greek law failed to extend their scope of application to every form of trafficking in human beings.

With regard to the protection of victims, it has already been noted that the bulk of EU provisions are reflected in administrative or other measures. There remain a limited number of provisions which have not been directly incorporated, owing to difficulties in monitoring EU law in this field.

Indeed, although Greek law has always provided for the right of any victim to intervene in the criminal procedure as "civil party" (or bring a lawsuit before civil courts), it contained no "welfare" provisions connected with the progress of the criminal proceedings, as it is now the case with the protection of the victims of trafficking.

Such wholly new dimension was introduced into Greek law with the addition of Article 187B into the CC (which took place by virtue of Statute No. 2928/2001), and was further expanded by virtue of Statute No. 3064/2002 and Presidential Decree No. 233/2003, as well as Articles 44 *et s*. of Statute No. 3386/2005. Such fragmented approach (aiming at the incorporation of as many EU provisions as possible) [66], have not proved particularly constructive. A case in point is the provision contained in Article 187B, para. 3 CC: although such provision is also applicable to trafficking cases [67], it was neither reevaluated nor correlated with either Statute No. 3064/2002 (which revised all provisions in the CC pertinent to trafficking) or Statute No. 3386/2005 (which introduced detailed provisions on granting residence permits to victims of trafficking).

Thus, the legislative framework concerning victims lacks cohesion, its principal trait being a hectic effort to formally comply with EU obligations. This is better explicable if one takes into account the vastness of EU/EC acts on immigration, i.e. a field closely related to trafficking. Although significant progress has been made [68], the fragmentation described above renders Greek law less receptive *vis-à-vis* new initiatives, as well as inhibits any effort to correct oversights or fill gaps.

3. Practical application of the norm

A. Greek case-law and practical use of the text

1. Quantitative assessment

As has already been mentioned, Statute No. 3064/2002 did not confine itself to transposing the FD, but incorporated other international documents as well. Thus, statistical data gathered subsequent to the adoption of the said Statute cannot possibly be used to assess the implementation of the FD alone. In any event, statistical data available to date can be classified as follows, depending on their source:

- The Ministry of Internal Affairs imparts data concerning arrests for trafficking offences under Articles 323A and 351 CC, as well as input concerning assistance to victims throughout 2003-2006 (i.e. from the entry into force of Statute 3064 onwards) [69].
- A comparative analysis of the above statistical data artlessly leads to one conclusion: although the number of trafficking cases has steadily been on the rise – indicating the viability of the existing system – at the same time the number of identified victims is declining, which means that fewer persons every year are entitled to protection and assistance under the law.

---

[66] Including the FD 2001/220/JHA, and Council Directive 2004/81/EC.

[67] According to this provision, the Prosecutor may abstain from pressing charges for immigration- or prostitution-related offenses if the offenders make an accusation for acts committed against them by a criminal organization.

[68] See *supra.*

[69] www.yds.gr.

	2003	*2004*	*2005*	*2006*
Cases	49	65	60	70
Offenders	284	288	202	206
Victims	93	181	137	83

On the other hand, the *National Center for Social Solidarity* (NCSS) reports having accommodated 18 victims of trafficking in 2005, while 44 more victims were placed in hostels run by NGOs or repatriated. During the first semester of 2006, one victim was accommodated in a NCSS hostel, while 4 victims phoned the direct social assistance line. NCSS agencies handled a total of 72 cases from 1 January 2002 to 30 June 2006.

According to data from the Ministry of Internal Affairs, 24 and 29 residence permits were issued in 2004 and 2005, respectively (based on Article 44, para. 7 of Statute No. 2910/2001); 39 residence permits were issued in 2006, while 24 existing ones were renewed (based on Article 46 of Statute no 3386/2005).

The 2005 Greek report under Article 18 of the Convention on the Elimination of all forms of Discrimination Against Women (*CEDAW*) states that, according to the Center for Research and Action on Peace (KEDE), the number of persons exercising forced prostitution in Greece was reduced from a record high of 22,500 in 1997 to 17,200 in 2002 to 13,000 in 2004.

Lastly the annual reports of the *US State Department* on trafficking in human beings reveal that first of all, despite the progress in terms of legislative measures, number of prosecutions, State funding of NGOs, public awareness, there remain deficiencies when it comes to identifying and treating the victims, which explains the decline in numbers [70].

It must be noted that neither the reports containing the abovementioned statistical data nor the National Statistical Agency provide input concerning the final outcome of trafficking cases. In addition, no reliable figures exist for the period prior to 2003. Therefore, one must be very cautious when assessing the data presented above; at all events, the last two remarks must be kept in mind.

2. *Qualitative assessment: case-study and examples*

Case-law indicates that the offences of Articles 323A and 351 CC are often charged in tandem with the offence of founding or participating in a criminal organization under Article 187 CC [71]. While it is true that trafficking in human beings is by definition associated with organized crime, pressing charges for the offence of Article 187 CC in reality is a pretext to bring into play a number of special investigative

[70] See *supra*.

[71] See, e.g., Pre-Tr.App.Ch. of Thessaloniki ruling No. 289/2005, *PoinDik*, 2005, p. 952 (Vice-Prosecutor for the Court of Appeals E. Michailides concurring); Pre-Tr.App.Ch. of the Aegean Sea ruling No. 35/2005, *PoinDik*, 2005, p. 672 (Vice-Prosecutor for the Court of Appeals P. Brakoumatsos concurring); Pre-Tr.App.Ch. of Dodecanese ruling No. 24/2005 (Prosecutor for the Court of Appeals I. Laines concurring) [NOMOS]; S. Ct. decision No. 592/2006.

measures under Statute No. 2928/2001 (such as undercover operations, lifting privacy in communication, audio and video in-house surveillance) [72].

A typical case of trafficking was discussed in ruling No. 24/2005 by the Pre-Trial Appeals Chamber of Dodecanese, with particular emphasis of the means employed for sexual trafficking (351 CC) [73]: the traffickers transferred the victims out of their country of origin, dispossessed them of their passports, threatened their life as well as the lives of their next of kin, and kept reminding them that they had to "repay" for their transportation, accommodation and "assignment" to their respective "employers".

On the other hand, interpretation of the provisions on trafficking is not always thorough: a case in point is ruling No. 90/2003 by the Pre-Trial Chamber of Amaliada [74], dealing with the element of "vulnerable position" under Article 351 CC in *no more* than the following lines: "*[the offenders] employed women from abroad (...) as "artists"*, *but in reality used them to sexually arouse an undefined number of male clients*" ; "*[the offenders] hired these women taking advantage of their need to find a job*". Thus, the pre-trial chamber identified the need of a person to find a job with the notion of "vulnerable position". It is important to note that the above ruling made extensive references to policy considerations, ending up in the following conclusion: "the principal goal of Statute No. 3064/2002 is to combat trafficking in human beings, in particular sexual exploitation; [such goal] is declared in the explanatory report to the said Statute, which must be interpreted accordingly". It becomes perceptible that, in this particular case, a primarily symbolic message (i.e. the goal to combat trafficking in human beings) [75] was used in such a way as to in effect substitute the letter of the law. In fact, such interpretative approach to the terms "vulnerable position" has been adopted in a number of judgments and rulings, thus constituting the prevailing view on the matter [76].

Coming to the application of the provisions on protecting victims, an interesting example would be the discord between the Prosecutor and the Pre-Trial Appeals Chamber of Thessaloniki on the occasion of ruling No. 289/2005 by the latter [77]. The case in question involved a woman from a third country who claimed to have been a victim of trafficking 3 months after her arrest for illegal entry in the country. Such detail, combined with the fact that an administrative decision to deport the victim had already been issued by the time of her statement, led the Prosecutor to classify her testimony as unreliable. In view of the evidence, the Prosecutor's submission to the

---

[72] See Article 253A CCP (introduced by Article 6 of Statute No. 2928/2001) as amended by Article 42, para. 2 of Statute No. 3251/2004.

[73] NOMOS Database.

[74] *PoinLog*, 2004, p. 2031.

[75] See *supra*, under 2.B.2, as well as under 4.B.

[76] See Pre-Tr.Ch. of Chania ruling No. 139/2007, *PoinDik*, 2007, p. 539 *et s*. (the victims were "impoverished immigrants who came to Greece to work and find a better future"); Pre-Tr.App.Ch. of Athens ruling No. 854/2006, *PoinDik*, 2007, p. 818 *et s*. ("the defendant took advantage of the vulnerable position of the victims, who were illegally in the country without financial wherewithal or anyone to support them (…)"). *Cf*. S. Ct. decision No. 1856/2006, *PoinDik*, 2007, p. 503 ("despondent financial and social status").

[77] *PoinDik*, 2005, p. 952.

pre-trial chamber was to charge the defendants with pandering as opposed to sexual trafficking under Article 351 CC. Nevertheless, the pre-trial chamber contended that "the fact that it took 3 months (June 2003 to 1 October 2003) for the victim to make an accusation for sexual trafficking does not per se indicate unreliability; on the contrary, it was only on that day (1 October 2003) that the victim felt safe to make the accusation, since she was brought to the premises of the Athens Subdivision for Aliens". Although the pre-trial chamber was not called to decide whether the victim was entitled to protection or not, such discord quite eloquently demonstrates how identifying victims of trafficking is tied in with identifying the offenders, which can sometimes lead to unwarranted prosecutions [78].

B. Specific difficulties encountered regarding the practical use of the text

The short time elapsed since the introduction of Articles 323A and 351 CC does not allow for steadfast conclusions regarding their application (compared to the previous legal framework, both provide for exacerbated penalties, thus cannot apply retroactively). Even so, certain publicists do point out that there is a certain degree of vagueness when it comes to certain elements of the pertinent offences, such as: (a) "hiring" (which is used as the counterpart to the FD's term "recruitment") and "harboring", used to describe the conduct; (b) "other coercive means", "imposition of authority", "abuse of authority", "luring" and "taking advantage of a position of vulnerability", used to describe the means. Case-law has yet to delineate these terms with precision, as prosecutions to date have relied on other elements of the offences.

While problems regarding the interpretation of these terms had also surfaced under the previous version of Article 351 CC [79], it is doubtful whether earlier case-law can retain its value, inasmuch as the novel legal framework on trafficking introduces

[78] See N. Chatzinikolaou, *I apelasi allodapou os kyrosi tou poinikou dikaiou*, Thessaloniki, Sakkoulas Publications, 2006, p. 322 ; A. Zachariades, "Prostasia martiron kai metra epieikias kata ti diadikasia diokseos tou organomenou egklimatos", *in* Tim. t. *I. Manoledakis*, II, Thessaloniki, Sakkoulas Publications, 2007, p. 775-776; see *infra*, under 4.2.2. *Cf.*, however, Ch. Papacharalabous, "I piniki antimetopissi tis lathrometanastefsis kai to zitima tis katochirosis ton anthropinon dikaiomaton ton ekonomikon metanaston", *PoinDik*, 2007, p. 1434 *et s.* On applying measures of protection (suspension of administrative expulsion) *see* Order No. 45/2004 by the Prosecutor of Gytheio, *PoinLog*, 2004, p. 2428.

[79] The term "coercion" was discussed in S. Ct. decision No. 2195/2005 (*PoinLog*, 2005, p. 2003), applying provisions on trafficking predating Statute No. 3064/2002. According to the facts proved before the Court of Appeals (whose judgment was under review by the Supreme Court), "*on the given date, the defendant attempted to coerce the victim into prostitution – in particular into having sex with a client – by using force, as well as by threatening her that he and his friends would rape her and kidnap her seven-year-old daughter*". The defendant claimed that his conviction for sexual trafficking was inconsistent with the use of the words "*attempted to coerce*". The Supreme Court held that "coercion" means "*any act committed with the intent to influence the victim towards exercising prostitution*", and concluded that "*sexual trafficking is committed regardless of whether the offender's intent was realized or not*". The Supreme Court upheld the judgment by the Court of Appeals, tagging the language employed therein "a bad choice of words".

wholly new offences in an entirely different context [80], as well as prescribes much stricter penalties than before.

4. Appraisal of effectiveness and efficiency

A. Appraisal of effectiveness

As mentioned above, Greek law did contain provisions which could – and can still – be used to combat trafficking in human beings even before Articles 323A and 351 CC. Thus, the real problem in the combat against trafficking was not some presumed dearth of *criminal law provisions*. Rather, what was probably lacking was complete awareness of the contours of the problem.

The changes brought about by Statute No. 3064/2002 – stemming from, among other things, the FD – did contribute in calling attention to the issue of trafficking, hence raising public awareness and stimulating the political will necessary to combat it. The said Statute created two comprehensive provisions on trafficking (thus facilitating the work of law enforcement and prosecutorial authorities), established universal jurisdiction over trafficking offences, acknowledged the link between trafficking and organized crime, and provided for administrative sanctions against businesses engaging in sexual trafficking, etc.; such provisions were trailed by operative measures by the Ministries involved [81], aiming at training agents, raising public awareness, protecting/assisting the victims, etc. Still, even more important were the changes *triggered* by Statute No. 3064/2002 – albeit not expressly introduced by it – in terms of the overall improvement of law enforcement [82] and prosecutorial authorities. On the other hand, the inherent vagueness of a number of terms employed in the said provisions (as well

[80] *Cf.* Pre-Tr.App.Ch. of Thessaloniki ruling No. 289/2005, *PoinDik*, 2005, p. 952 (Vice-Prosecutor for the Court of Appeals E. Michailides concurring), interpreting the terms "hires" ("the defendant artfully recruited the victim in order to hand him/her over to third persons for exploitation purposes (...) in the context of a depraved contract"), "lures" ("the defendant lured the victim into prostitution"), "detains" ("preventing the victim from leaving the brothel, even with deceitful means" "[the meaning of detention] is broader than Article 325 CC, the latter requiring restraint to freedom of movement"), "imposition or abuse of authority" ("also encompasses de facto exercise of authority over the victim"), "coercive means" ("any means, without the use of which the victim would not consent to exercising prostitution"), "deceitful means" ("those means that can create false impression as to the actual nature of employment"). *Cf.* Pre-Tr.App.Ch. of the Aegean Sea ruling No. 35/2005, *op. cit.*; Pre-Tr.App. Ch. of Dodecanese ruling No. 24/2005, *op. cit.*

[81] A special committee has been put together to coordinate political actions (by the Secretariat-Generals of 8 Ministries) to implement Statute No. 3064/2002 and prepare a National Action Plan to combat Trafficking in Human Beings; in 2006, the committee was upgraded to a Special Drafting Committee (SDC), with the additional task to suggest legislative measures. However, the NCHR rightly observes that, despite its stature, the SDC is lacking in members possessing first-hand experience on trafficking.

[82] Fifteen anti-trafficking teams have been created all over the country; they are coordinated by the Central Anti-trafficking of the Public Security Division of the Hellenic Police, two new Departments on Combating Trafficking in Human Beings operating in the Department for Organized Crime, as well as the Operational/Inter-organizational Action Plan to Tackle the Problem of Human Trafficking.

as in the FD) creates ambivalence as to whether certain acts constitute trafficking or not; as a result, not only are civil liberties jeopardized, but also failure to identify actual victims of trafficking becomes a realistic risk.

Truth be told, Greek law used to be deficient in terms of *assistance to victims.* In that respect, Statute No. 3064/2002, the acts issued based thereupon, as well as Statutes No. 3386/2005 and 3625/2007 *did* fill an existing gap by setting up a system of protection of and assistance to victims. Such system, however, is not without problems, which is why the National Commission for Human Rights (NCHR) suggests a number of measures (after consultation with various NGOs and the Ombudsman) [83], such as: extension of the deliberation period (which is currently one month); clarification of the procedure to identify victims (in order to diminish the risk of expelling them in the process); revision of the procedure to grant residence permits and the respective rights (so that obtaining such permit is no longer dependent on whether the victim cooperates with the authorities); introduction of a functional, comprehensive procedure of protection of victims (so that competences are clearly distributed between State agencies, NGOs, and the IOM); posting multilingual guides in detention centers (so that victims have access to information concerning the protection they can receive and their rights); and giving specialized NGOs – or even an Independent Commission – access to detention centers in order to allow for objective evaluation of the conditions of detention (so that the rights of aliens are better protected). Besides, there are several problems that need to be dealt with on a purely practical level, such as policing hostels, providing interpreters to victims, etc.

B. Appraisal of efficiency

1. Adequacy, necessity and proportionality of the norm

Evaluating criminal law measures entails a number of factors. It also presupposes identifying the goals of crime policy. The present report shall proceed to an evaluation of the efficiency of pertinent provisions based on the following principles: a. The introduction of criminal sanctions can only be justified as a last resort, i.e. when all other alternatives have proved inadequate to address a given problem. b. Criminal law does not constitute a tool of welfare policy, nor can it supplant such policy. Instead, it is itself a source of social problems for those affected by its enforcement. c**.** In view of the above, even when the need to resort to criminal sanctions is well-founded, these ought to be confined to the minimum extent possible, rather than be used to restrain the general population.

As conceded above, the need to amend the provisions of the CC on trafficking was unquestionable, at least to some extent. Such amendment was precipitated thanks to the FD, which indeed contributed in drawing attention to the problem of trafficking on a symbolic level [84]. Nevertheless, assessing the profundity of the amendment that

[83] See Ombudsman comments to NCHR report on trafficking in human beings (19 April 2007). *Cf.* paper entitled “Gynaikes thymata paranomis diakinisis (Trafficking) – Empeiria ‘Synigorou tou Politi’”, where reference is made to reports Nos. 10021/2004, 2011/2004, 17170/2004, 7013/21 April 2004, 20111/2004, 10021/2004 on residence permits and the overall treatment of victims of trafficking.

[84] See *supra*, under 2.A.

took place, as well as determining whether it has been constructive and proportional requires further scrutiny.

Despite the effort to draw a clear line between smuggling and trafficking, it is a given fact that the vast majority of victims of trafficking are persons who arrived in the host country in search of a better life. In that sense, it would be accurate to state that *toughening criminal sanctions on illegal immigration props up trafficking circuits*. Still, the main focus of both EU and Greek policy on migration is to suppress illegal immigration and rein in immigration. One of the facets of such policy is the occasional "legalization" of illegal immigrants by Member States. Though beneficial in many respects, the "legalization process" in effect poses an additional incentive for traffickers assisting the illegal immigration of their victims.

It becomes evident that relaxing migration policy could help both contain trafficking and control illegal immigration. Likewise as regards the austerity by which the law treats refugees, i.e. persons who find themselves in a vulnerable position.

Furthermore, the trafficking cycle perpetuates itself through the eagerness of traffickers to take advantage of the vulnerable position of the victims on the one hand, and the victims' need to improve their living conditions on the other. Thus, it is imperative to implement policies aiming at informing potential victims of the actual conditions they will encounter in "host" States, as well as fighting the very causes of those persons' vulnerability.

That is not to say that States should abstain from applying criminal law measures against trafficking until such time as an equitable distribution of wealth has been achieved. What is meant is that *trafficking can by no means be viewed solely as a problem of criminal law* [85].

In fact, an all-embracing approach would not only help address the roots of the problem, but also delineate the boundaries of an effective crime policy as well. Regrettably, such a comprehensive approach has yet to be realized, while addressing the causes of the problem is constantly neglected. Quite the contrary, initiatives undertaken to combat trafficking internationally (including – but not limited to – the FD) mainly focus on criminal law aspects.

Of course, no one disputes that the crux of trafficking activities does call for criminal law provisions in order to be contained. The preamble of the FD illustrates this by alluding to "serious violations of fundamental human rights and human dignity". Despite the elusive language, such avowal is a reminder that traffickers routinely resort to inhumane treatment of their victims, consisting in breach of such fundamental rights as life, health, personal liberty, and sexual self-determination.

That being said, it remains doubtful whether the provisions defining trafficking confine themselves in proscribing acts of this gravity.

The following hypothetical example quite vividly illustrates the disparity between declared goals and the letter of the law: A exercises prostitution in her country of origin in order to support her two children and her impoverished parents. Although she engages in sexual intercourse with over 10 "clients" on a daily basis, she still does

[85] See the 1998 Opinion of the Economic and Social Committee, EEC 284, 14 September 1998, 92.

not earn enough money to cover the basic needs of her family. One of her "clients" (B) is surprised at the low price A charges for her services, and asks A to go to Greece with him. In fact, B gets in touch with C, who owns a cabaret and has been looking for young dancers. On C's behalf, B offers A 20 times the money she earns in her country (including travel arrangements, food and accommodation); at the same time, he explains to her that her only job will be to perform sensual dances for clients, without having to engage in sexual intercourse with them. A is talked into traveling to Greece with B, who "hands her over to C" upon arrival in the country.

One can hardly argue that characterizing A's position as vulnerable in the sense of Article 1, para. 1-c FD is to be excluded. In fact, it could well be argued that, under the circumstances described above, A had "no real and acceptable alternative but to submit to the abuse". Still, no "serious violation of [her] human rights [or] human dignity" has occurred. Such "serious violation" might have occurred if C were to dispossess A of her passport in order to force her into prostitution, place her in debt bondage, etc. Instead, the only element present in the example is *intent* of sexual exploitation. Even combined with some presumed abuse of her vulnerable position, it still is not enough to justify imprisonment of 5 to 10 years, which is the penalty prescribed under Article 351 CC.

One could counter-argue that EU initiatives merely purport to suppress serious cases of trafficking, not situations like the one described in the hypothetical example. Nonetheless, what the drafters of the FD or Article 351 CC had in mind when adopting the said language is immaterial; what matters is the letter of the law.

Since the FD did not confine the obligation to criminalize trafficking in the circumstances enumerated under Article 3, para. 2, it should at least unambiguously define trafficking so as to cover cases in which *fundamental human rights and human dignity are indeed violated.*

Article 3, para. 2 itself offers fine examples, such as section (d), associating trafficking with criminal organizations. Indeed, the "inhumane", "ruthless" character of trafficking is largely related to organized groups acting for profit. Besides, this is precisely what renders such conduct an international matter, hence calling for trans-boundary cooperation.

It could also be contended that the FD did not require Member States to prescribe the same penalty for each type or circumstance of trafficking, leaving this matter to their discretion. As has already been mentioned [86], however, the drafters of the Greek Statute translated the international initiatives on trafficking (including the FD) into a call for toughening criminal sanctions.

One might add that such understanding was not unjustified [87]. No country wishes to give the impression that it tolerates similar practices by failing to live up to its international obligations (particularly when such obligations are solely related to seemingly costless criminalization of certain acts). When trafficking in human beings is carried out in the context of organized crime, however, even the strictest penalties pale compared to measures targeted against the roots of the problem in the victims'

---

[86] Under 2.B.2

[87] In view of the abovementioned thoughts under 4.B.1.

countries of origin. Still, the EU has not sought to implement comprehensive policies aiming at the protection of victims, along with a simple rationalization of existing criminal law provisions.

Moreover, stockpiling distinct types of conduct under Article 1 of the FD has not been of particular aid in drawing a clear line between them. For instance, "deception" is considered less serious than "coercion" or "force" under Greek law, while "abduction" is treated differently than "threat" or "abuse of vulnerable position". However, these "means" are all listed in *one* "blanket" provision, which creates the impression that they ought to be treated similarly.

Thus, *proportionality* is not properly served. The same goes with respect to the circumstances listed under Article 3, para. 2 of the FD (for instance, "deliberately" endangering the victim's life ought to be distinguished from doing so "by gross negligence").

2. *Impact on fundamental principles of Greek criminal law and due process rights*

Greek criminal law is harm-centered, in the sense that the wrongfulness of each act or omission is measured by the harm it inflicts on legal interests. Needless to say, any criminal act or omission must also fulfill fault requirements, i.e. be accompanied by the requisite *mens rea*.

Such foundation of criminal law evolves around the belief that the starting point for a just and effective crime policy is the notion of "legal interest". That is not to say that the delimitation of such notion is entirely left to the Legislature. However, proscribing offences in an unambiguous fashion does play a part in pointing up those legal interests, thus allowing novel offences to blend in with other provisions of criminal law.

As noted above [88], the offences proscribed in accordance with the FD essentially protect personal liberty and sexual self-determination. They also aim at suppressing sexual exploitation. Nonetheless, the prescribed penalties do not always reflect the harm inflicted by the proscribed conduct, especially in view of the fact that mere intent of forced labor or sexual exploitation is enough [89]; engaging or even attempting to engage in such exploitation is not a required element of trafficking offences, while it is doubtful whether all of the proscribed acts are even fit to result in the intended exploitation [90] or, in other words, place protected legal interests in jeopardy.

Simply put, this runs contrary to the harm-oriented nature of Greek criminal law.

The fact that certain types of particularly harmful conduct are often associated with trafficking is not enough to justify such departure from the foundations of criminal law, as it is precisely the failure to *accurately delimit* trafficking that inhibits the fight against such conduct. From a broader perspective, it is crucial to note that fundamental principles of criminal law are all the more useful in pressing situations, when some are willing to set them aside.

---

[88] Under 2.B.2

[89] See *supra*, under 2.B.2.

[90] On the doctrinal requirement that the proscribed conduct be fit to result in the achievement of the purposes described see G. Demetrainas, *op. cit.*, p. 116-117.

Inevitably, international cooperation leads to the convergence of completely different legal systems. A case in point is the notion of "legal interest", which may not be as central to other systems as in the Greek or German ones. These differences should not get in the way of cooperation but actually further it. However, fusion of doctrinal groundwork of various States is an absolute prerequisite to such cooperation; otherwise, any attempt to incorporate international initiatives into domestic legislation will be fractional, hence abortive.

In terms of procedural rights, the provisions on protection of victims outlined above [91] do not appear to have a disproportionate impact on due process rights [92].

However, connecting the protection of victims to the prosecution of specific defendants demonstrates the problems engendered by viewing trafficking as nothing but a problem of criminal law.

A victim of trafficking who cannot or will not assist authorities in the prosecution of traffickers deserves no less protection than any other victim.

Such connection is all the more apparent when it comes to granting residence permits to victims, based on pertinent EU provisions [93]. These provisions have been fully incorporated into Greek law [94] and are liable to egg on false accusations by victims desiring to obtain residence permit.

5. Reception and perception

A. Reception and perception by practitioners

1. The position of practitioners towards Statute No. 3064/2002 and the FD

Those who have been tasked with the implementation of Statute No. 3064/2002 have more or less taken a positive stance on its provisions. In a series of personal interviews given by jurists (a judge [95], two State Prosecutors [96], and a lawyer [97]), a police officer [98], as well as representatives of NGOs [99] all concurred that the legislative framework established by the FD and Statute 3064 is a cut above the previous regime, in that it comprehensively proscribes trafficking as a self-contained offence. The interviewees emphasized the fact that the new legal framework covers all forms of trafficking in human beings, as well as includes the exploitation of a "vulnerable" position among the means of committing the offence. The pertinent provisions are thus applicable in cases of the so-called "*happy trafficking*", i.e. a form of trafficking

---

[91] Under 2.B.5.

[92] *Cf.* the reservations expressed regarding the novel provision of Article 226A CCP as introduced by Article 3, para. 4 of Statute No. 3625/2007 (see *supra*, under 2.B.5).

[93] 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.

[94] Under Articles 46 *et s*. of Statute No. 3386/2005.

[95] A. Meliopoulos, Thessaloniki Appeals Court President.

[96] M. Malouchou, Vice-Prosecutor for the Court of Appeals of Athens, V. Florides, Head of the Prosecutor's Office of Thessaloniki.

[97] E. Glegle, Court of Appeals attorney.

[98] E. Filiopoulos, head of the Vice Squad of the Thessaloniki Security Issues Division.

[99] N. Gavalas, of "ARSIS" (NGO).

which does not entail physical violence or absolute deprivation of liberty, but rather relies on the victim's "cooperation" (induced by a position of vulnerability).

The interviewees unanimously acknowledged that substantial improvements have been achieved in terms of protecting the victims. The police officer emphasized that certain measures, such as suspending the victims' expulsion or providing lodging and care to them, help build trust towards law enforcement agencies, thus encouraging victims to assist in the offenders' prosecution. On the other hand, one of the State Prosecutors pointed out that each case must be carefully examined, as there is always the possibility that certain provisions be abused (e.g. by persons attempting to be identified as victims – thus avoid expulsion – through false accusations).

Lastly, it was underlined that the success of the new provisions (in terms of both prosecution and assistance to victims) will have to bank on proper training of law enforcement agents, as well as the assignment of experts (e.g. psychologists, sociologists); such steps will make possible the identification and support of victims on the one hand, and the effective gathering of evidence on the other.

2. Informing the public about Statute No. 3064/2002 and the FD

Scores of *conferences*, *debates*, *and educational seminars* have been organized (or are scheduled for the proximate future) in Greece to enlighten agents and persons involved with trafficking cases, as well as to raise public awareness.

These events demonstrate that the general public in Greece does have many opportunities to receive information on the existing legal framework and the international initiatives it derives from. Case-law regarding Statute No. 3064/2002 [100] – albeit scarce [101] – also attests to this fact: although there is no direct mention of the FD, word is made of international initiatives to combat trafficking [102].

Still, the National Commission for Human Rights rightly observes that more coherent action must be taken in order to alert the general public to the problem. Such action must, among other things, find its way into the school system, lest society begin to regard the exploitation of impoverished persons from poor countries as something natural.

Lastly, the interviews cited above do indicate familiarity of the interviewees with the provisions incorporating the FD into the domestic legislature.

B. Reception and perception by politicians

The explanatory report accompanying the initial draft of Statute No. 3064/2002 echoes the concerns of the international community about the magnitude of trafficking in human beings – especially children – as well as affirms the Government's resolve to bring Greek law into line with the international documents signed by Greece. In particular, it expresses the willingness to comply with pertinent EU acts, including the FD.

---

[100] See *supra*, under 3.A.

[101] As noted above, the scarcity of case-law on Statute No. 3064/2002 is due to the short time elapsed since its introduction, as well as to the fact that it may not apply retroactively.

[102] See esp. Pre-Tr.Ch. of Amaliada ruling No. 90/2003, *PoinLog*, 2004, p. 2031.

Furthermore, passing Statute No. 3064/2002 was based on political *consensus*, as the need to reform the pre-existing legislative framework was becoming more and more apparent after the initial outbreak of trafficking acts during the nineties. During the parliamentary debate of August 2002, every political wing backed the Statute, and every speaker advocated its adoption. In its report on the draft Statute, the *Directorate of Studies of the Parliament* avowed that the proposed amendments would further the effort to modernize the CC (which had begun in 1984) and ensure compliance with Greece's international obligations.

Ever since the passing of the Statute, the political drive to intensify action against trafficking is still strong. This is evident from various activities organized by a number of Ministries and State agencies.

In 2001, an inter-ministerial, inter-disciplinary anti-trafficking team (*Task Force for Combating Human Trafficking/OKEA*) was established to prepare changes in the legislative framework on trafficking and help raise public awareness. The establishment of this team was soon to be trailed by Statute No. 3064/2002 and Presidential Decree No. 233/2003.

In May, 2004 a *Special Inter-Ministerial Commission* (composed of delegates from 8 Ministries and assisted by experts, officers, Prosecutors and NGO representatives) was set up to coordinate action toward the implementation of Statute No. 3064/2002. In July 2004, this Commission planned a comprehensive program entitled "Action against trafficking in human beings", whose goals were to monitor trafficking, create shelters and hostels, identify and protect victims, offer them medical care, counseling, legal assistance, educational and job opportunities, as well as to help train law enforcement agents, judges and prosecutors, and raise public awareness. The Commission entered into a Memorandum of Mutual Aid with 12 NGOs and the IOM, in order to ensure better protection and assistance to victims of trafficking. In 2005, Statute No. 3386 on "the entry, stay and social integration of third-country citizens in Greece" was passed: among other things, this Statute defined a victim of trafficking and introduced specific provisions on protection and assistance.

In May 2006, a *Special Drafting Committee* was established [103], in order to coordinate the implementation of Statute No. 3064/2002 and propose legislative or other measures to combat trafficking. In November 2006, the said Committee prepared a meticulous "National Action Plan against trafficking in human beings", which set the objectives for each Ministry involved. Among its priorities are: allowing for more active involvement of NGOs in providing assistance to victims, monitoring prosecutions and releases of prisoners, as well as preparing the ratification of the "Palermo Convention" and the bilateral Treaty with Albania on trafficking in human beings.

Although the present report cannot provide an exhaustive list of each Ministry's initiatives, it is worth noting a few: to begin with, the "Hellenic International Development Cooperation Department" (also known as "Hellenic Aid", acting under the auspices of the Ministry of Foreign Affairs) plays a vital part: in collaboration with

---

[103] By virtue of MD No. 41398, OG B 493/18 april 2006 and MD No. 41404, OG B 581/ 9 May 2006, upgrading the 2004 Commission.

the General Secretariat for Gender Equality (GSGE) and various NGOs, it conducts a number of programs (educational, etc.) all over the Balkans to prevent trafficking and support victims; it works together with a number of international organizations and Greek NGOs; it funds several training and social reintegration programs run by the GSGE, NGOs and other institutions; it generally supports the networking between States and NGOs against trafficking.

The GSGE is also quite active in this field: it frequently executes programs under the auspices of "Hellenic Aid"; it runs two advice offices in Athens and Thessaloniki; it generally promotes public awareness through leaflets, TV spots; its agenda also includes programs to support female victims in particular, as well as to train agents in Greece and abroad.

The *National Center for Social Solidarity* (NCSS), operating under the auspices of the *Ministry of Health and Social Welfare*, is the main public agency offering information, protection, and lodging to victims of trafficking; it runs two hostels (in Athens and Thessaloniki), and it offers a three-digit Hotline service, as well as urgent intervention and social aid services.

It has already been mentioned that OKEA – acting under the auspices of the *Ministry of Public Order* and since the last elections (2007) in Greece under the auspices of the *Ministry of Internal Affairs* – is particularly active in raising public awareness on trafficking. The Hellenic Police runs 15 anti-trafficking teams all over Greece, as well as two anti-trafficking departments in the General Police Divisions of Athens and Thessaloniki. The Hellenic Police engages in international cooperation, exchanges information and participates in meetings in the framework of the EU, UN, Europol, Interpol, SECI, the Adriatic-Ionian Initiative, the Black Sea Initiative, etc. Along with southeastern European countries, it executes the operational/inter-organizational action plan to tackle human trafficking (also known as "ILAEIRA"). The objective of the said action plan is to disband organized, trans-boundary trafficking circuits, as well as to offer protection and care to their victims.

In addition, there are other institutions, such as *independent authorities* or *national commissions*, which support legal action against trafficking (particularly aiming at the improvement of the legal framework after the introduction of the FD).

The *Ombudsman* is primarily dedicated to monitoring the rights of victims of trafficking. It welcomed Statute No. 3386/2005 concerning the issuance of residence permits to aliens who become victims of trafficking; at the same time, however, it has expressed reservations as to the fact that making an accusation against the trafficker is a prerequisite to benefiting from the provisions of the said Statute. The Ombudsman frequently functions as an intermediate between victims of trafficking and the State either to expedite/facilitate the issuance of a residence permit or to ensure that an alien who is a victim of trafficking be erased from the National List of Alerts (EKANA). Ombudsman delegates participate in conferences and meetings on trafficking, and make suggestions to improve the legislative framework.

The *NCHR* dealt with the issue of trafficking in Greece in a recent report [104]. Among other things, the report notes that "Greek legislation generally abides by international and European standards (…) and can be considered adequate". At the same time, it identifies certain problems and makes suggestions, such as extending the deadline given to victims to decide whether they will cooperate with the authorities to 3 and 2 months for adults and minors, respectively; clarifying the procedure to identify potential victims; disassociating the issuance of a residence permit from whether the victim makes an accusation or not, and granting the same rights to all victims, including those who decide not to cooperate; specifying and systematizing the tasks of institutions such as NGOs, the IOM, etc.; and addressing certain problems that have surfaced in practice, such as impunity of clients due to the inherent difficulty of proving their *mens rea*, frequent downgrading of charges from felony (sexual trafficking) to misdemeanor (pandering), tardiness in the criminal procedure, etc.

It is worth noting that a recent report by *Amnesty International* on trafficking in Greece (dated June 2007) arrived at identical conclusions: specifically, it focused on the failure of Greek authorities to identify victims of trafficking, resulting in the imposition of sanctions (including imprisonment and expulsion) against them. The AI's suggestions are in the same vein as those made by the NCHR.

The above presentation demonstrates that the Statute on trafficking in human beings was well received, and in fact prompted a national strategy toward furthering cooperation with NGOs and international institutions. Still, certain issues such as guaranteeing fundamental freedoms, proportionality between the offences committed and the penalties prescribed, and the disassociation of the protection of and assistance to victims from prosecution, have not found their way into the political agenda. Fortunately, the NCHR and the Ombudsman are pressing for political action, while publicists are constantly suggesting further improvements.

C. *Reception and perception by the media*

The adoption of a Statute on trafficking in human beings received favorable media coverage. Major newspapers have published numerous stories relating to trafficking and to the pertinent provisions [105].

On the other hand, these news stories reveal some "disenchantment" as regards the scope and implementation of the legislative framework. However, it is true that the amendment to the law, coupled with the activities of NGOs and public agencies, have shifted the focus to trafficking. The mass media have done their share in raising public awareness. Overall, trafficking in human beings is no longer considered to affect only other countries.

---

[104] Entitled "The position of the National Commission for Human Rights on trafficking in human beings – The Greek situation", 14 June 2007

[105] See, e.g., *Eleutherotypia*, 25 April 2002, 21 July 2002; *To Vima*, March 2002 and 2005; *TA NEA*, 2002 and 25 September 2004; *MACEDONIA* and *ANGELIOFOROS* (frequent publications); in addition, the news portal <pathfinder.gr> often publishes stories related to trafficking (e.g. it favored the adoption of Statute No. 3386/2005), while it also posts information on conferences and other events on the subject.

D. Reception and perception by social groups

Quite a few Greek NGOs are active in the field of trafficking in human beings. The leading ones (in alphabetical order) are: ARSIS, the Center for Rehabilitation of Victims of Torture and other Forms of Abuse (CRVT), the Center for Research and Action for Peace (KEDE), the European Women Network, the Greek Council for Refugees (GCR), the Human Rights Defense Center (KEPAD), the International Police Association (IPA), the International Society for Family Support (FRONTIDA), KLIMAKA, NEW LIFE – Group for the Support and Rehabilitation of Persons Exercising Prostitution, the Research and Support Center for Victims of Maltreatment and Social Exclusion (CVME), the Smile of the Child, and SOLIDARITY.

Although an exhaustive presentation of the activities of the above NGOs escapes the confines of the present report, it would be in order to briefly mention some of these activities.

Among the main tasks of these NGOs are: providing short-term or long-term lodging to victims of trafficking (ARSIS, CRVT, CVME, FRONTIDA, KLIMAKA, SOLIDARITY); offering medical care, counseling, and legal aid (ARSIS, CRVT, CVME, European Women Network, GCR, KLIMAKA, NEW LIFE, SOLIDARITY); operating hotlines for support and information (European Women Network, Smile of the Child, SOLIDARITY); facilitating repatriation of victims (ARSIS, European Women Network, CRVT); offering training and job opportunities for victims (ARSIS, KLIMAKA); providing information to the general public or even the competent authorities (ARSIS, IPA, KEDE, KEPAD, KLIMAKA, SOLIDARITY). Needless to say, these NGOs regularly participate in various events on trafficking and cooperate with domestic or international institutions.

Some of these NGOs are involved in more specialized programs against trafficking: for instance, ARSIS engages in “street work” action to trace children who have been victims of trafficking or are in danger through the TACT program; “Smile of the Child” also gives its support to children who are victims of trafficking; and the GCR identifies victims of trafficking and intermediates between them and the authorities through its asylum service.

The introduction and implementation of a novel legislative framework on trafficking has drawn the attention of other non-governmental institutions as well. Here are some of them (in alphabetical order):

- *Bar Associations:* During the 2004 Olympic Games, the Athens Bar, working together with the Ministry of External Affairs and the Bar Associations of other Olympic Cities (Volos, Herakleio, Thessaloniki, Patras), developed a legal assistance network for women who could potentially be trafficked to those cities. Ever since 1997, the Athens Bar has run a legal aid department for persons in need, including victims of trafficking. The Thessaloniki Bar Association is also active in the field: among other things, it is currently participating in the NOSTOS project, aiming at the development of new ways to tackle all forms of discrimination, as well as to give victims the opportunity for social reintegration (including finding a job). It has also released a Guide of Civil Rights and International Law for victims of trafficking in human beings, as well as a Regulation of Lodging Facilities and Transit Stations.

- *Marangopoulos Foundation for Human Rights (MFHR):* The MFHR pored over the draft which became Statute 3064, and approved of most of its provisions, including those prescribing harsh penalties. As regards assistance to victims, it emphasized the need to engage NGOs, and called for prioritizing action to prevent trafficking, such as information programs. On the occasion of the World Day against Child Labor (12 June) and in its capacity as national coordinator of the Global March against Child Labor, the MFHR issued a resolution (dated 11 June 2004) condemning forced child labor and calling for immediate and effective action against it. In addition, it has organized a number of meetings and press conferences to inform the public.

Last but not least, a number of *international organizations/associations* are active in the field of trafficking:

- The International Organization for Migration (IOM), acting in Greece through a field office since 1952, brought up the issue of trafficking in 2000, and has cooperated with State agencies and NGOs ever since. Apart from organizing or participating in conferences, the IOM participates in the drafting committee on implementing Statute 3064, is a member of OKEA, coordinates the National Network to Combat the Illegal Trafficking in Human Beings under the auspices of "Hellenic Aid", implements voluntary repatriation programs (along with other IOM country missions), launches information campaigns, and hosts training seminars.
- Moreover, the *Alternative Seat of the Stability Pact for Southeast Europe in Thessaloniki* has organized a series of events on trafficking, put together a group of experts to foster cooperation between countries in the region (2002-2004), and supports a network of 13 NGOs located in some of these countries; in 2006, it created a Field Office to Combat Trafficking in Human Beings, tasked with informing public agencies, disseminating the position of NGOs working in the field, coordinating the action of NGOs, international organizations and the Stability Pact, and taking part in conferences on trafficking. An upgrading of the said Field Office is scheduled to take place in 2007, and closer cooperation with the IOM is expected to follow.

It follows that a number of NGOs and other non-governmental institutions (domestic and international alike) are active in the field of trafficking, both in terms of raising public awareness and assisting victims (particularly those from abroad). Some of these initiatives could do with further encouragement in order to be effective. However, any perceived shortcomings are due to the absence of a systematic legal framework coordinating such action as opposed to the NGOs themselves. The Memorandum of Cooperation signed by the inter-ministerial commission of the National Action Plan to tackle trafficking and 12 NGOs constitutes an important first step in that direction; still, it falls short of an official acknowledgment of the role of NGOs in protecting the victims' rights.

E. Reception and perception in legal literature

Greek publicists have adopted a positive stance *vis-à-vis* the part of the FD on the protection of victims (some skepticism being expressed *vis-à-vis* linking the protection of victims with their willingness to cooperate under Directive 2004/81/EC and the respective provisions of the Greek Law, as well as the pertinent provisions on organized crime, namely Article 187B, para. 3 and 4 CC). On the other hand, there is criticism as regards the use of certain terms under Articles 1 and 3 FD. Specifically, the terms "recruitment", "transfer of control", "abuse of a position of vulnerability", "control over another person", and "particularly vulnerable victim" are considered rather vague. Inasmuch as some of these terms have been introduced into Greek law, such criticism is also applicable thereto. In addition, the introduction of two novel provisions in the CC (creating lack of cohesion) is disputed, as the gap could have been filled through the amendment of already existing provisions (mainly those contained in Articles 322, 323 and 351 CC). Lastly, certain publicists are quite skeptical regarding the criminalization of the conduct of persons who receive services from victims of trafficking, which is liable to embroil a large number of people in prosecutions, which will in turn be subject to probative difficulties.

6. Conclusion

A. The impact of the FD in terms of building up cooperation between the authorities of Member States

Although trafficking in Greece is largely a trans-boundary issue, cases that have been brought to court to date [106] have not been resolved through intergovernmental cooperation within the EU (at least the pertinent judgments so indicate).

Besides, no reliable data exists from which to derive safe conclusions regarding the degree of cooperation between law enforcement or prosecutorial authorities subsequent to the adoption of the FD. The impact of the FD in the field is thus indeterminate.

On the other hand, the approximation in terms of the types of conduct proscribed and – most notably – shifting the focus on the problem of trafficking through international initiatives including the FD has indeed created a common ground between Member States' authorities, with a potential to enhance cooperation in the future.

The vast number of conferences, seminars and other events following the transposition of the FD [107] is evidence for this potential. Given the participation of several foreign delegates, it is safe to assume that this type of action will foster closer cooperation.

At the same time, the activities described above bring together Balkan States rather than EU Member States. Evidently, the need for international cooperation is more present in the victims' countries of origin.

In addition, it must be noted that international cooperation – albeit useful – is simply the means to an end, which is to combat crime, including trafficking. In order to fully evaluate the degree and quality of cooperation, one must first and foremost

[106] See *supra*, under 3.
[107] See *supra*, under 5.

proceed to a balancing of the goals such cooperation purports to achieve against the means employed. Thus, strengthening international cooperation through the FD is inexorably linked to the problems mentioned above [108].

In fact, a closer look reveals that attempting to *reinforce cooperation between law enforcement agencies through substantive criminal law amendments* is inherently self-contradictory. Indeed, it is criminal procedure which exists to serve the goals of substantive criminal law, not vice versa: simply put, the provisions guaranteeing due process are there to regulate the prosecution of offences which are proscribed based on substantive (hence extra-procedural) criteria (such as the harm inflicted, the understanding that criminal law should be used only as a last resort, etc.) [109]. These observations are valid at a national and international level alike. Hence, the regulation of trafficking in human beings (or any other crime, for that matter) *should not merely be designed to facilitate cooperation between law enforcement agencies*, lest fundamental principles be set aside.

The following two examples help clarify this point: a) The penalty prescribed for any given offence is analogous to its gravity (i.e. the harm it inflicts and the respective guilt of the offender), which is in turn measured against the importance of protected legal interests. Thus, it is inconceivable how such penalty can be prescribed based on whether it renders the offence extraditable, in order to facilitate judicial cooperation. Yet this is precisely what Article 3, para. 1 FD does by requiring a single penalty for all types of conduct labeled as trafficking, despite the marked differences between them [110]. b) The broader the definition of an offence, the easier it becomes to develop cooperation of law enforcement and prosecutorial authorities to combat it. However, this does not come without cost for civil liberties. It has already been noted that the FD is not free from ambiguities in terms of the conduct proscribed. Obviously, it is up to each Member State to ensure respect for the principle *nullum crimen nulla poena sine lege certa* by lifting such ambiguities. Although this undermines the approximation of the legislation in the EU, it may be the only way to conform to constitutional norms.

In conclusion, an affirmative answer to the question whether a FD proscribing certain types of conduct has promoted closer cooperation between authorities in the EU does not necessarily imply a positive impact on Member States' criminal law.

B. The impact of the FD on the double criminality requirement

In attempting to harmonize the domestic legislations of Member States, the FD on trafficking in human beings has had an impact on the principle of double criminality, a necessary component for interstate cooperation in criminal matters.

With a particular view to the Greek legal order, the issue of the double criminality requirement is raised so as to allow: a) the extension of Greek jurisdiction over crimes committed abroad based on active or passive personality (Articles 6 and 7 CC); b) the provision of certain forms of judicial assistance to third States. An examination of the

---

[108] See *supra*, under 2.B.2 and 4.B.

[109] See *supra*, under 4.B.1.

[110] See *supra*, under 4.B.1.

effect of both the FD and Statute No. 3064/2002 with regard to these matters leads to the following conclusions.

The approximation of the domestic law of Member States through the FD has an obvious impact on the double criminality requirement, which is more likely to be fulfilled inasmuch as the same conduct is proscribed in the same fashion. Still, law enforcement and prosecutorial authorities must be diligent when it comes to this requirement, as it is possible that certain States have omitted certain types of conduct due to constitutional constraints. That being said, double criminality does not apply to trafficking offences under Greek law, since the CC recognizes universal jurisdiction thereupon. Therefore, the incorporation of the FD into Greek law is only of practical use inasmuch as it enables other Member States to exercise jurisdiction over cases that have some nexus to Greece. In that latter, it gives rise to "international *lis pendens*" issues.

As already noted above, the harmonization of the domestic law of Member States facilitates interstate cooperation between prosecutorial and judicial authorities. Nonetheless, it must not be overlooked that overstretching the definition of trafficking to achieve procedural goals might prove detrimental to the integrity of substantive criminal law of Member States. It is also to be noted that the requirement of double criminality is of no less significance in an environment of harmonized laws; quite the contrary, it remains useful as a tool for testing out the quality of harmonization.

C. The impact of the FD in terms of building mutual trust

The approximation of domestic legislations indubitably fosters mutual trust among Member States. However, another fundamental prerequisite thereto is consistency of the pertinent provisions with the principles mentioned above. Otherwise, not only is mutual trust impossible to achieve, but one can even lose faith in one's own (national) criminal justice system.

One must not forget that most of the types of conduct labeled as trafficking were already proscribed in Greek law even before the FD [111]. This can be safely assumed as regards the domestic law of other Member States, at least for those acts which form the "core" of trafficking [112]. In that sense, the FD cannot be considered to have had drastic effects in terms of building mutual trust. In order to achieve that goal, it would have to promote approximation of domestic criminal procedure of Member States as well (or at the very least introduce legal tools to regulate interaction between various systems), so that the conditions and guarantees accompanying the attribution of criminal liability are made clear.

Lastly, it has already been noted that a number of international instruments were incorporated into Greek law along with the FD; therefore, any perceived degree of mutual trust cannot be attributed solely to the latter.

---

[111] See *supra*, under 2.A.

[112] See *supra*, under 4.B.1.

D. *The impact of the FD and of Statute No. 3064/2002 as to the general objectives of AFSJ*

Truth be told, the "area of freedom, security and justice", in the context of which the FD was developed, has so far (i.e. even after the adoption of the Hague Program) proved to be prone to "unevenness". Specifically, *security* is clearly given priority; *freedom* is primarily understood in a narrow sense (i.e. freedom of movement within EU territory); at the same time, the protection of fundamental rights, which lies at the core of *justice*, is merely treated in the vein of confidence-building measures aimed at promoting mutual recognition of judgments [113]. Such configuration blurs the traditional (European) conception of human rights protection, which evolves around the *content* and *substance* of each fundamental right and allows for limitations thereto provided that the *essential core* of the right remains intact. The Hague Program itself lets slip some preference to suppression of crime over fundamental rights. This is precisely why the European Parliament itself issued a recommendation on the "future of the area of freedom, security and justice", emphasizing the need to submit it to democratic control, as well as to achieve a balance between security on the one hand and respect for fundamental rights on the other [114]. Despite its declared goals, the Hague Program seems to regrettably overlook recommendations of this sort [115].

Unfortunately, the FD on trafficking in human beings is prone to the same unevenness described above. As a result, those Member States which have faithfully transposed it run the risk of "importing" its end product as well.

On the one hand, proscribing conduct which is harmful to personal liberty, sexual self-determination and – ultimately – human dignity incontrovertibly protects these particular rights, thereby fostering security; on the other hand, it remains unclear what *balancing of legal interests* led to the conclusion that the penalty for every single offence under Article 1 FD must be so severe as to render them extraditable ones, or which criteria determined that all the aggravating circumstances under Article 3, para. 2 should incur a maximum penalty of no less than 8 years [116]. The principle of proportionality is apparently set aside in the FD, although it is a corollary of both

---

[113] See M. Kaiafa-Gbandi, "Aktuelle Strafrechtsentwicklung in der EU und rechtsstaatliche Defizite", *ZIS*, 2006, p. 522 *et s*., with further analysis.

[114] P6_TA(2004)0022, *OJ*, No. 166 E of 7 July 2005, p. 58-63.

[115] *OJ*, No. C 53 of 3 March 2005, p. 1-14.

[116] P. Asp ("Basic models of a European Penal Law", in 4th European Jurists Forum, 3-5 May 2007, Wien (in publication)) aptly criticizes the minimum level approach adopted to homogenize substantive criminal law in the EU in these words: "The minimum level-approach reflected in Article 31e of the TEU is one factor that creates a risk for a one-sided, mainly repressive, development. If you add that a far-reaching harmonisation probably presupposes some sort of common criminal policy *and* that there are fairly significant differences between the Member States in respect of the general level of repression, the problem becomes even clearer". The author also hints at the principle of proportionality: "As regards the area of criminal law, the presumption concerning the need for justification of a certain measure is turned around, turned upside down or inside out. The point of departure is that repression does not call for justification and that the burden of proof lies with the Member States that are least repressive in the specific area discussed".

freedom and justice. In other words, as long as the EU fails to develop comprehensive standards to correlating the proscribed conduct to the prescribed penalties in a proportionate fashion, the "area of freedom, security and justice" is liable to turn into an area of (presumed) security without freedom or justice, thus becoming a dead letter.

Besides, appraising trafficking in human beings under the prism of migration leads to intriguing similarities in the policies adopted by various Member States: specifically, while uniform provisions have been adopted to criminalize conduct relating to illegal immigration, including trafficking [117], States are reluctant to adopt uniform rules to address the central question of any policy on migration, which is how many immigrants and on what conditions they are willing to admit them. Although important steps have been taken in the field (e.g. family reunification or status of long-term residents), consensus only seems to exist as regards willingness to suppress illegal immigration and contain immigration in general. Such paradoxical preference of Member States to cede their sovereignty in criminal law matters is bound to favor security over freedom.

E. The impact of the FD and of Statute No. 3064/2002 on the protection of human rights

As noted above, the contribution of the FD in the protection of fundamental rights consists in the enumeration of a number of trafficking offences, harmful to such rights as personal liberty and sexual self-determination; the FD appears to have covered every type of trafficking save for organ trafficking. However, complete protection of human rights can only be achieved through assistance to victims of trafficking, which in turn cannot be offered without granting a residence permit. In that respect, problem arises because of the trade-off between the protection afforded on the one hand and the victim's "cooperation" on the other, which proves that the EU's main focus is not to protect fundamental rights. It then becomes evident that disassociating the protection of victims from the prosecution of the offenders is called for, in terms of both EU policy and Greek law.

On the other hand, the fundamental rights of alleged offenders should also be protected. Regrettably, neglecting the principle of proportionality and proscribing conduct largely based on subjective elements pose direct affronts to the freedoms recognized in any criminal law system founded on liberal values.

F. The impact of the FD and of Statute No. 3064/2002 on the Greek criminal law system and its fundamental principles

As has repeatedly been mentioned, the incorporation of the provisions of the FD in Greek law took place through the introduction of two new Articles in the CC, even though trafficking was covered under preexisting provisions for the most part. This has admittedly undermined the cohesion of the pertinent chapters of the CC, created a number of contradictions, and brought about overlapping of offences.

---

[117] Beyond the FD in question, *cf.* Council FD 2002/946/JHA of 28 November 2002 "on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence", *OJ*, No. L 328, 5 December 2002.

In some cases, the FD has opted for proscribing offences mainly on the basis of subjective elements, without any objective association with the actual harm caused to the sexual freedom of the victims. This runs contrary to the core values of a harm-based system, such as the Greek one [118].

On the other hand, the above analysis makes plain that, despite the goal to protect the fundamental rights violated by trafficking, both the FD and the Statute incorporating it into Greek law tend to disregard basic principles of criminal law (failure to address proportionality concerns – excessive use of subjective elements to proscribe offences – broadening definitions through vague terms). Besides, both seem to depart from the perception of criminal law as last resort; such a perception would require the direct implementation of policies to support victims, and allow for the adoption of novel, inchoate offences only as long as deficits of penal control could be well established. Treating criminal law merely as a tool to further cooperation between law enforcement agencies at an interstate level – as opposed to a freedom-preserving instrument – is liable to keep causing problems like the ones mentioned above.

In fact, the provisions of Statute No. 3064/2002 have exacerbated the problems caused by the FD, since they prescribe a single "blanket penalty" exceeding the limit set by the latter (imprisonment of 5 to 10 years) for every type of conduct under Article 1 FD.

However, the biggest problem engendered by EU acts endeavoring to *standardize criminal law*, including – but not limited to – the FD on trafficking, has to do with the principle of legality. It is well-established that legality in its purest form is a corollary of the *democratic principle*, and indeed it is only a democratically elected parliament that possesses the authority to define an offence and prescribe the appropriate penalty. In contrast, FDs are the product of *executive* (not legislative) power exercised by the Council of Ministers, the European Parliament's role being reduced to merely delivering an opinion (Article 39 TEU). Such democratic deficit is all the more dangerous when it comes to substantive criminal law, particularly in view of the EU's position that the *minimum* standards set by FDs are binding upon Member States under Article 34, para. 2(b) TEU. Attempting to override national Parliaments in this manner, especially in terms of dictating the elements of crimes and the respective penalties, is inconsistent with the principle of legality, hence with the democratic principle itself [119]. As long as the democratic deficit inherent in the third pillar remains uncompensated, national Parliaments should not consider themselves bound to incorporate substantive criminal law provisions against their Constitutions or fundamental principles of their respective criminal justice systems. Besides, Article 34, para. 2(b) TEU merely alludes to "*approximation* of the laws and regulations" of Member States, which could be interpreted so as to only dictate harmonization of *pre-existing* provisions. Unfortunately, national Parliaments often consider themselves compelled to tag along EU initiatives, owing in large part to

[118] See *supra*, under 4.B.1.

[119] M. Kaiafa-Gbandi, "The development towards harmonization…", *op. cit.*, p. 249-250; B. Schünemann, "The Foundations of Trans-national Criminal Proceedings", *in* B. Schünemann (ed.), *A programme for European Criminal Justice*, München, 2006, p. 346 *et s.*

political pressure exercised thereupon [120]. As a consequence, the principle of legality is radically – albeit surreptitiously – undermined.

Moreover, FDs also have an adverse effect on the requirement of *specificity of criminal law*, which is another facet of the principle of legality. Indeed, the EU favors the adoption of broad – and often vague – definitions to facilitate intergovernmental cooperation; at a subsequent stage, national Parliaments are reticent to depart from the language employed in FDs, lest certain types of conduct be left unregulated. Such *emasculation of the principle of legality* is observable in the field of trafficking as well. This is yet another reason why national Parliaments must resist political pressure to adopt FDs to the letter, thus safeguarding legality.

In the context of today's democratically deficient EU, *it is of utmost significance* to demarcate the "binding effect" of a FD, particularly when it comes to proscribing offences and providing for the respective penalties. Besides, such demarcation is a prerequisite to an overall evaluation of FDs as legal "tools". *Thus, the analysis included in the present national report must be read in light of the above critical assessment of the "binding" effect of FDs on the legal order of every member-State.*

Other references

V. Alexandris, O. Tsolka, *Diefkolynsi Akolasias allon (ar. 348 § 1 PC) kai Asemna (ar. 29 ep. kai 30 tou n. 5060/31)*, Athens, Ant. N. Sakkoulas Publishers, 1998.

N. Androulakis, ""Asemno" kai poini simera (taftochrona mia simvoli sto provlima tis poinikis kyrosis ithikon epitagon)", *PChr*, 1983, p. 209 *et s.*

—, *Poiniko Dikaio*, *Theoria gia to eglima*, Athens, P. N. Sakkoulas, 2000.

—, G.-A. Magakis, I. Manoledakis, D. Spinnellis, K. Stamatis, A. Psarouda-Benaki (Epopteia), *Systimatiki Ermineia tou Poinikou Kodika*, Athens, P. N. Sakkoulas, 2005 (epim. D. Spinelis), 2005.

A. Antonopoulou, D. Pippidou, "Oikonomiki ekmetallefsi kai ergasia anilikon", *in Human Trafficking*, periodical edition by ARSIS, vol. 4, 2006, p. 18-19.

Ph. De Bruycker (ed.), *Regularizations of illegal immigrants in the EU*, Bruxelles, Bruylant, 2000.

Th. Charalabides, "To ischyon nomiko plaisio gia tin paranomi diakinisi antropon stin Ellada ", *in Human Trafficking*, periodical edition by ARSIS, vol. 1, 2004, p. 10.

—, "Apelasi anilikon: otan ta aftonoita ginontai polyteleia", *in Human Trafficking*, periodical edition by ARSIS, vol. 2, 2005, p. 10-11.

N. Chlepas, D. Spyurakos, *O nomos 1975/1991 peri allodapon kai to Syntagma*, Athens, Ant. N. Sakkoulas Publishers, 1992.

N. Chloupis, *Diasynoriako kai Yperethniko Organomeno Eglima*, Athens, Nomiki Bibliothiki, 2005.

—, "Gynaikes kai paidia thymata diasynoriakis kai diethnikis eglimatikis drasis", *PoinDik*, 2006, p. 922 *et s.*

N. Chorafas, *Poiniko Dikaio*, t. 1, 9th ed., Athens, Sakkoulas Brothers, 1978 (epim. K. Stamatis).

G. Demetrainas, "Arthro 323A: to elliniko kyrotiko encheirima stin katapolemisi tis emborias anthropon me skopo tin ergasiaki tous ekmetallefsi i tin afairesi organon tou somatos tous", Tim. tom. N. Androulaki, Athens, Ant. N. Sakkoulas Publishers, 2003, p. 143 *et s.*

[120] Through *inter alia* the Reports Committee.

N. DIMITRATOS, “Poinikes kai Eglimatologikes diastaseis sto zitima tis Eglimatikotitas allodapon kai tis lathrometanastefsis”, *PChr*, 2005, p. 685 *et s.*

Ch. DIMOPOULOS, *Eglimata tis Genetisias Ekmetallefsis Anilikon*, *Emboria – Pornografia – Katachrisi se aselgeia*, Athens, Nomiki Bibliothiki, 2006.

I. DIONYSIOU, “I anagi mias eglimatologikis erevnas gia tis diastaseis tou fainomenou “paidia tou dromou” stin Athina”, *CrimJust*, 1998, p. 1033 *et s.*

ETHNIKI EPITROPI DIKAIOMATON TOU ANTRHOPOU, *Theseis kai Protaseis sto thema tis emborias anthropon – i katastasi stin Ellada* (www.nchr.gr).

—, “ To nomoshedio gia tin emboria anthropon kai tin arogi sta thymata eglimaton oikonomikis ekmetallefsis tis genetisias zois”, *CrimJust*, 2002, p. 663 *et s.*

I. GAFOS, *Poinikon Dikaion: Eidikon Meros*, *Eglimata kata ton Ithon*, 1957.

K. GARDIKAS, “Eglimata kata ton ithon”, *PChr*, 1952, p. 49 *et s.*

S. GIAFIS, “I poiniki antimetopisi ton allodapon stin Ellada”, *in* ELLINIKI ETAIRIA IDIOTIKOU DIETHNOUS DIKAIOU (Ed.), *To nomiko kathestos ton allodapon stin Ellada*, 1995, p. 187 *et s.*

A. GIOTOPOULOU-MARAGOPOULOU, *Dikaiomata tis Gynaikas – Dikaiomata tou Anthropou*, *Idryma Maragopoulou gia ta dikaiomata tou anthropou*, Athens, Estia Publications, 1994.

E. GLEGLE, “Gynaikes thymata somatemborias”, *in Human Trafficking*, periodical edition by ARSIS, vol. 2, 2005, p. 6-7.

—, “Paidiki pornografia sto Internet”, *in Ibid.*, vol. 3, 2005, p. 16-17.

—, “Paidia os emporevmata”, *in Ibid.*, vol. 2, 2005, p. 12-13.

M. KAIAFA-GBANDI, *Emvathynsi stin Poiniki Nomologia*, Thessaloniki, Sakkoulas Publications, 2006.

—, “Gemeinsame Grundsätze des Strafprozessrechts als Basis einer grenzüberschreitenden Strafverfolgung”, 4. Europäischer Juristentag vom. 3-5, Mai 2007, Wien (in publication).

P. KAKKALIS (epim.), *Dikaio allodapon – nomothesia*, 2nd ed., Athens, Nomiki Bibliothiki, 2005.

G. KARANIKOLAS, “Paidiki pornografia sto diadiktyo: provlimatismoi gyro apo ti nea rythmisi tou arthrou 348A PC”, *PoinDik*, 2005, p. 964 *et s.*

V. KARYDIS, *I eglimatikotita ton metanaston stin Ellada-zitimata theorias kai anteglimatikis politikis*, Athens, Papazisis, 1996.

—, “To neo Schedio Nomou gia tin metanasteftiki politiki i “Odinen oros kai eteke myn””, *PoinDik*, 2000, p. 1126 *et s.*

—, “Alvanoi lathrometanastes drastes i thymata” *in* G. PANOUSIS, Ch. DIMOPOULOS, V. KARYDIS, *Thymatologika keimena*, Athens, Ant. N. Sakkoulas Publishers, 1994, p. 74 *et s.*

KENTRO POLITIKIS EREVNAS KAI EPIKOINONIAS, *O neos kindynos apo to organomeno eglima – Emborio anthropon*, Athens, 2002.

A. KONTAXIS, *PC*, t. A, 3rd ed., Athens, 2000.

N. KOURAKIS, “Allodapoi, metanasteftiki politiki kai eglimatikotita”, *PChr* 2003, p. 577 *et s.*

V. KOURTIS, “Adeies diamonis sta thymata emborias anthropon”, *in* Z. PAPASIOPI-PASIA (Ed.), *O neos nomos 3386/2005 gia tous allodapous*, *Schepseis kai provlimatismoi*, Athens, Ant. N. Sakkoulas Publishers, 2006, p. 95 *et s.*

R. KOSTATZIKI, “Paranomi diakinisi kai emboria gynaikon”, *Enopion*, 38, March-April 2007, p. 76 *et s.*

E. KYRIAKAKIS, “Allodapoi stin Ellada-Provlimata astynomikis fyseos”, *EEEvrD,* 1998, p. 85 *et s.*

—, “Eglimatologiki prosegisi ton kata thalassa vareon eglimaton”, *PoinDik* 2000, p. 898.

G. LAZOS, *Porneia kai diethniki somatemboria sti synchroni Ellada*, *1. I ekdidomeni*, *2. O pelatis*, Athens, Kastaniotis Publications, 2002.

—, " Diethniki somatemboria kai exanagastiki porneia stin Ellada tou 2002 ", *in* http://www.stop-trafficking.org/TRAFFICKING%20 GREECE%202002%20FINAL%20B.pdf.

G.-A. Magakis, " I mastropeia kata to arthro 349 PC ", *PChr*, 1966, p. 449 *et s.*

—, *Ta Eglimata peri tin Genetision kai tin Oikogeneiakin Zoin*, Athens, P. Sakkoulas Brothers, 1967.

—, S. Papageorgiou-Gonatas, *Systimatiki ermineia tou Poinikou Kodika: Kefalaio dekato enato*, Athens, P. N. Sakkoulas, 1994.

—, "To eglima tis diefkolynsis akolasias allon kai i dimosiefsi agelion erotikis, tilefonikis epikoinonias", *Yper*, 1197, p. 447.

A. Maganas, " I thymatopoiisi ton prosfygon ", *in* A. Maganas (ed.), Tim. tom. *A. Giotopoulou-Maragopoulou*, t. B, Athens, Nomiki Bibliothiki, 2003, p. 855 *et s.*

—, "Poios efthynetai gia tin paidiki porneia?", *PoinDik*, 1999, p. 497 *et s.*

—, N. Gavalakis, " I poinikopoiisi tis symberiforas tou pelati ekdidomenou atomou ", *PoinDik*, 2000, p. 427 *et s.*

A. Manesis, I. Deligiannis, *I pragmatosi tis syntagmatikis prostasias tia anilikis neotitas sto iscyon dikaio*, A.P.Th. 1989.

I. Manoledakis, " I paidiki ilikia os aftoteles ennomo agatho sto Poiniko Dikaio ", *NoV*, 32, p. 1107 *et s.*

—, M. Kaiafa-Gbandi, E. Symeonidou-Kastanidou, *Poiniko Dikaio, Epitomi Genikou Merous*, 7th ed., Thessaloniki, Sakkoulas Publications, 2005.

V. Mantouvalou, "Metanastes ergazomenoi se synthikes synchronis douleias", *EDPA*, 2005, p. 397 *et s.*

L. Margaritis, "Anastaltiko apotelesma endikon meson kai nomothetika pisogyrismata: O prosfatos nomos gia tous lathrometanastes", *PoinDik* 2001, p. 636 *et s.*

—, "Efstoches rythmiseis i astoches paremvaseis (scholio epano sto Schedio Nomou gia tin katapolemisi tis emborias anthropon kai tin arogi sta thymata ton eglimaton oikonomikis ekmetallefsis tis genetisias zois)", *PoinDik*, 2002, p. 181 *et s.*

—, N. Paraskevopoulos, *Poinologia*, 7th ed., Thessaloniki, Sakkoulas Publications, 2005.

G. Matzouranis, "To eglima tis metanastefseos kai i eglimatikotita ton metanaston", *NoV*, 1978, p. 1388.

Ch. Mylonopoulos, *Diethnes PD – Ta topika oria ton poinikon nomon*, 2nd ed., Athens, Ant. N. Sakkoulas Publishers, 1993.

A. Papadamakis, "Paratiriseis stin AP 892/2001", *PoinDik*, 2002, p. 14 *et s.*

T. Papadopoulou, "Thesmikes kainotomies stin antimetopisi tis metanastefsis", *ToS*, 2002, p. 507 *et s.*

S. Papageorgiou-Gonatas, "I ennoia tis aselgeias meta ti nomothetiki metarrythmisi "ton eglimaton kata ton ithon"", *NoV*, 1989, p. 1493 *et s.*

—, *I ennoia tis aselgeias sto poiniko dikaio: nomothetiki protovoulia kai dikastiki praktiki*, Athens, Ant. N. Sakkoulas Publishers, 1997.

—, "Sexualika eglimata kai anteglimatiki politiki", *in* N. Kouraki (Ed.), *Anteglimatiki Politiki*, Athens, Ant. N. Sakkoulas Publishers, 1994, p. 253 *et s.*

D. Papagiannis, *O Evropaikos choros eleftherias*, *asfaleias kai dikaiosynis*, Athens, Ant. N. Sakkoulas Publishers, 2001.

Z. Papasiopi-Pasia, "O nomos 1975/1991 gia tin eisodo-exodo, paramoni, ergasia, apelasi allodapon kai diadikasia anagnorisis politikon prosfygon", *ToS*, 1996, p. 73 *et s.*

—, "I exelixi kai i anaptyxi tou dikaiou katastaseos allodapon kata tin teleftaia dekaetia", *EEEvrD*, *Special Issue* 1997, p. 127 *et s.*

—, *Dikaio katastaseos allodapon*, 3rd ed., Thessaloniki, Sakkoulas Publications, 2007.

—, *Vasikoi nomoi dikaiou katastaseos allodapon*, 6th ed., Thessaloniki, Sakkoulas Publications, 2007.

E. PAPATHANASSOPOULOS, "Emboria anthropon, thymatologikes opseis kai prothesmia periskepsis kata to N. 3386/2205", *PoinDik*, 2006, p. 1428 *et s.*

Th. PAPATHEODOROU, *Dimosia Asfaleia kai Anteglimatiki Politiki*, 2nd ed., Athens, Nomiki Bibliothiki, 2005.

—, "To neo thesmiko plaisio gia tous metanastes: Metaxy nomimotitas, afstirotitas kai elenchou", *PoinDik*, 2005, p. 1185 *et s.*

—, *Nomiko kathestos allodapon – Elliniki kai evropaiki nomothesia*, Athens, Nomiki Bibliothiki, 2007.

N. PARASKEVOPOULOS, *Oi ennoies ton ithon kai tis aselgeias sta eglimata kata ton ithon*, Thessaloniki, 1979.

—, "Oi ennoa tis aselgous (genetisias praxis: ermineia kai kritiki theorisi)", *PChr*, 1984, p. 337 *et s.*

—, "Metaxy timorias kai therapeias: ta metra asfaleias tou PK", *in Memory of N. Chorafas/I. Gafos/K. Gardikas*, t. 2, 1986, p. 227 *et s.*

M. PAVLOU, D. CHRISTOPOULOS (ed.), *I Ellada tis Metanastefsis*, Athens, Kritiki, 2004.

S. PAVLOU, "To diasynoriako eglima kai I stadiaki prosarmogi tis Elladas gia tin antimetopisi tou", *PChr*, 2002, p. 776 *et s.*

E. POULARAKIS, E. PSOMIADOU, *Dikaio Allodapon*, Athens, Nomiki Bibliothiki, 2007.

M. SHUTERIQI, "I diasynoriaki synergasia os anagaiotita gia tin katapolemisi tis paranomis diakinisis paidion", *in Human Trafficking*, periodical edition by ARSIS, vol. 2, 2005, p. 4-5.

L. SOFOULAKIS, "I "lathrometanastefsi" stin Hpeiro kata tin teleftaia idios pentaetia kai i schesi tis me alles morfes tou "diasynoriakou" eglimatos", *PoinDik*, 2005, p. 84.

D. SPYRAKOS, "Roz diafimiseis kai diefkolynsi tis aselgeias metaxy allon", *PChr*, 1997, p. 166 *et s.*

—, "I poiniki antimetopisi tis lathrometanastefsis ston n. 1975/1991 – ena paradeigma alogistis eglimatopolitikis", *in* N. KOURAKIS (Ed.) *Anteglimatiki Politiki*, t. I, Athens, Ant. N. Sakkoulas Publishers, 1994, p. 363 *et s.*

A. SYKIOTOU, *Emboria anthropon sta Valkania: Thyma*, *drastis kai katastaltikes stratigikes*, Athens, Ant. N. Sakkoulas Publishers, 2003.

—, "I ennoia tou thymatos stin emboria anthropon", *PChr*, 2006, p. 684 *et s.*

—, "Emfyli eglimatikotita, mia apopeira kritikis prosegisis", *in* N. KOURAKIS (ed.), *Emfyli eglimatikotita*, *poiniki kai eglimatologiki prosegisi tou fylou*, Athens, Ant. N. Sakkoulas Publishers, 2006, p. 81 *et s.*

—, *Trafficking in human beings: Internet recruitment*, Editions Council of Europe, 2007.

E. SYMEONIDOU-KASTANIDOU, "Paratiriseis stin AP 595/1996", *Yper*, 1997, p. 294 *et s.*

—, "Emboria anthropon, oi diethneis katefthynseis, to ischyon poiniko dikaio kai to nomoschedio tou Ypourgeiou Dimosias Taxis", *PoinDik*, 2002, p. 424 *et s.*

—, *Eglimata kata ton prosopikon agathon*, Athens, Nomiki Bibliothiki, 2006.

—, "Emboria anthropon: eidika metra antimetopisis provlimata efarmogis", *PoinDik*, 2006, p. 234 *et s.*

SYNIGOROS TOU POLITI, "Sxolia stin eisigisi tis EEDA gia to thema tis emborias anthropon (19 April 2007)", www.synigoros.gr.

—, "Genikes paratiriseis schetika me to schedio nomou gia ti "metanastefsi kai paramoni allodapon stin elliniki epikrateia"", *PoinDik* 2001, p. 35.

A. TSIGRIS, *Emboria kai Sexualiki ekmetallefsi tis Gynaikas (ta apotelesmata mias erevnas)*, Athens, Ant. N. Sakkoulas Publishers, 1997.

—, *Sexualiki Kakopoiisi tou Paidiou (opseis koinonikou eleghou)*, Athens, Ant. N. Sakkoulas Publishers, 1999.

—, *Ta sexoualika eglimata: eglimatologikes prosegiseis tis sexualikis vias*, Athens, Ant. N. Sakkoulas Publishers, 2000.
—, "To sexualiko emborio stin Ellada", *in* the Publication of KEPEE, *O neos kindynos apo to organomeno eglima: Emboria anthropon*, Athens, 2002.
A. Tsitsoura, "H prostasia ton allodapon (diasinoriakon thimaton) eglimatikon prakseon", *in* Tim. t. *I. Manoledakis*, II, Thessaloniki, Sakkoulas Publications, 2007, p. 1199 *et s.*
O. Tsolka, "To dikaioma tou katigoroumenou na exetazei "martires katigorias" kata tin ennoia tou arthrou 6 par. 3 d tis ESDA", *PoinChr*, 2006, p. 86 *et s.*
A. Tsoukala, *Metanastefsi kai eglimatikotita stin Evropi*, Athens, Ant. N. Sakkoulas Publishers, 2001.
Ch. Tsouramanis, "Pornografia kai Internet", *PoinDik*, 2002, p. 400 *et s.*
S. Vrellis, *Dikaio Allodapon*, 2nd ed., Athens, Nomiki Bibliothiki, 2003.
E. Zacharis, "Synchrones morphes eglimatikotitas", *PChr*, 2005, p. 481 *et s.*
D. Zimianitis, *Dikastiki synergasia se poinikes ypotheseis stin Evropaiki Enosi – Thesmiko plaisio*, Athens, Ant. N. Sakkoulas Publishers, 2007.
I. Zisiadis, "Ta metra asfaleias", *EpEpSchNoE APTh-Tim tom I. Kyriakopoulou*, B, 1966-9, p. 1319 *et s.*
A. Zygouras, "I ennoia tis aselgous praxeos", *PChr*, 1988, p. 333 *et s.*

Trafficking in human beings in Hungary

Katalin Ligeti

1. Criminological background

Hungary is often described as a transit country or a country of origin in relation to trafficking in human beings [1]. If we study, however, the official Hungarian statistical figures on trafficking in human beings, an opposite picture emerges:

Year of reference	Human trafficking	Human trafficking involving violation of personal freedom	Pandering
1999	2	7	198
2000	16	6	94
2001	34	20	116
2002	34	16	99
2003	19	11	97
2004	22	21	76
2005	28	2	39
2006	5	15	255

[1] R. Oberloher, "To Counter Effectively Organised Crime Involvement in Irregular Migration, People Smuggling and Human Trafficking from the East. Europe's Challenge Today", *in Organised Crime, Trafficking, Drugs: Selected papers presented at the Annual Conference on the European Society of Criminology*, HEUNI Papers No. 42, Helsinki, 2003, 192.

As far as the number of offenders is concerned, the following statistical pattern evolves:

Number of detected offenders	Human trafficking	Human trafficking involving violation of personal freedom	Pandering
1999	3	7	112
2000	15	8	29
2001	39	6	39
2002	19	7	50
2003	22	2	41
2004	23	12	28
2005	25	0	31
2006	6	1	31

As regards figures *in concreto*, the volume of human trafficking shows a considerable dispersion. Bearing in mind that the yearly number of offences in Hungary approaches 450,000, human trafficking represents only a little fragment of criminality. There is probably remarkable latency behind the figures on human trafficking. There has not been, however, any in-depth criminological research on human trafficking in Hungary.

The above data are based on the Hungarian Uniform Crime Register which contains entries on both the volume of human trafficking and the number of offenders sentenced. There are no detailed data on the aggravating forms of human trafficking, but a distinction is made between human trafficking as such and human trafficking involving violation of the victim's personal freedom. The above table shows also statistics on pandering. Since pandering is an offence very much similar to trafficking, if transfer of control over a person is motivated by both sexual and financial goals, it is only by chance that the very crime shall qualify as pandering or as human trafficking. This overlap between the two offences exists only if special aggravating circumstances such as pursuit of sexual and illegal financial motivations stand jointly (see *infra*). Due to this overlap it is highly probable that the large number of pandering cases also include numerous human trafficking offences. Even if this assumption is accepted, the cumulated number of trafficking and pandering still represents a rather insignificant part of officially registered crime in Hungary.

Starting from this criminological background we will examine in the following what is the legal framework of the criminalisation of trafficking in human beings in Hungary and whether this framework is in conformity with Hungary's obligation under EU law.

2. Hungary's international and European obligations in regard to the criminalisation of trafficking in human beings

Hungary signed and ratified the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others [2], the Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others [3] and the UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children supplementing the UN Convention of 12 December 2000 against transnational organised crime [4]. Hungary also signed the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 (CETS 197) on 10 October 2007, but the convention is not yet implemented in Hungary.

It should be mentioned that Hungary also implemented several other international instruments which are linked to the suppression of trafficking in human beings such as the International Convention for the suppression of trafficking in female persons [5], the League of Nations Convention for the Suppression of Traffic in Women and Children [6], the League of Nations International Convention for the Suppression of the Traffic in Women of Full Age [7], the League of Nations Slavery Convention [8], the Protocol amending the League of Nations Slavery Convention [9] and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery [10].

As far as EU instruments are concerned Hungary did not implement the Joint action concerning action to combat trafficking in human beings and sexual exploitation of children since the subsequent FD 2002/629 of 19 July 2002 on combating trafficking in human beings [hereinafter referred to as FD] and FD 2004/68 of 22 December 2003 on combating the sexual exploitation of children and child pornography were implemented by Act No. 27 of 2007 amending the Hungarian Criminal Code [11] [hereafter referred to as HCC]. FD 2001/220/IB of 15 March 2001 on the standing of victims in criminal proceedings is implemented in Hungary by Act No. 135 of 2005 on assisting victims of crimes and reducing crime related harms. This latter act also

---

[2] Lake Success, New York, 21 March 1950 promulgated in Hungary by Decree-Law No. 34 of 1955.

[3] Lake Success, New York, 21 March 1950 promulgated in Hungary by Decree-Law No. 34 of 1955.

[4] Act No. CII of 2006 and by Decree No. 4 of 2007 of the Minister of Foreign Affairs.

[5] Signed in Paris on 4th May 1910, implemented in Hungary by Act No. 62 of 1912.

[6] Signed in Geneva on 30th September 1921, implemented in Hungary by Act No. 19 of 1925.

[7] Signed in Geneva on 11th October 1933, implemented in Hungary by Act No. 20 of 1935.

[8] Signed in Geneva on 25th September 1926, implemented in Hungary by Act No. 3 of 1933.

[9] Signed in Geneva on 25 September 1926, implemented in Hungary by Decree-Law No. 18 of 1958.

[10] Signed in Geneva on 7 December 1956, implemented in Hungary by Decree-Law No. 18 of 1958.

[11] Act No. 4 of 1978.

implemented the provisions of 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.

One may, therefore, summarize that Hungary adhered to an extensive number of international and EU instruments related to the fight against trafficking in human beings and formally implemented them in Hungarian law.

3. Some general remarks on Hungarian criminal law

Before analysing the Hungarian legal framework on trafficking in human beings in detail, some general remarks concerning Hungarian criminal law and criminal procedure should be made.

A. The classification of offences and the age of majority in Hungarian criminal law

The HCC divides criminal offences into two fundamental classes: *felony* and *misdemeanour.* The landmark provision to distinguish these two categories of criminal acts is Article 11, which prescribes that: "Felony is an intentional criminal offence for which a prison sentence exceeding two years may be imposed. Any other criminal offence is a misdemeanour".

It follows from the above definition that negligent offences always constitute a misdemeanour.

There are some consequences attached to the classification of an offence either as felony or as misdemeanour:

- imprisonment based on a misdemeanour is always executed in a detention center,
- probation is always possible for misdemeanour, whereas in case of a felony, only if it is punishable with imprisonment of less than two years.

As far as age of majority is concerned, according to Hungarian law every person under eighteen years of age qualifies as a *minor*. Sole exception derives from a family law regulation providing that a minor older than sixteen may get married and by force of marriage becomes automatically a major. This family law rule has got little relevance in criminal law. As far as crimes examined in this paper are concerned, only in case of child pornography shall this family law rule be paid attention to.

With a view to minors, the HCC distinguishes within this category *infants* and *juveniles*. However this distinction is only relevant in terms of criminal liability and by no means in respect of victimisation. A *minor* under fourteen years of age qualifies an *infant/child* (hereafter referred to as: a child), between fourteen and eighteen years of age is regarded a *juvenile*.

The age of both offender and victim is particularly significant in respect of criminal liability and culpability. Article 22 HCC stipulates that punishability shall be precluded by infancy and adds in Article 23 that any person younger than fourteen years of age when committing a crime, shall not be punishable. The age group of *juveniles* is defined in Article 107(1) HCC stipulating that juvenile is the person who is between his/her fourteenth and eighteenth year of age when committing a crime.

As underlined above, categories of children and juveniles are only relevant from the viewpoint of criminal liability.

As far as *victims* are concerned, no general rule applies, i.e. the HCC does not set out for adult or underage victims. However, there are certain special offences in respect of which the victims' age is of key importance: if the victim is very young or very old, he/she shall be deemed as incapable of defence, which is a severely aggravating circumstance.

As far as *age of sexual consent* is concerned, Hungarian law does not formally and explicitly acknowledge any such point of age. However, the HCC attaches significance in terms of sexual relationship to the twelfth and in a more or less tacit and indirect way, the fourteenth year of age. Relevance of the victim's twelfth year of age derives from the above-cited sections of the HCC. If the victim is younger than twelve involving him/her into any sexual act automatically qualifies as a *sexual assault* – rape or assault against decency – even if the involvement occurred upon mutual consent [12]. In case consensual sexual action is performed with a child older than twelve the offender shall be liable exclusively for a non-violent sexual crime (seduction).

To sum up:

1. a person younger than eighteen is a *minor*;
2. a minor younger than fourteen is a *child*, deemed not punishable;
3. a minor older than fourteen is a *juvenile*, susceptible of criminal liability.

B. Typology of criminal sanctions in Hungarian criminal law

The HCC provides for a dualistic system of sanctions consisting of *punishments* and *criminal measures*. The only formal difference between punishments and criminal measures is that the latter do not result in criminal record. Though the HCC does not attach any further differentiation to punishments and criminal measures, it is generally accepted in Hungarian criminal law theory that punishments have the foremost aim of repression and general deterrence whereas criminal measures are directed more towards special prevention [13].

The dualistic system of the HCC is further refined in Article 38, which distinguishes between *principal punishments* – these are: imprisonment, community service, and day fine – and *supplementary punishments* – these are: prohibition from participating in public affairs, prohibition from exercising one's profession, prohibition from driving vehicles, banishment, expulsion, fine as supplementary punishment. The original idea behind distinguishing principal and supplementary punishments was that only principal punishments could have been imposed alone whereas supplementary punishments were applied in addition to a principal punishment [14]. With the growing

[12] K. Ligeti, "Missing and sexually exploited children in the enlarged EU, Hungarian national report", *in* G. Vermeulen (ed.), *Missing and sexually exploited children in the enlarged EU – Epidemiological Data in the New Member States*, Antwerpen, Maklu 2005, p. 103-131.

[13] F. Nagy, *A magyar büntetőjog általános része*, Budapest, Korona, 2004.

[14] F. Nagy, *Intézkedések a büntetőjog szankciórendszerében*, Budapest, KJK, 1986; K. Györgyi, *Büntetések és intézkedések*, Budapest, KJK, 1984.

importance of individualised penalties and special prevention the original distinction of the HCC was, however, lifted so that presently HCC provides for the independent application of several supplementary punishments. According to Article 38(3) HCC prohibition from profession, prohibition from driving vehicles, banishment, and expulsion may be imposed independently from any principal punishment.

Criminal measures are defined in Article 70 HCC, there are reprimand, probation, forced medical treatment, forced alcohol treatment, confiscation, forfeiture of assets, supervision by probation officer, and criminal measure imposed against legal entities [15].

As regards *imprisonment*, Article 40(1) HCC stipulates two types of imprisonment: life sentence and definite time sentence. The shortest duration of a *definite time sentence* is two months, while its maximum duration is fifteen years – in case of cumulative sentences and for crimes perpetrated within the framework of a criminal organisation twenty years. As regards *life sentences*, Article 47/A HCC sets out that the trial court may either establish the earliest possible date of early release [16] – minimum time to be served shall be twenty years of imprisonment, or thirty years imprisonment in case of offences to be punished without limitation – or exclude the possibility of early release. This latter type of punishment is deemed as *actual or definitive life sentence*.

Articles 49-50 HCC set out that offenders sentenced to *community service* shall perform the work defined by the trial judge, but their personal freedom may not be restrained otherwise. The trial judge defines a type of community service that the offender is reasonably expected to perform with a view to his/her health condition and capacity. Community service shall be performed at least once a week, on the weekly day of rest or on a day off, without remuneration. Shortest duration of community service is one day while its maximum duration is fifty days. One day of community service corresponds to six working hours. If not performed voluntarily, community service or remaining part thereof shall be substituted by imprisonment to be served in a detention centre, whereas each day of community service or remaining part thereof shall correspond to one day of imprisonment (in such cases the minimum term of imprisonment may be less than two months).

Under Articles 51-52 HCC, when imposing a *day fine*, the trial judge establishes the number of the daily items with a view to the gravity of the offence (especially the

---

[15] Criminal measures against legal entities were introduced in Hungary as a result of implementing the *acquis communautaire*. Since Hungarian criminal law rejects the criminal liability of legal persons, a special construct was invented in order to provide for criminal measures against legal persons. Latter is regulated in a separate act.

[16] Articles 47-48/A HCC provide for the rules of *early release*. Decision on early release is exercised by the correctional judge. The correctional judge shall release a prisoner on parole, if with special regard to the prisoner's flawless conduct during the period of time served and to his/her endeavour to adhere to a law-abiding life, it can be reasonably supposed that the goals of the punishment may also be achieved without further incarceration. As far as definite time imprisonment is concerned, Subsection (2) of Section 47 HCC stipulates that prisoners may be early released in case they have served at least (i) four-fifth of the imprisonment to be served in high security prison, (ii) three-fourth of the imprisonment to be served in prison, (iii) two-third of the imprisonment to be served in a detention centre.

illegal profits the offence raised or aimed at), while the amount of money corresponding to each daily item shall be in line with the offender's financial status, income, and living standard. Duration of day fine shall reach thirty daily items but shall not exceed five hundred and forty daily items, while the amount of money corresponding to one daily item shall reach HUF 100 but shall not exceed HUF 20,000. In case of non-payment, the day fine or the remaining part thereof shall be substituted by imprisonment to be served in a detention centre. Each daily item of the day fine shall correspond to one day of imprisonment (in such cases the term of imprisonment may be less than two months).

Article 77 HCC foresees that any object shall be *confiscated* which

- has been used or has been intended to be used as an instrument for the perpetration of an offence,
- endangers public order or its maintenance is otherwise illegal,
- has been achieved by an offence,
- has been the target of the offence, or has been used to transfer such an object.

Article 77/B HCC recalls that *forfeiture of assets* shall be ordered in regard of assets

- resulting from the perpetration of an offence, obtained by the offender in the course of perpetrating an offence or in connection with an offence,
- obtained by the offender in the course of participating in a criminal organisation,
- replacing the assets originating from the perpetration of an offence, obtained by the offender in the course of perpetrating an offence or in connection with the offence,
- supplied or intended to be used to assure necessary or facilitating means aimed at the perpetration of an offence.

All assets obtained by the offender while participating in a criminal organisation shall be subject to forfeiture unless the legal origin of such assets is proven by the accused.

Besides punishments and criminal measures stipulated in the HCC, attention should also be paid to Article 222 of the Hungarian CCP (hereafter CCP). Latter provides that the prosecutor may *delay indictment* for a period between one to two years in case of a crime punishable with a maximum imprisonment of three years. Though the delay of indictment is not a criminal sanction but a procedural measure, in its effects it functions as a criminal sanction. When delaying indictment, the prosecutor orders parallel supervision by probation officer and prescribes mandatory rules of conduct. If the delay period of one or two years has been successfully completed, the procedure is terminated.

Finally it should be mentioned that as of 1 January 2007 the Hungarian criminal justice system allows for mediation in criminal cases. Based on Article 221/A of the Hungarian CCP the prosecutor may suspend proceedings and call for *mediation* in case of an offence to be punished with imprisonment not exceeding five years.

As far as trafficking in human beings is concerned the HCC allows for the application of imprisonment and day fine as principal punishments as well as for certain supplementary punishments. It also allows for the application of *criminal*

measures. Therefore confiscation, forfeiture of assets, and criminal measure against legal entities may be made use of for the purposes of trafficking in human beings.

4. The general framework of criminalisation in Hungary

A. Trafficking in and smuggling of human beings

Hungarian criminal law differentiates between smuggling and trafficking in human beings. Whereas *trafficking* is understood as a crime against personal freedom and human dignity (included in Title III – crimes against freedom and dignity – of Chapter XII – crimes against person) [17], *smuggling* is conceived as a crime against public order (included in Title II – crimes against policing – of Chapter XV – crimes against public administration and justice).

According to Article 218 HCC *smuggling human beings* is committed if a person assists another person to cross the state borders of the Republic of Hungary (i) without a due permission, or (ii) in a non admissible manner. More grievous forms of smuggling occur if it is committed (i) for gaining illegal profits, (ii) by assisting more persons to illegally cross the state borders, (iii) results in tormenting the smuggled person, (iv) if committed by armed with firearms, or (v) in a businesslike manner.

It is clear from the above provision that smuggling intrinsically has an international dimension, it concerns border crossing. Smuggling incriminates, therefore, in the first place certain forms of interfering with state interests of policing state borders. As opposed to smuggling, *trafficking* in human beings – seen from a criminal law point of view – does not necessarily require an international dimension as a constituent element of the crime. Trafficking is also punishable when it takes place within the boundaries of the Republic of Hungary.

B. Pandering

It must be noted that the offence of *pandering* is very much alike *human trafficking*. It involves change of control over a person and it aims at illegal financial profits. The transfer of control over a human presupposes the victim's humiliation and degrading objectification. The difference between pandering and trafficking is that pandering is done purely for sexual motivation, whereas trafficking covers not only sexual but also other forms of exploitation too.

The alikeness of these two offences makes a hard job for the judiciary to decide in cases of sexual exploitation if transfer of control over a human being qualifies as human trafficking or as pandering. As figures and abstracts of crime statistics show (see the charts above) the judiciary still very much tends to assume offences involving transfer of control over a human being as pandering – on condition that both sexual and financial motivation stands – instead of establishing human trafficking. The one and only feature helping the judiciary to resolve on the qualification of transfer of control over a human being might be the character of such control. Trafficking presupposes that the person trafficked does not possess any bit of control over itself, i.e. he or she is entirely exposed to the offenders' decisions. On the contrary pandering as an act

[17] M. Hollán, "Az emberkereskedelemre vonatkozó magyar büntetőjogi szabályozás", *in* K. Tóth (ed.), *Publicationes doctorandorum juridicorum*, Univ. Szeged, 2002, p. 240.

linked up with prostitution does not exclude in a mandatory sense some remainders of the victim's self determination. Nonetheless Hungarian judiciary and criminal law enforcement still proves incapable of investigating into the existence, lack or extent of the victim's self determination.

C. *Prostitution*

Hungarian criminal law policy adheres currently to the *abolitionist* approach to prostitution [18]. Thereby the law maker morally condemns prostitution, but prostitution is not an offence. The prostitute him/or herself is not considered to be a criminal, but a victim in need for protection. This protection is provided by ensuring that each type of exploitation of prostitution by others is punishable regardless of the form in which the exploitation takes place.

It was Act No. 17 of 1993 amending the HCC that abolished prostitution formerly constituting a criminal offence. As a result, both prostitution and using services of prostitutes are exempted from criminal liability. However, promoting prostitution (being a *sui generis* abetting and instigation), living on the earnings of prostitution and pandering still do qualify as criminal offences. These three offences are covered by *exploiting services of prostitution.*

According to Article 205 HCC *promotion of prostitution* shall mean the making available of a dwelling for the purposes of prostitution, as well as running a brothel, or supplying financial means to the functioning thereof. According to Article 206 HCC *living on earnings of prostitution* means living in whole or in part on the earnings of a different person prostituting him or herself. Lastly, Article 207 HCC defines *pandering* as procuring another person for the sake of sexual intercourse with a third person in order to gain illegal profits.

It should be mentioned that the present policy is very much questioned in Hungary as it leads to the paradoxical situation that being a prostitute is not punishable, whereas all aspects related to working as a prostitute such as advertising, renting a room for providing sexual services, are. Decriminalising prostitution, while at the same time qualifying illegal all aspects of the organisation of the work of prostitutes leads to the isolation and marginalisation of prostitutes. Therefore there are attempts in Hungary to introduce the so called *regulatory* system, which accepts prostitution as an inevitable evil and focuses on regulating all aspects thereof. There should be mandatory registration and imposed check for diseases in order to protect the public. Even registered brothels should be allowed. This policy is, however, only at its beginnings in Hungary [19].

5. The offence of trafficking in human beings in Hungarian criminal law

The offence of trafficking in human beings was introduced into the HCC by Act No. 87 of 1998. This first version of trafficking in human beings entered into force on the 1st March 1999 and was in force until 31st March 2002. It applied to cases where

---

[18] L. Feher, "Az emberkereskedelem fogalmi megközelítésének néhány kérdése", *in* K. Ligeti (ed.), *Wiener Imre Ünnepi Kötet*, Budapest, KJK, 2005.

[19] K. Parti, "Nők és gyermekek szexuális kizsákmányolása, gyermekpornográfia", *in* F. Kondorosi and K. Ligeti (ed.), *Európai Büntetőjog Kézikönyve*, Budapest, MHK, 2008.

the offender sold, purchased, conveyed or received for remuneration another person or exchanged a person for another person, or acquired a person for such purpose. The basic offence was to be punished with imprisonment up to three years.

Act No. 121 of 2001 amending the HCC reshaped the offence of trafficking in human beings in line with UN Protocol to prevent, suppress and punish trafficking in persons supplementing the UN Convention of 12 December 2000 against transnational organised crime [20]. This provision [Article 175/B HCC] has not been amended or modified since then. Accordingly trafficking in human beings means the sell, purchase, convey or receiving for remuneration another person or exchange a person to another person, as well as to recruit, transport, harbour, hide or acquire another person for such purposes. The basic offence is to be punished with imprisonment up to three years. Aggravated forms of trafficking in human beings apply if it was committed: (a) against a person under eighteen; against a person deprived of its personal freedom; for the purposes of forced labour; for the purpose of sexual exploitation; for the unlawful exploitation of the human body for illegal medical purposes; within the framework of an organised criminal group; or in a businesslike manner, (b) against a person under the offender's education, supervision, care or medical treatment; or for the purposes of forced labour, sexual exploitation, or unlawful exploitation of the human body for illegal medical goals by means of force or threat, deception, tormenting the victim; (c) against a person under eighteen or deprived of its personal freedom or under the offender's education, supervision, care or medical treatment for the purposes of forced labour, sexual exploitation, or unlawful exploitation of the human body for illegal medical goals or by means of force, threat, deception or tormenting the victim, or for the purpose of illicit use of pornographic material; (d) against a person under twelve years of age for the purposes of forced labour, sexual exploitation, or unlawful exploitation of the human body for illegal medical goals, by means of force, threat, deception or tormenting the victim, or for the purpose of illicit use of pornographic material.

As regards punishments of the aggravated forms of trafficking in human beings:

– aggravated forms listed in (a) are to be punished with imprisonment of one year to five years,
– aggravated forms listed in (b) are to be punished with imprisonment of two years to eight years,
– aggravated forms listed in (c) are to be punished with imprisonment of five years to ten years,
– aggravated forms listed in (d) are to be punished with imprisonment of five years to fifteen years or life sentence.

Since in the very moment when the FD entered into force in Hungary, the provisions of the HCC in regard of trafficking in human beings were formally in line with the FD, the Hungarian legislator considered that the above definition of trafficking in human

[20] M. Hollán, "Emberkereskedelem", *in* F. Kondorosi and K. Ligeti (ed.), *op. cit*.

beings covers that of the FD, therefore, *no implementing legislation was necessary*. In other words, the FD has never been formally implemented in Hungary [21].

6. The conformity of Hungarian law with the FD

Looking from a formal point of view one may contest that all material acts (recruitment, transportation, transfer, harbouring and subsequent reception of a person including exchange or transfer of control over that person) and means referred to in Article 1. FD are covered by Hungarian criminal law. However, abduction and the victim's special vulnerability are not stipulated as such. Abduction is covered by the Hungarian concept of force, threat and deprivation of personal freedom. The victim's special vulnerability is included in the category of victims under twelve years of age or under the offender's education, supervision, care or medical treatment (this very latter also covers cases involving abuse of certain position or authority and/or trust). Both abduction and the special vulnerability of perpetration are, however, not required to establish the basic offence of trafficking in human beings. Both abduction and the special vulnerability are regulated only as aggravating circumstances.

It must be mentioned, however, that the scope of the Hungarian provision on trafficking in human beings is much wider than that of the FD. One of the aspects of this over assessment of risks is that the Hungarian legal provisions *omit to provide for the exploitation purposes of trafficking in human beings in the basic offence*. As a result, Article 175/B(1) HCC incriminates all forms of trafficking without any purpose of exploitation, and thus applies to a lot larger scale than required by the FD. The exploitation purposes qualify as aggravated forms of trafficking in human beings. As a consequence, the respective Hungarian legal provisions unnecessarily threaten certain human activities not at all expected to be punished by the FD. This understanding of trafficking has been much criticized in Hungary since there is international consensus that exploitation (labour, sexual or other kind) is a constitutive element of the trafficking offence [22].

A. The victim's consent

The consent of the victim is generally accepted in Hungary as a circumstance which excludes criminal liability of the offender [23]. Hungarian adjudication sets, however, certain limits on the consent of the victim, i.e. one may not consent to injury

[21] Since the FD decision was not formally transposed into Hungarian law, the exact date of the submission of Act No. 121 of 2001 is of less importance. It is worth mentioning, however, that information such as submission of a law to the Parliament is very burdensome to trace back in Hungary. Only in-depth studying of the parliamentary minutes reveals it. As far as Act no. 121 of 2001 is concerned, it was adopted on 28 December 2001 and entered into force on 1 April 2002. It is general practice in Hungary that there is a delay between the date of adoption and that of entry into force. The period of time between adoption and entering into force of a new law is to enable and facilitate the judiciary and the law enforcement agencies to prepare for the application of the new law.

[22] M., Hollán, "Emberkereskedelem", *in* F. Kondorosi and K. Ligeti (ed.), *op. cit*.

[23] K. Bárd, B. Gellér, K. Ligeti, É. Margitán & A. I. Wiener, *Büntetőjog Általános Rész*, Budapest, KJK, 2003.

or bodily harm going beyond severe injuries. This means that e.g. most forms of euthanasia are punishable under Hungarian criminal law [24].

As far as trafficking in human beings is concerned, in case the victim is a consenting adult (a person over eighteen, clearly having the age of consent), i.e. when the victim's freedom of choice has not been restricted in any way, the constituent element of trafficking in human beings is missing, meaning that there is no offence. However most of the aggravated forms of trafficking in human beings involve some type of physical or mental violence. As a result, the presence of the victim's either expressed or inherent consent is irrelevant. Therefore, aggravated forms of trafficking in human beings constitute an offence under Hungarian criminal law even if the victim consented to it.

If there is no consent on the victim's side, the offender's liability shall be established in one of the aggravated forms of trafficking in human beings which is to be punished more severely, since the use of means to suppress the victim's countering constitutes an aggravating circumstance [25].

B. *Specially vulnerable victims and child victims*

There is no such term or phenomenon as particularly vulnerable victim in Hungarian criminal law. However children and victims towards whom the offender has abused of a certain position of trust and authority shall be deemed as particularly vulnerable victims. For the purposes of trafficking in human beings, there is a multilevel scale of particular vulnerability. Victims of trafficking in human beings are particularly vulnerable if 1) they are younger than eighteen, 2) they have been deprived of their personal liberty, 3) they have been tormented, 4) they stood under the offender's education, supervision, care or medical treatment. An even more special category of vulnerability includes victims younger than twelve years, who are generally deemed as incapable of defence (Article 183/A HCC). As age of sexual consent or majority in Hungary is fourteen years, the HCC fully complies with the definition of particularly vulnerable victims provided for in Article 3(2) b FD.

Hungarian criminal law does not attach any general importance to the circumstance that the victim is a child. There are, however, certain offences in the HCC, which provide for special regimes for child victims (e.g. endangering of a minor [Article 195 HCC] or illicit use of pornographic material [Article 204 HCC]). For such purposes, *persons younger than eighteen are deemed as children*.

Though the provisions on trafficking in human beings do not only aim at the protection of child victims, they still do attach special importance to three different

---

[24] The act of euthanasia constitutes formally homicide, but it is excused by Act No. 154 of 1997 on Healthcare. Act. No. 154 of 1997 regulates the right to self-determination of patients. Latter encompasses the right of the patient to reject medical treatment. Life saving measures can only be then rejected if the death of the patient according to the state of medical art is close and the sickness is incurable. Act No. 154 of 1997 prescribes a special procedure to ensure that the patient expressed his will voluntarily, i.e. consciously and unimpeded. If the foreseen procedure is met, passive euthanasia is excused under the law. E. Belovics, G. Molnár, P. Sinku, *Büntetőjog Különös Rész*, Budapest, HVG Orac, 2003, p. 83-84.

[25] See definitions of trafficking in human beings above.

categories of children: 1) victims under eighteen, 2) victims under the offender's education, supervision, care or medical treatment, and 3) victims under twelve. Either of these categories may cover the concept of child. Nonetheless a victim standing under the offender's education, supervision, care, or medical treatment does not necessarily equal a child victim.

As already expressed, no special means of perpetration is required to establish criminal liability for the basic form of trafficking in human beings as defined in Article 175/B(1) HCC. Thus any special means of perpetration qualifies as aggravating circumstance, rendering both responsibility and punishment more rigorous. If the trafficked person is under eighteen, it is already an aggravated form of trafficking in human beings and if combined with certain forms or means of perpetration – as set out in Articles 1 and 3 FD – aggravation shall be even more significant.

C. Instigation of, aiding, abetting or attempt to commit trafficking in human beings

The General Part of the HCC stipulates that instigation of, aiding, abetting, and attempt (Articles 16 to 21) are punishable in respect of every crime defined in the Special Part of the HCC. Therefore instigation of, aiding, abetting, and attempt to trafficking in human beings constitute an offence in Hungary according to the general rules of criminal liability.

Furthermore subparagraph (6) of Section 175/B HCC stipulates that preparation to commit trafficking in human beings is also an offence under Hungarian criminal law. Thereby, the Hungarian legislator criminalized all forms of participation and preparation, as well as all possible stages in respect of trafficking in human beings.

D. Penalties against natural persons

As already detailed above, trafficking in human beings belongs to the most severely punishable offences in Hungarian criminal law. As a mainframe rule, the punishment for trafficking is exclusively imprisonment.

Of course the trial judge always has a margin of appreciation when delivering the sentence. He may either mitigate the sanctions foreseen by the law or – only in case of the basic offence of trafficking in human beings – may impose instead of imprisonment probation, he may suspend the enforcement of the sanction for a certain period of time or may impose a conditional sentence.

With a view to the level of sanction foreseen in Article 175/B of the HCC one may realise that Hungarian criminal law excessively overrates the severity of sanctions compared to the respective provisions of the FD. A maximum penalty of not less than eight years as set out in Article 3 FD is nothing but a medium range of the sanctions envisaged for trafficking in human beings by the HCC. For the most serious forms of trafficking in human beings defined in Article 3 FD, the HCC envisages imprisonment of (i) five to ten years, (ii) five to fifteen years, or (iii) life sentence. One may wonder, whether such extreme punishments are proportionate, effective and dissuasive. As the Trafficking in Persons Report of June 2007 issued by US Department of States notes, such severe sanctions are rather "stringent and incommensurate", usually not followed by adequate implementation and enforcement, which is everything but deterrent.

As far as penalties for the aggravated form of trafficking are concerned, all but one of the aggravating circumstances of Article 3(2) FD are covered by the Hungarian definition of trafficking in human beings. Deliberately or negligently endangering the victim's life is not encompassed by the Hungarian offence definition. Consequently, if trafficking deliberately or negligently endangered or damaged the trafficked victim's life, such act will qualify – depending on the actual circumstances of the case – as attempted murder, grievous bodily harm, physical assault, etc. which is to be established in conjunction with trafficking offence. Such "joint offence", i.e. when the act committed by the perpetrator simultaneously qualifies as two or more offences, will result in even higher penalties.

It should be mentioned that if the trafficked victim dies due to the danger his/her life was exposed to, the act shall constitute an aggravated form of murder (murder for low motivation or carried out with special cruelty, etc.) to be alternatively punished with life sentence or imprisonment from five to fifteen years. This absorbs even the most aggravated forms of trafficking in human beings.

All remaining aggravating circumstances, let them be forms, means, motivation of perpetration or material outcomes are fully complied with by the HCC. As trafficking in human beings is defined in the HCC as a formal offence, all the above features constitute aggravating circumstances.

As regards commission within the framework of a criminal organisation, Act No. 121 of 2001 introduced significant changes. It altered on the one hand the concept and the sanctioning of perpetration within the framework of a criminal organisation, while on the other hand it did also modify the definition of a criminal organisation introducing a new approach for assessing risks of organised crime.

The General Part of the HCC (Article 98) provides as of 1 April 2002 that perpetrating a criminal offence to be punished with at least five years of imprisonment within the framework of a criminal organisation shall be deemed as an aggravating form of the respective offence, and shall double the upper threshold of imprisonment foreseen in the Special Part of the HCC for the very offence in question. Consequently, commission of the offence within the framework of a criminal organisation constitutes an aggravating circumstance in respect of all offences contained in the Special Part of the HCC provided that the offence is to be punished with at least five years of imprisonment. Therefore it was not necessary to include into Article 175/B HCC on trafficking in human beings the case of commission within the framework of a criminal organisation, since it is foreseen as an aggravating circumstance in the General Part.

As far as the definition of criminal organisation is concerned, Point 8 of Article 137 HCC provides that criminal organisation shall mean a "consolidated group, which is designated to operate for a longer period of time, comprising three persons or more and aiming at perpetrating intentional criminal offences to be punished with at least five years of imprisonment".

This approach to criminal organisations proves, however, insufficient from the viewpoint of the FD. Since the basic offence of trafficking in human beings is to be punished with imprisonment up to three years, perpetration within the framework of a criminal organisation – as the definition of a criminal organisation is restricted to offences to be punished with at least five years of imprisonment – does not apply to

the basic form of trafficking in Hungary. Due to the discrepancies in the concept of sanctioning, provisions on criminal organisations apply only to the aggravated forms of trafficking. This may hinder effective prosecution and sanctioning of trafficking in human beings.

Moreover, the Hungarian definition of criminal organisation is not fully in line with Article 1 of Joint Action 98/733/JHA. According to the definition contained in the joint action, Member States shall take into account criminal offences punishable with at least four years of imprisonment when defining criminal organisations in their national law. As opposed to this expectation, the HCC restricts the scope of the concept of criminal organisations to felonies punishable with at least five years of imprisonment.

As far as penalties against natural persons are concerned, one may summarize that though Hungarian provisions on human trafficking are considerably harsher than expected by the FD, they do not challenge the fundamental principles of criminal law and criminal procedural law. Burden of proof relies on the public prosecutor, and persons suspected/accused of or charged with having committed trafficking in human beings shall be regarded innocent unless proven guilty. However the definition of a criminal organisation and the respective provisions on forfeiture of assets (see above) do strongly cast doubt upon principles and fundaments of both substantive and procedural criminal law by turning burden of proof upside down.

E. Penalties against legal persons (Articles 4 and 5 FD)

Hungarian criminal law is strictly based on the principle of criminal liability of natural persons. However Act No. 104 of 2001 on criminal measures against legal entities provides for the criminal law sanctioning of legal persons without acknowledging their criminal responsibility. In other words, Act No. 104 of 2001 deliberately does not establish criminal liability of legal entities. It allows, however, for imposing criminal measures on legal entities. Since criminal measures – differently from criminal punishments – may be applied even in lack of criminal liability (e.g. against minors under the age of criminal responsibility or against insane offenders) there is no dogmatic problem to apply them also against legal persons.

Article 1(1)-(2) of Act No. 104 of 2001 includes an almost word by word translation of Article 4 FD. The only restriction is that the liability of legal persons under Hungarian law stands only for acts that earned or attempted to earn illegal profits for the very legal entity in question. As Hungarian legal provisions require profit motivation for applying criminal measures against a legal person, the Hungarian concept of liability of legal entities does not entirely cover that of the FD.

Articles 3 to 6 of Act No. 104 of 2001 provide for criminal measures to be imposed against legal entities which fully cover Article 5 FD. These criminal measures are as follows:

- fines not exceeding HUF 500,000 (EUR 2,000),
- closing of the legal person if it disguises criminal activities or is used for the purposes of such activities and

- prohibition from exercising certain commercial and economic activities – such as temporary or permanent disqualification of certain practice or activity, exclusion from public benefits or aid, ban on participating in public procurement.

It should be mentioned that though Act No. 104 of 2001 entered into force upon Hungary's accession to the EU (1 May 2004), it has not been used ever since. In fact, it was first applied in a foodstuff fraud case very recently, where the public prosecutor requested the imposition of a fine on the company which put on the market certain disguise foodstuff [26]. Accordingly, criminal measures have not yet been applied in Hungary in relation to trafficking in persons.

7. Jurisdiction and prosecution (Article 6 FD)

The HCC enumerates the basis of criminal jurisdiction under the title "territorial and personal scope of the criminal law". Hungary prescribes its territorial jurisdiction as well as its extraterritorial criminal jurisdiction based on the active personality principle, the protective principle, the universality principle and the representative principle:

Article 3

(1) Hungarian law shall apply to crimes committed in Hungary, as well as to acts committed by Hungarian citizens abroad, which are crimes in accordance with Hungarian law.
(2) The Hungarian law shall also apply to crimes committed on board of Hungarian ships or Hungarian aircrafts outside the borders of the Republic of Hungary.

Article 4

(1) Hungarian law shall also apply to acts committed by non-Hungarian citizens abroad, if they are
    a) criminal acts in accordance with Hungarian law and are also punishable in accordance with the law of the place of perpetration,
    b) it is a criminal act against the state (Chapter X), excluding espionage against allied armed forces (Section 148), regardless of whether it is punishable in accordance with the law of the country where committed,
    c) crimes against humanity (Chapter XI) or any other crime, the prosecution of which is prescribed by an international treaty.
(2) Espionage (Article 148) against allied armed forces by a non-Hungarian citizen in a foreign country shall be punishable according to Hungarian penal law, provided that such offence is also punishable by the law of the country where committed.
(3) In the cases described in Subsections (1)-(2) the indictment shall be ordered by the Attorney General.

Article 3 HCC provides for territorial and so called "quasi-territorial" jurisdiction, which are the main principles of Hungarian criminal jurisdiction.

---

[26] L. Kőhalmi, "A jogi személy büntetőjogi felelőssége", *in* F. Kondorosi and K. Ligeti (ed.), *op. cit*.

According to the HCC Hungarian law shall also apply to acts committed by Hungarian citizens abroad, which are deemed as crimes under Hungarian law (*active personality principle*). There is no limitation on the application of extraterritorial jurisdiction based on the active personality principle. Therefore double criminality is not a condition for prosecuting a Hungarian citizen for having committed a crime outside Hungary [27]. Such extra-territorial jurisdiction of Hungarian criminal law rarely results in proceedings, as normally crimes committed in a foreign country are prosecuted and adjudicated by the foreign country's judicial authorities, regardless of the offender's nationality. It should be noted that active personal jurisdiction in Hungary is restricted to acts that are deemed as offences under Hungarian criminal law. Thus Article 6(1) b FD is not fully complied with. Had the FD been formally transposed into Hungarian law, a reservation based on Article 6(2) FD ought to have been made.

The other basis for Hungary's extraterritorial jurisdiction is the *protective principle*. According to this principle Hungarian law shall be applied to acts committed by non-Hungarian nationals outside Hungary, if those acts are deemed to be crimes against the state as enumerated in Chapter X of the HCC. There is no limitation on the application of Hungarian jurisdiction based on the protective principle, except for the fact that such jurisdiction may be relied upon only in relation to certain offences. Under the protective principle Hungary can take cognizance of an offence committed abroad with the intention of damaging its fundamental interests.

The third basis for Hungarian extraterritorial jurisdiction is the *representative principle*. Latter allows for the application of Hungarian criminal law if double criminality is fulfilled, i.e. Hungarian criminal law may be applied to all offences committed by non-Hungarian citizens abroad if the act constitutes an offence both under Hungarian law and the law of the *locus delicti*. Conversely, the HCC does not contain the usual limitation of jurisdiction based on the representative principle, namely the refusal of an extradition request from another State. Article 4(1) HCC applies to all crimes. This broad definition of Hungarian extra-territorial jurisdiction combined with the principle of legality underlying Hungarian criminal procedural law results in a situation where the public prosecutor is theoretically obliged to prosecute all cases where double criminality is fulfilled. Thereby the double-criminality rule of the HCC expands Hungarian extra-territorial jurisdiction unreasonably.

Hungarian criminal law also explicitly recognises the universality principle as a basis for the application of Hungarian criminal law. Though the HCC does not contain the terms "universality principle", it follows from the above cited wording of Article 4(1)c HCC that there is a distinctive jurisdictional basis for offences committed by non-Hungarians abroad, if such offences concern crimes against humanity as contained in Chapter XI of HCC or if such jurisdiction is prescribed by international conventions. It is clear that the distinctive feature of the jurisdictional basis contained in Article 4(1)c is the international nature of the crime, which is the very idea of universal jurisdiction.

---

[27] There are suggestions that the active personality principle should be narrowed. I. A. WIENER, *A Btk. Általános Része de lege ferenda*, Budapest, MTAJI, 2003.

Finally it is worth mentioning that Hungarian law does not allow for jurisdiction based on the passive personality principle [28].

In respect of jurisdiction based on the protective principle, the representative principle and the universality principle, the prosecutor general of the Republic of Hungary is entitled to decide on whether criminal proceedings should be launched. It must be mentioned in that respect that the public prosecutor has the obligation to exert criminal prosecution whenever there is suspicion that a criminal offence has taken place, therefore the margin of appreciation vested in the prosecutor general by Article 4(3) HCC is an exemption for the legality principle. Except for this exception Hungary follows the legality principle. Therefore requiring reports or accusations from the victim or making criminal processes dependent from any other form of private motion are exceptional. Trafficking in human beings constitutes one of the most serious offences in Hungarian criminal law, therefore, investigation and prosecution thereof is not dependent on any kind of initiative of the victim.

As far as cooperation with other EU Member States is concerned, Council FD 2002/584/JHA on the European arrest warrant and the surrender procedure between Member States lifts double criminality in regard of offences punishable with at least three years of imprisonment. Hungary transposed the EAW by Act No. 130 of 2003 on co-operation in criminal matters with EU Member States. Article 3 of this Act stipulates that the EAW shall be executed without verification of double criminality if the offence underlying it is mentioned in the Annex and is punished with at least three years of imprisonment. Trafficking in human beings is included in the annex. Consequently, double criminality has no relevance any more in respect of surrender of offenders of aggravated forms of human trafficking. Since the basic offence of human trafficking is sanctioned in Hungary with imprisonment up to three years, the threshold stipulated in Article 3 of Act No. 130 of 2003 is not reached. Therefore for the basic offence of trafficking as well as for the preparation thereof, double criminality remains in place. This is, however, not a result of the FD but solely that of the Hungarian legislation.

8. Protection of and assistance to victims (Article 7 FD)

Children are deemed as particularly vulnerable victims as it has been explained above. To assist and protect them, special provisions of the Hungarian CCP apply. Article 2(2) of FD 2001/220/JHA on the standing of victims in criminal proceedings sets out as an overall objective that "Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances". Hungary made remarkable efforts to fulfil this obligation and a set of legal institutions has been introduced in order to protect and assist victims of crimes.

As regards Article 8(4) of the FD on standing of victims, Hungarian criminal procedure provides for interrogation of victims by a duly authorised judge, there is no compulsory appearance in open court rooms during the trial, interrogation via

[28] There are suggestions that the passive personality principle should be introduced into Hungarian criminal law. K. Ligeti, "Az új Büntető Törvénykönyv Álalános Részének Koncepciója", *Büntetőjogi Kodifikáció*, 2006/1.

CCTV network is available, and a special scheme for the protection of witnesses is in operation. Article 8(4) of the FD on standing of victims was transposed in Hungary by the following legislations:

- Act No. 135 of 2001 on the Protection Program of persons participating in criminal proceedings and of persons cooperating with justice,
- Government Decree No. 34 of 1999 on personal protection,
- Act No. 130 of 2003 on legal assistance,
- Articles 95-98/A of the Hungarian CCP (protection of witnesses and of participants in criminal proceedings), Article 207 of the Hungarian CCP (interrogation of child witnesses and specially protected witnesses by a judge and interrogation by way of a CCTV), and finally Articles 244/A-244/D of the Hungarian CCP (interrogation by way of a CCTV during court trial).

To some extent, Article 14(1) of the FD on standing of victims is also complied with but as regards victim oriented training of the criminal justice personnel, a shift in the law enforcers' mindset is still ahead of us.

Article 7(3) FD refers to Article 4 of the FD on standing of victims. Latter has been fully transposed into Hungarian law. The only shortcoming of the Hungarian legislation relates to the notification of victims on release of the offender. Currently there is no such obligation in Hungarian law, it is merely an option that some law enforcers follow but it is definitely not a mandatory rule.

Article 4 of the FD on the standing of victims was transposed by Act No. 135 of 2005 on assisting victims of crimes and reducing crime related harms. There are no separate national provisions on assisting the victim's family. Act No. 135 of 2005 introduces, however, a wide range of victim's assistance services which are not restricted for the benefit of victims in a strict substantive criminal law approach (*Verletzte*), but also apply to persons who suffered physical or mental harm as a consequence of the criminal offence (*Opfer*). Due to the broad scope of victim as defined in Act No. 135 of 2005, also family members of the victim may benefit from victim support.

In regard of victims of trafficking in human beings, their nationality or domicile is irrelevant, they are entitled to assistance. As regards child victims, their family benefits from such services too as family members may suffer physical or mental harm due to crime committed against their close relatives and thus they are considered as victims for the purposes of Act No. 135 of 2055. Since children under fourteen are not expected to exercise their rights and fulfil their obligations independently, it is the person having authority over the child – in most cases one of the parents – who proceeds *in loco* the actual victim. This goes also for victims' rights and duties in respect of criminal proceedings, and for rights to assistance.

Under Act No. 135 of 2005 victims are entitled to receive overall information about their rights and duties, assistance to pursuit legitimate interests, assistance of a trained lawyer and – in case of being a victim of a violent criminal offence – immediate pecuniary assistance. As regards reduction of crime related harms, *in integrum restitutio* of the victim's pre-crime status should be achieved. In order to do so, the victim shall receive a variety of financial aids and assistance in form of both allowances and immediate payments.

9. Shortcomings of Hungarian law in regard to the criminalisation of trafficking in human beings

As it has been pointed out earlier, Hungary failed to formally transpose the FD. The Hungarian provisions on trafficking in human beings are not "just" in line with the requirements of the FD, but they go beyond the incrimination foreseen in the FD. However there are some minor shortcomings:

- when trafficking in human beings endangers the victim's life a joint indictment has to be made for trafficking in human beings and crimes against life and personal integrity,
- there are some discrepancies and inconsistencies in regard of the definition and implementation of criminal organisations, and
- the FD shows a strong commitment towards victim's care and assistance, especially child victims and particularly vulnerable victims. In this respect, Hungary still has to implement certain provisions of the FD on the standing of victims.

10. Practical application

Without questioning the necessity to criminalize trafficking in human beings, it is widely accepted that such incrimination must be backed by efficient administrative and labour law provisions and by crime prevention measures.

It is well known that traffickers often abuse existing administrative (especially asylum and immigration) provisions and benefit from tolerating black labour. Therefore incriminating trafficking cannot be efficient as long as there are other loopholes in the legal system.

Simultaneously, it is insufficient to only incriminate trafficking in order to fight back this phenomenon. Much has to be done also on the prevention side and a comprehensive strategy should be put in place that identifies sources and causes of trafficking in human beings, reduces the harms they present to social communities, prevents victimisation and assists victims of trafficking. Reinforcing social inclusion and solidarity and increasing community and individual skills of self-defence and prevention are more cost-effective in the long run than incrimination.

11. Reception of the FD in Hungary and concluding remarks

Provisions on trafficking in human beings are widely assumed in Hungary as a result of international obligations flowing from signing and ratifying the respective UN document and not linked to either the EU or the FD itself. Regardless of this factor, the provisions concerned are not at all welcome in Hungary. Reasons of unpopularity derive on the one hand from the inaccurate terminology that is sometimes very hard to adjust to prevailing practice. On the other hand, the above offence definition of trafficking in human beings is problematic in itself. Introducing a formal offence not requiring motivation or material outcome leads to massive and needless over-incrimination.

There are some major problems of interpretation too. The most grievous form of trafficking in human beings (Article 175/B(5) HCC) provided for is trafficking in children under twelve. However an incorrectly stipulated "or" confuses the whole provision: if sticking strictly to the written text of the law, trafficking in children under

twelve for the sake of illicit pornography shall be punishable equally to trafficking in adults and children over twelve for the very same purposes. This of course might not have been the legislator's intention.

Moreover, the way aggravating circumstances of the offence are structured is illogical and does not respect traditions and practice of Hungarian criminal legislation. A number of senseless aggravating circumstances have been stipulated. Furthermore the provisions on certain combinations of aggravating circumstances lead to an insurmountable burden of evidence.

It is the objective of the Area of Freedom, Security and Justice to "provide citizens with a high level of safety" as proclaimed in Article 29 TEU. Within this framework, prevention of and combating crime is an important component of public order and community safety. The FD contributes to achieve these objectives. However, the Hungarian provisions on human trafficking is far too symbolic. An Area of Freedom, Security and Justice should equally respect and warrant the fundamental rights of both offenders and victims. Symbolic use of criminal law including extreme harsh sanctions is not reconcilable with the aims of AFSJ.

Evaluation of the impact in Italy of the 19th July 2002 Framework Decision against trafficking in human beings

Giovanni Grasso and Annalisa Lucifora *

1. Introduction

Trafficking in human beings is a growing criminal phenomenon, that concerns the international community and has acquired a particular visibility these last years.

Globalization has favoured contacts between regions and areas of the world characterized by different economic conditions and the growth of a migratory process towards the West: this evolution has caused the development of a real "market" in the illegal transport of people to Europe.

Italy is particularly concerned by this problem because it is both a final destination and a transit country. Because of its geographical position, the extension of its shores and the instability of its Balkan neighbours, Italy has always been crossed by migratory flows, but their composition and the manner of controlling them changed over the years.

In the past, these illegal flows involved mainly economic migrants who, because of the poverty of their own countries, left them.

These last ten years the presence in these flows of victims of trafficking in human beings has increased, and, among them, there are more and more women and children, who have been compelled to leave their country and whose fate proved to be a future of sexual and economic exploitation.

Trafficking and smuggling have assumed different political significances over time.

Though the fight against illegal immigration has been a national priority since a long time, trafficking in human beings has only latterly drawn the attention of the Italian Government. This situation is reflected in the evolution of Italian legislation.

* The introduction and conclusion were written by both authors. The developments were written by A. Lucifora.

2. Internal legal context

Article 12 of the *Testo Unico* on Immigration of 1998 punished exclusively the smuggling of migrants as the action of helping foreigners entering the country in violation of its provisions, without any specific purpose. This is clearly different from trafficking because, when smuggling only is concerned, there is no offence to the victim's self-determination freedom.

In the same year, on 3 August 1998, spurred by international instruments, the Italian legislator adopted the Law No. 269 to tackle exploitation of trafficked people. However the scope of this law was limited to people considered as needing protection, i.e. children.

In fact, the Law No. 269 introduced new articles in the Criminal Code, namely Articles 600*bis* to 600*septies*, concerning prostitution and pornography involving children, possession of pornographic materials and other types of children sexual exploitation. Moreover, a new type of criminal offence was inserted by Article 601, para. 2, according to which: "whoever commits trafficking or whoever makes commerce of minors in order to induce them to prostitution is punished by imprisonment from six to twenty years". All these provisions were included in the chapter of the code devoted to criminal offences against individual freedom, thus creating a link with other serious offences against children, such as reduction to slavery and conducts related to it.

Some legal scholars criticized this Italian legislator's choice since it created an illogical fracture and a stratification of heterogeneous norms, making the task of interpreters more difficult [1].

Through this law, the Joint action of 24 February 1997, concerning actions against trafficking in human beings and sexual exploitation of children, received a partial implementation in Italy.

The need to draw appropriate strategies to fight against trafficking, whoever the victim is, was only perceived in the following years. Such evolution was the result of 2 main incentives.

The first was the United Nations Convention on Transnational Organised Crime of December 2000 and its Protocols on Trafficking in Persons and on Smuggling of Migrants. The Convention and the Protocols were signed by Italy on 12 December 2000 and, even if they were only ratified some years later (by Law No. 146 of 2 August 2006), they favoured the revision of the pre-existing legal provisions in order to cover and tackle more effectively all kinds of trafficking.

The second incentive was the attitude of Italian Courts. The Italian Criminal Code already contained some articles aimed at punishing "trafficking" and conducts related to it (mainly Articles 600-603) but they were inadequate to combat new forms of trafficking and reduction to slavery developed in modern society. That is the reason why these existing provisions were only rarely applied by judges who pointed out the need for legislative reform in that field. Both the influence of international instruments and the position clearly assumed by Courts (see *infra*) resulted in the adoption by the Italian legislator of the Law No. 228 of 11 August 2003 that has mainly reformulated

[1] See L. Picotti, "I delitti di tratta e di schiavitù. Novità e limiti della legislazione italiana", www.nuoveschiavitù.it.

the criminal offences of reduction to slavery (Article 600 CC), trafficking and slave trading (Article 601 CC), conveyance and acquisition of slaves (Article 602 CC) [2].

The effort to comply with commitments at international and European levels led the Italian Government to the signature, on 8 June 2005, of the Council of Europe Convention of May 2005 on Action against Trafficking in Human Beings [3].

Moreover, the protection granted to children has been enhanced by the Law No. 38 of 6 February 2006, which has implemented the 22 December 2003 FD against the sexual exploitation of children and child pornography. Through this law, children are protected until their majority and the concept of child pornography has been enlarged, as requested by the FD. However, no full and adequate implementation of this FD has been achieved as far as the introduction of common provisions about jurisdiction and exercise of criminal action are concerned.

As regards the 2001 FD on the standing of victims in criminal proceedings, it has been implemented in the Italian legal order by both Articles 90 and following of the Code of Criminal Procedure and by the Law No. 228 of 11 August 2003.

The articles of the code assign various rights to victims, one of the most important being the possibility to become *parte civile*, which allows victims to play a role in the criminal trial.

The Law No. 228 introduces a special programme to give appropriate conditions of lodging, board and sanitary assistance to the victims of the criminal offences listed in it.

Some EU instruments did not give rise to the adoption of new legal provisions in the Italian legal order. For example, Article 18 of the *Testo Unico* on Immigration of 1998 provides for the issuance of a special residence permit to the people from third countries who have been victims of violence or of any kind of exploitation, and for their participation to a social assistance program. This article has always been considered as a model in the European context because it provides for the issuance of a residence permit to victims even if they do not cooperate with the competent authorities, thereby offering them a larger protection than the EC Directive of April 2004, which subordinates the residence permit to cooperation of the concerned individuals with the competent authorities.

Laws mentioned so far constitute the general legal framework in which Italian initiatives against trafficking in human beings have been conceived.

3. Control of formal and substantive conformity

The Law No. 228 of 11 August 2003 is the instrument that implements the FD of 19 July 2002 against trafficking in human beings in the Italian legal order.

In order to realize the importance of this law, it is useful to summarize the pre-existing legal situation.

---

[2] In Italian legal order, all the offences related to trafficking are *delitti*, the most serious figure of criminal offence provided for in the Italian Criminal Code and punished by life imprisonment, imprisonment or fine.

[3] The ratification procedure of this Council of Europe Convention has been launched.

As mentioned above, though Articles 600 and following already concerned "trafficking" and conducts related to it, judges preferred to refer to other criminal offences, such as sexual violence, threat and private violence.

Consequently, Articles 600, 601, 602 found poor application because they were based on the concept of slavery or "similar conditions" and had been conceived to fight against a phenomenon of slave trafficking very different from the modern one. These provisions referred to the notion of slavery as defined in the Convention signed in Geneva in 1926 and approved by Italy by R.D, 26 April 1928, No. 1723, namely to the "status or condition of the person on whom the elements of property right are exercised ". About it, the High Court observed that, "(…) slavery and similar conditions represent a status of right and if this status lacks, we are out of the situation provided for in the norm (…)" [4].

As a result, these criminal offences were only meant to be committed abroad, particularly in States where slavery still existed. These features explain the reluctance or the impossibility for Italian judges to apply these norms to modern kinds of slavery, differently characterized both in the way of instauration and protraction of victim subjection.

The interpretation offered by the Italian Constitutional Court in the famous decision of 8 June 1981 [5] about *plagio* favoured the development of new trends in jurisprudence aimed at finding adequate tools to tackle modern kinds of slavery. In fact, the Court pointed out that Articles 600, 601, 602 of the Criminal Code did not deal only with situations of deprivation of freedom recognized by the law, focusing the attention on the need to consider situations of factual deprivation of freedom as well. In this way, the Constitutional Court made it possible for judges to overcome the specific wording used in Articles 600 and following.

These Italian case-law's attempts of change were also encouraged by the growing attention devoted to the phenomenon of trafficking by the international community.

The case-law evolution and the subsequent legislative reform were linked to the need of adapting provisions of the Italian CC both to modern kinds of exploitation and to the international and European contexts. The Italian legislator made a visible political and technical effort to modify the internal legislation on trafficking and to draft the new text so as to comply with the requirement of the Palermo Convention.

The process of revision lasted more than two years before the final approval. In fact, the project was submitted to the Italian Parliament on 9 July 2001 and definitively approved on 30 July 2003. Parliamentary *iter* was particularly troubled because the text initially approved by the Chamber of Deputies was modified by the Senate, after that modified again by the Chamber and then also by the second Permanent Commission of the Senate.

---

[4] "(…) *la condizione di schiavitù e quelle analoghe sono condizioni di diritto, integrano cioè dei veri e propri stati di diritto, mantenuti e previsti purtroppo, ancora, in alcuni stati ed aggregati politici. Quando manchi un tale status e ricorra invece una vera situazione di fatto, si è fuori dall'ipotesi prevista dalla norma in esame* (…)", High Court, sect. V, 22 December 1983, Barberio, *Cass. pen.*, 1985, p. 864.

[5] Const. Court, 8 June 1981, n. 96, *Giur. cost.*, 1981, I, 806.

All political powers were aware that trafficking had acquired serious proportions and that no existing internal criminal provision was able to fill in the legal gaps of the Code. They considered this situation unacceptable in the light of the obligations of Italy both at international and EU levels.

Although it consists of only 16 articles, the finally adopted text has an innovative content. In fact, the Law No. 228 of 11 August 2003 has significantly modified the criminal law in force, both from the substantive and procedural points of view; it has also reorganised the competences of the responsible offices.

As mentioned above, the new law has reformulated the criminal offences of reduction to slavery (Article 600 CC), trafficking and slave trading (Article 601 CC), of conveyance and acquisition of slaves (Article 602 CC). It has in particular introduced the new figures of "state of continuative subjection" and "induction or compulsion to migration" with the specific aim of reduction to slavery. It has raised the general level of sanctions related to trafficking and to related conducts; it has provided for confiscation and additional sanctions and it has created an aggravating circumstance when these conducts are realized in the framework of activities of criminal associations. Moreover, the Law No. 228 has introduced Article 25*quinquies* into the legislative decree No. 231 of 2001 about the liability of legal persons and modified in this respect Articles 5, 51 and 407 of the CCP.

As a matter of fact, all changes introduced by the Law No. 228/2003 aimed at enhancing the repressive aspects of the Italian action against trafficking.

Nevertheless, according to Italian legal literature, the protected value is still the *status libertatis*, that includes all manifestations of individual freedom [6]. The identification of the protected value is also a consequence of the particular legislative method used by the Italian legislator in 2003. In fact, the *nomen iuris* of previous offences has been maintained (*tecnica novellatrice*), which shows the legislator's intent not to repeal previous provisions but rather to modify them. Such solution confirms the taking into consideration of conducts previously punished as criminal offences and the extension of the field of criminal prosecution, through the description of a detailed series of behaviours considered similarly condemnable. In this sense, the influence of international instruments on the drafting of Article 600, para. 1 and 2 is clear.

After having identified the main global changes brought to the pre-existing relevant Italian provisions, we will now analyse the conformity to the FD of Article 601 that deals for the first time, explicitly, with trafficking in human beings [7].

According to the definition of trafficking provided for in Article 1 of FD, the covered material acts are "the recruitment, transport, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person".

As such, these acts are not directly listed in Italian law. However, the conducts punished by Law No. 228/03 are wider and may include all forms of material acts provided for in the FD. In fact, Article 601 of the Italian CC punishes whoever forces

[6] B. Romano, *Delitti contro la sfera sessuale della persona*, Milano, Giuffrè, 2004, p. 208.

[7] Before Law No. 228/03, Article 601 was entitled "trafficking and commerce of slaves".

a person to enter, stay on, or leave or move within the national territory. This kind of behaviour being less serious than those provided for in the FD, it may be argued that the scope of application of Italian law is wider than that of the FD and includes all material acts referred in it. All these behaviour may

- either be committed against people already reduced in slavery or servitude;
- or be committed with the purpose of reducing or keeping them under such status, against persons induced by deceit, forced by means of violence, threats or abuse of authority, or by taking advantage of a situation of psychological inferiority or of necessity, or by promising money or other benefits to the person with authority over the victim.

Whereas, in the first case, the condition of slavery or servitude is the preliminary assumption of the criminal offence, in the other cases slavery or servitude is the specific purpose of the conduct. The major difference thus concerns the situation of the victims. The first case occurs when the victim is already in a condition of subjugation referred to in Article 600 of the CC and the other cases occur when the person is free and is induced or forced to subject him or herself to trafficking.

As regards the means mentioned in the Italian legal provision, they are the same as those referred to in the FD. It provides for the use of coercion, force or threat, including abduction, or use of deceit or fraud; it includes situations characterized by an abuse of authority, or of a position of vulnerability, and also the cases where payments or benefits are given or received to obtain the consent of a person having authority over another one. Italian law also corresponds to the requirements of the FD as regards the purposes of exploitation, with one exception, namely the explicit reference to pornography included in the FD.

In this case also, the scope of the Law No. 228 seems to be wider than that of the EU text: it refers not only to forced labour, begging and sexual exploitation, but also to any type of activity implying victim exploitation. So, the list has been intentionally left open. Such legislative technique is appropriate from the repressive point of view, allowing to cover forms of exploitation that may appear in the future. However, it could give rise to interpretative incertitude, since the wording of the provision leaves room for extensive interpretation or even for interpretation by analogy.

Concerning the victim's consent, although the Law No. 228 does not contain any provision expressly related to it, Italian legal scholars affirm the irrelevance of such consent, since it is presumed as being vitiated.

The EU FD and the Italian law differ concerning the case where the victim of trafficking is a child. According to the FD, trafficking is punishable even when it is committed without the use of means referred to in its Article 1, whereas in Italian law the fact that the victim is a child only influences the sanction level. Thus, according to the Italian legal provisions, if the victim is a child, the use of at least one of the listed means remains necessary but the penalty provided for is higher [8].

[8] Some legal scholars believe Law No. 228/03 has not implemented the FD in relation to this aspect. For example, see MARINUCCI-DOLCINI, *Codice penale commentato*, Milano, Ipsoa, 2006, p. 4129.

The penalty shall be increased of one third to a half if the conduct involves minor victims or if it is aimed at exploiting prostitution or at removing body organs. Besides these circumstances, others are envisaged and are given specific effects namely the offence committed against a person under the age of 14 (Article 600*sexies* CC), in the presence of specific relations of kinship, of dependence, of custody of a minor or of foster care, as well as the offence perpetrated with abuse of power by a public official (Article 600*sexies*, para. 2 CC). In these cases, the judge may not take any mitigating circumstances into consideration – except those provided for by Article 98 of the CC in case of under-aged offenders.

In ordinary hypotheses, in order to enhance the legal response to the contemporary dynamics of crime, the Law No. 228 has increased the previous duration of imprisonment from 5-15 years up to 8-20 years. Compared to the Italian scale of criminal penalties, such sanctions can be considered as being effective, proportionate and dissuasive. Moreover, the penalty provided for ordinary hypotheses by internal law is superior to that required for more serious behaviours by Article 3, para. 2 of the FD. Consequently, even if some aggravating circumstances provided for by the FD are not explicitly covered in Italian law (such as the situation where the offence has endangered the life of the victim), the latter is consistent with to the EU requirements.

Regarding the liability of legal persons, the FD has been fully implemented by the Law No. 228 since it introduced into the legislative decree No. 231 of 2001 the Article 25*quinquies*, which provides for the liability of legal persons covering the criminal offences of Articles 600, 601, 602, 600*bis*, 600*ter*, 600*quater*, 600*quinquies* of the code, concerning trafficking and conducts related to it.

Although the Italian legal order does not provide expressly for a *criminal* liability of legal persons, this decree has introduced new rules concerning the liability of legal persons related to some specific offences, the list of which has been extended. Although the law itself considers this liability as being of administrative nature it is rather a liability of a special kind [9], considering that it depends on the realization of a criminal offence, that it needs *mens rea* as constitutive element and that it has to be ascertained in a criminal trial. For all these reasons, according to some Italian legal scholars, it represents a kind of criminal liability.

Sanctions provided for in internal law to punish legal persons are of pecuniary nature and cover interdictions. Pecuniary sanction goes from 400 to 1,000 shares. The amount of a share goes from a minimum of 258,23 € to a maximum of 1,549.37 €. Criteria to identify shares are the seriousness of the incriminated conduct, the degree of liability of the legal person and the activity needed to eliminate the consequences of offences. Other sanctions are aimed at prohibiting the exercise of the activity or at revoking permissions, authorizations and the possibility to contract with the Public Administration. The dissolution of the legal person is also possible.

Likewise, the Law No. 228 of 2003 extends the scope of confiscation. In particular, the confiscation of the *tantundem* (i.e. of goods of equivalent value belonging to the defendant) becomes compulsory if confiscation of the proceeds of the offence

---

[9] In the introductive explanatory report to the decree, it is defined as a *tertium genus* of liability.

is impossible. Judges may also apply the preventive seizure of goods subject to confiscation.

As far as jurisdiction is concerned, Article 604 of the Italian CC extends the limits of application of Italian criminal law by providing that norms related to reduction to slavery, trafficking, child pornography and prostitution may also apply when the offence is committed abroad by an Italian citizen, or against an Italian citizen, or by a foreigner together with an Italian citizen. In the last case, the foreigner is punishable when the criminal offence is sanctioned by imprisonment of a maximum period of at least 5 years and at the request of the Minister of Justice. This provision is intended to regulate the territorial scope of application of Italian criminal rules. But it could give rise to a conflict of provisions since the Italian code in its general part contains other articles devoted to such issue. Its Articles 9-10 concern the criminal offence committed by a citizen abroad and by a foreigner against an Italian citizen; these provisions require the presence of the accused in Italy. According to the principle of speciality, Article 604 which, on the contrary, does not contain any reference to the presence of the accused on the Italian territory, should prevail.

Another important aspect of the Law No. 228 is that the objectives of prevention and suppression of trafficking are pursued jointly with the protection of victims.

First of all, investigations or prosecution of offences covered by the Law No. 228 of 2003 do not depend on the report or accusation made by a person subjected to the offence.

It is also provided for the creation of a fund for anti-trafficking measures to be used in financing programmes for the assistance and re-socialisation of the victims.

The Law No. 228 introduces a special programme to guarantee appropriate conditions of lodging, board and sanitary assistance to the victims of the criminal offences listed in it.

As a result of the previous developments, the formal correspondence between the FD and the Law No. 228 is not perfect. One explanation lies in the fact that the draft proposal was brought to the Italian Parliament in 2001, namely before the adoption of the FD.

However, legal literature supports the view that the Law No. 228 implements the FD in the Italian legal order. Italian case-law helps guaranteeing the substantive conformity of internal law to the European text. Despite the fact that the Law No. 228 does not respect the exact wording of the European text, judges interpret internal legal terms in full conformity with it. For instance, Italian law does not use the expression "particularly vulnerable victims" but it refers to the "victim's situation of necessity". The High Court has specified the content of such requisite, stating that it is different from the notion "state of necessity" used in Article 54 of the Italian CC and that it consists in any situation of weakness or any situation of material or moral lack that can affect the victim's will [10]. This example shows that the judicial interpretation given to the Law No. 228 allows to correct eventual formal shortcomings in the transposition of the FD.

[10] High Court, sect. III, 26 October 2006, n. 2841.

In other cases, some ambiguities can be corrected by other legal provisions or by other principles of national law. For instance, the absence of reference to pornography among the purposes of exploitation can be compensated by Article 600 of the Italian CC that refers generally to compulsion to sexual services.

Therefore, in spite of chronological incongruity, the result is a good level of compliance with the FD and, in cases of formal nonconformity, compensations or corrections are made either by judicial interpretation or by other legal provisions which allow to achieve substantive conformity.

4. Practical application of the norm

According to the legislator's intent, the Law No. 228 of 2003 aimed at answering the pressure resulting from international instruments but also at correcting the lack of precision of the previous norms.

The latter purpose has not been reached. The practical implementation of the law shows that interpretative problems remain. For example, as far as the slavery concept is concerned, in spite of the reformulation of Article 600 of the Criminal Code, doubts about the exact meaning to be assigned to the term still exist. This is best illustrated by a recent case concerning a man who, in order to claim the paternity of an unborn child, had paid money to a criminal association which had helped the future mother to enter in Italy, and then, when the child was born, had falsely recognized him as his son.

Although the child was the object of buying and selling, the Court excluded the criminal offence of reduction to slavery, underlining that all conducts provided for by Article 600 have to be characterized by a purpose of exploitation, absent in this case [11].

Moreover, concerning Article 600 devoted to reduction or keeping in slavery or servitude, the Court has observed that it provides for two different hypotheses:

– a criminal offence "*di mera condotta*", i.e. the exercise of power equivalent to property rights on another person,
– and a criminal offence "*di evento*", consisting in reducing or keeping another person in a position of persistent subjugation, forcing him/her to work or furnish sexual services, to beg, or to any type of activity that implies his/her exploitation [12].

In the latter case, the event can be realized also by taking advantage of the "victim's situation of necessity" as interpreted by the High Court (see *supra*).

Another case is important for an exact understanding of the "protected value" in the law against trafficking. It concerns people who have brought minor girls from Albania to Italy to be forced to prostitution, often without receiving any remuneration. According to the Court, the criminal offence of reduction to slavery exists because of the situation of persistent subjugation. Judges believe this status persists when the control over the girls slackens, allowing them also moments of apparent benevolence. This example reinforces the idea that the criminal offence at stake subsists also when

[11] High Court, sect. III, 10 September 2004, n. 39044, *Riv. pen.*, 2005, p. 27. Before the legislative reform case-law was in the same sense. See Cass., 22 December 1983.

[12] High Court, sect. III, 2 February 2005, n. 3368.

the victim keeps a certain freedom of movement. This can be explained by the fact that the value protected by the norm is not a specific freedom, but *status libertatis* on the whole, which can also be offended by those behaviours that give victims some autonomy.

5. Control of effectiveness and efficiency

The level of realization of the objectives of the FD in the Italian legal order can be considered satisfactory because the instruments introduced by the Law No. 228 have contributed to the prevention and to the fight against trafficking in human beings, as requested by the European legislator.

Prevention and investigation activities have been reinforced by the extension of some investigative techniques provided for organized crime and drug trafficking, such as increased powers to intercept communications and to use "*agents provocateurs*". Controlled delivery and under-cover activity are by now indispensable means for investigations on organized crime. These instruments, in fact, enable the investigators to catch the final links in the organisational chain and to determine the structure directing the criminal activity.

Moreover, the assignment of trafficking cases to Anti-mafia District Divisions has had very important consequences from the point of view of effectiveness. This innovation will also facilitate investigative coordination at international level through the action of the National Anti-Mafia Division (*Direzione Nazionale Anti-mafia*), which will be entrusted with all information on the criminal phenomena in question. Thereby, the provisions of the UN Convention and of the FD intending to improve police and judicial cooperation will be latter implemented.

Other changes have been introduced in criminal procedure law in order to deal with the typical problems arising in the fight against the concerned phenomena, such as the poor coordination of investigations and their strict time limits. In fact, the new law modifies the time-limits for pre-trial investigations, extending their maximum duration up to two years. Since crimes related to trafficking in persons are often perpetraded by criminal organizations, the Law No. 228 of 2003 allows the prosecutor to delay the execution of precautionary measures, arrest, seizure, or police detention when it is necessary to acquire important evidence and to identify or arrest the perpetrators of the crimes envisaged by Articles 600, 601 and 602 of the CC.

As far as the control of efficiency is concerned, the means used to achieve the objectives of the FD are on the whole well balanced. In fact, the strategy to combat trafficking in human beings proposed by both the FD and Law No. 228 is based on an integrated approach, whereby the objectives of prevention and punishment are pursued jointly with the objective of victims' protection. Based on the idea that prevention and victims' protection are only effective if carried out together with action against the concerned criminal organizations, the Law No. 228 introduced funds for anti-trafficking measures and special assistance programme.

According to the authors and generally speaking, the implementation of the FD does not bring any negative effects on the rights of defence and on the basic principles of criminal law.

6. Reception and perception

In the preparatory work of the final version of Law No. 228 of 11 August 2003, it is stated that "(…) although there is no legislative gap, as the Italian CC contains articles to punish these behaviours, the result is a general dissatisfaction with the current rules. Through a new norm, whose content is more extensive, it is possible to solve problems of interpretation and lack of precision and to provide prosecutors with an efficient tool allowing them to avoid a multiplication of contestations and to identify more easily the competent judge, because the whole issue comes under the competence of tribunals in collegial composition" [13].

In fact, both magistrates and lawyers were convinced that previous norms were inadequate because they were intended to deal with previous kinds of trafficking very different from the modern ones.

For these reasons, practitioners welcomed the transposing law and the FD itself. In their opinion, the new instruments are very important because they allow to combat more efficiently the contemporary dynamics of criminal offences concerned. For example, the Law No. 228 of 2003 includes situations where reduction to slavery is realized not only by prohibition of movement or by use of a particularly brutal violence, but also by deceiving, threatening and abusive conducts. Hence, the result is a clear extension of the scope of the criminal offences concerned.

The attention devoted to the law against trafficking is important both at experts' level and in public opinion.

At experts' level, discussions have been organized to evaluate the progress made by Member States concerning an effective implementation of the FD and a strengthening of the fight against trafficking in human beings. In particular, speakers have focused their attention on problems associated with the prosecution of traffickers under national law and on procedures. In discussions as well as in the organized trainings, efforts were made to understand whether European law has had an added value regarding the specification of offences related to trafficking and if it has enhanced the cooperation between Member States.

The observation of civil society reveals that important transformations have taken place in the field of the fight against trafficking in human beings, such as deep changes in the perception of international security and a significantly growing role of NGOs. NGOs are mainly involved in the victim assistance programs, supporting women and children exploited in prostitution. Some associations also try to give victims a job. Several prosecutors suggest to improve the relationship with NGOs in application of Article 18 of *Testo Unico* on Immigration about the residence permit.

---

[13] "(…) *sebbene non vi sia alcun vuoto legislativo, in quanto il codice penale italiano contiene delle norme volte a punire tali condotte, nel complesso vi è un clima di generale insoddisfazione verso tali norme. Attraverso una nuova disciplina, il cui contenuto sia più preciso, è possibile risolvere i problemi di interpretazione e di mancanza di tassatività, fornire ai pubblici ministeri un efficiente strumento che gli consenta di evitare una moltiplicazione delle contestazioni ed di identificare il giudice competente più facilmente, in quanto l'intera materia è attribuita alla competenza del tribunale in composizione collegiale*".

Media have also an increasing importance. They are very sensitive to the problem of trafficking and subsequent exploitation of human beings and they pay particular attention to the cases where the victims are children.

Even if there is in general no detailed knowledge of EU and internal instruments which concern this phenomenon, there is a perception that these instruments exist and that they have to be used mainly to protect women and children. Generally speaking, people interested in tackling trafficking in human beings are aware that the measures to prevent this offence require a development of cooperation among the countries involved and the organisation of international meetings, of awareness-raising campaigns, and of training courses for people involved in the fight against these offences.

7. Conclusion

The European Union has set itself the objective to maintain and develop the Union as an area of freedom, security and justice. Trafficking and other kinds of exploitation of human beings represent a fundamental threat for the safety as pursued by EU. Organized crime is taking advantage of the opportunities resulting from the increasing mobility of people, goods and services across national boundaries, which are further enhanced by internet, mobile communication and cheap air travel. Criminal activities are continuously evolving and the involved criminal organizations exploit gaps in the legislation and regulatory asymmetries among the countries in order to maximize their profits and minimize their risks.

The FD approximates the different Member States' legislations in this field as far as they concern constitutive elements, penalties and other sanctions, liability of legal persons and sanctions specially established on them, jurisdiction, prosecution and protection of the victims. This is useful for the creation of a common legal approach between Member States because it improves mutual trust and thus the cooperation between the competent authorities. Therefore, it is a good starting point because it contributes to harmonize the Member States' different legislations and to enhance judicial cooperation.

However, the concerned FD does not suffice. It should be completed by other essential measures.

Among these, the EU should develop comprehensive European migration policy based on common political principles, capable of taking account of all aspects of migration (migration and development agenda, as well as internal aspects such as legal migration, integration, protection of refugees, border control, readmission and the fight against illegal migration and human trafficking), also based on a genuine partnership with third countries and fully integrated into the Union's external policy.

Annex. Main internal legal provisions

Art. 600 Codice penale “Riduzione o mantenimento in schiavitù o in servitù”

1. Chiunque esercita su una persona poteri corrispondenti a quelli del diritto di proprietà ovvero chiunque riduce o mantiene una persona in uno stato di soggezione continuativa, costringendola a prestazioni lavorative o sessuali ovvero all’accattonaggio o comunque a prestazioni che ne comportino lo sfruttamento, è punito con la reclusione da otto a venti anni.
2. La riduzione o il mantenimento nello stato di soggezione ha luogo quando la condotta è attuata mediante violenza, minaccia, inganno, abuso di autorità o approfittamento di una situazione di inferiorità fisica o psichica o di una situazione di necessità, o mediante la promessa o la dazione di somme di denaro o di altri vantaggi a chi ha autorità sulla persona.
3. La pena è aumentata da un terzo alla metà se i fatti di cui al primo comma sono commessi in danno di minore degli anni diciotto o sono diretti allo sfruttamento della prostituzione o al fine di sottoporre la persona offesa al prelievo di organi.

Art. 601 Codice Penale “Tratta di persone”

1. Chiunque commette tratta di persona che si trova nelle condizioni di cui all’articolo 600 ovvero, al fine di commettere i delitti di cui al primo comma del medesimo articolo, la induce mediante inganno o la costringe mediante violenza, minaccia, abuso di autorità o approfittamento di una situazione di inferiorità fisica o psichica o di una situazione di necessità, o mediante promessa o dazione di somme di denaro o di altri vantaggi alla persona che su di essa ha autorità, a fare ingresso o a soggiornare o a uscire dal territorio dello Stato o a trasferirsi al suo interno, è punito con la reclusione da otto a venti anni.
2. La pena è aumentata da un terzo alla metà se i delitti di cui al presente articolo sono commessi in danno di minore degli anni diciotto o sono diretti allo sfruttamento della prostituzione o al fine di sottoporre la persona offesa al prelievo di organi.

Art. 602 Codice Penale “Acquisto e alienazione di schiavi”

1. Chiunque, fuori dei casi indicati nell’articolo 601, acquista o aliena o cede una persona che si trova in una delle condizioni di cui all’articolo 600 è punito con la reclusione da otto a venti anni.
2. La pena è aumentata da un terzo alla metà se la persona offesa è minore degli anni diciotto ovvero se i fatti di cui al primo comma sono diretti allo sfruttamento della prostituzione o al fine di sottoporre la persona offesa al prelievo di organi.

Art. 12 TU Immigrazione (d. lgs. 286/98 come modificato dalla legge 189/02)

“Disposizioni contro le immigrazioni clandestine”

1. Salvo che il fatto costituisca più grave reato, chiunque in violazione delle disposizioni del presente testo unico compie atti diretti a procurare l’ingresso nel territorio dello Stato di uno straniero ovvero atti diretti a procurare l’ingresso illegale in altro Stato del quale la persona non è cittadina o non ha titolo di residenza permanente, è punito con la reclusione da uno a cinque anni e con la multa fino a 15.000 euro per ogni persona.
2. Fermo restando quanto previsto dall’articolo 54 del codice penale, non costituiscono reato le attività di soccorso e assistenza umanitaria prestate in Italia nei confronti degli stranieri in condizioni di bisogno comunque presenti nel territorio dello Stato.
3. Salvo che il fatto costituisca più grave reato, chiunque, al fine di trarre profitto anche indiretto, compie atti diretti a procurare l’ingresso di taluno nel territorio dello Stato in violazione delle disposizioni del presente testo unico, ovvero a procurare l’ingresso illegale

in altro Stato del quale la persona non è cittadina o non ha titolo di residenza permanente, è punito con la reclusione da quattro a quindici anni e con la multa di 15.000 euro per ogni persona. *[La stessa pena si applica quando il fatto è commesso da tre o più persone in concorso tra loro o utilizzando servizi internazionali di trasporto ovvero documenti contraffatti o alterati o comunque illegalmente ottenuti.]*

Other references

F. Eramo, "Lotta contro lo sfruttamento sessuale dei bambini e la pedopornografia anche a mezzo Internet. Ombre e luci", *Fam. e Dir.*, 1, 2007.

M.G. Giammarinaro, *Riflessioni sull'applicazione della legge 11 agosto 2003, n. 228 "Misure contro la tratta di persone". Aspetti positivi e nodi critici*, presentation at the Conference organized by Terres des Hommes – Italy "La legge contro il traffico di esseri umani: parlano le Procure", Roma, 23 November 2004.

V. Musacchio, *La nuova normativa penale contro la riduzione in schiavitù e la tratta di persone*, presentation at the Conference "Le nuove forme di schiavitù nel terzo millennio", Roma, 12 November 2003.

A. Peccioli, "Giro di vite" contro i trafficanti di esseri umani: le novità della legge sulla tratta di persone", *Dir. Pen. Proc.*, 1, 2004.

Evaluation of the impact of the Framework Decision of 19 July 2002 on combating trafficking in human beings: Lithuania

Gintaras Švedas

1. Introduction

Trafficking in human beings in the Republic of Lithuania still remains rather a relevant problem – according to the data of the Police Department of Lithuania, 96 persons have suffered from trafficking in human beings in 2006 and the common depersonalised database on the victims of trafficking in human beings, where information is submitted by all NGOs working with persons of this category, had 101 persons recorded in 2006. In the area of trafficking in human beings, Lithuania remains a country of import, export and sometimes also of transit. About 1,000-1,200 persons are brought out of Lithuania or leave the country voluntarily every year (Europol, 2000-2002). Trafficking in human beings in Lithuania, including trafficking of Lithuanian citizens abroad, is mostly aimed at sexual exploitation and engagement in prostitution. The analysis of pre-trial investigations relating to the trafficking in human beings shows that the majority of such instances pertain to the exportation of women to foreign States for the purposes of sexual exploitation or engagement as prostitutes. In the meantime, women are brought to Germany, Spain, Italy, Denmark, Norway, Holland, Great Britain, France, Switzerland, Belgium, Greece, Czech Republic, Poland and other States. Intensive trafficking of women to Poland is explained by the fact that this State is a particular point of transit of women. Recently, fewer prostitutes from Belarus, Russia and Ukraine have been brought to Lithuania; this is explained by the fact that the fee rates for sexual services have in particular decreased and the risk of being deported has become higher.

Lithuania is not only a State of export, but also of transit of women. Women from Eastern European States usually come themselves for various purposes to Lithuania, quite many of them intending to engage in prostitution. More than 15 per cent of all prostitutes in Lithuania are immigrants from such neighbouring States as Belarus,

Russia, Ukraine. Once involved into the illegal business of prostitution, they are subjected to forced sexual exploitation and some are brought to Western European States. More and more instances of trafficking in minors have been identified in Lithuania and in foreign States – and among them an increased number of cases of trafficking in minors from Lithuania. It has not been identified that young children (persons younger than 14 years) would have suffered from such trafficking. In all cases, these were minor girls from 14 to 17 years, forced to become prostitutes or involved into this business. Other forms of trafficking in minors have not been identified in Lithuania (trafficking in children for forced labour, trafficking in child organs, trafficking in children for other families). According to the data of experts of the Ministry of Interior, the proceeds of illegal prostitution in Lithuania exceed 50 million *litas*, and the total income from the trafficking in human beings and related criminal offences is about 200 million *litas*.

2. Lithuania's international and European obligations

Lithuania has ratified and implemented the UN Protocol to prevent, suppress and punish trafficking in persons supplementing the UN Convention of 12 December 2000 against transnational organised crime on 22 April 2003 (Law No. IX-1525 [1]). Lithuania has not yet signed and ratified the Council of Europe Convention on Action against Trafficking in Human Beings of 2005.

The Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children was to be implemented in the Member States before the accession of the Republic of Lithuania to the European Union (hereafter – EU), therefore, the database does not contain the internal legal acts that implemented this Joint Action in Lithuania. According to the assessment of experts, most of the Joint Action provisions have been implemented by the adoption of the new Penal Code [2] (hereafter – PC), the Code of Criminal Procedure [3] (hereafter – CCP) and the Punishment Enforcement Code [4], which came into force on 1 May 2003. The requirements of this Joint Action were fully implemented when the *Seimas* of the Republic of Lithuania on 22 June 2006 passed the Law No. X-711 amending and supplementing the Penal Code, which came into force on 14 July 2006 [5].

The Framework Decision (hereafter – FD) of 15 March 2001 on the standing of victims in criminal proceedings was fully implemented when the *Seimas* of the Republic of Lithuania on 1 June 2006 passed the Law No. X-636 amending and supplementing the CCP, the Punishment Enforcement Code and the Law on Remand Detention, which came into force on 1 July 2006 [6].

The FD of 22 December 2003 on combating the sexual exploitation of children and child pornography was fully implemented when the *Seimas* of the Republic of

---

[1] Valstybės žinios, 2003, No. 49-2157.

[2] Baudžiamasis kodeksas, Vilnius, TIC, 2007.

[3] Baudžiamojo proceso kodeksas, Vilnius, TIC, 2007.

[4] Bausmių vykdymo kodeksas ir jį įgyvendinantys teisės aktai, Vilnius, TIC, 2007.

[5] Valstybės žinios, 2006, No. 77-2961.

[6] *Ibid*., No. 68-2494.

Lithuania on 22 June 2006 passed the Law No. X-711 amending and supplementing the PC, which came into force on 14 July 2006 [7].

Directive 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, was fully implemented when the *Seimas* of the Republic of Lithuania on 28 November 2006 passed the Law No. X-924 amending and supplementing the Law on the Legal Status of Aliens, which came into force from 16 December 2006 [8].

Lithuania has also ratified and implemented the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to United Nations Convention on the Rights of the Child [9], the United Nations Convention on the Elimination of All Forms of Discrimination against Women [10], the Forced Labour Convention No. 29 of the International Labour Organisation [11], the Abolition of Forced Labour Convention No. 105 of the International Labour Organisation [12] and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour No. 182 of the International Labour Organisation [13]. Lithuania has implemented recommendations of the Committee of Ministers of the Council of Europe [14], recommendations and resolutions of the Parliamentary Assembly of the Council of Europe [15]; it also observes the requirements of other international documents [16].

---

[7] *Ibid.*, No. 77-2961.

[8] *Ibid.*, No. 137-5199.

[9] *Ibid.*, 2004, No. 108-4028.

[10] *Ibid.*, 1996, No. 21-549.

[11] *Ibid.*, No. 27-648.

[12] *Ibid.*, No. 28-676.

[13] *Ibid.*, 2003, No. 49-2161.

[14] Recommendation R(91) 11 Concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults; Recommendation R(96) 8 on Crime Policy in Europe in a Time of Change; Recommendation R(97) 13 to Concerning Intimidation of Witnesses and the Rights of the Defence; Recommendation R(2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation; etc.

[15] Resolution 1099 (1996) on the sexual exploitation of children; Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe Member States; Recommendation 1450 (2000) on violence against women Europe; Recommendation 1545 (2002) on campaign against trafficking in women; Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution; etc.

[16] United Nations Declaration on the Elimination of Violence against Women 1993, the Beijing Declaration 1995 and the Beijing Platform for Action adopted by the Fourth World Conference on Women (Beijing, 4-15 September 1995), the Recommendations 2000 of the 23rd Special Session of the General Assembly of the Committee on the Elimination of the Discrimination of Women of the UN (New York, 12-30 June 2000) to the Government of the Republic of Lithuania (consideration of reports of the State parties. Lithuania. The initial and second periodic reports), the Brussels Declaration on Preventing and Combating Trafficking in Human Beings 2002, adopted at the European Conference that took place on 18-20 September 2002, and the Action Plan to Combat Trafficking in Human Beings 2003 of the Organisation

3. General considerations on Lithuanian criminal law

This chapter provides some basic information related to Lithuanian penal law such as classification of criminal offences, typology of criminal sanctions, age of criminal responsibility, etc.

A. Classification of criminal offences

All criminal acts provided in the PC are classified into crimes and criminal misdemeanours. It is to be noted that in addition to criminal misdemeanours and crimes set forth in the PC, there is also a separate type of administrative offences (similarly to Germany) provided for in the Code of Administrative Offences (hereinafter – CAO).

A crime is a dangerous act prohibited by the PC (action or omission), for which a custodial sentence is prescribed by law. Crimes can be intentional or negligent. Intentional crimes are classified into minor, semi-grave, grave and very grave crimes. A minor crime is an intentional crime, for which a maximum penalty provided for in criminal law does not exceed 3 years of imprisonment. A semi-grave crime is an intentional crime, for which a maximum penalty provided for is more than 3 years of imprisonment, but does not exceed 6 years of imprisonment. A grave crime is an intentional crime, for which a maximum penalty provided for is more than 6 years of imprisonment, but does not exceed 10 years of imprisonment. A very grave crime is an intentional crime, for which a maximum penalty provided for exceeds 10 years of imprisonment.

A criminal misdemeanour is a dangerous act prohibited by the PC (action or omission), for which a non-custodial sentence, with an exception of detention, is provided for.

The theory of Lithuanian criminal law, in addition, classifies all the acts provided by the PC into two groups: (a) criminal misdemeanour, negligent crime, minor and semi-grave intentional crime; and (b) grave and very grave intentional crime. In case of criminal acts attributed to group (a), the court has discretion to apply all the types of release from criminal liability (for example, upon reconciliation of the offender and the victim, on bail, etc.), deferral of sentence execution and types of sentence mitigation. Whereas in case of crimes attributed to group (b), the court may (if the preconditions set forth by the PC exist) only mitigate the punishment imposed.

B. Typology of criminal sanctions

The PC provides for the following types of punishments for any natural person who commits an offence: 1) deprivation of public rights; 2) deprivation of the right to do a certain job or engage in certain activities; 3) community service; 4) fine; 5) restriction of liberty; 6) detention; 7) a term of imprisonment; 8) life imprisonment :

– deprivation of public rights means the deprivation of the right to be elected or appointed to any elective or appointed post of State or municipal authorities and institutions, enterprises or non public organisations. The court shall impose this punishment when the criminal act has been committed abusing public rights. The

---

for Security and Co-operation in Europe (PC.DEC/557), approved at the meeting of the OSCE Permanent Council on 24 July 2003.

court shall specify what right shall be deprived when imposing the punishment of deprivation of public rights. Public rights may be deprived for a term from 1 to 5 years;

- the court shall order deprivation of the right to be employed in a certain job or to engage in certain activities in cases specified in the Special Part of the PC, where the guilty person has committed a crime during the job or work" or while performing his professional duties or where the court comes to the conclusion, considering the nature of the criminal act committed, that the convicted person should not have the right to be employed in a certain job or engage in certain activities. The deprivation of the right to be employed in a certain job or engage in certain activities may be imposed for a period from 1 to 5 years;
- the court shall impose community services in cases set forth in the Special Part of the PC. Community service may be executed only with the consent of the convicted person. Community service may be imposed for a period of 1 month to 1 year. A person sentenced to community service is obliged to work for the community without payment for 10 to 40 hours per month during the period set by the court. The time and number of hours of community service shall be determined by the court when it passes the sentence. However, this time may not exceed 480 hours for a crime and 240 hours for a misdemeanour. The service to be performed by the convicted person shall be assigned by the institution executing the penalty, assisted by executive bodies of municipalities and/or the county governor's administration. A fine is a pecuniary penalty imposed by the court in cases specified by the Special Part of the PC. The minimum fine shall be 1 minimum monthly wage (hereafter – MMW. 1 MMW is equal to approximately 33 EUR). Fines shall be imposed: a) for misdemeanours: up to 50 MMWs; b) for minor crimes: up to 100 MMWs; c) semi-grave crimes: up to 200 MMWs; d) for grave crimes: up to 300 MMWs; e) for negligent crimes: up to 75 MMWs. The amount of the fine shall be set by the court when determining the penalty. Restriction of liberty shall be imposed by the court in cases specified in the Special Part of the PC. Restriction of liberty may be imposed for a term from 3 months to 2 years. Persons sentenced to restriction of liberty shall be obliged: 1) not to change their place of residence without the knowledge of the court or the body responsible for the execution of the penalty; 2) to comply with prohibitive and mandatory injunctions of the court; 3) to give an account in the prescribed manner of compliance with the prohibitive and mandatory injunctions of the court. The court may issue one or more prohibitive or mandatory injunctions in respect of a person sentenced to restriction of liberty. The court may prohibit from: 1) visiting certain places; 2) associating with certain individuals or groups of individuals; 3) owning, using, acquiring, storing passing on for safekeeping to other persons certain articles. The court may obligate: 1) to stay at home at a certain time; 2) make payments in partial or full restitution for damage caused by his criminal act or to repay the damages with his own work; 3) to take a job or register at the labour exchange, or to undertake education; 4) to voluntarily participate in a alcohol/drugs/toxic substances treatment programme or to undergo treatment for sexually transmitted diseases; 5) to perform community service in health and social care

institutions or other non-State institutions taking care of the disabled, the aged or other person in need of assistance for up to 200 hours, but not longer than the term of restriction of liberty to which the person is sentenced. At the request of the person or other parties to the criminal proceedings, instead of the above referred prohibitive or mandatory injunctions, the court may issue in respect of the person other prohibitive or mandatory injunctions not provided for under the criminal statutes, which, in the opinion of the court, would have a positive effect on his/her behaviour. The number of prohibitive and mandatory injunctions issued by the court shall not be specified; however, they shall be consistent;

- detention shall be imposed by the court in cases specified in the Special Part of the PC. Detention is imprisonment for a short period of time and is served in a house of detention. Detention shall be imposed for a period of 15 to 90 days for a crime and 10 to 45 days for a misdemeanour. The time to be spent in detention for a criminal act shall be set by the court when determining the penalty. If detention is imposed for a period of 45 days or less, the court may rule that it be served on days of rest. Detention shall not be applicable to pregnant women and persons with children under the age of 3 years, taking into account the interests of the child;
- a sentence of imprisonment for a certain fixed term is imposed by the court in cases specified in the Special Part of the PC. The term of imprisonment may be set from 3 months to 20 years. In the case of another crime being committed when a sentence for a previous crime has not been served, a sentence of up to 25 years may be imposed. Convicted persons shall serve their sentences of imprisonment in open colonies, houses of correction and prisons. The place to serve the punishment shall be determined by the court, having regard to the personality of the offender, the type and dangerousness of the offence committed;
- a sentence of life imprisonment shall be imposed by the court in cases specified in the Special Part of the PC. If a criminal statute provides for commutation of a life sentence, the term of the commuted sentence shall not be less than 25 years. Persons sentenced to life imprisonment shall serve their sentences in prison. After serving the first 10 years of imprisonment lifelong, the convicted persons may be transferred to a house of correction.

A person who commits a misdemeanour may be subjected to all aforementioned penalties, except for imprisonment for a fixed period of time and imprisonment lifelong.

Only one penalty may be imposed for the person who commits one crime or a misdemeanour. When a person is sentenced for two or more criminal acts committed as well as in cases of concurrent sentences, two penalties may be imposed. If more than two penalties of a different type are imposed for several committed crimes, the court, when pronouncing the final sentence, shall select two penalties from those imposed, one being the most severe of the sentences, the other one being selected at the discretion of the court.

Prohibition from exercising a special right and/or confiscation of property may be imposed upon the person who commits a criminal act, alongside the “main” penalty.

C. *Age of majority*

Article 13 of the PC sets the general age limits since which a person shall be liable under Lithuanian criminal laws. Pursuant to the PC, a person who has been 16 years old before the time of commission of a crime or misdemeanour shall be liable. A person who is 14 years old at the time of commission of a crime or misdemeanour shall be liable for a murder (Article 129), major health impairment (Article 135), rape (Article 149), sexual assault (Article 150), theft (Article 178), robbery (Article 180), property extortion (Article 181), property destruction and damaging (Article 187, para. 2), theft of a firearm, ammunition, explosives or explosive substances (Article 254), theft, extortion or other unlawful seizure of narcotic or psychotropic substances (Article 263), damaging of vehicles, roads or installations contained therein (Article 280, para. 2) [17]. The person who has not attained the age of 14 years at the time of commission of a dangerous act provided for by the PC may be subjected to reformative or other sanctions prescribed by Lithuanian laws.

It should be noted that separate articles of the Special Part of the PC, providing for criminal liability for some crimes, may set special requirements for the person who commits a crime, for example gender (killing of a newborn committed by the mother: Article 131), duties (bribery: Article 225) and age (distribution of narcotic substances to minors: Article 261), etc.

D. *General framework of criminalisation in Lithuania: trafficking and smuggling in human beings, prostitution*

Lithuanian law distinguishes between trafficking and smuggling in human beings. The PC provides for a separate criminal liability for smuggling in human beings – illegal transportation of people across the national border (Article 292) and organising travel of citizens of the Republic of Lithuania to stay illegally or leave them without assistance abroad (Article 293):

> "Article 292. Illegal transportation of persons across the national border
>
> 1. Any person who illegally transports a foreigner without permanent residence in the Republic of Lithuania across the national border of the Republic of Lithuania, transports such persons who illegally cross the national border or conceals them in the territory of the Republic Lithuania, shall be punished by a fine or detention, or imprisonment for a term of up to 6 years.
>
> 2. Any person who commits the acts referred to in paragraph 1 of this Article for personal gain or if it causes danger to a human life, shall be punished by imprisonment for a term of up to 8 years.
>
> 3. Any person who organises the acts referred to in paragraph 1 of this Article, shall be punished by imprisonment for a term from 4 to 10 years.
>
> 4. A legal entity shall also be liable for the acts specified in this Article.
>
> Article 293. Organising travel of citizens of the Republic of Lithuania to stay illegally or leave them without assistance abroad
>
> 1. Any person who organises citizens or permanent residents of the Republic of Lithuania to seek asylum abroad or to work there illegally, or stay illegally abroad

[17] Baudžiamasis kodeksas, *op. cit.*, p. 44-45.

due to any other reasons or by deceitfully promising a legal status abroad, shall be punished by detention or imprisonment for a term of up to 7 years.

2. A legal entity shall also be liable for the acts specified in this Article" [18].

Prostitution does not constitute a criminal act under the criminal law of Lithuania. Engagement in prostitution, as well as using such services is an administrative offence covered by the CAO and incurs administrative liability, i.e. a fine. It should be noted that neither the PC nor the CAO define the contents or elements of prostitution. PC provides criminal liability only for the behaviour linked to prostitution: earning a profit from prostitution by other persons (Article 307) and engagement into prostitution (Article 308):

"Article 307. Earning profit from prostitution of other persons

1. Any person who earns an income from another person's engagement in prostitution, shall be punished by a fine or restriction of liberty, or detention, or imprisonment for a term of up to 4 years.

2. Any person who organises or leads prostitution or transports the person with the latter's consent to or from the Republic Lithuania for prostitution, shall be punished by imprisonment for a term of up to 6 years.

3. Any person who earns profit from the prostitution of a minor person or organises or leads the prostitution by the latter, or transports the minor with the latter's consent to or from the Republic Lithuania for prostitution, shall be punished by imprisonment for a term from 2 to 8 years.

4. A legal entity shall also be liable for the acts specified in this Article.

Article 308. Engagement into prostitution

1. Any person who engages another person into prostitution, shall be punished by a fine or restriction of liberty, or detention, or imprisonment for a term of up to 3 years.

2. Any person who engages into prostitution another person who is dependent on him economically, through employment or in any other way, or engages another person into prostitution by physical or mental coercion or deceit, or who engages a juvenile into prostitution in whatever way, shall be punished by imprisonment for a term from 2 to 7 years.

3. A legal entity shall also be liable for the acts specified in this Article" [19].

4. Control of formal and substantive conformity

The legal act, which transposes the FD of 19 July 2002 on combating trafficking in human beings in Lithuanian law, is the Law amending and supplementing the PC, approved and submitted to the *Seimas* (Parliament) by the Government on 13 April 2005 [20].

A. Incriminations

In the opinion of the experts of criminal law, the pre-existing wording of the PC regarding trafficking in human beings and sale or purchase of a child, was in full

[18] *Ibid.*, p. 190.

[19] *Ibid.*, p. 196-197.

[20] Valstybės žinios, 2005, No. 49-1628.

conformity to the FD requirements by its substance (but not contents) [21]. Article 147 and 157 of the PC in force at that time was worded as follows:

> "Article 147. Trafficking in human beings
> Any person, who sells, purchases or in any other way alienates or acquires a person with the intention of gaining material or any other personal advantage, shall be punished by imprisonment for a term of up to 8 years.
>
> Article 157. Sale or purchase of a child
> 1. Any person who sells, purchases or in any other way alienates or acquires a young child, shall be punished by imprisonment for a term of up to 8 years.
> 2. Any person who is engaged in trafficking of young children, shall be punished by imprisonment for a term from 2 to 10 years".

On the other hand, having considered all the opinions of criminal law practitioners and experts (police officers, prosecutors and judges), the Ministries of Justice and Interior decided to approximate the PC of Lithuania to the FD requirements not only by its substance, but also by its contents. Such decision was also favoured by the Seimas that enacted the Law No. X-272 amending and supplementing the PC on 23 June 2005 [22] and it came into force on 30 June 2005:

> "Article 147. Trafficking in human beings
> 1. Any person who sells, buys or transfers, or acquires a person, or recruits, transports or harbours a person by means of physical violence or threats, or by otherwise depriving him of the opportunity to resist, or by making abusing authority or of his position of vulnerability, or deceit, or by paying money or any other material benefit to the person who is actually in control of the victim, if the offender knows or intends to have the victim involved into prostitution or profit to be earned from the prostitution of this person or to have him exploited in prostitution or forced labour, shall be punished by imprisonment for a term from 2 to 10 years.
> 2. Any person who commits the act referred to in paragraph 1 of this Article in respect of two or more victims or participates in an organised group, or with the intent of acquiring an organ, tissue or cells of the victim, shall be punished by imprisonment for a term from 4 to 12 years.
> 3. A legal entity shall also be liable for the acts specified in this Article.
>
> Article 147-1. Exploitation for forced labour
> 1. Any person who, by using physical violence or threats or otherwise depriving the person of the opportunity to resist, or by taking advantage of the person's dependence, unlawfully forces him to do a certain job, shall be punished by a fine or restriction of liberty, or detention, or imprisonment for a term of up to 3 years.
> 2. Any person who commits the act referred to in paragraph 1 of this Article by forcing a human being to work under slavery or other inhuman conditions, shall be punished by detention or imprisonment for a term of up to 8 years.
> 3. A legal entity shall also be liable for the acts specified in this Article.

---

[21] A. Abramavičius, D. Mickevičius, G. Švedas, *Europos Sąjungos teisės aktų įgyvendinimas Lietuvos baudžiamojoje teisėje*, Vilnius, 2005, p. 118-119; *Prekybos žmonėmis tyrimo bei teisminio nagrinėjimo problemos Lietuvoje*, Vilnius, TIC, 2006, p. 46-48.

[22] Valstybės žinios, 2005, No. 81-2945.

> Article 157. Sale or purchase of a child
>
> 1. Any person who offers to buy or otherwise acquire a child, or buys or otherwise disposes of or acquires the child, or recruits, transports or holds the child captive knowing or intending to have him engaged into prostitution or gain profit from his engagement into prostitution or to have him exploited in prostitution or forced labour, shall be punished by imprisonment for a term from 3 to 12 years.
>
> 2. Any person who commits the act referred to in paragraph 1 of this Article in respect of two or more children or young children or participates in an organised group, or with the intent of acquiring an organ, tissue or cells of the victim, shall be punished by imprisonment for a term from 5 to 15 years.
>
> 3. A legal entity shall also be liable for the acts specified in this Article" [23].

Victim's consent is irrelevant for criminal responsibility for trafficking in human beings (Article 147) and sale or purchase of a child (Article 157). A general concept of the child in Lithuanian national criminal law , is provided by the Law on Fundamentals of Protection of the Rights of the Child [24], under which a child is a human being below the age of 18 years.

The abovementioned FD [25] and the implementing national Law amending and supplementing the PC may be assessed as having brought important changes in national criminal law. This conclusion is based on the fact that certain acts alternative to trafficking in human beings or sale or purchase of a child (for example, "recruiting", "transporting", "harbouring", etc.) have become separate criminal acts, in which trafficking in human beings or sale or purchase of a child manifests itself. Whereas according to the earlier wording of the PC, these acts did not constitute separate criminal acts and were treated as complicity or preparation, or attempt to commit a crime, following the requirements of the EU legal acts an opinion has emerged in the theory of Lithuanian criminal law, according to which general criminal liability for the preparation to commit a crime should be dispensed with and replaced in the PC by certain separate elements of criminal acts, consisting in their substance of preparatory acts of certain crimes.

Pursuant to the Lithuanian PC, complicity in the commission of any criminal act (including trafficking in human beings or sale or purchase of a child) is punishable. Complicity is the intentional involvement in the commission of a criminal act by two or more conspiring legally capable persons who have attained the age specified in Article 13 of the PC. The accomplices in the criminal act shall include a perpetrator, an organiser, an abettor and an accessory:

– the perpetrator is a person who actually commits the criminal act either by himself or by causing incapacitated persons or person who have not yet attained the age specified in Article 13 of the PC or any other persons who are not mentally able

---

[23] Baudžiamasis kodeksas, *op. cit.*, p. 116-117, 121-122.

[24] Valstybės žinios, 1996, No. 33-807.

[25] The same could be said about certain other FDs in criminal law field, for example, FD of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment (2001/413/JHA), FD of 13 June 2002 on combating terrorism (2002/475/JHA), etc.

to commit the act. If the criminal act is carried out by several persons acting together, each person is considered a perpetrator (co-perpetrator);

– the organiser is a person who forms an organised group or a criminal association, directs the group or coordinates the activities of its members, or realizes preparatory actions for a criminal act and oversees its commission;
– the abettor is a person who incites another person to commit a specific criminal act;
– the accessory is a person who aids, counsels or commands another in the commission of a criminal act, or who provides means or removes obstacles, or who protects or shields other accomplices, or who promises in advance to harbour the offender, or to hide the instruments or means of crime, the traces of the act or the goods acquired by criminal means, or who promises in advance to sell goods produced or acquired in the course of the criminal act.

Article 25 of the PC provides for the following forms of complicity: a group of accomplices, an organised group, a criminal association:

– a group of accomplices is one which is formed by two or more persons at any stage of the commission of a criminal act for the purposes of committing, continuing or completing the act, if at least two of them are perpetrators;
– an organised group is a combination of 2 or more persons who, at any stage of the commission of a criminal act, conspire to commit several crimes or one grave crime and each member of the group carries out a specific task or has a different role while committing the crime;
– a criminal association is a combination of 3 or more persons who join together for joint criminal activities, i. e., for one or more grave or very grave crimes; such persons are linked by regular mutual relations and have shared roles or tasks. An anti-constitutional group or organisation or terrorist group shall be equivalent to a criminal association.

A criminal act committed by accomplices or by an organised group is an aggravating circumstance when determining the punishment and in case of a criminal association the person shall be in addition subject to criminal liability for an additional crime – criminal organization (Article 249).

Pursuant to the Lithuanian PC, the person shall be liable not only for the attempt to commit trafficking in human beings or sale or purchase of a child, but also for the preparation to commit such a crime. Article 21 of the PC stipulates that preparation to commit a crime is finding or fitting means or instruments, working out a plan of actions, gathering accomplices or any other intentional creation of conditions that facilitate the commission of the crime. A person shall be prosecuted only for preparation to commit a grave or a very grave intentional crime. Article 22 of the PC States that an attempt to commit a criminal act is an intentional act or omission directly commencing the commission of a crime or misdemeanour, when the completion of the act has been prevented by circumstances beyond the control of the offender. A person is also guilty of an attempt to commit a criminal act when he is not aware that his act will not be completed because his attempt is directed at the wrong target or he applies improper means. The person shall be liable for the preparation to commit a

crime and attempt to commit a criminal act under the Article of the PC which covers the appropriate completed crime, however, the penalty imposed upon such a person may be mitigated.

B. *Penalties against natural persons*

The PC of Lithuania provides for imprisonment for a term from 2 to 10 years for a simple *corpus delicti* of trafficking in human beings, and imprisonment from 4 to 12 years for qualified *corpus delicti* (i.e. against two or more victims, or by participating in an organised group, or with the intent of acquiring an organ, tissue or cells of the victim).

The Lithuanian PC provides for imprisonment for a term from 3 to 12 years for a simple *corpus delicti* of the purchase or sale of a child, and imprisonment from 5 to 15 years for qualified *corpus delicti* (i.e. against two or more victims, or by participating in an organised group, or with the intent of acquiring an organ, tissue or cells of the victim).

The court, imposing the punishment for trafficking in human beings or purchase or sale of a child, shall apply an actual punishment of imprisonment (i.e. it cannot defer its execution) and, if the preconditions laid down in the PC exist, may only mitigate the duration of the punishment of imprisonment imposed.

Compared to the Lithuanian scale of criminal penalties as provided in the PC for other grave and very grave crimes, penalties for trafficking in human beings and sale or purchase of a child are effective and dissuasive. The requirement of proportionality, on the other hand, may give rise to doubts (especially theoretical) as the PC provides for imprisonment from 3 to 15 years for crimes of similar nature, for example, injury, torture or other inhuman treatment of persons protected under international humanitarian law (Article 103); imprisonment from 3 to 15 years for violation of the norms of international humanitarian law regarding the protection of civilians and their property in time of war (Article 104); imprisonment from 5 to 15 years for an act of terrorism hazardous for the life or health of a great number of people (Article 250, para. 3).

Lithuania has chosen a two-fold approach to transpose aggravating circumstances provided in the FD into national criminal law: a) as a circumstance aggravating liability that has impact on the level of punishment, but within the extent of the punishment set forth in the Article of the PC, which provides criminal responsibility for the crime or b) as one additional incriminated crime (in this case, the final sentence is made more severe):

- the intentional or negligent crime has endangered the life of the victim and constitutes an element of another incriminated crime – i.e. serious intentional or negligent health impairment (Article 135 or 137);
- the crime committed against an especially vulnerable victim is provided as a qualified element of the purchase or sale of a child (i.e. sale or purchase of a young child) or as an aggravating circumstance under Article 60, para. 1, points 5 and 6 of the PC (the act is committed against a young child or a person in a helpless State owing to an illness, disability, old age or other reason, (without his request). It should be noted that the Lithuanian PC does not contain a definition

of a “victim particularly vulnerable“; however, in the theory of criminal law and jurisprudence of the Supreme Court of Lithuania, a young child (i.e. a person below 14 years) is treated in all cases as a person in a particularly helpless State;

- the crime committed through extreme violence or inflicting major damage upon the victim, depending on the outcomes of the violence or type of the damage, will be treated as a circumstance aggravating liability under Article 60, para. 1, point 4 of the PC (the act is committed torturing the victim or subjecting the victim to degrading treatment), point 11 (the act committed has lead to serious consequences) or as a separate crime;
- the crime committed by a criminal organisation constitutes an element of another incriminated crime – i.e. criminal association (Article 249).

C. *Liability of and sanctions against legal persons*

Article 20 of PC provides for the criminal liability of legal persons [26]. Legal persons can be held liable for the commission of the crimes for which criminal liability of legal persons is expressly provided for in the Special Part of the PC. Currently, the Special Part of the PC States that legal persons shall be liable only for the commission of crimes for which criminal liability of legal persons is provided for according to international treaties or according to EU legal acts (for example, trafficking in human beings, sale or purchase of a child, corruption, fraud, terrorism, etc.).

Legal persons are liable for the crimes committed for their benefit or interest by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

1) a power of representation of the legal person, or
2) an authority to take decisions on behalf of the legal person, or
3) an authority to exercise control within the legal person.

Legal persons can also be held liable where the lack of supervision or control by a person, having a leading position within the legal person (as mentioned above), has made the commission of the crime for the benefit of that legal person possible by a person under its authority.

Criminal liability of legal persons does not exclude criminal responsibility of a natural person who has committed, instigated, organised or aided the commission of the criminal act. The State, municipalities, central and local government authorities and agencies and international public organisations shall not be liable under the PC.

The following penalties may be imposed upon legal persons: 1) fine; 2) restriction on activities of a legal person; 3) liquidation of a legal person:

- fines of up to 50 000 MMWs may be imposed upon legal persons;
- when imposing restrictions on the activities of a legal person, the court shall prohibit the legal person from engaging in a certain type of activity or pass an order compelling the legal person to close a certain branch. The activities of a legal person may be restricted for a period ranging from 1 to 5 years;

[26] Baudžiamasis kodeksas, *op. cit.*, p. 47-48.

– when imposing the penalty of liquidation of a legal person, the court shall obligate the legal person to terminate all economic, commercial, financial or professional operations and close all the branches of the legal person within the time limit specified by the court. Having made a decision to impose the penalty on the legal person, the court may also decide to announce the decision in the media.

One penalty may be imposed on the legal person for one crime.

Currently, it is difficult to assess whether the abovementioned penalties are effective, proportionate and dissuasive, since the criminal liability of legal persons in Lithuania is a novelty, which is applied rather seldom in the practice of courts and since, in the cases it is, the sanctions imposed upon legal persons are fines. On the other hand, legal literature notes that the system of penalties of legal persons is not complete as penalties of medium severity are missing. In this regard, the academics of criminal law propose to include penalties such as temporary exclusion from entitlement to public benefits or aid, placing under judicial supervision, etc. into the system of penalties applied to legal persons [27].

D. Jurisdiction, investigation and prosecution

The PC of Lithuania contains rules for territorial, active personal jurisdiction, State protection and universal jurisdiction.

Article 4 of the PC establishes that “any person who commits criminal acts within the territory of the State of Lithuania or vessels or aircraft flying the flag of the Republic of Lithuania or carrying its distinctive symbols shall be liable under this Code. The place of commission of a criminal act is the place in which the person acted or could have acted or had to act, or the place in which the consequences covered in the criminal statute occurred. The place of commission of a criminal act by accomplices shall be the place where the criminal act was committed or, if one of the accomplices operated elsewhere, the place where he carried out his activity. A single criminal act committed both within the territory of the State of Lithuania and abroad shall be considered as having been committed within the territory of the Republic of Lithuania if it was commenced or completed, or forestalled in the territory of the Republic of Lithuania. The issue of criminal liability of persons, who under international legal norms enjoy immunity from criminal jurisdiction and commit a criminal act in the territory of the Republic of Lithuania, shall be decided in accordance with both international agreements of the Republic of Lithuania and this Code” [28].

Article 5 of the PC provides that “citizens of the Republic of Lithuania and other permanent residents of Lithuania shall be held liable for crimes committed abroad under the criminal statutes of the Republic of Lithuania” [29].

Article 7 provides that “persons who commit the following crimes specified in international treaties shall be criminally liable under this Code regardless of their citizenship and their place of residence, the place of commission of the crime, or the punishability of the committed act under the laws of the place where the crime was

[27] A. Abramavičius, D. Mickevičius, G., Švedas, *op. cit.*, p. 98.

[28] Baudžiamasis kodeksas, *op. cit.*, p. 37.

[29] *Ibid.*, p. 38.

committed: 1) crimes against humanity and war crimes (Article 99-113); 2) *trafficking in human beings* (Article 147); 3) purchase and sale of a child (Article 157); 4) counterfeiting, keeping or sale of money or securities (Article 213); 5) laundering of proceeds of crime (Article 216); 6) act of terrorism (Article 250); 7) hijacking of an aircraft, a vessel or a stationary platform in the continental shelf (Article 251); 8) taking of hostages (Article 252); 9) unlawful handling of radioactive materials (Article 256 and 257); 10) crimes related to narcotic or psychotropic, poisonous or powerful substances (Article 259-269)" [30].

Any person who commits a crime covered in Article 5 of the PC abroad shall be liable under the criminal law only if the committed act is recognised as a crime in Lithuania and is punishable under the penal law of the State of the place where the crime was committed. In the case of a person who commits a criminal act abroad being prosecuted in both Lithuania and another country and receiving different punishment in each country, the person shall be subjected to a penalty under the Lithuanian laws, however, it shall not exceed the maximum amount specified in the criminal laws of the State where the crime was committed.

A person who commits crimes covered in Articles 5 and 7 of the PC shall not be held criminally liable under this Code, if he: 1) has served the sentence imposed by the court abroad; 2) has been fully or partly released from the punishment imposed by a foreign court; 3) has been acquitted or relieved from criminal liability or penalty by an effective judgement of a foreign court, or if no penalty has been imposed by reason of the statute of limitations or other legal grounds which may be provided for in that foreign country [31].

The Government has not made any decision in respect of jurisdiction rule provided in the FD yet, however, such declaration is necessary, because the rules of jurisdiction provided in the PC of Lithuania do not directly cover the situation when "the crime is committed for the benefit of the legal person established in the territory of a member-State". It should be noted that the Government of Lithuania has made a declaration to this effect regarding FD of 22 July 2003 on combating corruption in the private sector (2003/568/JHA) by its Resolution No. 23 of 1 January 2006 [32] and regarding FD of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA) by its Resolution No. 1331 of 22 December 2006 [33].

The CCP specifies that any (including in cases of trafficking in human beings and sale or purchase of a child) "pre-trial investigation shall be commenced: 1) upon receipt of a complaint, application or report about a criminal act; 2) upon establishing elements of a criminal act and drawing up of an official notice by a prosecutor or a pre-trial investigation official" [34]. This provision of the CCP means that investigation and prosecution shall be commenced either following a report made by a person subjected to the crime and following a report of any other person, or on the basis of the official notice of a prosecutor or pre-trial investigation officer.

---

[30] *Ibid.*, p. 38-39.

[31] *Ibid.*, p. 39.

[32] Valstybės žinios, 2006, No. 5-149.

[33] *Ibid.*, No. 144-5475.

[34] Baudžiamojo proceso kodeksas, *op. cit.*, p. 140.

A decision to commence pre-trial investigation shall be made by the prosecutor, head of a pre-trial investigation institution or the person authorised by the latter by writing a direction on the application, report or complaint regarding the criminal act. The person who has filed a complaint, application or report shall be notified about the pre-trial investigation which has been commenced. Following the receipt of a complaint, an application or a report, and, where necessary, their updated version, the prosecutor or the pre-trial investigation officer may refuse to commence pre-trial investigation only where the facts stated in the complaint, application or the report about the criminal act are obviously unmotivated. A copy of the reasoned resolution to refuse commencing the pre-trial investigation shall be sent to the person who has filed the complaint, application or report. The pre-trial investigation officer shall, within 24 hours, send a copy of the resolution to the prosecutor. The resolution of the pre-trial investigation officer not to commence the pre-trial investigation may be appealed against to the prosecutor, and the prosecutor's resolution – to the pre-trial judge.

Upon receipt of a complaint, application or report on the committed criminal act or upon establishing elements of a criminal act, the prosecutor shall forthwith commence the pre-trial investigation. After the commencement of the pre-trial investigation, the prosecutor shall either perform all required actions of pre-trial investigation himself or direct that to a pre-trial investigation institution.

The prosecutor shall have the right to conduct by himself the whole pre-trial investigation or separate actions thereof. Where the pre-trial investigation or its separate actions are conducted by pre-trial investigation officers, the prosecutor shall be obliged to supervise the course of pre-trial investigation. The prosecutor shall give mandatory instructions to pre-trial investigation officers, rescind their unlawful or unfounded resolutions. Only the prosecutor shall make decisions regarding: 1) joinder and separation of the investigation; 2) discontinuation of the pre-trial investigation; 3) renewal of the discontinued pre-trial investigation; 4) closure of the investigation and drawing up of an indictment [35].

If a complaint, application or report about a criminal act is received by a pre-trial investigation institution or if a pre-trial investigation institution itself establishes elements of a criminal act, the pre-trial investigation officer shall forthwith commence a pre-trial investigation and shall, at the same time, notify a prosecutor thereabout. Upon receipt of such a notice from the pre-trial investigation officer, the prosecutor shall decide who shall conduct the investigation. The prosecutor may decide: 1) to conduct the entire pre-trial investigation or perform its separate actions by himself; 2) to instruct the pre-trial investigation institution, which has notified him about the commenced pre-trial investigation, to perform pre-trial investigation actions [36].

The prosecutor shall have the right to form an investigative group from several officers of one or different pre-trial investigation institutions.

When conducting a pre-trial investigation, pre-trial investigation officer shall have the right to perform all the actions provided for in the CCP, with the exception of those which may be performed solely by the prosecutor or a pre-trial judge. Pre-

[35] *Ibid.*, p. 142-143.
[36] *Ibid.*, p. 143.

trial investigation officer shall: 1) comply with all the instructions of the prosecutor; 2) report on the course of pre-trial investigation to the prosecutor at the time set by the latter [37].

Pre-trial investigation shall be conducted by a prosecutor or by an officer of the pre-trial investigation institution of the area where the criminal act has been committed. With a view to ensuring a speedier and more exhaustive investigation of criminal acts, the investigation may be tasked to prosecutors or pre-trial investigation institutions of another location.

Pre-trial investigation shall be carried out within the shortest time limits. Prosecutors shall supervise the compliance with this requirement.

E. Protection of and assistance to victims

The CCP of Lithuania does not directly single out children who are victims of trafficking in human beings as "victims particularly vulnerable".

However, the CCP lays down special rules when minors take part in pre-trial investigation actions or in judicial hearings. Article 186 of the CCP sets forth that "a juvenile witness or a victim under 18 years of age shall be examined by the pre-trial judge (…) when it is requested in the interests of the child by his representative, prosecutor or defence counsel" [38]. A juvenile witness and a victim under 18 years shall, as a rule, be questioned during the pre-trial investigation not more than once. A video and audio recording may be made during their questioning. If a suspect or his defence counsel is present at the questioning of a witness or victim younger than 18 years, the pre-trial judge shall ensure that such witness or victim is not subjected to any unauthorised influence. Witness and victims younger than 18 years of age shall be called to a trial hearing only in exceptional cases.

On request of the parties to the proceedings or on the initiative of the pre-trial investigation officer, prosecutor or pre-trial judge, a representative of the national child's rights protection agency or a psychologist may be invited to the examination of the accused juvenile under 18 years to provide assistance in questioning such a juvenile in consideration of the latter's social and psychological maturity. Article 280 of the CCP provides for the specifics of questioning juvenile witnesses during judicial case hearings. It lays down that "when questioning a witness under 18 years, a representative of the national child's rights protection agency or a psychologist shall be called who provides assistance in questioning such a juvenile in consideration of the latter's social and psychological maturity. (…) The representative of the national child's rights protection agency or the psychologist, parents and other statutory representatives of a juvenile witness taking part in the questioning may ask questions to the witness upon permission of the chairman of the trial hearing. A witness under 16 years of age shall be moved out of the courtroom after questioning, unless the court considers that his presence in the courtroom is necessary. When the questioning of a witness who is under the age of 18 before the court may inflict a mental trauma or result in other grave consequences, the court may dispense with the presence of the

[37] *Ibid.*, p. 143-144.
[38] *Ibid.*, p. 151.

witness at the hearing, having his testimony given to the pre-trial judge read out at the trial" [39].

Victims and witnesses in criminal proceedings (minors included) may be subject to non-disclosure of their identity. Articles 198-203 of the CCP provide for the grounds and conditions of such non-disclosure and for the procedural rules to apply in this regards. The identity of a victim or a witness shall not be disclosed, if: 1) it endangers the life, health, liberty or property of the victim, of the witness, of his family members or close relatives; 2) the testimony of the victim or witness is important for the criminal case; 3) the victim or witness takes part in the proceedings regarding a very grave or grave crime. The identity of the victim or witness shall be kept anonymous, if all the aforementioned grounds exist [40].

Before questioning, a victim or witness may ask for non-disclosure of his identity. Having determined that there is a reasonable basis to ensure non-disclosure of identity, the prosecutor or the pre-trial investigation officer must, in addition, check whether the victim or the witness: 1) has no physical or mental handicap which would prevent him from clearly understanding the circumstances relevant to the case and provide truthful testimony about them; 2) has no previous convictions for perjury; 3) may give false testimony against the suspect for personal or egoistic motives [41].

If there is a reasonable basis to ensure non-disclosure of identity and in the absence of the aforementioned circumstances, the prosecutor or pre-trial investigation officer shall make a reasoned resolution to apply non-disclosure of identity. The resolution of the pre-trial investigation officer shall be confirmed by the prosecutor.

The victim and the witness who are subject to non-disclosure of identity shall be indicated in the documents of investigation and other documents of the case by a number. The real data about the identity of the person shall be recorded in a special supplement to the record of an investigation act. No information shall be put in the records of investigation acts, resolutions, rulings, and other case file documents which would make possible to establish the identity of the victim or the witness subject to non-disclosure of identity who participated in the investigation act or who were mentioned in any other document.

The pre-trial judge shall question the victim or the witness subject to non-disclosure of identity by providing acoustic and visual obstacles for establishing the identity of the person questioned. The pre-trial judge may determine that the questioning must be conducted without the presence of the defence counsel and the suspect at the place where the questioning is taking place. In such a case after questioning the person, the pre-trial judge shall inform the defence counsel and the suspect about the evidence obtained. Afterwards the defence counsel and the suspect shall have the right to put questions to the victim or the witness through the pre-trial judge. If the questions asked may divulge the identity of the person subject to questioning, the pre-trial judge shall have the right not to ask the questions or to re-formulate them. The defence counsel shall have the right of access to the record after the questioning. The prosecutor may

[39] *Ibid.*, p. 198-199.
[40] *Ibid.*, p. 157-160.
[41] *Ibid.*, p. 158.

be present during the questioning of the victim or the witness who is subject to non-disclosure of identity.

Lithuania applies both general rules laid down by legal acts and has taken additional special legal and organisational measures for the protection of the rights of victims of the trafficking in human beings (see *infra*).

The Law on the Protection from Tampering of the Participants of Criminal Procedure and Intelligence Activities, Judicial and Law Enforcement Officers [42] lays down that the measures of protection from tampering can be applied to: 1) participants in intelligence activities; 2) persons participating in criminal proceedings: witnesses, victims, experts, defence counsel, suspects, defendants, convicted persons, acquitted persons; 3) officers of justice and law enforcement institutions: judges, prosecutors, pre-trial investigation officers, bailiffs; 4) close relatives of the mentioned persons: parents, adoptive parents, children, adopted children, siblings, grandparents, grandchildren and spouses.

Measures of protection from tampering may be applied where in the course of pre-trial investigation or hearing of criminal cases in respect of grave and very grave crimes there are solid grounds to believe that: 1) the life or health of persons is at risk; 2) the property of persons may be destructed or damaged; 3) constitutional rights and freedoms of persons are at risk.

Measures of protection from tampering shall be applied to the persons participating in criminal proceedings (except experts and defence counsel) and their close relatives, if these persons actively co-operated with officers of justice and law enforcement institutions, assisted in disclosing criminal acts or provided other valuable information to the officers of justice and law enforcement institutions. Measures of protection from tampering may be ordered and applied in the course of intelligence activities, pre-trial investigation, trial of a case, as well as after the intelligence activities or the case hearing.

Types of measures of protection from tampering are the following: 1) physical protection of a person and his property; 2) a person's temporary transfer to a safe place; 3) special regime for the provision of personal data contained in passport departments and other official information funds; 4) relocation of a person's residential, working or study place; 5) changing of a person's record and biographical data; 6) plastic surgery for changing a person's appearance; 7) issuance to a person of firearms and other special means of protection.

The Law on the State-Guaranteed Legal Aid [43], whereby the Council Directive of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (2002/8/EC) has been implemented, sets forth that the right to primary legal aid shall be enjoyed by all citizens of the Republic of Lithuania and the States of the EU as well as other persons permanently residing in the Republic of Lithuania or any other Member State of the EU. The right to get secondary legal aid, regardless of the property and income levels set by the Government to qualify for legal aid under this Law, shall also be enjoyed by

[42] Valstybės žinios, 1996, Nr. 20-520.

[43] *Ibid*., 2005, No. 18-572.

victims in cases of damage caused by crimes, including the cases where the issue of damage reparation is settled in criminal cases.

In Lithuania, the right to obtain compensation and the procedure of its implementation is regulated by the Law on the Compensation for Damage Inflicted by Crimes [44], whereby the Council Directive of 29 April 2004 relating to compensation to crime victims (2004/80/EC) has been implemented. This Law lays down the cases where the State shall compensate for material and/or non-material damage and provides for the procedure for such compensation. A violent crime is an act having elements of a semi-grave, grave or very grave crime covered by the PC, whereby a human being has been deliberately deprived of his life, major or minor health impairment has been inflicted upon him or the freedom of sexual determination or inviolability of an individual has been encroached. A victim is the citizen of the Republic of Lithuania or of any other Member State of the EU, another person permanently residing in the Republic of Lithuania or any other Member State of the EU, and in cases provided for in international agreements of the Republic of Lithuania, also any other person against whom a violent crime has been committed.

Article 28 of the CCP lays down that "the person who, as a result of a crime, sustains physical, property or moral damage shall be recognised as the victim. The person shall be recognised the victim by the resolution of the pre-trial investigation officer, prosecutor or by the ruling of the court. The victim and his representative shall be entitled to adduce evidence, make applications, make challenges, have access to the case file during the pre-trial investigation and at the court, take part in the hearing, appeal the actions of the pre-trial investigation officer, the prosecutor, the pre-trial judge and of the court, as well as appeal against the judgment or court order; and to address the court with the last statement. The victim shall testify. He shall take an oath and be held responsible for committing perjury" [45].

Article 53 of the CCP sets forth that "legal representatives of the suspect, the accused, the convicted person or the victim where they are minors or have been recognised incompetent following the established procedure, may participate in the proceedings and defend the interests of the persons they represent. Parents, adoptive parents, guardians, foster parents, guardians, caretakers or persons authorised by the institution taking care of a minor or incompetent suspect, the accused, convicted person or the victim may act as legal representatives. A representative, upon submitting a written or oral application, shall be permitted to participate in the proceedings subject to an appropriate decision of the pre-trial investigation officer, the prosecutor, and an order of the judge. A representative shall, as a rule, participate in the proceedings together with the person he is representing. By the resolution of the pre-trial investigation officer or the prosecutor and the ruling of the court, the legal representative may be refused participation in the proceedings as representative, if this would conflict the interests of the minor or incapable person. In this case the pre-trial investigation officer, the prosecutor or the court shall ensure that another legal representative is present in the proceedings and, where this is impossible, to

[44] *Ibid.*, No. 85-3140.

[45] Baudžiamojo proceso kodeksas, *op. cit.*, p. 49.

appoint any other person able to represent the interests of the minor or incapable person temporarily until the issue of a new statutory representative is solved" [46].

A legal representative shall be entitled to participate in the proceedings involving the person he represents and to help this person to exercise the rights granted to him by law. If the person represented is detained, the legal representative may visit him upon authorisation of the pre-trial investigation officer, the prosecutor or the court. The legal representative may be questioned during the proceedings as a witness, and may also be involved in the proceedings as a civil defendant. In these cases he shall have the rights and duties of a witness or civil defendant.

Article 55 of the CCP sets forth that "the representative of a victim, a civil plaintiff or civil defendant shall be the person who provides legal aid to these parties to a proceeding, protects their rights and lawful interests. The representative of a victim, civil plaintiff or civil defendant shall be a lawyer or a lawyer's assistant under the lawyer's instruction, and, upon authorisation of the pre-trial investigation officer, the prosecutor or the judge, any other person with a university degree in law, having power of attorney of a party to a proceeding to represent his interests. The manager or authorised employee of a legal person or an attorney may act as a representative of the legal entity" [47].

The representative of the victim, civil plaintiff or civil defendant shall be permitted to participate in the proceedings as of the moment the person is recognised the victim, civil plaintiff or civil defendant when the pre-trial investigation officer or the prosecutor adopts a resolution or the court passes a ruling. The victim, the civil plaintiff or the civil defendant may at any moment refuse the representative's services or chose another representative.

The representative of a victim, civil plaintiff or civil defendant shall have the same rights as the party to the proceedings he represents. The victim's representative shall have the right to take part in the victim's questioning and in all proceedings conducted at the request of the victim. The representative of the victim, civil plaintiff or civil defendant shall provide to the person represented legal aid, represent his rights and lawful interests; he appears before the pre-trial investigation officer, prosecutor, judge or court when summoned; follows the established procedure during the pre-trial investigation and the court hearing.

Articles 128 and 308 of the CCP provide for the right of the victim to be notified of the offender's release from custody or after serving the sentence. The prosecutor or the pre-trial investigation officer shall notify the victim about the detention of the suspect and find out whether the victim wishes to be informed about the future release of the suspect. It shall not be required to notify about the arrest of the suspect if the place of residence of the victim is unknown. If there are many victims, it shall be sufficient to inform the person (persons) representing their interests about the arrest of the suspect. A report of notification to the victim shall be drawn up. If the victim wishes to be notified of the future release of the suspect, the prosecutor or the pre-trial investigation officer shall draw up a statement to this effect. This statement shall be

[46] *Ibid.*, p. 60-61.
[47] *Ibid.*, p. 61-62.

sent by the prosecutor or the pre-trial investigation officer to the place of detention of the suspect. The suspect and his defence counsel shall have no access to the contents of this statement.

When an actual sentence of detention or imprisonment is imposed upon the convicted person, the presiding judge of the trial shall find out whether the victim wishes to be informed about the future release of the convicted person. If the victim did not appear at the trial hearing, this information shall be found out within five days after the pronouncement of the judgment. It shall not be required to ascertain that, if the place of residence of the victim is unknown. If there are many victims, it shall be sufficient to find out that information through the person (persons) representing their interests. If the victim wishes to be notified of the future release of the convicted person, the judge presiding over the trial shall draw up a statement to this effect. Once the judgment becomes enforceable, this statement, together with a copy of the judgment, shall be sent to the institution executing the sentence. The convicted person and his defence counsel shall have no access to the contents of this statement.

The Law on Support for Employment [48] attributes "victims of trafficking in human beings, who have completed psycho-social and/or vocational rehabilitation programmes" to the group of persons who qualify for additional support in the labour market. The group of persons receiving additional support in the labour market (including victims of trafficking in human beings shall be subject, in addition to general market support measures, to special measures, e.g. subsidised employment, implementation of a special employment support programme, etc.

In addition to the aforementioned legal measures relating to various aspects of protection of the rights of victims of trafficking in human beings, the Government, the Ministries of Justice, Social Security and Labour, Interior, Foreign Affairs and the Police Department have undertaken a number of measures and campaigns of organisational-informative nature to inform the public and its separate groups (e.g. NGOs, victims of violent crimes, etc.) about legal acts in force that grant individuals the right to legal aid; right to compensation for victims of violent crimes; legal status of such persons (i.e. to what institution to address their complaints, what are their rights and duties, etc.); as well as about State authorities and NGOs providing support and assistance to victims of violent crimes (including trafficking in human beings). Moreover, implementing the Programme of Legal Education of the Public, the Ministry of Justice has published specific publications on rights to legal aid and compensation for victims of violent crimes and, together with the Police Department, has distributed them in territorial police institutions that are the first to have contacts with victims.

It should also be noted that the issues of trafficking in human beings and work (assistance and support) with victims of these crimes have been included into training programmes of judges and their assistants (Ministry of Justice and the Council of Courts), prosecutors and their assistants (Office of the Prosecutor General), police officers (Police Department).

[48] Valstybės žinios, 2006, No. 73-2762.

F. General assessment

In the opinion of the author of this article, in principle, all the provisions of the FD have been transposed in the national law without any important formal shortcomings. The author bases his opinion on the assumption that the FD is compulsory in terms of results that must be achieved within the time limit set by the FD, however, it leaves the right to a Member State to choose the form and manner of its implementation.

However, one partial inconformity of the national law to the requirements of the FD could be noted, concerning the legal aid to victims of trafficking in human beings. The Law on the State-Guaranteed Legal Aid [49] does not single out victims of trafficking in human beings as a separate group of persons qualifying for free legal aid. Thus, willing to get free legal aid, such victim of trafficking in human beings shall prove that he/she does not have sufficient property and funds for legal aid. As practice shows, this partial inconsistency of the national law does not cause any serious problems, because, by their property status, most of the victims of trafficking in human beings qualify for free legal aid. Moreover, this partial inconformity is compensated by the activities of NGOs (for example, Lithuanian Caritas, etc.) that provide legal, psychological and material assistance to victims of trafficking in human beings.

It should be noted that even though Lithuania has fully implemented the requirements of FD, legal literature (particularly in criminal law) criticises the definition and elements of trafficking in human beings due to the complicated trinomial structure of its definition that consists of alternative acts, alternative ways of taking control over the person's will and alternative criminal purposes, as well as due to the use of English terms that are difficult to translate into Lithuanian [50].

Moreover, in the opinion of the author of this article, it is not sufficiently clear (it is to be noted that Lithuania was not involved in the drafting process of this FD) why the FD does not require to impose criminal liability only for the sale or transfer, or purchasing irrespective of the intention of the person acquiring such human being and it is also not sufficiently clear why the criminal purposes of acquiring a human being do not include the intention to acquire an organ, tissue or cells of the victim.

5. Practical application of the norm

The following table shows statistical data about practical application of the Lithuanian criminal law on trafficking in human beings during the period 1999-2004.

In 2005, 32 crimes of trafficking in human beings were registered and 9 cases were submitted to court; in 2006, 29 crimes of trafficking in human beings were registered and 6 criminal cases were submitted to court. In 2005 and during the first six months of 2006, 23 persons were sentenced for trafficking in human beings; the judgements have become enforceable in respect of 19 of them. 42 per cent of the accused persons have been sentenced for trafficking in human beings (Article 147), other acts have been redefined into earning a profit from prostitution of other persons (Article 307),

[49] *Ibid.*, 2005, No. 18-572.

[50] A. Abramavičius, D. Mickevičius, G. Švedas, *op. cit.*, p. 114-115; *Prekybos žmonėmis tyrimo..., op. cit.,* p. 43-47.

organising travel of citizens of the Republic of Lithuania to stay illegally or leave them without assistance abroad (Article 293).

Year	Cases in total	Cases referred to the court	Cases adjudicated by the court	Dropped cases	Cases with suspended investigation	Cases with discontinued investigation	Persons supervised by law enforcement authorities	Suspects	Victims known to law enforcement authorities	Victims	Convicted persons
1999	3	1	1		2		2	2	2		2
2000	5	3	3				7	3	2		3
2001	19	6	3	2	9	2	52	18	37	9	7
2002	17	10	3	1	5		58	26	23	16	6
2003	18	5	2	1			40	33	28	7	2
2004	22	13	4	–	3	1	41	25	31	23	14
Total	84	38	16	4	19	2	200	107	123	55	34

During the period 1999-2004, the courts of the Republic of Lithuania have adjudicated 16 criminal cases where persons were accused of trafficking in human beings. The analysis of these cases enables to presume that the facts of crime in most cases raised no doubts as to their legal qualification as trafficking in human beings. For example, the Supreme Court of Lithuania rejected an appeal in the criminal case 1A-2004/2005 and upheld the judgment whereby T. Č. was held guilty and sentenced to imprisonment of 4 years and 7 months for having acquired a minor for LTL 800 from a person unidentified by the investigation near Plungė town in 2002, for having organised and earned profit from her prostitution. In another criminal case 1A-428/2005, the Supreme Court of Lithuania rejected an appeal in the criminal case and upheld the judgment whereby G. S. and O. E. were held guilty and sentenced to 4 years and 6 months of imprisonment for having acquired J. P. from persons unidentified by the pre-trial investigation and, with the intention of gaining material benefit from her prostitution and knowing that her liberty would be restricted, having alienated her for LTL 600 to H. L. who had promised to hand over every month a certain amount of money obtained from J.P's prostitution to G. S. and O. E.

It should be noted that a part of the crimes of trafficking in human beings were disclosed by undercover police officers (agents): for example, in the criminal case 2K-1005/2005 the Supreme Court of Lithuania rejected the appeal and upheld the judgment whereby N. S., A. B. and A. L. were held guilty and sentenced to 1 year and 6 months of imprisonment for having attempted to purchase from the undercover police officer (agent) 2 girls for EUR 200 and LTL 50, by acting as a group with the intention of deriving pecuniary gain and for having sought to transport them (with their consent) to sell them abroad for prostitution business. In another criminal case 1A-353/2005, the Supreme Court of Lithuania dismissed the appeal and upheld the judgment whereby A. B. was held guilty and sentenced to 2 years of imprisonment for having purchased another person (undercover police officer) and attempted to

transport her (with her consent) to England for prostitution business by acting as a group together with S. Ž. with the intention of gaining material benefit.

The attention should be drawn to two more aspects of the majority of criminal cases heard by courts regarding trafficking in human beings.

– Firstly, the absolute majority of offenders were held guilty and sentenced not only for trafficking in human beings, but also for earning profit from the prostitution of another person.
– Secondly, most of the victims of trafficking in human beings would give their consent to be transported abroad to be engaged in prostitution (for example, the victim L. V., bought for EUR 150, was transported to Kaunas and was put into the bus, with LTL 50 for travelling expenses, to travel by herself to Belgium).

The practical application of the new elements of the crime of trafficking in human beings, provided for in the PC, did in the beginning pose certain problems in the pre-trial investigation and the practice of courts, because, as it has already been mentioned, the definition of this crime is based on a complicated trinomial structure consisting of alternative acts, alternative ways of control over the person and alternative criminal purposes. Moreover, in order to translate the English terms which appear in the FD to describe the features of trafficking in human beings and which are difficult to translate into Lithuanian (for example, "recruitment", "harbouring and subsequent reception of a person", "an abuse of authority or of a position of vulnerability of the person", etc.), Lithuanian words, which do not belong to the usual vocabulary of internal criminal law, have been used.

The problems of pre-trial investigation of trafficking in human beings have been disclosed in the review of the practice of pre-trial investigation of trafficking in human beings carried out by the Office of the Prosecutor General (27 April 2007, No. 7.7-9) [51] where the following reasons for discontinuing the pre-trial investigation or redefining trafficking in human beings as another criminal act have been identified: 1) impossibility to prove *mens rea*; 2) impossibility to prove that the offenders have restricted the liberty of the victim; 3) impossibility to prove a conspiracy regarding trafficking in human beings with persons acting abroad. Without information on the extent of the conspiracy it is impossible to ascertain whether the persons who meet the victims abroad and have control over their liberty do not exceed the ambit of the agreement, because under the criminal law of Lithuania accomplices are not liable for the perpetrator's excess.

Probably linked to the abovementioned difficulties, some typical mistakes are to be noticed in the judicial practice. They are illustrated by the following extract from the cassation ruling passed by the Supreme Court of Lithuania in 2006. The Supreme Court of Lithuania, having examined the cassation appeal in the criminal case No. 2K-332/2006, has noted the mistakes of the courts of lower instance in qualifying the act under Article 147 of the PC :

[51] *Prekybos žmonėmis ikiteisminio tyrimo praktikos apibendrinimas. – Prekybos žmonėmis nusikaltimų tyrimo metodika*, Vilnius, TMO, 2007, p. 77-86.

> "Trafficking in human beings is one of the crimes against the freedom of the individual. The act may be qualified as the crime covered by Article 147 of the PC only upon establishing that the freedom of the individual has been violated. When qualifying the act of the convicted person in the case in question under Article 147 of the PC, it must be established that the personal freedom of the victim E. K. has been restrained by taking control over her will at least by one of the ways of having control over one's will as specified in the disposition of Article 147 of the PC (wording of 23 June 2005). Even though the act in question was committed when the wording of 26 September 2000 of Article 147 of the PC was in force, in this case the wording of Article 147 currently in force must be followed, because, after additional objective features were introduced into the elements of the crime by the amendments and supplements made to the PC on 23 June 2005, the possibilities of qualifying the acts under Article 147 of the PC have been narrowed and in this regard the new wording of Article 147 of the PC can be considered to be the law mitigating liability".

Without identifying that the freedom has been restricted, the act cannot be qualified under Article 147 of the PC. In such case, only the issue of criminal liability for the commission of one of the acts provided for in Article 307 of the PC may be considered. The court of appeal grounds its conclusion that, had the transaction been successful, the traffickers would have been able to have complete control over E. K. on the "case-law of equivalent cases". Such manner of substantiation is not allowed in criminal litigations. The features of a criminal act in each case must be proved by the data collected in the case in question. Information on what in some cases happens to women who engage in prostitution abroad is an insufficient ground to conclude that the will of E. K. has been under control in the case under consideration" [52].

6. Control of effectiveness and efficiency

First of all it should be borne in mind that Lithuania did not participate in the process of drafting this FD; however, as a EU Member State, it had to implement it in its national law. Assessing whether this FD has realized its objectives in Lithuania, the most general answer should be positive in the opinion of the author of this article. A particular emphasis should be placed on the significance of this FD for the prevention of trafficking in human beings and international co-operation in criminal matters, since practical changes can be identified in these spheres. In this regard, the following examples can be mentioned:

1) information campaigns aimed at the prevention of trafficking of women for prostitution abroad and at public assistance and support for the victims of trafficking in human beings are changing the attitude not only of the public, but also of public servants (policemen, prosecutors, judges, etc.) towards the phenomenon of trafficking in human beings;
2) the co-operation between and among State authorities and NGOs working in the area of support for victims of trafficking in human beings has intensified and their mutual understanding has increased as well;

[52] Ruling of the Supreme Court of Lithuania in the criminal case No. 2K-332/2006.

3) the development of the system of assistance and support for victims of trafficking in human beings has been commenced and started functioning to some extent;
4) the Division of Investigation of Trafficking in Human Beings has been formed at the Police Department and began its activities on 1 January 2006; the Division analyses the situation of trafficking in human beings in Lithuania and specialises in the pre-trial investigation of these crimes; within the system of prosecution, specialisation of prosecutors leading pre-trial investigation of trafficking in human beings and sustaining changes in the cases of this category in courts have been introduced;
5) international legal co-operation of police officers and prosecutors with individual States (e.g., Great Britain) in matters of trafficking in human beings has improved and has come more intensive and effective, etc.

The implementation of the FD in Lithuania has not brought any negative effects either on the rights of defence or on the basic principles of criminal law. In a certain sense, it is even the opposite – the implementation of the FD and, especially the new definition of the elements of the crime of trafficking in human beings (even though rather complicated) has created preconditions to ensure the rights of defence in a more appropriate way, since the elements of trafficking in human beings are laid down in a more specific, precise and formalised manner.

7. Reception and perception

A. Practitioners

The author of this article has interviewed 2 prosecutors (from the Office of the Prosecutor General and from the Šiauliai County Prosecutor's Office) specialising in the pre-trial investigation of cases of trafficking in human beings and prosecuting before the court, 2 judges hearing criminal cases (from the Court of Appeal of Lithuania and the Vilnius County Court) as well as two academics interested in trafficking in human beings. The majority of respondents (5) assessed FD and the transposing legal act positively. On the other hand, 4 respondents noted that even though it was easier to work under the old PC wording of trafficking in human beings, the new wording of the PC, which transposes the FD requirements, ensures better human rights and justice.

Implementing the activity priorities of the prosecution of Lithuania 2005-2006 approved by the Resolution of the *Seimas* No. X-265 "On the Performance Report and Priorities for 2005-2006 of the Prosecution of the Republic of Lithuania" of 21 June 2005 [53], the Office of the Prosecutor General has carried out a review of the practice of pre-trial investigation concerning specific criminal acts, including also trafficking in human beings (27 April 2007, No. 7.7.-9) [54]. The review points out the deficiencies and mistakes of the pre-trial investigation of cases of trafficking in human beings and provides suggestions to improve the quality of pre-trial investigation. The following suggestions should be mentioned: 1) to seek good quality and consistent questioning of victims or witnesses and to make use of the possibility of having them questioned

[53] Valstybės žinios, 2005, No. 80-2891.
[54] *Prekybos žmonėmis ikiteisminio tyrimo praktikos apibendrinimas..., op. cit.,* p. 85-86.

by the pre-trial judge; 2) to seek to have victims questioned only once during pre-trial investigation; 3) after having assessed the relations of the victim with the offender, to consider the right of the victims to non-disclosure of identity and protection; 4) to strengthen co-operation in pre-trial investigation with NGOs that provide material, legal, psychological and other kinds of assistance to the victims of trafficking in human beings; etc.

The knowledge of the FD and the transposing national legal act of the prosecutors, judges and academics interviewed can be assessed as good and professional. On the other hand, this knowledge relates only to those aspects of the FD and the transposing national legal act that pertain to criminal law and criminal procedure. However, the knowledge of both judges and prosecutors about the FD and the transposing national legal acts regarding assistance and support for victims of trafficking in human beings is poor.

The training and professional development programmes of judges and prosecutors, assistants of judges and prosecutors, as well as examination programmes contain topics pertaining to the requirements of EU legislation [55].

Quotations from EU legal acts and other international legal acts (unless they are directly applicable legal acts, such as the 1957 Convention on Extradition) are not popular in Lithuanian judicial decisions. Judicial decisions most often quote the FD 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. The Court of Appeal of Lithuania has referred to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Convention against transnational organised crime in one of its rulings pronounced in the criminal case No. 1A-428/2005 in 2005. The Chamber of the Court of Appeal ruled that "even though the Law No. X-272 of 23 June 2005, which came into force from 30 June 2005, has amended Article 147 of the PC, the act has not been decriminalised; therefore, the Chamber holds that the appellants have been sentenced for trafficking in human beings groundlessly. The provision of Article 147 of the PC in force earlier was very concise. Trafficking in human beings covered the sale, purchase or any other transfer, acquisition of a human for the purpose of gaining material or any other personal benefit. The Law currently in force is much more comprehensive, it lists the whole range of actions making up the *actus reus* of trafficking in human beings (…). At the same time, the Chamber notes that the criminal acts of the appellants fall within the interpretation of the concept "trafficking in human beings" contained in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Convention against transnational organised crime, which was ratified on 22 April 2003" [56].

B. Politicians

When the approximation of Lithuanian criminal laws to the requirements of the FD was taking place, Lithuania was not a Member State of the EU yet; therefore,

[55] For example, "Implementation of legislation of the EU in the criminal law and criminal procedure of Lithuania" with 4 academic hours allocated, "International legal assistance in criminal matters" with 2 academic hours allocated, etc.

[56] Ruling of the Court of Appeal of Lithuania in the criminal case No. 1A-428/2005.

special knowledge of politicians (and, in particular, parliamentarians) about individual pieces of EU legislation was not extensive. As the approximation of the Lithuanian legal acts with the EU *acquis* was a direct competence of the Government, major discussions on the implementation of the above-mentioned FD and the contents of the internal law to amend took place at its level – between the Ministries of Justice and Interior. The Ministry of Interior maintained the position that the constituent elements of trafficking in human beings had to be literally transposed from Article 1 of the FD into the draft laws amending and supplementing the PC. On the contrary, in the opinion of the Ministry of Justice, the *corpus delicti* of the crime of trafficking in human beings in the PC in force did fully implement the requirements of FD and it did not favour its amendment. The main arguments sustaining the position of the Ministry of Justice were the following: the features of trafficking in human beings in the FD are formulated in a complicated manner by using a trinomial feature structure consisting of alternative acts, alternative ways of control over the person and alternative criminal purposes; the English terms describing the features of the offence in the FD do not have precise equivalents in Lithuanian language etc. Nevertheless, after several meetings of the representatives of the Ministry of Interior and of the Ministry of Justice, it was decided to follow the position of the first one and to transpose the elements of the crime of trafficking in human beings from Article 1 of the FD into the draft law amending and supplementing the PC.

No comment and suggestion regarding the elements of trafficking in human beings were made when considering the Law amending and supplementing the PC at the sitting of the Government nor in the Committees for Law and Enforcement and for European Matters of the *Seimas*.

Carrying out the control on the Prosecutor General's and his subordinate prosecutors' activities, the *Seimas* approved the priorities of the Prosecution of Lithuania for 2005-2006 concerning specific activities, among which pre-trial investigation of trafficking in human beings [57].

On the other hand, the Government of Lithuania pays considerable attention to the problem of trafficking in human beings. On 17 January 2002, the Government approved by its Resolution No. 62 the Programme of Control and Prevention of Trafficking in Human Beings and Prostitution 2002-2004 [58], which was the first programme of this type in the region of the Baltic Sea States. The Resolution No. 558 of the Government of 19 May 2005 approved the Programme for the Prevention and Control of Trafficking in Human Beings for 2005-2008 [59], which in fact was the continuation of the first programme. The objectives of this Programme are: 1) to determine the scope of trafficking in human beings and prostitution in Lithuania, the dynamics and trends of this phenomenon; 2) to create an information system of analysis which has the purpose of storing and analysing information about trafficking in human beings and related processes; 3) to develop and implement a national system

---

[57] See Resolution No. X-265 "On the Performance Report and Priorities for 2005-2006 of the Prosecution of the Republic of Lithuania" of 21 June 2005, Valstybės žinios, 2005, No. 80-2891.

[58] Valstybės žinios, 2002, No. 6-231.

[59] *Ibid*., 2005, No. 65-2333.

of monitoring trafficking in human beings and prostitution, to develop and introduce a uniform system of data collection, to build a common (depersonalised) data base about the victims of trafficking in human beings; 4) to develop and implement a system of early prevention measures which would not allow the involvement of new persons in trafficking in human beings and prostitution; 5) to develop and introduce a system of measures reducing the demand for prostitution; 6) to build a system of social assistance to victims of trafficking in human beings, in particular focusing on protective and social issues as well as on reintegration into society; 7) to develop cooperation among public (municipal), non-governmental and international organisations with a view to fighting trafficking in human beings; 8) to strengthen Lithuania's specialised police units combating trafficking in human beings; 9) to ensure effective cooperation between regional and international organisations with a view to combating trafficking in human beings.

This Programme envisages implementing more than 30 measures related to the accumulation and analysis of information, development of legal regulation, education and training, improvement of the activities of law enforcement institutions, international co-operation in the area of control and prevention of trafficking in human beings.

C. Media and written press

To carry out this part of the research, two information search websites, "Delfi paieška" and "Google", were chosen; the terms "trafficking in human beings" were used to search. "Delfi paieška" displayed 58,644 units found and "Google", 455. For a more detailed analysis, 455 results given by "Google" search have been chosen, namely: a) 100 articles on various aspects of trafficking in human beings; b) 18 information notices on conferences on the issues of trafficking in human beings; c) 9 information notices on various projects carried out by NGOs for the prevention of trafficking in human beings, assistance and support for the victims of these crimes, etc.; d) 20 articles describing, in particular, crimes of trafficking in human beings committed in Lithuania where (as offenders or victims) Lithuanian citizens were involved or describing the judicial proceedings or judgments of such cases; e) 5 information notices explaining the rules of criminal law which define the elements and features of the crime of trafficking in human beings; f) 14 interviews with officials of different levels (police officers, prosecutors, representatives of the Ministries of Justice or of Interior, parliamentarians) on the issues of trafficking in human beings or specific criminal proceedings of trafficking in human beings.

No information was found on the approximation of the provisions of the PC with the requirements of the FD.

From the expert's point of view, the assessment of objectivity of the information contained in the media and written press singles out several trends: firstly, in the TV and radio programmes or broadcasts in which politicians, prosecutors, police officers, other lawyers and NGO representatives participated, the topic of trafficking in human beings, the legal requirements and the problematic issues related to their application, etc. were presented and discussed with sufficient objectivity. Secondly, TV and radio news as well as the written press, as a rule, provide only information on crimes

of trafficking in human beings, their pre-trial investigation, trials and judgments (especially emphasizing the imposed sentences), without giving any explanation, discussions, etc.

D. Civil society

The NGOs working in Lithuania in the area of assistance and support to the victims of trafficking in human beings pay mainly attention not so much to the aspects of criminal prosecution, but rather to the attitude of the State towards the victims of trafficking in human beings, the provision of assistance and support to these victims, the co-operation of State authorities and NGOs, etc. As it has been mentioned, the last years show a remarkable improvement in the mutual co-operation and understanding of public authorities and NGOs, in particular in the spheres of provision of assistance and support to victims of trafficking in human beings, prevention of trafficking in human beings, etc.

There are 25 NGOs in Lithuania providing or ready to provide assistance to victims of prostitution and trafficking in human beings. The assistance of NGOs to victims of trafficking in human beings could be classified into the following groups: a) providing lodging, ensuring security; b) providing social-psychological assistance; c) providing medical assistance; d) providing assistance during legal procedures. In support of the activities of these NGOs, the Government finances through the budget of the Lithuanian State 28 NGOs' projects (557,000 *litas* were allocated to finance these projects in 2002-2004). Two information campaigns were held, a special informative project on the fight against trafficking in human beings and other activities were implemented. A Programme of Psychological Rehabilitation, Vocational Guidance and Employment (in 6 municipalities) for Victims of Trafficking in Human Beings for 2003-2004 has been developed and is being implemented. The latter Programme was approved by the Order No. A1-111 of the Minister of Social Security and Labour on 1 July 2003; its objective is to create conditions for victims of trafficking in human beings and of prostitution to return to the labour market, to encourage them to work, to provide and develop their professional and general skills. A Preventive Programme of Education on Trafficking in Human Beings and Prostitution for 2003-2004 has been developed and is being implemented. This Programme was approved by the Order No. ISAK-1699 of the Minister of Science and Education on 28 November 2003 [60]; its objective is to develop and implement a system of educational measures, firstly, in schools in order to prevent trafficking in human beings and prostitution. Continuous special training for social workers, pedagogues, law enforcement officials is organised. The system of protection of witnesses and victims of trafficking in human beings from criminal effect has been developed. Co-operation with embassies and consular posts of foreign States has intensified in solving the problems of victims of trafficking in human beings abroad.

---

[60] *Ibid*., 2004, No. 13-389.

E. Legal litterature

Trafficking in human being is a rather new topic in the theory of Lithuanian criminal law. Thus, there are not many scientific articles in the legal literature. Moreover, bearing in mind the limited case-law related to this crime, scientific articles mostly focus on the theoretical aspects of this crime, such as the definition of trafficking in human being [61], compatibility issues of definitions of trafficking in human beings and sale or purchase of child in Lithuanian criminal law to international treaties and European Union legislation [62], methodology of investigating trafficking in human beings [63], etc.

8. Conclusions

1. All the provisions of the FD have been transposed in the Lithuanian law without any important formal shortcomings. The FD and the national legal acts implementing it have simplified, on the one hand, cooperation among Lithuanian public institutions or between national and foreign public institutions (as law enforcement institutions, police and prosecution) in investigating criminal cases regarding trafficking in human beings and, on the other hand, cooperation between public institutions and NGOs in the prevention of trafficking in human beings and in the provision of assistance and support to the victims of trafficking in human beings.

2. A clear-cut answer concerning the impact of the FD on the strengthening of international legal co-operation is difficult to give at present, because, as the experience of international co-operation of Lithuania shows, the execution of requests takes a long time and responses from some Member States (the Netherlands, Spain, etc.) were received (often incomplete) only after a few additional reminders about requests for legal assistance. On the other hand, the law enforcement officials of Lithuania and Great Britain have completed one successful joint investigation concerning trafficking in human beings, which was presented as a successful example of co-operation at the Council of Ministers of Justice and Interior in Newcastle (Great Britain). This example shows the tendency of strengthening international co-operation in criminal matters between competent authorities. However, it has not yet become an effective and regular system.

3. By laying down uniform and mandatory features of trafficking in human beings, the FD simplifies the control of the double criminality requirement, which is of particular significance to the Lithuanian criminal law and criminal procedure (especially, for international legal co-operation in criminal matters). The FD has only created pre-

[61] D. Bolzanas, A. Drakšienė, “Prekybos žmonėmis samprata”, *Teisė*, 53, 2004; O. Fedosiuk, “Prekyba žmonėmis kaip nusikaltimas žmogaus laisvei”, *Jurisprudencija*, 45/37, 2003; Id., “Prekyba žmonėmis baudžiamojoje teisėje ir teismų praktikoje”, *Teisė*, 54, 2005.

[62] A. Abramavičius, D. Mickevičius, G. Švedas, *op. cit.*; D. Mickevičius, “Kai kurie prekybos žmonėmis ir vaiko pirkimo arba pardavimo sampratų Lietuvos Respublikos BK suderinamumo su Lietuvos Respublikos tarptautinėmis sutartimis ir ES teisės aktais aspektai”, *Teisė*, 54, 2005.

[63] *Prekybos žmonėmis tyrimo..., op. cit.; Prekybos žmonėmis nusikaltimų tyrimo metodika (mokymo priemonė)*, Vilnius, TMO, 2007.

conditions for the strengthening of mutual trust in the field. Whereas mutual trust is (and may be) strengthened only by joint investigations in the cases of trafficking in human beings conducted by officials of law enforcement institutions of several States (in particular, police officers and prosecutors).

4. The implementation of the FD and its transposing national text and other measures have improved the prevention and control of trafficking in human beings in Lithuania and thereby reduced the number of victims of trafficking in human beings; they have allowed to start creating a system of support and assistance to these victims and improved the international legal co-operation in the criminal proceedings of trafficking in human beings of the Member States, etc. All this has undoubtedly increased the security of people (in particular, the security of women and children) both in Lithuania and in the EU.

5. The FD and its transposing text have had a direct impact on the level of protection of human rights (especially for the victims of the trafficking in human beings). Through the implementation of this FD, Lithuania has taken measures which allowed not only to duly legally regulate the rights of the victims of trafficking in human beings, but also to start creating a system of support and assistance to these victims, based on the co-operation of State authorities and NGOs. Another important aspect is the changing attitude of the public and officials of law enforcement institutions to the victims of the trafficking in human beings. It should be noted that for a rather long time adult women who agreed to be brought away for prostitution voluntarily were not considered as victims by a certain part of the public and officials of law enforcement institutions.

6. The general impact of the FD and the national transposing text in Lithuania is related to the legitimisation of a consistent and completed system of prevention and control of trafficking in human beings. Before implementing the FD in Lithuania, the focus was on criminal prosecution and on sentencing the offender, whereas the prevention of this phenomenon and especially assistance and support to the victims of trafficking in human beings was treated as if it was outside the scope of the State's interests.

Trafficking in human beings in the Netherlands

Laura Bosch

1. Introduction

On the first of July 2002, a monument of remembrance was inaugurated by Her Royal Highness Queen Beatrix dedicated to the slavery history of the Netherlands. This monument would suggest that slavery has become a relic of the past, but sadly enough, this is not the case. The Dutch history of slavery has not ended with the abolishment of slavery in 1863 because so-called modern forms of slavery still persist today.

As part of the European Union the Netherlands have taken action to end these new forms of slavery. The Framework Decision of 19 December 2002 on combating trafficking in human beings and its implementation have meant a significant change of our Dutch legislation on human trafficking. The FD has however not been the first effort to create legal measures to end and prevent the practice of human trafficking.

A. International legislation

Legislation has been adopted earlier in time to stop and prevent slavery or human trafficking as it is called currently. The first international legal instrument aimed at combating trafficking in women signed by the Netherlands is the 1904 International Agreement for the Suppression of the White Slave Trade [1]. Approval of the Treaty was announced on 31 December 1906 [2]. Other important international agreements

---

[1] Besluit van den 28sten maart 1907, bevelende de bekendmaking van de te Parijs op 18 mei 1904 ondertekende International Regeling tot bestrijding van den zoogenaamden handel in vrouwen en meisjes. Bekrachtiging (akte van) nedergelegd op 14 januari 1907, *Stb*, 1907,79.

[2] Wet van den 31sten December 1906, houdende goedkeuring van de op 18 Mei 1904 te Parijs namens Nederland, Duitschland, België, Denemarken, Spanje, Frankrijk, Groot-Brittannië

are the International Agreement for the Suppression of the White Slave Traffic, also known as the Treaty of Paris, of 4 May 1910 [3]. For the implementation of the Treaty a new law was enacted on 20 May 1911 [4] that criminalised the trafficking of women [5]. The League of Nations drafted two complementing conventions: the International Convention to Suppress the Traffic in Women and Children [6] and the International Convention for the Suppression of the Traffic in Women of Full Age [7]. Both Conventions of 1921 and 1933 and the aforementioned Treaty of 1910 were transposed into treaties within the United Nations framework by the Protocol of New York of 12 November 1947 [8]. The UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 2 December 1949

---

en Ierland, Italië, Portugal, Rusland, Zweden en Noorwegen en Zwitserland, onderteekende Regeling met bijbehoorend Proces-verbaal van onderteekening, strekkende tot bestrijding van den zoogenaamden handel in vrouwen en meisjes, *Stb*, 1906, 369.

[3] It was signed by the Netherlands on 30 March 1912 and ratified on the 27th of November 1912. Wet van den 30sten Maart 1912, houdende goedkeuring van het op 4 Mei 1910 te Parijs namens, Nederland, Duitscland, Oostenrijk, Hongarije, België, Brazilië, Denemarken, Spanje, Frankrijk, Groot-Brittannië en Ierland, Italië, Portugal, Rusland en Zweden onderteekend verdrag met bijbehoorend slotprotokol tot bestrijding van den zoogenaamden handel in vrouwen en meisjes, *Stb*, 1912, 133. Besluit van den 27sten November 1912, tot bekendmaking in het Staatsblad van het op 4 Mei 1910 te Parijs onderteekend verdrag met bijbehoorend Slotprotokol, tot bestrijding van den zoogenaamden handel in vrouwen en meisjes, *Stb*, 1912, 355

[4] Wet van den 20sten Mei 1911, tot bestrijding van den zedeloosheid, *Stb*, 1911, 130.

[5] Article 250*ter* (old) DCC.

[6] The International Convention to Suppress the Traffic in Women and Children of 30 September 1921 was signed by the Netherlands on 17 July 1923. It was ratified on 19 September 1923 and came into force on the same day. Implementation legislation to amend the law was introduced by the Act of 13 May 1927. Wet van den 17den Juli 1923, tot goedkeuring van het verdrag ter bestrijding van den handel in vrouwen en kinderen, op 30 September 1921 ter onderteekening nedergelegd op het Secretariaat-Generaal van den Volkenbond, *Stb*, 1923, 359. Besluit van den 22 november 1923, bepalende de bekendmaking in het Staatsblad van het Verdrag ter bestrijding van den handel in vrouwen en kinderen, op 30 September 1921 ter onderteekening nedergelegd op het Secretariaat-Generaal van den Volkenbond, *Stb*, 1923, 526. Wet van den 13den Mei 1927, houdende wijziging van het Wetboek van Strafrecht en van de Uitleveringswet in verband met de Verdragen ter bestrijding van den handel in vrouwen en kinderen en ter beteugeling van de verspreiding van en den handel in ontuchtige uitgaven, *Stb*, 1927, 156.

[7] On 11 October 1933 the International Convention for the Suppression of the Traffic in Women of Full Age was signed. The Netherlands ratified the Convention on 20 September 1935, and it came into force on 19 November 1935. Besluit van den 9sten October 1935, bepalende de bekendmaking in het Staatsblad van het Internationaal verdrag van Genève van 11 October 1933 nopens de bestrijding van den handel in meerderjarige vrouwen, *Stb*, 1935, 598.

[8] Besluit van 2 Mei 1949, bepalende de bekendmaking in het Staatsblad van de op 12 November 1947 te New York ondertekende Protocollen respectievelijk tot wijziging van de handel in vrouwen en kinderen, gesloten te Genève op 30 September 1921 en van het Verdrag nopens de bestrijding van de handel in meerderjarige vrouwen, gesloten te Genève op 11 October 1933, alsmede tot wijziging van het Verdrag tot het tegengaan van de verspreiding van en de handel in ontuchtige uitgaven, gesloten te Genève op 12 September 1923, *Stb*, 1949, J188.

was not signed by the Netherlands. The abolitionist view represented in the convention was considered to be in conflict with the tolerance policy of the Netherlands regarding voluntary prostitution, the policy which was practiced at the time [9].

The Netherlands are also party to the UN Convention of 1979 on the Elimination of All Forms of Discrimination against Women (CEDAW) [10]. Article 6 of this Treaty makes it compulsory to take all necessary measures to combat all forms of exploitation of women, including legislative measures.

More recent legislation on human trafficking can be found in the Protocols to the UN Convention against Transnational Organized Crime of 15 November 2000 [11]. Two Protocols, the so called Palermo protocols, supplementing the UN Convention against transnational organised crime are of relevance, the UN Protocol to prevent, suppress and punish trafficking in persons, especially Women and Children [12], and the Protocol against the Smuggling of Migrants by Land, Sea and Air [13].

Another important UN Protocol is the Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography of 25 May 2000 [14].

From a European perspective one should mention the Council of Europe Convention on Action against Trafficking in Human Beings of May 2005 [15].

Within the European Union, and besides the FD of 19 July 2002 on combating trafficking in human beings, which will be the object of further developments below, the following instruments have been of particular importance: the Joint action (97/154/JHA) of 24 February 1997 concerning action to combat trafficking in human beings

---

[9] Eerste rapportage van de Nationaal Rapporteur Mensenhandel, Bureau NRM, den Haag, maart 2002, p. 19.

[10] Rijkswet van 3 juli 1991, goedkeuring van het Verdrag inzake de uitbanning van alle vormen van discriminatie van vrouwen (New York, 18 december 1979), *Stb*, 1991, 355.

[11] The UN Convention against Transnational Organized Crime was signed by the Netherlands on the 12th of November 2000, and ratified on 26 May 2004. Verdrag tegen transnationale georganiseerde misdaad; New York, 15 november 2000, *Trb*, No. 68, 2001.

[12] This protocol was signed by the Netherlands on 12 December 2000 and ratified on the 27th of July 2005. The Protocol came into force on 26 August 2005. Protocol inzake de voorkoming, bestrijding en bestraffing van mensenhandel, in het bijzonder vrouwenhandel en kinderhandel, tot aanvulling van het Verdrag van de Verenigde Naties tegen grensoverschrijdende georganiseerde misdaad; New York, 15 november 2000, *Trb*, No. 236, 2005.

[13] The Protocol against the Smuggling of Migrants by Land, Sea and Air of 28 November 2000 was signed on 12 December 2000. It was ratified by the Netherlands on 27 July 2005. Protocol tegen de smokkel van migranten over land, over zee en door de lucht, tot aanvulling van het Verdrag van de Verenigde Naties tegen grensoverschrijdende georganiseerde misdaad; New York, 15 november 2000, *Trb*, No. 237, 2005.

[14] It was signed by the Netherlands on 7 September 2000 and ratified on 23 Augustus 2005. It came into force on the 23rd of September 2005. Facultatief Protocol inzake de verkoop van kinderen, kinderprostitutie en kinderpornografie bij het Verdrag inzake de rechten van het kind; New York, 25 mei 2000, *Trb*, No. 250, 2006 (*Trb*, No. 63 and 130, 2001).

[15] It was signed by the Netherlands on 17 November 2005 but has not yet been ratified. Verdrag van de Raad van Europa inzake de bestrijding van mensenhandel; Warschau, 16 mei 2005, *Trb*, No. 99, 2006.

and sexual exploitation of children [16] and also the FD of 15 March 2001 (2001/220/JHA) on the standing of victims in criminal proceedings. Initially the Netherlands held the opinion that the already existing policy led to compliance with the requirements of the 2001 FD [17]. However, a rapport of the European Commission of 16 February 2004 took a different view. New legislation has been drafted by the Government to reinforce the position of victims in criminal proceedings [18]. The FD of 22 December 2003 (2004/68/JHA) on combating the sexual exploitation of children and child pornography led to new legislation as well.

Measures that address human trafficking are also part of European Union instruments that are primarily focussed on migration, such as: Council Directive (2002/90/EC) of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, FD of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, Directive of April 2004 (2004/81/EC) 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 [19], and Directive of April 2004 (2004/81/EC) 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 [20].

As Member State of the European Community, the Netherlands have also signed several Stabilisation and Association agreements to establish legal cooperation with third States, which include aspects related to the fight against human trafficking [21].

B. Dutch penal law

These international agreements and treaties have led to the current situation where trafficking in human beings is penalized in Article 273f Dutch Criminal Code (hereafter DCC). There is also a provision, Article 197a, penalizing smuggling of human beings. The difference between the two offences is sometimes difficult to discern. In short, smuggling in human beings means aiding to illegal immigration, and human trafficking is forcing human beings to make themselves available to perform

[16] *OJ*, No. L 63, 4 March 1997, p. 2.

[17] Tweede Kamer, vergaderjaar 2001-2002, 27 213, No. 5.

[18] Tweede Kamer, vergaderjaar 2004-2005, 30 143.

[19] These last three European instruments were together implemented on 21 December 2004. Wet van 9 December 2004 tot uitvoering van internationale regelgeving ter bestrijding van mensensmokkel en mensenhandel, *Stb*, No. 645, 2004, inwerkingtreding op 21 December 2004. Amendment to the Penal Code realising international legislation concerning the fight against human trafficking.

[20] The introduction of new implementation legislation was not considered necessary for the Netherlands to comply with the directive, *Kamerstukken* II, No. 158, 2005-2006, 21 109.

[21] For example the Stabilisation and Association Agreement between the European Community and the former Yugoslav Republic of Macedonia of 9 April 2001. Stabilisatie- en Associatieovereenkomst tussen de Europese Gemeenschappen en hun lidstaten, enerzijds, in de Voormalige Joegoslavische Republiek Macedonië, anderzijds; Luxemburg, 9 april 2001, *Trb*, No. 81, 2001.

sexual services or make their organs available or other forms of exploitation. The difference between the two offences can also be found in the rights they try to protect. Whereas the penalization of human trafficking tries to protect the physical integrity and personal freedom of the individual, the smuggling provision is concerned with the interest of the state to combat illegal immigration [22].

As a consequence, human trafficking is more connected to prostitution and other forms of sexual exploitation. It is important to note here that, since the first of October 2000, the Netherlands have legalized the exploitation of prostitution with an exception for minors [23]. However, excessive or forced exploitation of prostitutes was penalized in Article 250a, i.e. the old human trafficking provision. Since the implementation of the 2002 FD on combating human trafficking, the Dutch provision concerning human trafficking has moved into Article 273f of the DCC.

2. Control of formal and substantive conformity of the transposition of the 2002 FD in national law

A. Conformity

Article 273f of DCC was inserted to achieve conformity of the Dutch national law with the 2002 FD. On 29 June 2004 a proposal of law to implement the FD was submitted to the second chamber of the Dutch parliament. The first chamber adopted the proposal on 7 December 2004. The Act was published in *Staatsblad* 645 of 21 December 2004. This is the date of its entry into force [24]. A slight delay can be identified in the implementation procedure. The implementation date was set on the first of August. The Netherlands were only able to meet this demand on the 23rd of that month. Reasons for this minor delay have not been given by the government.

The consequences of the implementation were various. Article 250a Sr of the DCC was replaced by Article 273f, changing the definition of human trafficking. Because of this revision small technical changes in the DCC and Extradition Act were made. Article 273f was added to Article 5 DCC to make the active personality principle applicable to Dutch nationals who commit the crime described in the provision abroad as far as the victim is a minor. The Extradition Act was changed in such a way that it now makes extradition possible to States which are parties to the UN Protocol to prevent, suppress and punish trafficking in persons, especially Women and Children and the Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography.

However, the most significant change in the Dutch internal law was the broadening of the definition of human trafficking. The purpose of human trafficking no longer exclusively entails various forms of sexual exploitation, but as well all other forms of modern slavery not being sex related. Besides, a considerable number of acts (recruitment etc.) and means (coercion) are now written out in the legal text [25].

---

[22] Tweede Kamer, vergaderjaar 2003-2004, 29 291, No. 3, p. 2.

[23] KB d.d. 18 januari 2000, *Stb*, 38.

[24] Adaptations to parts of the Act were published in *Stb*, No. 690 of 28 December 2004 and *Stb*, No. 415 of 23 Augustus 2005.

[25] Tweede Kamer, vergaderjaar 2003-2004, 29 291, No. 3, p. 10.

A symbolic change emerged with the replacement of the offence. Whereas the old provision, Article 250a, was placed in the chapter on crimes against morality of the DCC, it is now to be found under Title 18 concerning crimes against personal freedom.

The implementation of the FD has also led to the insertion of provisions related to aggravating circumstances, which will be discussed further on.

B. Formal conformity

The implementation of the FD in Article 273f DCC is almost a literal adoption of the text of the FD. For example, the material acts of Article 273f are almost an exact carbon copy of those mentioned in the FD. However, the exchange or transfer of control over the concerned person cannot be found in the new provision. Small differences appear as well regarding the means concerned. Sub a, "use is made of coercion, force or threat, including abduction", is covered with the exception of abduction. The authors of a commentary on the DCC state that the term "coercion" is open to a much extended interpretation [26]. It is therefore very well possible that abduction as well is covered by the Dutch legislation, but without stating it explicitly. Sub b and d are both literally adopted from the FD. Sub c can be recognised in the text in slightly different wordings but according to the aforementioned commentary to the legislation the meanings of the words are supposed to cover the same means as the FD.

This can also be said about the exploitation purposes stated in Article 1, para. 1 of the FD. The text of para. 2 of Article 273f is almost copied from the FD with the exception of pornography. The sexual exploitation purpose is implemented as well, but it is important to reiterate here that the purpose of exploitation of the prostitution of others has in the Netherlands a special position. Since the legalisation of prostitution in 2000, exploitation or rather the employment of prostitutes as such is not criminalised. A distinction is made between legal exploitation and the forbidden *excessive* exploitation of prostitution. The dividing line between both activities is drawn by jurisprudence.

If one of the means referred to in paragraph 1 has been used, the victim's consent is irrelevant. But the Dutch Minister of Justice considered it not necessary to explicitly codify this condition [27].

Also when the victim is a child the means referred to in paragraph 1 are not needed. This is codified in Article 273f, para. 1, sub 5. The definition of a child or a minor can be found in Article 1:233 Civil Code (*Burgerlijk Wetboek*). Minors are those who have not reached the age of 18 years. For the special protection of married minors, who do no longer fall under the legal term "minor", Article 273f does not speak of minors, but of "persons who have not yet reached the age of 18 years" [28].

Instigation, aiding, abetting or attempt to commit an offence referred to in Article 1 of the FD is punishable by Article 273f. The legal provisions of aiding abetting and

---

[26] Commentaar op artikel 273a Wetboek van Strafrecht – supplement 130, behorend tot Article 273a Sr (februari 2005).

[27] Tweede Kamer, vergaderjaar 2003-2004, 29291, No. 3, p. 19.

[28] Tweede Kamer, vergaderjaar 2003-2004, 29 291, No. 3, p. 16.

attempt (Titles 4 and 5 of DCC) are applicable to the crime of human trafficking. Article 45 of the DCC stipulates that attempting to commit a crime is punishable. Articles 47, 48, and 46(a) provide that having a crime committed, helping to commit a crime or instigating to a crime, being an accessory to a crime and attempting to instigate to a crime are all punishable.

Regarding the penalties, for the offence of human trafficking a penalty of no more than 6 years of prison or a fine of the fifth category (maximum of €67,000) are provided by the Dutch law. Aggravating circumstances can lead to imprisonments of 8, 10, 12, up till 15 years. According to the Government, these maxima are proportional to the nature and seriousness of the crime of human trafficking [29].

The aggravating circumstances of Article 3, para. 2 of the FD have partly been transposed in Dutch internal law. The endangering of the life of the victim, described in Article 3, para. 2 FD, can be retraced in the wordings of the fifth paragraph of Article 273f and provides for a penalty of 12 years or a fine of the 5th category.

A victim particularly vulnerable is defined as a sexual minor, i.e. a person under the age of 16. This is stated in a special provision, Article 273f, para. 3, sub 1, which provides for a penalty of 8 years. But no reference is made to the purpose of sexual exploitation of the particularly vulnerable victim.

The aggravating circumstances of serious violence or when particularly serious harm is caused to the victim can partly be retraced. Causing particularly serious physical harm falls as well under the fifth paragraph of Article 273f and can lead to a penalty of 12 years. Serious violence as such is not directly included in the Dutch provision, but it could fall under the description of causing particularly serious harm. Article 273f does distinguish a special aggravating circumstance when the offence has led to the death of the victim. A punishment of 15 years of prison is then open.

The last aggravating circumstance of the FD, i.e. when the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, is not transposed as such, apart from the penalty level referred to therein. When the offence is committed by two or more united persons, Article 273f sees it as an aggravating circumstance, therefore a penalty of 8 years is considered. Whether this has the same purpose as sub d of the FD is a question that needs to be examined. It is important to note here that Article 140 of the DCC criminalizes the membership of a criminal organization as such. Lastly, if the offences are committed jointly by two or more persons against a victim who has not yet reached the age of 16, they are punishable by a prison sentence of maximum 10 years.

Concerning the liability and sanctions of legal persons, Article 51 DCC provides for the criminal prosecution of legal persons including those issuing instructions and exercising actual leadership. They do not have to be formally a manager, director or owner of the legal person. Someone subordinated to the management of the legal person can also hold actual leadership. Punishment of legal persons is dealt with by Article 51(2). It states that relevant penalties and measures provided for by law may be imposed on a legal person. According to Article 23(7) of the DCC a legal person may be punished by a fine. The legal provisions allow for effective, proportionate and

[29] Tweede Kamer, vergaderjaar 2003-2004, 29 291, No. 3, p. 6.

dissuasive penalties. Since the criminal liability of legal persons was already provided for in Article 51 of the DCC, there was no need to implement Article 4 of the FD.

The jurisdiction criteria concerning the above mentioned offences can be found in Articles 2 and 3 of the DCC. Dutch criminal law generally applies to anyone who commits a criminal offence within the territory of the Netherlands or on board a Dutch ship or aircraft outside the Netherlands. Article 5 establishes the State's jurisdiction over Dutch nationals for offences committed outside the Netherlands. Jurisdiction in this matter does not depend on the victim's being a Dutch national nor is there a regional or universal jurisdiction.

The general requirement that an offence be punishable under both Dutch law and the law of the country in which the crime was committed ("double criminality") has not applied to sexual exploitation and sexual abuse of children since 1 October 2002 or to non-sexual exploitation of children and trafficking in children's organs since 1 January 2005 (Article 5, para. 1, subpara. 3°). As a general rule, Dutch criminal law is not applicable to non-Dutch nationals who commit criminal offences outside the Netherlands. However, since 1 October 2002, it does apply to persons being habitually resident in the Netherlands who commit offences outside the Netherlands involving sexual exploitation or sexual abuse of children. On 1 January 2005 this was extended to non-sexual exploitation of children and trafficking in children's organs. The requirement of double criminality does not apply in such cases (Article 5a, DCC).

With regard to the protection of and assistance to victims the new Article 273(a) of the DCC does not require a complaint to be made. Neither is a crime report a prerequisite for investigation or prosecution. Duth law thereby complies with Article 7, para. 1 FD.

Children who are victims of abovementioned offences are considered as particularly vulnerable victims. The provisions contained in Article 273(a)(1), subpara. (2), (5) and (8) relate specifically to the criminal law protection of children. Minor victims of human trafficking will also be taken special care of by the national council for child protection. For minor aliens in general there is the organisation NIDOS, which is an organisation that takes care of the guardianship of minor aliens.

Concerning Article 4 of FD 2001/220/JHA, the Netherlands have implemented it by providing victims with information on the internet. No implementation was considered necessary to fulfil the second paragraph of Article 4 regarding the right to information about the progress of the case. The right to receive information and the right to be informed about the acquittal of the perpetrator were sufficiently implemented according to the report of the Commission [30]. The distribution of information to the family of the minor victim as provided for in Article 7, para. 3 FD was considered as needing no further implementation according to the Dutch government [31].

In general the Netherlands have almost completely transposed the FD in internal law. Small discrepancies can be found in the implementation of the aggravating circumstances.

---

[30] Report of the Commission of the European Communities, Brussels, 3 February 2004, COM (2004) 54.

[31] Tweede Kamer, vergaderjaar 2003-2004, 29 291, No. 3, p. 22.

In the Dutch provision, there is no specific aggravating circumstance taking specifically serious violence into account. However, it can easily be covered by the aggravating circumstance of causing serious physical harm.

When the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA it will not be an aggravating circumstance. Article 140 DCC separately deals with the membership of a Criminal Organisation.

Neither is there an aggravating circumstance retraceable when it comes to human trafficking for the purpose of sexual exploitation. This could be explained by referring to the Dutch policy of legalising prostitution. Following this line of thought, sexual exploitation is indeed more serious than all other forms of exploitation but should not be considered as a specific aggravating circumstance. The severity of this specific kind of human trafficking will be taken into account when it comes to determining the penalty.

C. Substantive conformity

The minor formal shortcomings have mostly been corrected or compensated by other legal provisions or by other principles of national law. Therefore the substantive conformity is quite high. Only the non-conformity of Dutch law with the means and acts of Articles 1 and 2 of the FD has not been compensated. The reasons for this are unclear. It is very likely that these minor elements were regarded as unnecessary and as being covered by the provision without explicitly stating them.

3. Practical use of the norm

Since the introduction of Article 273f, only a small number of cases based on this article have been tried before court. The government wanted Article 273f to cover the same situations as the old provision Article 250a used to cover. But besides the old sex related situations, new versions of modern slavery were criminalised by the new provision. Since the creation of Article 273f, two cases of "modern slavery" only have been tried before the Dutch courts. It is most interesting to take a closer look at these two cases since they result directly from the implementation of the 2002 FD. Remarkable is that none of them has led to a conviction of the suspects.

The first case to be tried [32] concerned the alleged forced labour of Bulgarian illegal immigrants in a cannabis plantation. Workers would voluntarily be transported from a local gas station to the plantation in a blinded van or truck in order to disorientate them. At the plantation they were not allowed to have a cell phone nor were they allowed to leave the workspace. They had to work, in general, under incorrect conditions. The situation did not lead to a conviction for the following reasons. The court held that there was no situation of exploitation since the immigrants were free to choose whether they would work or not. But the court did take notice of the fact that the illegal immigrants were in a vulnerable position and that the suspect had taken advantage of their dependence. More relevant however was the question whether there had been serious abuses in the work sphere that would lead to a violation of their

[32] LJN : AZ2707, Rechange 's Gravenhage, 21 November 2006, 09/757289-06.

fundamental human rights. Since the work was of an incidental nature and the work time was not extremely long and the wage not extremely low, the court held that there was, how reprehensible it might have been, no situation of exploitation in the sense of Article 273f(1), sub 4. Therefore no conviction could take place since the provision was understood as containing the constitutive element of exploitation even though it is not explicitly mentioned in the sub provision.

This interpretation of the court seems to be in accordance with the purpose of the FD. The border lines between exploitation as in human trafficking and "just" bad working conditions need to be drawn by jurisprudence.

The other ruling is from the court of 's Hertogenbosch [33]. Again the alleged crime concerned a situation where illegal immigrants come to work voluntarily under bad working conditions. Chinese immigrants worked long hours in a Chinese restaurant in return of receiving housing and food. However, the court ruled again that this was no case of human trafficking. Its argumentation shows an interesting interpretation of the definition of human trafficking. The court refers to the definition given in Article 3 of the UN Protocol on human trafficking emphasizing the *actions* that constitute human trafficking. The court then refers to the FD and states that the definition of human trafficking in this instrument and the definition of human trafficking in provision 273f both try to connect to the definition given in Article 3 of the UN Protocol. This in contrast with the former definition of human trafficking, described in the previous version of Article 250. In this version, the focus was on the *exploitation* and not primarily on the *activities* with the purpose of exploitation. It used to cover as well certain activities (such as the recruitment, transportation etc.) where use was made of means (such as coercion, abuse of authority) with the purpose of exploitation.

In short this results in the following conclusion of the court. The Chinese illegal immigrants came voluntarily to the Netherlands and to the restaurant for work and were not forced to stay. Neither was anyone bonded by debt and they could leave any time they wanted to. Therefore, since the owners of the Chinese restaurant did not actively recruit the illegal employers they did not undertake any actions with the purpose of exploitation and as a result did not commit the crime of human trafficking.

In addition, the court examines whether the working conditions in the Chinese restaurant would have constituted a situation of exploitation. The employees had to work between 11 and 13 hours a day, 5 days off a month, they shared several beds in one bedroom and earned a general wage of 450, – and 800, – Euros a month. According to the court this does not directly create situation of exploitation as in the sense of Article 273f. The court takes into account that the working conditions have not been proven to be particularly bad, the income was at the free disposal of the workers since housing and food was covered by the restaurant, and none of the Chinese workers was forced to stay and work in the restaurant.

This last ruling of the court shows an interesting approach to the new Article 273f. The court has studied the underlying international treaties and agreements to define human trafficking. And by doing so has shifted the focus of human trafficking from exploitation towards the *actions* with the purpose of exploitation. What will now

---

[33] LJN : BA0145, Rechtbank 's Hertogenbosch, 8 March 2007, 01/825364-06.

happen with those situations that do not constitute acts with the purpose of exploitation but rather exploitation is unclear if we follow the last ruling. Even though the FD not explicitly criminalises the exploitation independently from the acts performed for that purpose, the Dutch provision however does so in the first paragraph, sub 1 of Article 273f. The explanation given later on for the definition of exploitation is a rather strict one, and can be placed in line with the first court ruling concerning the Bulgarian immigrants.

In conclusion it can be said that doubtful working conditions not easily lead to a situation of exploitation as in human trafficking. But the definition needs to be further developed in the future. It has to be decided in the future as well whether the exploitation independently of activities for that purpose still falls under the definition of human trafficking. In both cases the public prosecutor has lodged an appeal.

It clearly appeared that there are difficulties regarding the practical use of the text of the FD. In the aforementioned cases courts have referred to both the UN protocol on human trafficking and the European FD. The definitions in both instruments differ somewhat and this might have led to a misinterpretation. This is also signalised by the National Rapporteur on Human Trafficking for the Netherlands. She describes it as follows: "(....) Article 273f is the longest Article of the DCC, and is difficult to comprehend. This as a result of the use of several definitions that are not further explained. These definitions stem from international arrangements that have led to the creation of the new human trafficking provision. For the interpretation of the Article it is therefore not only important to look into the explanatory memorandum but as well to the nature and aim of the underlying international rules"[34] [35].

4. Control of effectiveness and efficiency of the text

The introduction of the FD in the Netherlands has led to several initiatives contributing to prevention of and the fight against trafficking in human beings, thereby complementing the other existing instruments in that field. Since 1 April 2006, for example, there is a new action plan concerning human trafficking [36] that now also covers the other forms of human trafficking besides sex industry related human trafficking. Another important initiative was the founding of the Expert group on Human Trafficking and Smuggling. The renewal and creation of the action plan and the Expert group can be attributed to, among other international instruments, the FD.

The introduction of the FD was not as intrusive as to directly restrict fundamental rights and as to affect the DCC in such a way that it would have negatively influenced the rights of defence or basic principles of criminal law.

In conclusion the legal instrument was effective in achieving its aim of enhancing the fight against human trafficking; it did not negatively affect other fundamental rights.

---

[34] Mensenhandel, 5de Rapportage Nationaal Rapporteur Mensenhandel, Bureau NRM, Den Haag, 2007, p. 21.

[35] For a quantitative assessment, see Annex 2.

[36] Nationaal Actieplan Mensenhandel, Tweede Kamer, Vergaderjaar 2004-2005, No. 13.

5. Reception and perception

Regarding the approach and attitude of practitioners towards the transposing law and the European FD itself, there are several perspectives.

From the investigation angle, offered by a police spokesman and a member of the Dutch national expert Group on human trafficking and smuggling, no significant opinions were given on the new provision. Neither of them considered the new legislation as having introduced major change to the former situation, only the broadening of the provision was mentioned as being a positive alteration. In general there was a positive attitude towards the transposing law. The EU FD was rarely recognised as one of the main causes of the amendment of the Dutch human trafficking provision.

Lawyers who have been contacted show a positive attitude towards the new legislation. The FD that has led to the creation of the new provision is however less well known. Since the new article is meant to cover the same crimes as the former provision but adds the modern forms of human trafficking as well, it is not regarded as a very invasive conversion. The aspirations of the EU regarding mutual trust and subsequently improved cooperation are not really considered relevant by the contacted lawyers.

Concerning the knowledge and interpretation of the European FD, it should be mentioned that trainings had been organised for both the police force and the expert group. Unfortunately it was impossible to obtain information from magistrates on the subject. As stated previously, the FD has been quoted and analysed by the court in the decision of 8 March 2007 [37]. This offers some insight in how the court interprets the FD.

Politics

The reception of the proposed legislation by the Dutch politicians was predominantly positive. There was little debate about the precise definition of the new legislation. Remarks were made about the maximum penalties, which led to an amendment to heighten the maximums but it was never adopted. Another concern was related to the possibility for victims of human trafficking to work. The Minister of Justice promised that this would change in the near future.

Media

There is significant media coverage of human trafficking in the Dutch press. However, it is not directly related to the FD, but reference is often made to the European Union as such. It is important to note that there has been a campaign named “Humans are not commodities” that started on October the 18th 2007, the day against human trafficking. An alliance of NGO’s working in the field of human trafficking took up the initiative of the European Commission to pay special attention to human trafficking on this day and the following week.

---

[37] LJN : BA0145, Rechtbank ‘s Hertogenbosch, 8 march 2007, 01/825364-06.

Civil society

In the Netherlands several NGO's are active in the prevention of human trafficking and the aid of victims, such as ECPAT (European organisation against child trafficking for sexual exploitation), BlinN (Bonded Labour in the Netherlands), STV (Organisation against women trafficking) and Vluchtelingenwerk (refugee aid). Even international NGO's are active, such as La Strada (Organisation aimed at the fight against trafficking in human beings in Central Europe), working directly with other EU partners on the prevention of human trafficking.

The general perception of the new legislation is positive to the extent that it now also includes other forms of human trafficking. It is important to note here that almost none of the contacted legal specialists of the NGO's had any knowledge of the FD. The amendment of national law it has led to is known but it is seldom connected with the FD.

Remarks of the NGO's mostly focus on the protection of victims that could still be improved. This is mostly due to the lack of cooperation between the different Dutch authorities that have to work together. This problem is only slightly related to the FD. But, according to the contacted NGO's, the cooperation between international authorities as well was a point of concern. The follow up of a case from one EU country to another is still perceived as problematic despite the efforts of the FD.

ECPAT pointed out the problem that the new provision does not explicitly cover the practice of illegal adoption. The organisation has also recently published a compendium on international youth law [38]. A part of the new publication is dedicated to the FD on human trafficking and its implications for youth law.

6. Conclusion

In the Netherlands the implementation of the FD has led to a change in the DCC, i.e. the creation of a new provision concerning human trafficking. The question is whether this has also allowed to realize the general objectives of the European Union. The FD aims at enhancing the approximation of the legislations of the Member States, thereby strengthening mutual trust. Hopefully this will also enhance the cooperation between Member States.

The Dutch Minister of Justice explicitly referred to the principle of mutual trust in the parliamentary documents. He stated in the Explanatory Memory that the common minimum of maximum penalties will contribute to mutual trust [39]. A spokesman of the expert Group on human trafficking stated that the FD has allowed to develop mutual trust and has indeed facilitated cooperation. However, mutual trust is something that has to grow over time and cannot be enforced by a FD but only stimulated.

Regarding the strengthening of the cooperation between the competent authorities, both representatives of the expert group and NGO's mentioned the internationally strengthened cooperation between authorities. However among the authorities within the Netherlands no significant change was indicated. At the moment the teamwork

[38] S. Meeuwisse, *Handboek Internationaal Jeugdrecht*, Nijmegen, Ars Aequi, 2005.

[39] Memorie van Toelichting, TK 29291, No. 3, p. 12.

between the Member States still leaves room for improvement, as well the cooperation within the Netherlands.

Another objective of the EU connected with the above mentioned is to control and limit the requirement of double criminality. The FD has not affected this requirement directly since double criminality is in principle still a requirement for the prosecution of Dutch citizens who commit the crime of human trafficking abroad. However, as mentioned earlier, this last requirement has been tempered by the insertion of some exceptions, especially the exception of Dutch citizens outside the Dutch territory who commit the crime of sexual exploitation of minors. Moreover considering that the provisions defining the offence of trafficking in human beings are expected to be similar in all Member States after the implementation of the FD, the traditional requirement of double criminality should logically create less problems than before. It is also important to note here that trafficking in human beings is one of the offences mentioned in Article 2 of the FD on the European Arrest Warrant. Consequently it should give rise to surrender without verification of the double criminality of the act.

Another European Union's main concern is related to the protection of victims. The most important change that the FD has initiated is the broadening of the definition of human beings. As a consequence, the notion of victims of trafficking in human beings has extended as well. The human rights of other victims of human trafficking besides victims of sexual exploitation are therefore now protected as well. This can be regarded as a positive effect on the human rights. So far, the implementation has not affected the level of protection of human rights in a negative way.

Since the impact of the implementation of the FD was not very intrusive, it has barely had an impact on the Dutch internal system nor did it affect the internal balance. The same is true for the impact of the implementation on the nature of the penal law in the Netherlands. The only change was the broadening and a slight alteration of the definition of human trafficking. Concerning the use of criminal law as *ultima ratio* and the "shield" and the "sword" functions, both are still regarded in the same way as before the implementation of the FD.

It is the same situation for the principle of legality, although here one should note that the new definition still needs some time for further development. New provisions are subjected to an interpretation by the courts to clarify their impact. In the meantime, this might affect somewhat the principle of legality.

In conclusion, the new legislation in The Netherlands introduced a small change in the good direction of protecting more victims against the crime of human trafficking. This adjustment to new ideas on human trafficking could temporarily affect the legality principle since it needs some time to settle in. More invasive consequences of the implementation of the FD, such as an impact on the nature of penal law can not be distinguished. Regarding the general objectives of the European Union, the implementation of the FD could increase mutual trust between Member States, which will enhance the cooperation and ease the control of the double criminality requirement in the long term. These possible future results of the implementation of the FD on combating trafficking in human beings would be of interest for further research.

Annex 1. Dutch Criminal Code provisions

Original version (Dutch version)

Artikel 273f

1. Als schuldig aan mensenhandel wordt met gevangenisstraf van ten hoogste zes jaren of geldboete van de vijfde categorie gestraft:
   1° degene die een ander door dwang, geweld of een andere feitelijkheid of door dreiging met geweld of een andere feitelijkheid, door afpersing, fraude, misleiding dan wel door misbruik van uit feitelijke omstandigheden voortvloeiend overwicht, door misbruik van een kwetsbare positie of door het geven of ontvangen van betalingen of voordelen om de instemming van een persoon te verkrijgen die zeggenschap over die ander heeft, werft, vervoert, overbrengt, huisvest of opneemt, met het oogmerk van uitbuiting van die ander of de verwijdering van diens organen;
   2° degene die een ander werft, vervoert, overbrengt, huisvest of opneemt, met het oogmerk van uitbuiting van die ander of de verwijdering van diens organen, terwijl die ander de leeftijd van achttien jaren nog niet heeft bereikt;
   3° degene die een ander aanwerft, medeneemt of ontvoert met het oogmerk die ander in een ander land ertoe te brengen zich beschikbaar te stellen tot het verrichten van seksuele handelingen met of voor een derde tegen betaling;
   4° degene die een ander met een van de onder 1° genoemde middelen dwingt of beweegt zich beschikbaar te stellen tot het verrichten van arbeid of diensten of zijn organen beschikbaar te stellen dan wel onder de onder 1° genoemde omstandigheden enige handeling onderneemt waarvan hij weet of redelijkerwijs moet vermoeden dat die ander zich daardoor beschikbaar stelt tot het verrichten van arbeid of diensten of zijn organen beschikbaar stelt;
   5° degene die een ander ertoe brengt zich beschikbaar te stellen tot het verrichten van seksuele handelingen met of voor een derde tegen betaling of zijn organen tegen betaling beschikbaar te stellen dan wel ten aanzien van een ander enige handeling onderneemt waarvan hij weet of redelijkerwijs moet vermoeden dat die ander zich daardoor beschikbaar stelt tot het verrichten van die handelingen of zijn organen tegen betaling beschikbaar stelt, terwijl die ander de leeftijd van achttien jaren nog niet heeft bereikt;
   6° degene die opzettelijk voordeel trekt uit de uitbuiting van een ander;
   7° degene die opzettelijk voordeel trekt uit de verwijdering van organen van een ander, terwijl hij weet of redelijkerwijs moet vermoeden dat diens organen onder de onder 1° bedoelde omstandigheden zijn verwijderd;
   8° degene die opzettelijk voordeel trekt uit seksuele handelingen van een ander met of voor een derde tegen betaling of de verwijdering van diens organen tegen betaling, terwijl die ander de leeftijd van achttien jaren nog niet heeft bereikt;
   9° degene die een ander met een van de onder 1° genoemde middelen dwingt dan wel beweegt hem te bevoordelen uit de opbrengst van diens seksuele handelingen met of voor een derde of van de verwijdering van diens organen.
2. Uitbuiting omvat ten minste uitbuiting van een ander in de prostitutie, andere vormen van seksuele uitbuiting, gedwongen of verplichte arbeid of diensten, slavernij en met slavernij of dienstbaarheid te vergelijken praktijken.
3. De schuldige wordt gestraft met gevangenisstraf van ten hoogste acht jaren of geldboete van de vijfde categorie, indien:
   1° de feiten, omschreven in het eerste lid, worden gepleegd door twee of meer verenigde personen;
   2° de persoon ten aanzien van wie de in het eerste lid omschreven feiten worden gepleegd, de leeftijd van zestien jaren nog niet heeft bereikt.

4. De feiten, omschreven in het eerste lid, gepleegd door twee of meer verenigde personen onder de omstandigheid, bedoeld in het derde lid, onder 2°, worden gestraft met gevangenisstraf van ten hoogste tien jaren of geldboete van de vijfde categorie.
5. Indien een van de in het eerste lid omschreven feiten zwaar lichamelijk letsel ten gevolge heeft of daarvan levensgevaar voor een ander te duchten is, wordt gevangenisstraf van ten hoogste twaalf jaren of geldboete van de vijfde categorie opgelegd.
6. Indien een van de in het eerste lid omschreven feiten de dood ten gevolge heeft, wordt gevangenisstraf van ten hoogste vijftien jaren of geldboete van de vijfde categorie opgelegd.
7. Artikel 251 is van overeenkomstige toepassing.

English version

Article 273f of the Criminal Code

1. Any person who:
   - (a) by force, violence or other act, by the threat of violence or other act, by extortion, fraud, deception or the misuse of authority arising from the actual state of affairs or by the misuse of a vulnerable position, recruits, transports, takes with him, accommodates or shelters another person or gives or receives remuneration or benefits in order to obtain the consent of a person who has control over this other person, with the intention of exploiting this other person or removing his or her organs;
   - (b) recruits, transports, takes with him, accommodates or shelters a person with a view to exploiting that other person or removing his or her organs, when that person has not yet reached the age of eighteen years;
   - (c) recruits, takes with him or abducts a person with a view to inducing that person to make himself/herself available for performing sexual acts with or for a third party for remuneration in another country;
   - (d) forces or induces another person by the means referred to under (a) to make himself/herself available for performing work or services or making his/her organs available or takes any action in the circumstances referred to under (a) which he knows or may reasonably be expected to know will result in that other person making himself/herself available for performing work or services or making his/her organs available;
   - (e) induces another person to make himself/herself available for performing sexual acts with or for a third party for remuneration or to make his/her organs available for remuneration or takes any action towards another person which he knows or may reasonably be expected to know that this will result in that other person making himself/herself available for performing these acts or making his/her organs available for remuneration, when that other person has not yet reached the age of eighteen years;
   - (f) wilfully profits from the exploitation of another person;
   - (g) wilfully profits from the removal of organs from another person, while he knows or should be reasonably expected to know that the organs of that person have been removed under the circumstances referred to under (a);
   - (h) wilfully profits from the sexual acts of another person with or for a third party for remuneration or the removal of this person's organs for remuneration, when this other person has not yet reached the age of eighteen years;
   - (i) forces or induces another person by the means referred to under (a) to provide him with the proceeds of that person's sexual acts with or for a third party or from the removal of that person's organs;
   - (j) shall be guilty of trafficking in human beings and as such liable to a term of imprisonment not exceeding six years or a fine of the fifth category:

2. Exploitation comprises at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory work or services, slavery or practices equivalent to slavery or servitude.
3. The following offences shall be punishable with a term of imprisonment not exceeding eight years or a fine of the fifth category:
   (a) offences as described in the first paragraph if they are committed by two or more persons acting in concert;
   (b) offences as described in the first paragraph if such offences are committed in respect of a person who is under the age of sixteen years.
4. The offences as described in the first paragraph, committed by two or more persons acting in concert under the circumstance referred to in paragraph 3 under 2°, shall be punishable with a term of imprisonment not exceeding ten years or a fine of the fifth category.
5. If one of the offences described in the first paragraph results in serious physical injury or threatens the life of another person, it shall be punishable with a term of imprisonment not exceeding twelve years or a fine of the fifth category.
6. If one of the offences referred to in the first paragraph results in death, it shall be punishable with a term of imprisonment not exceeding fifteen years or a fine of the fifth category.
7. Article 251 is applicable mutatis mutandis.

Annex 2. Statistics

Table 7.1 Number of registered cases and cases that (also) involve minor victims, per year

Year	*Registered cases*	*Cases that (also) involve minor victims*	
2001	130	27	21%
2002	200	27	13%
2003	156	41	26%
2004	220	32	15%
2005	135	36	27%
Total	841	163	19%

Table 7.8 Settlement by the Public Prosecutor, per year of settlement

Settlement	2001		2002		2003		2004		2005		2006	
	N	%	N	%	N	%	N	%	N	%	N	%
Summons human trafficking	99	62%	111	68%	117	66%	177	70%	107	73%	611	68%
Absolute dismissal	46	29%	40	25%	42	24%	63	25%	28	19%	119	24%
Summons other facts	12	8%	10	6%	11	6%	6	2%	2	1%	41	5%
Transfer	1	5%	-	-	2	1%	2	0%	1	1%	6	1%
Joining	-	-	1	1%	4	2%	1	0%	2	1%	8	1%
Conditional dismissal	1	1%	-	-	-	-	2	0%	4	3%	7	1%
Transaction	-	-	1	1%	-	-	1	0%	2	1%	4	0%
Total	159	100%	163	100%	176	100%	252	100%	146	100%	896	100%

References

D. Korvinus,"Mensenhandel: het begrip uitbuiting in art. 273a Sr.", *Trema*, 7, 2006, p. 286 *et s*.

The former Rapporteur Mensenhandel of the Netherlands elaborates in the article on the new definition of exploitation influenced by the FD.

J. Van de Leun, L. Vervoorn, *Slavernij-achtige uitbuiting in Nederland*, Den Haag, Boom, Juridische uitgevers, 2004.

A literature based research on the practice of slavery and exploitation in the Netherlands. The research was conducted in view of the proposed broadening of the definition of human trafficking to include as well non-sex industry related exploitation.

L. Otten, H. Peters, *Mensenhandel, de strafrechtelijke grens van exploitatie van prostitutie*, Utrecht, Wetenschapswinkel Rechten, Universiteit Utrecht, 2006.

The research of Otten is focused on the question whether the new provision on human trafficking still left the same room for the legal exploitation of prostitution. In her conclusion she states that the new provision has not altered the difficulty of establishing the border line between legal exploitation and human trafficking.

WODC, *Justitiële verkenningen 2007/07*, Den Haag, Boom Juridische uitgevers, 2007.

Publication of the Dutch Scientific Research and Documentation.

Centered on issues surrounding human trafficking, Relevant articles on the new definition of Human trafficking in a Dutch perspective.

Poland : implementation without transposition

Adam Łazowski

1. Introduction

Trafficking in human beings has regrettably become a part of everyday life in Central and Eastern Europe. No doubt it remains an element of the legacy of years of totalitarian regimes and, at the same time, the price one has to pay for a rapid transition from Communism to market economy. At the same time, it remains an element of a wider phenomenon that has managed to attract the attention of several international organizations, including the United Nations, the Council of Europe and the European Union [1]. This contribution is tailored to evaluate the level of compliance of Polish law with the EU's Framework Decision 2002/629/JHA on combating of trafficking in human beings [2]. The nature of this piece of legislation, combined with a number of international treaties dealing with the fight against trafficking, has influenced the structure of this contribution. Indeed, in order to appreciate the complexity of legal regimes aimed at combating the criminal activity in question and the role of the EU legislation in this respect, one has to take a broader approach bearing in mind the plethora of legal acts. Thus before looking at issues strictly related to the FD a basic overview of relevant international treaties to which Poland is a party is made. This will lead to the analysis of main legal issues associated with the transposition and implementation of the FD in Poland [3]. The main argument of this contribution is

---

[1] See, *inter alia*, S. Carpa, *Trafficking in Human Beings. Modern Slavery*, Oxford, 2008.

[2] Council FD 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, *OJ*, No. L 203/1, 2002. For an academic appraisal see T. Obokata, "EU Council framework decision on combating trafficking in human beings: A critical appraisal", *CMLRev.*, 40, 2003, p. 917-936.

[3] This distinction is based on the premise that "transposition" and "implementation" are two different, yet linked notions. The first is understood as technical incorporation of a piece of

that a degree of implementation has been achieved, despite the lack of a tailor made piece of legislation aimed at the transposition of the FD. While in legal terms such *modus operandi* – based on pre-existing legislation being turned into transposition measure for a piece of EU secondary legislation – is not a problem in itself, the risk of incompleteness of transposition is daunting. Arguably, the main drawback of the existing Polish law is the lack of a statutory definition of the terms "trafficking in human beings". This, as explained in this chapter, is a great source of headache and uncertainty for academics and practitioners alike. If only for this reason (not to mention the obligation stemming from the FD – as such) it is necessary to fill the legislative *lacunae* at the earliest convenience.

2. Setting the stage – an overview of international treaties on combating trafficking in human beings to which Poland is a party

As explained, it is fitting to start by looking at the plethora of international treaties dealing with combating trafficking in human beings to which Poland is a party or at least signatory. Not only they play an important role in combating the criminal phenomenon discussed in this contribution but they also have affected the shape and effectiveness of the FD. First, and foremost, Poland is a party to the UN Convention of 12 December 2000 against transnational and organized crime as well as three additional protocols. It ratified the first Protocol to prevent, suppress and punish trafficking in persons on August 18th 2003 (hereinafter referred to as the Protocol) [4]. The Protocol entered into force in relation to Poland on December 25th, 2003, however it became a source of law for the purposes of the domestic legal order upon its publication in *Dziennik Ustaw* (the official gazette) on January 31st 2005 [5]. In September 2008 Poland was still only a signatory to the Council of Europe Convention on Action against Trafficking in Human Beings. One may consider this to be a paradox as the Convention had been officially signed in the Polish capital – Warsaw [6]. However, an

EU legislation into a domestic legal order of a Member State. The second notion has different meaning, encompassing proper application and enforcement of transposed legislation. For an interesting appraisal of those linguistic puzzles see, *inter alia*, S. Prechal, *Directives in EC Law*, 2nd ed., Oxford, 2005, p. 6.

[4] In order to allow the President to ratify the Protocol an act of Parliament had been necessary (Ustawa z dnia 18 grudnia 2003 r. o ratyfikacji Protokołu o zapobieganiu, zwalczaniu oraz karaniu za handel ludźmi, w szczególności kobietami i dziećmi, uzupełniającego Konwencję Narodów Zjednoczonych przeciwko międzynarodowej przestępczości zorganizowanej, przyjętego przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 15 listopada 2000 r, Dz.U No. 17/2003, Item 153).

[5] Ratified international treaties are a source of law in the Polish legal order, however a prior publication in the state gazette (*Dziennik Ustaw*) is *conditio sine qua non* (Article 87 of the Polish Constitution 1997). For an overview see, *inter alia*, A. Łazowski, "Poland", *in* A. Ott, K. Inglis (ed.), *Handbook on European Enlargement. A Commentary on the Enlargement Process*, The Hague, T.M.C. AsserPress, 2002, p. 299-308.

[6] The Convention entered into force on February 1st, 2008. On that day the list of parties included: Albania, Austria, Bulgaria, Croatia, Cyprus, Denmark, Georgia, Moldova, Romania, and Slovakia. For a detailed account of progress in ratification see http://conventions.coe.int.

act of Parliament authorizing the President to ratify this Convention was adopted on April 25th 2008, therefore the ratification was expected very soon [7].

Poland is also a party to a number of older international treaties, including the International Convention for the Suppression of the White Slave Traffic, signed in Paris on May 4th 1910 [8]; International Convention for the Suppression of the Traffic in Women and Children, signed in Geneva on September 30th 1921 [9]; International Slavery Convention, signed in Geneva on September 25th 1926 [10]; International Convention for the Suppression of the Traffic in Women of Full Age, signed in Geneva on October 11th 1933 [11]; Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, signed in Lake Success on March 21st 1950 [12]. It is worth to add that Poland is also a party to various international conventions that only indirectly touch upon the trafficking in human beings. This includes, for instance, ILO Convention No. 105 on the Abolition of Forced Labour [13].

This brief overview proves that at the level of public international law – at least in technical terms – Poland is heavily committed to combating the trafficking in human beings. As explained in section 4.2. of this contribution, these international sources are sometimes explicitly referred to by the Polish Courts. As it happens, the Protocol is quite often being referred to as a point of reference in attempts to define the term "trafficking in human beings".

3. Implementation with(out) transposition – compliance of Polish law with EU legislation

A. An overview

Pursuant to Article 2 of the Act on Conditions of Accession EU law has become applicable to Poland on the date of accession, which is on May 1st 2004 [14]. Since no transitional periods in respect to trafficking in human beings *acquis* have been provided, the transposition deadline for Poland was, as for the other Member States, August 1st,

[7] Ustawa z dnia 25 kwietnia 2008 r. o ratyfikacji Konwencji Rady Europy w sprawie działań przeciwko handlowi ludźmi, sporządzonej w Warszawie dnia 16 maja 2005 r., Dz.U No. 97/2008, Item 626.

[8] 3 League of Nations Treaty Series 278.

[9] 9 League of Nations Treaty Series 415.

[10] 60 League of Nations Treaty Series 253.

[11] 150 League of Nations Treaty Series 431.

[12] 96 United Nations Treaty Series 271.

[13] 320 United Nations Treaty Series 291.

[14] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, *OJ*, No. L 236/33, 2003. For a discussion on the immediate effect of EU law in the new Member States see S.L. Kaleda, "Intertemporal Issues in the Community Case Law Relating to the 2004 and 2007 Accessions", *in* A. Łazowski (ed.), *Brave New World. The Application of EU Law in the New Member States*, The Hague, 2009 (forthcoming).

2004 [15]. In fact no transposition measures have been adopted as existing legislation was considered to meet, in general terms, the aims laid down in the FD. As will be proved later in this contribution, this approach is entirely correct. Relevant provisions are contained in the Criminal Code 1997 (hereinafter CC) [16]; Provisions Introducing Criminal Code 1997 [17]; Criminal Procedure Code 1997 (hereinafter CPC) [18] as well as in the Liability of Legal Persons Act 2002 (hereinafter the Act 2002) [19]. Neither of these pieces of legislation has been tailor made to accommodate the FD, moreover no special revisions have taken place in the wake of the enlargement. Therefore the FD as such has not brought a major change to the domestic legal order. All relevant provisions have been in force since the entry into force of the CC. Yet, one has to acknowledge that in 2007 an unsuccessful attempt was made to insert a definition of trafficking in human beings to Article 115 CC. Paradoxically, no reference to the FD was made in the bill and even the Office of the Committee for European Integration concluded that despite a clear link with the FD, the bill covered matters not regulated by EU law [20].

B. Control of formal conformity

1. Trafficking, smuggling, and prostitution

CC treats both trafficking in human beings and smuggling as two different types of crimes. The first is regulated in Article 253 *in fine* CC and the second by combined Articles 264 and 264a CC. The latter provision was tailored to implement Council FD 2002/946/JHA [21] and Council Directive 2002/90/EC [22]. The provision in question entered into force on the date of accession to the European Union, that is on May 1st, 2004. However, the sanction for smuggling of human beings into the Polish territory

[15] For an appraisal of the EU's actions in this respect see, *inter alia*, T. Obokata, "EU Action against Trafficking in Human Beings: Past, Present and the Future", *in* E. Gould & P. Minderhoud (ed.), *The Legal Measure and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings*, Leiden, 2006, p. 387-406.

[16] Kodeks karny z dnia 6 czerwca 1997 r, Dz.U., No. 88/1997, Item 553 (as amended).

[17] Ustawa z dnia 6 czerwca 1997 r. – przepisy wprowadzające kodeks karny, Dz. U. No. 88/1997, Item 554 (as amended).

[18] Kodeks postępowania karnego z dnia 6 czerwca 1997 r., Dz. U. No. 89/1997, Item 555 (as amended).

[19] Ustawa z dnia 28 października 2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary, Dz.U. No. 197/2002, Item 1661 (as amended).

[20] Sprawozdanie Komisji Nadzwyczajnej do rozpatrzenia projektów ustaw związanych z koalicyjnym programem rządowym "Solidarne Państwo" o rządowym projekcie ustawy o zmianie ustawy Kodeks Karny oraz niektórych ustaw, Druk 1958 (available at http://www.sejm.gov.pl also on file with the author).

[21] Council FD 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, *OJ*, No. L 328/1, 2002.

[22] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, *OJ*, No. L 328/17, 2002.

does not meet the minimum standard set forth in Article 1 of the FD 2002/946/JHA [23]. One has to note that the prostitution as such is not prohibited by Polish law, however numerous linked behaviors are penalized by the CC. This includes exploiting of services (a person, who by the use of force, threat, superiority or critical position of the victim forces the prostitution is liable to imprisonment from one to ten years). Also, a person who for pecuniary or non-pecuniary benefit facilitates prostitution is liable to imprisonment for a maximum of 3 years. However, a minor is the victim or a person is attracted or kidnapped for the purposes of prostitution abroad then a perpetrator is liable to imprisonment for at maximum 10 years.

2. The statutory definition of "trafficking in human beings"

Article 253 CC contains only a general definition of trafficking in human beings. It reads as follows:

"§ 1. Anyone who is engaged in trafficking of human beings, even with the permission of a victim, shall be liable to imprisonment for at least 3 years.

§ 2. Who, in order to obtain benefit, organizes adoptions against the law shall be liable to imprisonment from 3 months to 5 years".

The broadness of this provision is subject to criticism in academic writing. For example, in a leading textbook on criminal law, written by the President of the Supreme Court, it is argued that the broadness of the provision amounts to the breach of the principle *nullum crimen sine lege certa* [24]. Although it is a rather drastic position, the potential criticism of the discussed provision has merits. Certainly, it is the case-law of Polish courts that comes to the rescue. It is thoroughly discussed in part 4 of this contribution.

Prima facie, neither Article 204, para. 4 nor Article 253 CC meets the requirements set forth in Article 1 FD. There is no comparable list of material acts that constitute trafficking in human beings or a list of means used. The only minor exception is Article 204, para. 4 CC, which prohibits enticement and abduction with the aim of engaging a person in prostitution abroad. Moreover, one shall mention Article 8 of Provisions introducing Criminal Code 1997. It contains a prohibition of slavery and trafficking in slaves.

However, the general wording of both provisions in question is compensated by the UN Protocol, which, in accordance with Article 87 of the Polish Constitution 1997 is part of the Polish legal system. To this end, it is argued in the academic writing, that both Article 204, para. 4 and Article 253, para. 1 CC must be read in accordance with

---

[23] Smuggling is punishable by imprisonment from 3 months to five years. The FD 2002/946/JHA provides for a maximum custodial sentence of at least 8 years.

[24] For an equal conclusion see B. Namysłowska-Gabrysiak, *Analiza orzeczeń sądowych pod kątem zgodności z definicją zawartą w aktach międzynarodowych, w szczególności w protokole z Palermo* [The Analysis of Case Law with the Emphasis on the Compliance with the Definition laid down in International Law and Palermo Protocol], *in Handel Ludźmi w Polsce. Materiały do Raportu, Ministerstwo Spraw Wewnętrznych* [Trafficking in Human Beings in Poland. Materials for the Report. Ministry of Interior], Warsaw, 2007, p. 23-39, at p. 35.

the provisions of the UN Protocol [25]. Similar approach is employed in case-law of some Polish courts (see part 4 of this contribution).

The consent of a person being trafficked is irrelevant. Article 253, para. 1 CC explicitly prohibits trafficking, even in cases where a person concerned has given his/her consent. This is not the case in Article 204, para. 4 CC, yet the nature of crime defined therein precludes by definition the consent of a person concerned. Enticement invalidates consent. F. Jasiński and E. Zielińska give an excellent example to prove the point. The Authors apply Article 204, para. 4 CC to a situation when a woman gives her consent to work as au pair abroad and upon arrival is forced into prostitution. The latter fact precludes the validity of her earlier consent [26]. In general terms, one has to conclude that the scope of Article 253, para. 1 CC is broader than Article 1 FD. The first makes, in general terms, the consent of a victim irrelevant, while the latter provides for an important limitation (exploitation only).

When it comes to trafficking in children, no special rules exist in the Criminal Code 1997. Yet, there are a few provisions which may be of relevance. First, Article 200 CC prohibits sexual activity with minors under 15 years of age [27]. At the same time Article 204, para. 4 CC does not make any distinction between children and adults, when it comes to enticement and abduction for prostitution related purposes. Yet, Article 203 CC, containing a prohibition of procuring and living from earnings of a prostitute provides for more severe sanction if a child is the victim.

There is no definition of a child that could be considered as common for the entire legal system. Particular differences are visible when one compares the marriage requirements set down in civil law and the age of criminal liability in criminal law.

There are no tailor made provisions on aiding, abetting or attempt to commit trafficking in human being. However, general rules set forth in Articles 13-19 CC apply. Article 13 CC deals with attempting. The first paragraph reads that a person, who with the aim of committing a crime, undertakes actions leading to such end, however fails to commit a crime, shall be liable with attempting. Article 13, para. 2 CC adds that the same rule will apply to a person, who at given time, is not aware that a device used for the purpose of committing a crime will not be sufficient or its use will make committing a crime impossible. Articles 14 and 15 CC provide rules on the penalties for attempting. According to the first, a court shall impose a sanction for attempting within the limits of sanctions for a particular crime. Yet, a degree of leniency is available in case of attempting where Article 13, para. 2 CC is applicable. Courts may either reduce the penalty or even decide not to impose one. Moreover, Article 15 CC provides that a penalty will not be imposed if a person voluntarily

[25] See, *inter alia*, F. Jasiński, E. Zielińska, "Komentarz do Decyzji Ramowej 2002/629/WSiSW" [Commentary to FD 2002/629/JHA], *in* E. Zielińska (ed.), *Prawo Wspólnot Europejskich a prawo polskie. Dokumenty karne, część II* [Law of the European Communities and Polish Law. Criminal Law Documents, Volume II], Warszawa, Oficyna Naukowa, 2005, pp. 539-568; E. Pływaczewski, "Komentarz do art. 253 K.K." [Commentary to Article 253 of Criminal Code], *in* A. Wąsek (ed.), *Komentarz do Kodeksu karnego* [Commentary to Criminal Code] vol. II, 3rd ed., Warszawa, C.H. Beck, 2006, p. 396-411.

[26] F. Jasiński, E. Zielińska, *loc. cit.* n. 25 at p. 559.

[27] This triggers a question of conformity with Articles 1-2 of the FD 2004/68/JHA.

refrains from committing a crime or prevents the effects of a crime. A degree of leniency is available if a person commits a crime, yet voluntarily takes measures to prevent its further effects.

Article 17 CC sets down rules on the preparation of crimes. This will happen if a person conducts activities aimed at committing a crime and fails to materialize the illegal activity. This includes reaching agreements with other persons, preparation of a plan, collection of necessary information and devices. Preparation is punishable only if a particular provision of law provides for it and at this point in time it does not apply to Article 204, para. 4 CC and Article 253 CC.

Instigation, aiding and abetting is prohibited by Article 18 CC. The penalties remain within the limits laid down for a particular crime. In case of aiding national courts may exercise a degree of leniency.

3. Sanctions

The sanctions provided in Article 204, para. 4 and Article 253, para. 1 CC meet the requirements of Article 3 FD. In case of the first, a person who enticements and abducts a person with the aim of engaging in prostitution abroad is liable to imprisonment from 1 to 10 years. As far as the trafficking in human beings is concerned, Article 253, para. 1 CC provides for imprisonment for a period not shorter than 3 years (maximum being 15 years).

There are no special provisions on the aggravating circumstances in case of trafficking in human beings, yet the general provisions on adjudication and imposition of penalties serve the purpose. Article 53 *in fine* CC provides that national judges must impose sanctions which are proportionate. When making decision on the sanction they shall take into account a number of factors related to the factual background, the type of crime and the behavior of the perpetrator. Neither Criminal Code 1997 nor Criminal Procedure Code 1997 contains a definition of a particularly vulnerable victim. However, provisions transposing the Council FD 2001/220/JHA on the standing of victims are scattered in different parts of the Criminal Procedure Code 1997. For example, Article 185a CPC provides special rules on giving the evidence by minors (under 15 years of age) who are victims of sexual offences and crimes against family. Article 185b CPC extends this to minor witnesses of other selected crimes.

Liability and sanctions on legal persons are regulated in a separate piece of legislation, that is Liability of Legal Persons Act 2002. The scope of the legislation extends to any legal person or an entity without legal personality, with the exception of state treasury, municipal authorities and associations composed thereof (Article 2.1 of the Act 2002). Article 2.2 of the Act clarifies, that the liability extends to companies owned by the State or local authorities (or associations thereof); company in creation or liquidation. Articles 3-5 of the Act 2002 meet the requirements of Article 4 FD. Crimes for which a legal person may be held liable include enticement and abduction with the aim of engaging in prostitution abroad (Article 204, para. 4 CC) as well as trafficking in human beings (Article 253 *in fine* CC) [28]. There is a lack of conformity when it comes to the list of sanctions which may be imposed on legal persons (Article

[28] See Articles 16.1.7 and 16.1.9 CC (respectively).

5 FD). The Act 2002 does not provide for permanent disqualification, placing under judicial supervision or judicial winding-up order. Articles 7-9 of the Act provide for the following penalties:

1) financial penalty (1,000 to 20,000 000 PLN), the penalty may not be higher that 10% of annual income in the year of crime,
2) loss of goods or pecuniary advantage being result of the crime,
3) ban on advertising and promotion of own activities,
4) ban on access to state aid, funding from an international organization and public procurement,
5) temporary disqualification from the main or ancillary commercial activities,
6) announcement of the judgment to the public.

Bans may be imposed for annual periods from 1 to 5 years.

4. The jurisdiction and prosecution

The principle of territoriality is provided for in Article 5 CC. Polish criminal law applies to perpetrator who committed a crime on the Polish territory, as well as on a Polish vessel or plane (unless an international agreement to which Poland is a party regulates otherwise) [29]. Further rules are provided in Articles 109-114 CC. Polish criminal law is applied to crimes committed by Polish citizens abroad (Article 109 CC). Moreover, Polish criminal law is applied to a foreigner, who while being outside the Polish territory, commits a crime against the interests of Poland, a Polish citizen, a legal person registered in Poland or a Polish entity without legal personality and to a foreigner who committed a terrorist offence outside the Polish territory (Article 110, para. 1 CC). In case of other categories of crimes, Polish criminal law will apply only if a sanction is imprisonment for at least two years, a perpetrator is in Poland and no decision on the surrender or extradition has been made. Article 111 CC provides for the double criminality rule, which is subject to exceptions provided in Articles 112-114 CC. Polish law will apply to Polish citizens and foreigners, irrespectively of measures applicable in another country, in case of:

1) crimes against internal or external safety of Poland,
2) defamation of the Polish nation,
3) crimes against Polish authorities and public officials,
4) crimes against vital economic interests of Poland,
5) false testimony presented to Polish authorities,
6) crimes, which resulted in a pecuniary or non-pecuniary benefit received in the Polish territory.

Moreover, Article 113 CC extends the jurisdiction, irrespective of domestic rules in a country where a crime has been committed, if an international agreement binding upon Poland so requires.

Last but not least, it is important to note that Article 55.1 of the Polish Constitution 1997 prohibits extradition of own nationals, yet, following the revision inspired by the

[29] Article 24 of the Act 2002 provides adequate rules applicable to legal persons.

judgment of the Constitutional Tribunal on the European Arrest Warrant [30], there are exceptions to the ban. Paradoxically, the Parliament while revising the provision in question, has also introduced the principle of double criminality (which is contrary to the EAW FD) [31].

5. Protection of and assistance to victims

Neither CC nor CPC contain tailor made provisions on the protection and assistance to victims of trafficking. However, there is a plethora of provisions scattered in those two legal acts. First and foremost both crimes (Article 204, para. 4 CC and Article 253 CC) are prosecuted *ex officio*. In accordance with Article 53 CPC a victim may become a party and act as an auxiliary prosecutor. The other provisions include (in the order of their appearance in CPC):

- Article 173, para. 2 CPC – protection to persons engaged in the recognition exercise (person under investigation will not be able to see the victim)
- Article 177, para. 1a CPC – under certain circumstances witness may testify out of court (IT equipment will be used)
- Article 184 CPC – allowing for the witness to remain anonymous
- Article 316, para. 3 CPC – witness may testify at Court during the preliminary phase of an investigation
- Article , para. 2 CPC – facilitates testimony without the presence of the person accused.

Articles 185a-b CPC provide for special arrangements to be employed when a minor (maximum 15 years of age) testifies. For example, when a minor is a victim of sexual offences or crimes against family. One should also note that further protection is guaranteed on the basis of national provisions transposing the Council Directive 2004/81/EC.

6. Conclusions

As clear from this contribution so far, the FD has been transposed only partly. There are two shortcomings of a considerable caliber. The first is the lack of a statutory

[30] Judgment of 27 April 2005 in the case P 1/05 [Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt P 1/05] OTK Z.U. 2005/4A, item 42, reported in [2006], *CMLRev.*, 1, p. 36. For an academic appraisal see, *inter alia*, A. Łazowski, "Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005", *EuConst.*, 1, 2005, p. 569; A. Łazowski, "The Polish Constitution, the European Constitutional Treaty and the principle of supremacy", *in* A. Albi, J. Ziller (ed.), *The European Constitution and National Constitutions*, The Hague, Kluwer Law International, 2007, p. 171; A. Wyrozumska, "Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant", *Polish Yearbook of International Law*, 27, 2004-2005, p. 5; D. Leczykiewicz, "Trybunal Konstytucyjny (Polish Constitutional Tribunal), Judgment of 27 April 2005, No. P 1/05", *CMLRev.*, 43, 2006, p. 1108.

[31] This has been heavily criticized in course of the evaluation exercise. See Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between Member States", Report on Poland, Brussels, February 7th 2008, Doc. No. 14240/2/07.

definition of the terms "trafficking in human beings". As already argued, this has turned into a serious practical problem, leading to uneven practice of Polish courts (discussed in part 4 of this contribution). Even when courts interpret Article 253, para. 1 CC in the light of the Protocol (due to substantive similarities also, implicitly, in the light of the FD) it may not be considered as proper transposition of the FD [32]. If one applies the case-law of the ECJ on transposition and implementation of directives *mutatis mutandis* to framework decisions then the judgment in case C-144/99 *Commission v. The Netherlands* may as well serve as an authority [33]. The ECJ made it clear that mere interpretation of domestic provisions in the light of a directive may not be considered as a proper transposition as it may put the legal certainty at risk [34]. Yet, in the light of the *Pupino* judgment it is an obligation imposed on domestic courts, albeit within the limits of the doctrine of indirect effect [35]. Also, the limited catalogue of sanctions that may be imposed on legal persons remains an issue. In all other respects, the Polish legislation remains in general compliance with the FD.

4. The legislation in practice

A. General overview of case-law

The amount of case-law is surprisingly small when contrasted with the scale of the activity. Moreover, the FD is almost non-existent in decisions of Polish courts. This section of the contribution is divided into two parts. First, a statistical data on investigations and prosecutions is presented. This is followed by an overview of selected judgments of Polish courts.

Statistical data is not easily available; moreover there are considerable discrepancies between figures provided by the government and other state authorities on one hand, and NGOs on the other. One thing is certain; the scale of the trafficking is immense and has been growing ever since the collapse of Communism in the early 1990s. During that period Poland has become both transit and destination country. The victims of trafficking are mainly women, in most of cases nationals of Central and Eastern European Countries. For a number of reasons it is impossible to determine exactly how many people are victims of trafficking per year. The statistics on a number of prosecutions is not a good point of reference as this type of criminal activity is

---

[32] For an overview see, *inter alia*, M. J. Borgers, "Implementing framework decisions", *CMLRev.*, 44, 2007, p. 1361-1386; B. Kurcz, A. Łazowski, "Two Sides of the Same Coin? Framework Decisions and Directives Compared", *YEL*, 25, 2006, p. 177-204.

[33] ECJ, Case C-144/99, *Commission v. The Netherlands*, *ECR* [2001], p. I-3541.

[34] For an overview of ambiguities associated with this matter see, *inter alia*, M. Klamert, "Judicial implementation of directives and anticipatory indirect effect: connecting the dots", *CMLRev.*, 43, 2006, p. 1251-1275; S. Prechal, *loc. cit.* n. 3, p. 78-81.

[35] ECJ, Case C-105/03, *Pupino*, *ECR* [2005], p. I-5285. For a commentary see, *inter alia*, M. Fletcher, "Extending "indirect effect" to the third pillar: the significance of Pupino?", *ELRev.*, 2005, p. 862-877; E. Spaventa, "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in Pupino", *EuConst.*, 3, 2007, p. 5-24.

rarely reported. The majority of perpetrators are Polish, yet in approximately 20% of cases, nationals of Bulgaria and Ukraine are involved in trafficking [36].

The available data covers the years 1995-2006. The following table presents information on the results of preparatory procedure, gathered by the National Prosecution Service (Prokuratura Krajowa).

Year	Number of completed investigations	Number of investigations that led to the prosecution	Number of investigations that did not reach the prosecution stage (no perpetrator found)	Number of investigations that did not reach the prosecution stage (no crime found)	Number of persons prosecuted	Number of victims
1995	20	18	0	2	43	205
1996	33	26	1	6	59	232
1997	37	31	1	5	58	163
1998	41	25	2	14	64	109
1999	17	14	0	3	24	109
2000	43	38	1	4	119	172
2001	49	35	6	8	71	93
2002	19	11	4	4	40	167
2003	45	30	4	11	134	261
2004	25	18	2	5	39	98
2005	31	19	2	10	42	99
2006	26	17	0	9	36	126
Total	**386**	**282**	**23**	**81**	**729**	**1834**

Source: *Handel ludźmi w Polsce: Materiały do Raportu*, p. 102.

In 104 cases the prosecution decided to drop a case. In 23 cases the perpetrator was not found, in 81 cases the lack of sufficient evidence precluded the prosecution. In years 1995-2004 approximately 200 persons were sentenced for trafficking in human beings. The highest charges were 10 years of imprisonment.

The number of judgments available to the public is relatively small. Only one decision explicitly mentions the FD; however the Protocol, since its entry into force in relation to Poland, is slowly becoming a standard feature in domestic case-law. The definition of trafficking contained therein has become a point of reference in struggles with the lack of a similar definition in CC. Yet, this is not always the case. There are numerous examples of judgments where Polish courts elaborate on the definition of trafficking without a reference to international legal acts. There are also judgments in which domestic courts fail to elaborate on the definition of trafficking and proceed in a rather technical way. Interestingly enough, no judgment delivered after 16th June

[36] See M. Wiśniewski, *Handel ludźmi-statystyka* [Trafficking in Human Beings-Statistics], *loc. cit*. n. 35 at p. 104-105.

2005 contains a reference to the *Pupino* case. One also has to note that Poland as of September 2008 has not recognized the jurisdiction of the European Court of Justice under Article 35 TEU [37]. To this end, even when faced with daunting problems with the interpretation of the FD, Polish courts have no jurisdiction to seek assistance from the ECJ [38].

B. Case-studies

To start with one can discuss the judgment of Court of Appeal in Wrocław of 7th June 2006 in case II Aka 116/06 [39]. This was an appeal submitted by three men sentenced for the trafficking in human beings. The factual background was as follows. Dariusz K, Robert P. and Paweł C. in August 2002 delivered a Polish woman – Sylwia W. to a brothel in Germany. Sylwia W. was a prostitute in Poland and gave her consent to the ordeal. In return for the service they received € 1,500. The Regional Court seized with the prosecution sentenced each accused for 3 years of imprisonment (Article 253 CC). In the request for appeal the counselors acting on behalf of the defendants submitted a number of substantive and procedural arguments. It was argued, *inter alia*, that the Regional Court acted in breach of law by relying on Article 253, para. 1 CC, when the factual background of the case precluded the classification of the activity as trafficking in human beings. In order to address this very issue the Court of Appeal had to check the facts of the case against the definition of trafficking in human beings. Since there is none in CC the recourse to the international instruments was necessary. The Court of Appeal referred to numerous international treaties that Poland is a party to and decided to make the Protocol the point of reference. Having looked at the definition contained in Article 3 of the Protocol, the Court made the following reference to the FD: "Framework Decisions of the Council of the European Union (...) [40] that is being referred to by the advocate representing Dariusz K., repeats the Protocol of 15th November 2000, which proves the coherence of Community Law".

It is striking to note that in this short paragraph the Court of Appeal managed to make two substantive mistakes. First, the definitions contained in the Protocol and in the FD are not mirror copies. Second, the FD cannot be classified as an instrument of Community Law, but law of the European Union (which is a broader concept covering both the first pillar *acquis* and second & third pillars *acquis*).

The Court of Appeal concluded that the activities of defendants could not be classified as trafficking in human beings as the conditions set in Article 3.a of the

[37] An Act on the Recognition of Jurisdiction was adopted on July 10th, 2008. However, before signing and promulgating the Act the President of the Republic has submitted a request to the Constitutional Tribunal for the verification of conformity with Article 45 of the Polish Constitution. The case is pending at the time of writing.

[38] In this context it is worth to mention a decision of the Polish Supreme Court in case I KZP 21/2006 Criminal prosecution against Adam G. Having experienced problems with the interpretation of the FD as well as the Polish implementing measures the Supreme Court expressed a regret that it has no jurisdiction to make a reference for preliminary ruling.

[39] Judgment of the Court of Appeal in Wrocław, case II Aka 116/06, Criminal proceedings against Dariusz K., Robert P. and Paweł C., not reported (on file with the author).

[40] Reference to the title and publication omitted by the author.

Protocol were not met. However, since these activities fell within the ambit of Article 204, para. 4 CC, the Court of Appeal changed the qualification and reduced the penalty to two years of imprisonment.

The next judgment that merits attention is the decision of Court of Appeal in Lublin of 7th April 2005 in case II AKa 75/05. It is an excellent example of practical problems caused by the legislative *lacunae*. Bernard Ż. was prosecuted for trafficking in human beings. In the period from 25th June 1996 to 31st December 1997 he facilitated a transfer of at least three women to brothels in Germany. He received a remuneration of 2,000 DM for each woman. The Regional Court in Lublin in a judgment of 30th November 2004 (Case No. IV K 171/02) sentenced him for 1 year and 6 months of imprisonment and imposed a financial penalty. The Regional Court held that Bernard Ż. was guilty of facilitating prostitution, a crime stipulated in Article 204, para. 1 CC. An appeal was submitted by a Public Prosecutor, who argued that Bernard Ż. was also guilty of trafficking in human beings (Article 253, para. 1 CC). The Court of Appeal started off by looking at the facts of the case. It was beyond doubt that the three women in question approached Bernard Ż and were fully aware of the type services they were expected to provide in Germany. Interestingly enough the first instance court wrongly referred to the Protocol, which at the given time, was not formally a binding source of law in Poland [41]. Having looked at the definition contained therein, the Regional Court held that the actions of Bernard Ż. could not be classified as trafficking in human beings. The Court of Appeal disagreed. It held that Article 253, para. 1 CC must not be interpreted in a literal fashion. To the contrary, it deserves historical and functional interpretation. To start with the Court of Appeal looked at the linguistic nuances of the terms "human being". Article 253, para. 1 CC uses the terms "*handel ludźmi*" – trafficking in human beings. The word "*ludzie*" is plural and there is no singular of that word. Thus, literal interpretation of Article 253, para. 1 CC may imply that only trafficking of at least two people is a crime. The Court of Appeal held that such interpretation is not acceptable (though supported by some courts and academics). It then turned to the in-depth analysis of international treaties, which Poland is a party to. It held that the definition of trafficking in human beings laid down in the Protocol applies to the Protocol only (Articles 3-4 of the Protocol), nevertheless it may be applied *mutatis mutandis* for the purposes of interpretation of Article 253, para. 1 CC. This led the Court of Appeal to the conclusion that the activities of Bernard Ż. could be classified as trafficking in human beings, therefore it returned the case to the Regional Court for re-adjudication.

As already noted, not all Polish courts make explicit references to international law or EU law binding upon Poland. There are examples of cases where judges interpret Article 253, para. 3 CC in a broad fashion. For that purpose they tend to refer to academic writing and domestic case law only. The following judgments may serve

[41] The Regional Court took 16th February 2003 as the date of entry into force in relation to Poland (the date of publication of the Act of Parliament allowing the President of the Republic to ratify the Protocol, see *supra* n. 1), while according to the Polish Constitution, international treaties become a source of law only upon their publication in *Dziennik Ustaw*. The Regional Court was not the only one to make this mistake. See, for instance, judgment of Court of Appeal in Białystok of 24th May 2004 in case II Aka 66/04.

as an excellent example. The Regional Court in Słupsk in case No. III K 4/04 held that Marek K. was guilty of trafficking in human beings. Together with other persons he approached three Polish women (minors), delivered them to the Polish-German border and passed to a German national with the aim of engaging in prostitution. This crime, according to the Court, was covered by both Article 204, para. 1 and Article 253, para. 1 CC. The Court referred to case-law of the Polish Supreme Court, yet failed to acknowledge relevant international or EU legal acts.

C. Activities aimed at combating the trafficking in human beings

Due to the scale of trafficking following the collapse of Communism the combating and preventing trafficking in human being has become a major policy choice for the Polish authorities [42]. Bearing in mind the biannual governmental action plans and the plethora of various activities it is surprisingly that the legal framework still suffers from the lack of definition of trafficking. A revision of CC is planned as a part of the 2007-2008 biannual program. In his recent letter to the Minister of Justice, the Polish Ombudsman explicitly mentioned the EU related obligations and the need for a complete transposition of the FD [43]. Interestingly enough the recent bills submitted (by the Government) for the adoption to the Parliament have been tailored to transpose a number of framework decisions [44] and Article 54 of the Schengen Implementing Convention (as interpreted by the ECJ), yet they fail to take into account the obligations stemming from the FD 2002/629/JHA.

The bi-annual programmes for 2003-2004, 2005-2006, 2007-2008 [45] provide the necessary framework for several types of activities organized by the Government (in some cases in close co-operation with an NGO – La Strada Foundation) [46]. This includes a plethora of conferences, training sessions for practitioners and awareness raising events and activities. The improvement of co-ordination between Police and Border Authority is of the aims of the current program. However, the FD is only one of the items on the rich agenda.

Alas, the FD is almost non-existent in the public discourse. It tends to concentrate on the scale of trafficking in human beings and general actions tailored at combating this negative phenomenon. The only framework decision, which has managed to attract the attention of the public, is the FD on the European Arrest Warrant. This is largely

[42] See F. Jasiński, "National Co-ordination of the Fight against Trafficking in Human Beings: Recommendations for Poland as a "New" EU Member State", EUI Working Paper RSCAS No. 2006/16.

[43] A copy of the letter on file with the Author.

[44] Council FD 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, *OJ*, No. L 13/44, 2004; Council FD 2005/222/JHA of 24 February 2005 on attacks against information systems, *OJ*, No. L 69/67, 2005; Council FD 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *OJ*, No. L 192/54, 2003; Council FD 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ*, No. L 76/16, 2005.

[45] Programmes as well as reports on the implementation are available at http://www.mswia.gov.pl/portal/pl/390/2174/Dokumenty.html

[46] Information about the Foundation and its activities available at http://www.strada.org.pl/

due to the well known decision of the Constitutional Tribunal and the subsequent revision of Article 55 of the Polish Constitution as well as the extensive use of this instrument. The same goes for the civil society. Interestingly enough, the website of Foundation La Strada, generally associated with the fight against trafficking in human beings, hardly mentions the FD. However, the FD has received a considerable attention in academic writing. There are not that many articles, commentaries devoted to the FD itself, yet a great deal of more general literature on trafficking in human beings mentions the FD in one way or another [47].

5. Conclusions

Having looked at the transposition and implementation of the FD it is time to draw some conclusions stemming from this exercise. Arguably, this piece of legislation suffers from a more general birth defect of framework decisions as instruments of EU law. If one looks at the public discourse in Poland it has no choice but to conclude that framework decisions are perceived as just one of many types of legal acts adopted by the EU, yet without any sanction for the partial or non-transposition or no implementation. Although in general terms the similarity of directives and framework decisions is acknowledged, the uniqueness of the third pillar is emphasizes beyond what is necessary. The seriousness of obligations undertaken under the third pillar is undermined by the intergovernmental nature of the third pillar and the lack of legal sanctions for breaches of EU law in this respect [48]. This situation may potentially change with the entry into force of the Treaty of Lisbon [49] and merger of pillars of the European Union [50]. Upon the expiry of the five year transitional period all existing framework decisions are likely to become directives, with all legal consequences resulting from this [51].

For a number of reasons it is very difficult to evaluate the real effectiveness of the Framework Decision. First and foremost, numerous provisions contained therein did not require an additional effort as comparable rules had already been available in the Polish law even before the accession to the European Union. In this respect

[47] F. Jasiński, E. Zielińska, "Decyzja Ramowa z dnia 19 lipca 2002 r. w sprawie zwalczania handlu ludźmi (2002/629/WSiSW)-komentarz [FD of 19th July 2002 on combatting trafficking in human beings (2002/629/JKA) – a Commentary]", *in* E. Zielińska (ed.), *Prawo Wspólnot Europejskich a prawo polskie. Dokumenty karne, część II*, Warszawa, Oficyna Naukowa, 2005, p. 531-568; F. Jasiński, K. Karsznicki, "Walka z handlem ludźmi z perspektywy Unii Europejskiej" [The Combat of Trafficking in Human Beings from the Perspective of European Union]", *Państwo i Prawo*, 8/2003, p. 84-63.

[48] See minutes of the debate on the revision of Article 55 of Polish Constitution 1997 (the provision prohibiting the extradition of Polish nationals) available at http://www.sejm.gov.pl.

[49] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ*, No. C 306/1, 2007. For an academic appraisal see, *inter alia*, M. Dougan, "The Treaty of Lisbon 2007: Winning minds, not hearts", *CMLRev.*, 45, 2008, p. 617-703.

[50] On the legal consequences for the JHA area see, *inter alia*, S. Peers, "EU criminal law and the Treaty of Lisbon", *ELRev.*, 33, 2008, p. 507-529.

[51] For an interesting discussion about this issue see House of Lords. The Treaty of Lisbon: an impact assessment, vol. I: Report, p. 172-173.

the FD remained almost unnoticed. The FD suffers from the "invisible touch" status as it clearly remains in the shadow of the Protocol and in the general perception it remains one of many international instruments. Interestingly enough, the specificity of the FD as part of *acquis*, is hardly ever raised. To the contrary, it is usually listed together with other international legal acts. This has more to do with the general perception of framework decisions as legal acts than this particular piece of legislation. Depending on the scientific background academics tend to treat framework decisions as international instruments (this is usually the case with criminal and international law specialists) or as *sui generis* acts of EU law (EU specialists) [52]. Depending on the perspective, the perception of the scope and character of obligations imposed on the Member State is different. This is clearly visible in academic writing referred to throughout this Report.

It is equally difficult to determine what practical changes the FD has brought. Again, they are overshadowed by the entry into force of the Protocol (in relation to Poland on 31st January 2005). A manual on handling of trafficking related cases prepared by the National Public Prosecutors service may serve as an excellent example [53]. In the part devoted to the definition of trafficking in human beings it only refers to the Protocol (the FD is not mentioned at all). Yet, a few pieces of EU legislation are mentioned in other parts of this document.

To conclude, in general terms the objectives of the FD have been met, yet it is very difficult to determine to what extend this initiative *per se* has contributed to the state of affairs. Being one of a few legal acts with international origin, the FD cannot be analyzed in separation from other pieces of international legislation and will likely remain in their shadow in the future.

[52] The case-law of Polish courts is inconclusive. A good example is the famous EAW judgment of the Polish Constitutional Tribunal, whereby the judges mentioned different ways of perceiving framework decisions as instruments of EU law without giving their opinion to this end.

[53] Wskazówki metodyczne dla prokuratorów prowadzących lub nadzorujących postępowania karne w sprawach dotyczących handlu ludźmi, available at the website of the Ministry of Interior Affairs at http://www.mswia.gov.pl.

Slovenia

Matjaž Ambrož and Mojca M. Plesničar

1. Introduction

The Republic of Slovenia gained its status of independence in 1991, after the dissolution of the Socialist Federal Republic of Yugoslavia. The legal system is in our belief deeply intertwined with the demographic and social reality of a particular State, therefore some additional background data will be useful. Slovenia has long been part of the central European legal reality and has even through its socialist period retained many of the pre-war legal institutions, inherited from the Austro-Hungarian Empire. Today, Slovenia is a young European country with a population of almost two million, a relatively low crime rate and number of sentenced persons and a stable legal system. The biggest problem its judiciary is facing at the moment is probably the matter of judicial delays.

The present Slovenian Penal Code (hereinafter PC) was adopted in October 1994 and entered into force on January 1st 1995. It has already been amended twice, namely in March 1999 and April 2004. To a considerable extent these amendments were due to the growing requirements of bringing Slovenian legislation in line with the EC *acquis communautaire* [1] and with international criminal law [2]. It is to be noted

[1] For an overview of this development see e.g. D. Korošec and M. Ambrož, "Das slowenische Strafrecht zum Zeitpunkt des Beitritts Sloweniens zur EU (am 1. Mai 2004)", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2006/2, p. 489-511.

[2] See K. Šugman, M. Jager, N. Peršak and K. Filipčič, *Slovenia – Criminal justice systems in Europe and North America*, Helsinki, Heuni, 2004, p. 6.

that a proposal of a completely new PC has been introduced into the parliamentary proceedings in January 2008, however its fate is at the moment still uncertain [3].

As regards the international documents related to trafficking in human beings, Slovenia has signed the two most important documents, namely the UN Protocol to prevent, suppress and punish trafficking in persons supplementing the UN Convention of 12 December 2000 against transnational organized crime [4] and the Council of Europe Convention on Action against Trafficking in Human Beings of May 2005 [5] [6].

Since the beginning of the process of accession to the EU Slovenia has implemented several EU instruments related to trafficking in human beings: besides the FD of 19 July 2002 on combating trafficking in human beings [7], the Joint action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children, the FD of 15 March 2001 on the standing of victims in criminal proceedings, the Directive of 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 [8] and the FD of 22 December 2003 on combating the sexual exploitation of children and child pornography [9] are worth mentioning. The latter has however not been implemented fully due to certain conceptual reservations mainly among criminal legal experts [10].

---

[3] The manuscript of this article was finalized in April 2008. The proposal of the new PC has received a considerable amount of serious criticism from both academia and practitioners, however political parties with different views on the subject will decide on its adoption in the following months.

[4] Signature: 15 November 2001, Ratification: 21 April 2004.

[5] Signature: 3 April 2006, Ratification: not yet.

[6] Some other documents (at least indirectly) related to trafficking in human beings that Slovenia has signed and ratified are to be mentioned: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Signature: 8 September 2000; Ratification: 15 July 2004), Agreement between the Republic of Slovenia and the European Police Office (Signature: 1 October 2001; Ratification 28 February 2002), European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Signature: 4 November 1993; Ratification: 2 February 1994), Convention for the Protection of Human Rights and Fundamental Freedoms (Signature: 4 May 1993; Ratification: 28 June 1994).

[7] See *infra*.

[8] Amendment of the Aliens Act (*Official Gazette of the Republic of Slovenia*, 79, 2006, 27 June 2006).

[9] Amendment of the Penal Code (*Official Gazette of the Republic of Slovenia*, 40, 2004, 20 April 2004).

[10] "It is quite obvious, that the EU might have foreseen in its legitimate efforts to combat the sexual exploitation of children certain measures, which are likely to broaden the net of criminal offences greatly or even disproportionately. Such broadening might represent a difficulty for those national legal systems which seriously consider the *ultima ratio* principle when amending the criminal legislation" (M. AMBROŽ, "Council FD on combating the sexual exploitation of children and child pornography and the Slovenian criminal law", *in* M. TOMAŠEK (ed.), *European law and National Criminal Legislation*, Prague, Faculty of Law Editions centre,

2. A rough outline of the Slovenian substantive penal law

A. General considerations

The Slovenian penal law acknowledges two types of criminal activity, namely criminal offences and misdemeanours. The two differ from each other with regard to the relative seriousness of the offence and subsequently to their position in the legislation. Criminal offences are thus construed as these unlawful acts that are, due to their danger, provided for by the PC together with their respective elements and prescribed punishment. Misdemeanours on the other hand are offences of lower importance, dealt with mainly in the Minor Offences Act.

The structure of the Slovenian PC is more or less classical and comparable to other PCs among continental legal systems. The PC is divided into the general and the special parts.

The general part is inspired by the German, Swiss, Austrian as well as Italian legal traditions. It accepts the three-part structure of a criminal offence, namely the fulfilment of statutory paradigm, unlawfulness and culpability. As regards participation, attempt, omissive offences and negligent offences, the Slovenian general part does not differ significantly from solutions accepted in comparable legal systems. The institution of *de minimis offence* [11] can be viewed as a relatively distinct feature, however similar solutions may be found in the Austrian and Finnish PCs.

The Slovenian determination of the age of criminal responsibility, set at the age of 14, is also quite common among other legal systems. Offenders in Slovenia can be divided into five categories: (1) children below the age of 14 (may not be held criminally liable), (2) juveniles between 14 and 16 years of age at the commission of the offence (only educational and safety measures may be applied), (3) juveniles between 16 and 18 years of age at the commission of the offence (generally educational and safety measures may be applied, but in exceptional cases juvenile detention or fine may also be imposed), (4) young adults who have not reached 21 years of age by the end of the trial (may be punished regularly as adults, but the court may – instead of imposing an imprisonment sentence – order social services supervision or any institutional measure), and (5) adult offenders.

As regards the special part of the PC, it is to be stressed that the Slovenian system at the moment does not have any side criminal laws, meaning that all criminal offences are listed in the special part of the PC itself. However, the preservation of this particularity is not certain at all, since there are frequent proposals of excluding certain parts, such as economical crime, international core crimes etc. and of forming separate codifications.

The Slovenian PC prescribes several types of criminal sanctions, namely punishments, admonitory sanctions, safety measures and educational measures.

2007, p. 147. The abovementioned reproach is directed to the rigorous measures regarding the incrimination of bare possession of child pornography.

[11] This substantive institution (Article 14 PC) allows the Court not to consider a certain act to be a criminal offence, even when the act contains all the statutory elements. This is only possible though, if the act is of low significance and certain other relatively strict conditions are met.

The PC imposes four types of punishments on perpetrators committing criminal offences. *Imprisonment* may only be imposed as a principal sentence. The duration of imprisonment ranges between 15 days and 15 years, but, under special circumstances, a punishment up to 20 years imprisonment may be imposed. A sanction of 30 years imprisonment is alternatively prescribed for murder under aggravating circumstances and for certain core crimes. *Monetary fines* may be imposed as a principal or as an accessory sentence in daily amounts. The punishments of imposing a *ban on driving the motor vehicle* and *deporting of foreign citizens from the country* may only be used as accessory sentences to imprisonment, fine or suspended sentence.

As for admonitory sanctions, *suspended sentences* may be applied by the court against the perpetrator of a criminal offence instead of a sentence, under conditions provided for by the PC. Under certain circumstances the court may decide that the perpetrator who is given a suspended sentence has to undergo *custodial supervision* for a certain period of time during the term of suspension. Perpetrators, committing criminal offences punishable with a fine or a prison sentence not exceeding one year (three years under special circumstances) may be sanctioned by *judicial admonition*, provided that such an offence has been committed in particularly mitigating circumstances [12].

The court may apply one or more safety measures to the perpetrator of a criminal offence, when the statutory conditions for their application are met. The possible measures are compulsory psychiatric treatment and custody in a medical institution; compulsory psychiatric treatment in the community; compulsory treatment of persons addicted to alcohol and drugs; barring from performing a certain occupation; confiscation of driving license; confiscation of objects. All safety measures are limited in their duration.

Educational measures may be imposed on juvenile perpetrators and under special circumstances on young adults (see above). The possible educational measures are reprimands; instructions and prohibitions; supervision by social services; committal to an educational institution; committal to a juvenile detention centre; committal to an institution for physically or mentally handicapped youth.

The Slovenian penal law also provides for the criminal liability of legal persons. The general possibility of holding legal persons criminally liable has been introduced by Article 33 of PC. According to this provision a legal person can be held liable for offences which were committed either in the name of the legal person, on its behalf or for its benefit. The more detailed rules of attribution of criminal liability to legal persons were issued in 1999 in the Criminal Liability of Legal Entities Act. This Act regulates substantive provisions (general and special part) as well as specific issues of criminal procedure.

The legal entity may be punished by either *fine*, *confiscation of property* or *termination of the legal person*. The fine imposed may range from a minimum of 10,432 euro to a maximum of 200 times the amount of the harm caused or to a maximum of 200 times the monetary gain collected by committing the criminal

[12] The Slovenian Courts, however, relatively rarely sanction offenders by admonitory sanctions. The prevailing type of punishment in practice is the suspended sentence.

offence. The confiscated property may amount to a half of the entire property or more or alternatively to the whole legal person's property. The legal person may be terminated in cases, where all or a large portion of its activities were used to commit the criminal offence.

The general rules on jurisdiction allow for both the territorial and personal jurisdiction. The jurisdiction applies to:

- any person who commits a criminal offence in the territory of the Republic of Slovenia;
- any person who commits a criminal offence on a domestic vessel regardless of its location at the time of the perpetration of the offence;
- any person who commits a criminal offence either on a domestic civil aircraft in flight or on a domestic military aircraft irrespective of its location at the time of the perpetration of the criminal offence;
- any citizen of the Republic of Slovenia who commits any criminal offence abroad (other than those specified above) and who has been apprehended in or extradited to the Republic of Slovenia;
- any person who, in a foreign country, commits either the criminal offence of counterfeiting money referring to domestic currency or any of criminal offences against the security of the Republic of Slovenia and its constitutional order (Chapter 33 of the PC);
- any foreign citizen who has, in a foreign country, committed a criminal offence against the Republic of Slovenia or any of its citizens and who has been apprehended in the territory of the Republic of Slovenia or has been extradited to it;
- any foreign citizen who has, in a foreign country, committed a criminal offence against it or any of its citizens and has been apprehended in the Republic of Slovenia and is not extradited to such foreign country. In such cases, the court shall not impose a harsher punishment on the perpetrator than the punishment prescribed by the statute of the country in which the offence was committed.

B. Penal provisions related to trafficking in human beings

The Slovenian PC provides for the option to distinguish between the acts of smuggling and of trafficking in human beings. Article 311 of the PC in fact criminalizes the prohibited crossing of state border; its second paragraph specifically criminalizes engaging in the prohibited transit of other persons across the border out of greed, which could be interpreted as the incrimination of smuggling. Trafficking in human beings is incriminated elsewhere as will be elaborated later.

In Slovenia, prostitution itself is decriminalized. This fact does not however prevent the State from incriminating certain linked behaviours, namely the participation for exploitative purposes in the prostitution of another person or instructing, obtaining or encouraging another person to engage in prostitution with force, threat or deception. The listed acts in fact do constitute a criminal offence (abuse of prostitution, Article

185 of the PC), punishable by imprisonment from 3 months to 5 years [13]. The judicial practice has not yet given a clear answer to how the statutory characteristic "for exploitative purposes" should be interpreted. In certain decisions Slovenian courts have recognized "exploitative purposes" in the sole fact that a pecuniary advantage was obtained regardless whether the partition of the monetary gain was "fair". This interpretation however does not meet the purpose of the legislator who wanted to narrow down the reach of previous regulation of prostitution [14].

Moreover, proposing sexual services in a public place in a forceful manner, if the action inconveniences other persons, causes uneasiness or repugnance, constitutes a misdemeanour (indecent behaviour (Article 7/III)) under the protection of Public Order Act. This provision has been strongly opposed by some authors, who believe that it exceeds the scope of the *ultima ratio* principle [15].

Using services is however not in any way punishable by law.

3. Substantive and formal conformity

A. General considerations

The FD of 19 July 2002 on combating trafficking in human beings was mainly transposed into the Slovenian criminal law with the Act amending the PC (KZ-B) in 2004 [16]. A new article has then been introduced, which incorporates the rationale of the FD as well as the UN Convention of 12 December 2000 against transnational organized crime and its protocols.

The transposing instrument, namely the Act amending the PC (KZ-B), brought some changes in internal law with regard to the topic, most obviously the specific incrimination of trafficking in human beings. Though trafficking in human beings had been punishable before the amendment, the specific incrimination was construed by combining several articles of the PC; therefore the new arrangement of the criminal offence has brought clarity to the subject. However, the newly added incrimination has also brought some inconsistencies with internal law (as elaborated below), thus causing possible misinterpretations.

The newly formulated article on trafficking in human beings states:

> "Trafficking in human beings
> Article 387.a
>
> (1) Whoever purchases other persons, takes possession of them, accommodates them, transports them, sells them, delivers them or uses them in any other way, or acts as a broker in such operations, for the purpose of prostitution or another form of sexual

---

[13] For an overview of developments in this field see M. Ambrož and D. Korošec, "Neue Entwicklungen im Sexualstrafrecht Sloweniens", *Jahrbuch für Ostrecht*, 47, 2006, p. 196-197.

[14] M. Ambrož, "Ali je treba kaznivo dejanje Zloraba prostitucije oblikovati bolj določno?", *in* A. Šelih (ed.), *Sodobne usmeritve kazenskega materialnega prava*, Ljubljana, IK, 2007, p. 329-332.

[15] N. Peršak, "Trgovina z ljudmi: problematika obstoječega zakonskega besedila in potencialne nove spremembe", *in* A. Šelih (ed.), *op. cit.*, p. 336.

[16] The amending act was submitted to the Parliament on 6 November 2003 and adopted on 30 March 2004. It entered into force on 5 May 2004.

exploitation, forced labour, enslavement, service or trafficking in organs, human tissue or blood shall be given a prison sentence of between one and ten years.
(2) Anyone who committed an offence from the preceding paragraph against a minor or with force, threats, deception, kidnapping or exploitation of a subordinate or a person in a dependent position, or in order to force a victim to become pregnant or to be artificially inseminated, shall be given a prison sentence of at least three years.
(3) Whoever carries out an offence from the first or second paragraphs of this article as a member of a criminal association for the commission of such offences, or if a large pecuniary benefit was gained through commission of the offence, the perpetrator shall be subject to the same penalty as specified in the preceding paragraph".

Other provisions of the PC also narrowly linked to the new incrimination of trafficking in human beings have not been abrogated; therefore some activities could be covered either by the new criminal offence or by the previously existing offence of placing in a slavery condition (Article 387). This article has remained unchanged, stipulating:

"Placing in a slavery condition
Article 387

(1) Whoever, in violation of the rules of the international law, places another person into slavery or a similar condition, or keeps another person in such a condition, buys, sells or delivers another person to a third party, or brokers the buying, selling or delivery of such person, or induces another person to sell his freedom or the freedom of the person he supports or cares after, shall be punished by imprisonment of one up to ten years.
(2) Whoever transports persons held in the condition of slavery or in similar condition from one State to another, shall be punished by imprisonment of six months up to five years.
(3) Whoever commits the offence referred to in the first or the second paragraphs of this Article against a minor, shall be punished by imprisonment of at least three years".

Significant changes have been made in the field of crimes related to prostitution, closely linked with the problem of trafficking in human beings; one of the articles concerning prostitution has been deleted (Article 186), while another (Article 185) has been amended in order to include two former criminal offences: procuring for prostitution and interceding for prostitution. Both incriminations are now included in the newly formed Article 185 entitled Abuse of prostitution [17], which states:

"Abuse of prostitution
Article 185

(1) Whoever participates for exploitative purposes in the prostitution of another person or instructs, obtains or encourages another person to engage in prostitution with force, threat or deception, shall be punished by imprisonment of three months up to five years.

[17] See elaborations in 2.B.

> (2) If an offence from the preceding paragraph is committed against a juvenile, against more than one person or as part of a criminal association, the perpetrator shall be punished by imprisonment of one up to ten years".

B. *Formal conformity*

The transposition of the FD provisions into internal law has been rather accurate and thorough.

The article incriminates purchasing other persons, taking possession of them, accommodating them, transporting them, selling them, delivering them or using them in any other way, or acting as a broker in such operations, for the purpose of prostitution or another form of sexual exploitation, forced labour, enslavement, service or trafficking in organs, human tissue or blood.

The basic incrimination as stated in the first paragraph does not include any means of achieving the aforementioned goals, while the FD enumerates the means by which those goals are pursued in order to constitute a criminal offence. The Slovenian PC is thus significantly more severe than the FD, since the means of committing the offence, that constitute an element of the criminal offence under the FD, are only aggravating factors in Article 387.a of the Slovenian PC and find their position in the second paragraph thus constituting a more serious form of the criminal act.

The Slovenian PC has also extended the definition of trafficking in human beings to cover trafficking with organs, human tissue or blood.

Among purposes linked to trafficking in human beings, the Slovenian PC enumerates "prostitution" without explicitly stating its exploitative nature. However, by interpreting the norm and taking into account the national legal attitude towards prostitution [18], one can deduce that in fact only the exploitation of prostitution is meant.

Victims' consent is not explicitly regulated in the Slovenian PC. Generally speaking, a victim's consent is understood to be a ground for justification, deriving from the very fundamental legal concepts. However, not every consent has legal value. The very nature of exploitative criminal behaviour is by itself not compatible with the notion of an informed and autonomous consent. Such assertion is of course true for the criminal offence of trafficking in human beings, that roots in exploitation. Therefore, the victim's consent cannot be a valid ground for justification neither an excuse. Since this is true for adult victims, it is even more so when the victim is a child [19].

Instigation of, criminal support and attempt to commit trafficking in human beings are all punishable under general rules of criminal law. Attempt is generally criminalized when the perpetrator intentionally initiates a criminal offence, but fails to complete it, provided that such an attempt involved a criminal offence punishable by three years imprisonment or more or when the punishability of the attempt is expressly stipulated in the special part of the PC. As regards criminal instigation the Slovenian PC provides for the punishability of those who intentionally instigate another person

---

[18] As mentioned above, prostitution itself is not criminalized under national law.

[19] The Slovenian PC interprets the FD's mentioning of children as including all minors, by general provisions of the legal system understood as all persons under the age of 18.

to commit a criminal offence; even in the case of absence of attempted commission of the offence, the instigator is still punishable, provided that the instigated offence is a serious one (punishable by three years imprisonment or more). Any person, who intentionally supports another person in the perpetration of the criminal offence, is punishable under the Slovenian PC as if he/she had committed the offence him/herself; nevertheless the sentence may be reduced. Bearing in mind the abovementioned explanations, one can argue that it was not absolutely necessary for the legislator to extensively enumerate all the modes of perpetration with regard to trafficking in human beings, since some of them (e.g. "acts as a broker") would still be punishable according to general rules.

The basic criminal offence of trafficking in human beings (as stated in Article 387.a/I) is punishable by imprisonment in a range from 1 to 10 years. When the criminal offence is committed against a minor or under other aggravating circumstances, the PC prescribes a minimum of 3 years imprisonment (Article 387.a/II and III).

Aggravating circumstances are transposed in internal law, though not exactly in the manner prescribed by the FD. There is no specific mention of endangering the life of the victim, though the basic criminal offence of trafficking in human beings may be combined with other criminal offences regarding endangering life. The vulnerability of the victim is not specifically defined, the minority however is mentioned. There is no mention of the amount of violence or harm towards the victim; however these aggravating circumstances may be implemented using other PC provisions. Committing the offence as a member of a criminal organization is specifically mentioned in the third paragraph.

Even though all aggravating circumstances enumerated in the FD are not explicitly mentioned in Article 387.a, the punishment required in Article 2 of the FD still applies, since the basic punishment for the criminal offence under Article 387.a is 1 to 10 years imprisonment.

The liability of legal persons is provided for by the Criminal liability of Legal Entities Act [20]. The criminal offence of trafficking in human beings has been added to the list of criminal offences for which legal persons may be held liable.

There was no need for a specific transposition of provisions regarding the jurisdiction, since the Slovenian PC regulates the question of jurisdiction relatively broadly, covering all relevant titles of jurisdiction, including the universal jurisdiction [21].

The prosecution of the offence does not depend on the willingness of the victim or its accusation; it is prosecuted *ex officio*. Each of the eleven District Prosecution Offices in Slovenia has a State Prosecutor, specially assigned with cases of trafficking in human beings; their work is coordinated and directed by a designated Supreme State Prosecutor.

When the victims of the offence are minors, their particular vulnerability, though not explicitly mentioned, is reflected in several parts of the Criminal Procedure Act. A minor, for example, may have an attorney to care for her or his rights, particularly

[20] See above.

[21] See above.

in connection with the protection of his or her integrity during examination before Court and during the assertion of a claim for compensation. When an injured minor does not choose an attorney, the Court assigns him with an *ex officio* attorney from among the members of the Bar. When the victim is a minor under the age of 15, the accused may not be present during examination. At the examination of a minor the Court must give special care to avoid producing harmful effects on his state of mind. If necessary, a pedagogue or some other expert should be called to assist in such an examination. Direct questioning of persons under the age of 15 is not permitted at the main hearing.

Unfortunately no piece of the Slovenian legislation contains the explicit right of the victim to be informed of his or her rights or possibilities to get support. Accordingly there is also no duty of the law enforcement agencies to inform the victims of their rights and possibilities. It all depends on the practice of the police station or prosecutorial authority respectively. Most of this duty therefore rests on the NGOs that deal with the victims.

Finally, one can argue that the Slovenian transposition of the FD of 19 July 2002 on combating trafficking in human beings has been rather accurate, though certain aspects of the national legislation appear to be more severe than the FD itself. Namely, the means of commission of the offence, part of the offence itself in the FD, only constitute aggravating circumstances that increase the prescribed punishment.

C. Substantive conformity

For the time being, no significant substantive discrepancies that would require corrections have been detected. However, since there is no relevant judicial practice yet, the occurrence of some problems that may appear in the process of application of the new rules is not entirely excluded.

In cases where judicial practice could have developed, one can identify the prosecutorial tendency to persist on the established incriminations (e.g. placing in a slavery condition, abuse of prostitution, prohibited crossing of State border), combining them according to the rules of concurrence of offences, rather than using the new incrimination of trafficking in human beings, which by itself combines the incriminated behaviours. It is however still unclear whether such prosecutorial behaviour reflects the tendency to use well established and previously tried incriminations or whether it in fact points at certain serious shortages of the newly formed Article 387.a.

4. Practical application of the norm and control of effectiveness and efficiency

As mentioned above, no judicial practice has been settled yet. Police and prosecution statistics do report several suspected offences, categorized as trafficking in human beings, however it is to expect that it will take years until final judgements are issued [22].

The categorizing of offences in those reports also show, that the general perception of trafficking in human beings is closely associated to the notion of sexual exploitation

---

[22] See *Annual report on the work of Public Prosecutors, years 2005, 2006*; *Annual report on the work of the Police, year 2007*.

and much less to other exploitative purposes set forth by the FD. All statistics in fact show a joint approach towards the criminal offences of trafficking in human beings, placing in a slavery condition, abuse of prostitution and prohibited crossing of state border.

The lack of judicial practice does not allow for thorough analysis of the criminal offence, one can only judge it in light of abstract concepts. In this regard, the newly introduced criminal offence does not seem to be excessively restrictive in the light of principles of criminal law.

5. Reception and perception

Trafficking in human beings has been taken rather seriously by the Slovenian government, which in 2001 established an Interdepartmental Working Group (IWG) for the fight against trafficking in human beings, constituted by representatives of several ministries, NGOs and several international organizations. In February 2002 a National Coordinator was appointed for this field. The Interdepartmental Working Group informs the Slovenian Government of its activities in regular annual reports.

In 2004 the Interdepartmental Working Group drafted, and the government confirmed an Action Plan for the period 2004-2006. The action plan has been amended and then renewed in 2007 to cover the period 2008-2009. The Plan is based on the preventive and protective operation of all bodies and organizations that are represented in the Interdepartmental Working Group for the fight against trafficking in persons. It is also based on training and international cooperation of professional staffs, officials and volunteers working in the area of trafficking in persons. They also draw attention to all the international and national documents on the problems of trafficking [23].

The FD itself is usually viewed in light of other international documents on the matter and a specific attitude towards it is relatively impossible to assess. The transposing law, on the other hand, has been welcomed mainly because it cleared the mist around several previous incriminations needed to prosecute an offender of such crimes; however practitioners, mainly the police and prosecutors, find it rather difficult to prove the element of abuse immanent to the criminal offence. Prosecution is relatively challenging due to the attitude of victims, who do not consider themselves as such and are thus less inclined to cooperate in criminal proceedings. Nevertheless, practitioners find the transposing text utilizable, though they very much stress the importance of putting enough emphasis and energy on its implementation, mainly in the phase of gathering evidence. It is, however, still early to make definitive assessments on the general attitude towards the text, since practical implementations have been limited since its adoption [24].

The level of knowledge among the practitioners and experts in the field is relatively satisfactory regarding the internal text whereas knowledge of the original FD is presumably lower. However, since the implementation has been rather adequate this should not cause serious difficulties.

---

[23] See the site: http://www.vlada.si/activities/projects/fight_trafficking_in_persons.

[24] Mr Sandi Čurin, the National Coordinator, head of the IWG, has provided us with extensive information on the matter.

The topic has received relatively little media attention in comparison with other types of crime. However on the basis of some responses it is safe to assess that media coverage is more than favourable towards a more severe and restrictive legislation in this field.

NGOs working in the field (mainly three NGOs: Ključ, Slovenska filantropija and Karitas) deal mainly with problems regarding victims of trafficking in human beings. The field of victim support is consciously left to NGOs, with governmental structures funding the process and laying down required criteria. NGOs help victims by providing housing, offering psychosocial help, helping with paperwork regarding their status and performing other tasks.

One of the main points of disagreement with the current legislation is the Alien's Act requirement of cooperation with the prosecution (Article 38.a) in order to receive temporary permits to stay in the country. NGOs are much inclined to broaden the right to temporary stay to all victims of trafficking in humans and not only the cooperative ones.

NGOs are also a part of the multidisciplinary body and collaborate fully in its several activities, among others education and raising awareness in the field.

There is some legal doctrine on the matter, and some scholars have laid more emphasis on the problems lately. The FD is generally viewed in connection with other international documents concerning trafficking in humans. The transposition of such documents in national law is viewed as welcome, though unsatisfactory in some aspects.

6. Conclusion

The impact of the FD of 19 July 2002 on combating trafficking in human beings as such on the Slovenian legal system is rather difficult to assess. Slovenian legislation in the field changed on the basis of both the UN documents concerning trafficking in human beings and the FD. On a general level, though, it can be claimed that it did contribute to the approximation of legislation within the EU, and the subsequent increase of mutual trust in this field.

A serious impact of the transposing text on the internal legal system has not been detected. The transposition has however not been optimal. The introduction of the new incrimination without abrogating or at least amending some of the previously existing offences has caused certain behaviour to be covered by more than one incrimination. This is not the single case where several incriminations overlap, however this overlapping can be one of the reasons for a relatively restricted use of the new criminal offence, since a comparable result can be achieved using pre-existing provisions.

Nevertheless, it cannot be denied that the new criminal offence has brought additional clarity to the matter. Furthermore, one can only approve of the fact that the new incrimination has not altered the nature of the penal law in any way and that the balance between the shield and sword functions of penal law has remained intact.

Other references

Annual report on the work of the Interdepartmental Working Group for the fight against trafficking in human beings for the year 2006.

S. Čurin (ed.), *Uveljavljanje mednarodnopravnih dokumentov s področja boja proti trgovini z ljudmi*, Ljubljana, 2006.

Z. Kanduč (ed.), *Kriminaliteta, družbeno nadzorstvo in postmodernizacijski procesi*, Ljubljana, 2005.

N. Peršak, "O novodobnem suženjstvu, tihotapljenju in izkoriščanju ljudi", *Revija za kriminalistiko in kriminologijo*, 1, January/March 2003, p. 52 *et s*.

N. Peršak, "Normativni vidiki tihotapljenja ljudi in reakcij nanj", *Revija za kriminalistiko in kriminologijo*, April-June 2006/2, p. 109 *et s*.

J. Šinkovec, "Trgovina z ljudmi", *Zbornik referatov,* 2003, p. 251 *et s*.

Trgovina z ljudmi v Sloveniji – fikcija ali realnost: *zbornik prispevkov*, Ljubljana, 2005.

Zagorac, "Strožje nad trgovino z ljudmi", *Pravna praksa*, 25, 23 June 2005, p. 31.

P. Zavratnik Zimic, "Trgovanje z ženskami: perspektiva žrtve", *Teorija in praksa*, 1, January/March 2005, p. 113 *et s*.

Spanish legislation on combating trafficking in human beings

Francisco Javier de León, Manuel Maroto, Miguel Ángel Rodríguez

1. Introduction

The Spanish Organic Law 11/2003 completed the transposition of FD 629/2002, 946/2002 and Directive 2002/90 into Spanish law, modifying Article 318*bis* of the Spanish Criminal Code (hereafter CC) on human trafficking. The 2003 reform was the last of a series of amendments summarized hereunder:

a) The old Spanish CC (in force until 1995) regulated two different offences concerning human trafficking: trafficking in workers and cooperation in illegal immigration (Article 499*bis* 3º) as well as human trafficking for the purpose of prostitution (Article 442*bis* a). Regarding trafficking in women, in its section dedicated to "crimes against honesty", the old CC provided for crimes of cooperation in prostitution activities and the recruitment of women for prostitution, may it be either inside or outside the Spanish territory (Article 452*bis* a, which sanctioned such offences with a punishment of 4 to 6 years and a fine). The facilitation, promotion or recruitment of women under 18 years were considered criminal activities in any case (according to Article 452*bis* b, which provided a prison term of 2 to 6 years and a fine).

b) The new CC of 1995 kept, among "crimes against workers", the offence of trafficking for illegal labor (Articles 312, 313.1 and 2) and included, as an additional offence, the employment of aliens without a work permit (Article 312.2), punishable with a prison term of 6 months to 3 years and a fine. On the other hand, the new code reduced the scope of the offences related to prostitution to those consisting in the cooperation and facilitation of underage prostitution (Article 187.1), punishable with a prison term of 1 to 4 years and a fine. Regarding adults, these conducts were only considered criminal in cases of forced prostitution, by means of coercion, deception or abuse of authority or of a position of need or

vulnerability, cases punishable by a prison term of 2 to 4 years and a fine. If the victim of forced prostitution was underage, the prison term ranged from 4 to 8 years. Proxenetism, understood as the cooperation or facilitation of non-forced prostitution, was decriminalized.

c) Another general reform took place in the part of the code dedicated to the "offences against sexual freedom" in 1999, on the basis of Article 29 of the Treaty of the European Union and the Joint Action of February 24th 1997 to combat trafficking in human beings and sexual exploitation of children. The *Organic Law* 11/1999 introduced a new subparagraph in Article 188, related to the forced prostitution of adults using violence, deception or abuse in a situation of need, criminalizing the facilitation of the arrival, stay or exit of persons from or into the Spanish territory for the purpose of sexual exploitation. If the victim was under 18 years old or especially vulnerable, the code provided for imprisonment of 4 to 8 years. Regarding adults, these conducts would only be considered offences when it is forced prostitution, using violence, coercion, deception, or abuse in a situation of need or vulnerability of the victim.

d) In 2000, a new law regulating the legal status of aliens, the *Ley Orgánica* 4/2000 of January 11th, introduced in the Spanish CC (Article 318*bis*) a general offence of human trafficking for both trafficking for purposes of labor and sexual exploitation and human smuggling. The introduction of this offence was explicitly inspired by the conclusions of the Tampere European Council in 1999, and also by the two 2001 Protocols of the United Nations Convention against Transnational Organized Crime on trafficking in persons and the smuggling of migrants, respectively. The new regulation was also a result of the Joint Action 98/733/JAI, which defined what was meant by criminal organization and stated that participating in a criminal organization in any of the Member States of the European Union should be considered an aggravating circumstance.

The 2000 reform on the offence of human trafficking makes provision for treating equally both human trafficking (*tráfico de personas*) and smuggling (*inmigración ilegal*). Any activity involving trafficking in persons is punishable by prison terms of 6 months to 3 years and fine. If the trafficking serves profit purposes, or uses violence, coercion, deception or abuse of a situation of need, the prison term provided raises up to a range from 2 to 4 years and a fine. If, when committing the crime, the person's life, health or physical integrity is at risk or the victim is underage, the punishment is increased up to a range from 3 to 4 years and fine. Should these actions be committed by a member of a criminal organization, the penalty provided for the basic offence is a prison term of 3 to 6 years, and of 4 to 8 years for the aggravated offences and fine. This same act added these illicit associations promoting illegal trafficking in persons stipulated in Article 515 into the list of "illicit associations".

Also in 2000, Spain proceeded to sign the UN Protocol to prevent, suppress and punish trafficking in persons supplementing the UN Convention of 12 December 2000 against transnational organized crime. The ratification instrument was officially published on December 10th, 2003. This same year, the *Ley Orgánica* 11/2003, transposing the FD 2002/629, 2000/946 and the Directive 2002/90, reformulated Article 318*bis*, analyzed hereafter. However, and despite a certain social pressure,

the Spanish government has not yet signed the Council of Europe Convention on Action against Trafficking in Human Beings of May 2005. In late 2007, the Spanish Parliament enacted the *Ley Orgánica* 13/2007 of November 19th, for the extraterritorial prosecution of human trafficking and clandestine immigration; human trafficking and smuggling entered then the limited catalogue of offences that are subject to universal prosecution by the Spanish authorities [1], as we will analyze more closely later in this contribution.

Undoubtedly, the most remarkable element of the Spanish legislation is, as provided by Article 318*bis*, that it criminalizes the facilitation of illegal immigration (human smuggling) and human trafficking all together, without any clear distinction concerning the penalties to impose. The criminal law framework is so severe that it provides for both modalities of conduct. Therefore, there is no different legislative framework for smuggling as foreseen in the FD 2002/629 and 2000/946.

Article 318*bis* 2 provides for an aggravated punishment only for cases of trafficking for purposes of sexual exploitation. Trafficking for purposes of labor exploitation is punished under the basic provision of Article 318*bis*. Penalties for both modalities might be aggravated in case of aggravating circumstances listed in Article 318*bis* 3 (profit purposes, violence, coercion).

Terminologically, the Spanish CC does not use the terms contained in the FD. Article 318*bis* does not mention “human trafficking” or “trafficking in persons” but “illegal trafficking” and “clandestine immigration” [2].

Complementarily, the CC provides punishment for several conducts related to prostitution, differentiating between adult and underage victims. Concerning prostitution of adults, the entry into force of the Spanish CC of 1995 implied the abandonment of the abolitionist system inspired by the United Nations Convention of 1950. Instead of that system, sanctions shall apply to those cases where the person is determined to engage in prostitution by means of violence, coercion, deception or abuse of a situation of need or vulnerability of the victim. Nevertheless, and due to the pressure exercised by some feminist collectives that defended that this regulation did not respect the – never denounced – obligations acquired under the United Nations Convention, the 2003 reform provided again for punishment of whoever profits from other person exploitation, even with the victim’s consent.

However, there is an academic discussion – but not a supporting case-law yet – on the definition of “exploitation”. The most common scholarly interpretations are clearly restrictive, indicating that Article 188 would at most provide punishment for the “sex entrepreneurs”, who organize the provision of sexual services.

Both for adult and underage victims, it is considered an aggravated offence to engage in these activities taking advantage of the condition of public servant.

---

[1] Namely: genocide, terrorism, piracy and airship hijacking, currency counterfeit, prostitution and corruption of minors and disable persons, illegal trafficking on drugs, trafficking in persons or illegal immigration and female genital mutilation. See Article 23.4, *Ley Orgánica del Poder Judicial* and the recent amending act, *Ley Orgánica 13/2007, de 19 de noviembre, para la persecución extraterritorial del tráfico ilegal o la inmigración clandestina de personas.*

[2] A critical approach to Article 318*bis* of the CC in J. de Leon Villaba, *Tráfico de personas e inmigración ilegal*, Valencia, Tirant lo Blanch, 2003, p. 244 *et s*.

Clients of prostitution services are not criminally liable. In relation to underage victims, any kind of promotion or cooperation to prostitution is punishable. According to some case-law, this can imply the incrimination of clients, when, because they are paying the victim, they are inducing the latter to engage in prostitution activities. Obviously, the offences related to prostitution do not exclude the concurrence of crimes of sexual aggression or abuses.

The *Ley* 11/1999 amending the Spanish CC in matters of sexual freedom and integrity responded to the harmonizing requirements of the Joint Action of February 24th, 1997, fully anticipating the elements that only later would be required by Articles 2, 3, 4 and 5 of the FD of December 22nd, 2003.

Thus, regarding sexual exploitation of minors and the exercise of prostitution, and after the amendments of Articles 187 and 188 of the CC introduced by the *Ley* 11/1999, coercing a child to engage in prostitution, exploitation, profiteering from it or any other conduct facilitating these activities are punishable by prison terms ranking from 4 to 6 years, in addition to any other penalty prescribed for crimes of sexual aggression or abuses against minors. There are also aggravated penalties provided for offences committed taking advantage of the condition of public servant, the consent or forgiveness of the minor being irrelevant (Article 191 CC). The omission by tutors or legal guardians to adopt the necessary measures to avoid the engagement of the minor in such activities is explicitly punishable under the legal code. Disabled people are equally considered.

Articles 186 and 189 contain an extended and specific regulation of activities related to the offering, production, distribution, transmission or exhibition of "child pornography", as well as to its facilitation by any other means, like acquisition or the simple possession of this material. They also provide for aggravated penalties when the victim is under 13 years old, when the case is especially degrading or humiliating or where children or disabled people suffering sexual or physical violence are involved, as well as when it is carried out by members of an organization or association, or by tutors or legal guardians of the victim.

As for activities involving sexual abuse of minors, Articles 180 and 182 of the Spanish CC criminalize abuse and sexual aggression, including any conduct implying force, coercion, threat or any other form of violence or coercion, as well as the abuse of a situation of trust, authority or influence over the minor or disabled person. Both articles provide for an aggravated penalty justified by the minority of age or vulnerability of the victim.

The penalties provided for these conducts respect the requirements for effectiveness, proportionality and deterrence. The minimum prison term is of 2 to 3 years for abuse of minors not involving penetration (Article 181.4 CP, in relation to Article 181.2); of 7 to 10 years if there was penetration (182.2 Spanish CC); of 12 to 4 years, respectively, for sexual aggression, depending on whether there is penetration or not (Article 180 CC). There is a minimum term of 1 to 2 years, respectively, in cases of child prostitution not involving or involving violence, coercion or deception, abuse of a situation of superiority, need or vulnerability. As for child pornography, minimum terms in prison oscillate between 1 and 4 years.

If we take into account that sentencing most of these conducts will require to acknowledge the concurrence of several offences, the final penalty imposed will normally be over 5 years of prison. In any case, the punitive limits for sexual aggression of minors are between 7 and 10 years if there is no penetration, and 13 to 15 years if there is. For sexual abuses without penetration, the maximum term is 3 years and up to 10 years if there is penetration. Penalties provided for prostitution of minors, in the aggravated cases, can increase up to 6 years and 8 years in cases where pornography is involved. Article 192 of the Spanish CC completes these dispositions providing for an aggravation for those subjects legally or *de facto* in charge of the child or the mentally incapacitated person who engage in such conducts as perpetrator or collaborator. This Article also allows the Judge to impose the especial punishment of incapacitation to exercise the rights of authority of parents, guardianship or tutorship, employment or public office, or certain jobs or professions, up to 6 years.

However, one of the main *lacunae* of the Spanish legislation is the non-existence of a systematic catalog of the rights and duties of the victim, besides the lack of transposition of the FD of March 15th, 2001. Nevertheless, many of its provisions can be considered already included in the procedural legislation.

In this sense, the Law of Criminal Procedure (*Ley de Enjuiciamiento Criminal,* hereafter LECr) enables victims to file criminal charges in all these cases. In the Spanish procedural system, the prosecutor is not the only party entitled to bring criminal charges. On the other hand, there are many provisions specifically aimed at protecting victims of domestic violence (Article 544*bis*, 544*ter*) and measures to protect witnesses who are under 18 years old (Articles 455, 448, 707 713, LECr).

The diverse procedural provisions of the LECr extend the victim's rights. This appears clearly in the proceedings for "accelerated trials" provided for certain kinds of offences (Article 795 *et s*. LECr), introduced by *Ley* 38/2002 and *Ley Orgánica* 8/2002. In this particular case, we can say that the victim holds an autonomous relevance in the criminal procedure.

As a complement of this law, the *Ley Orgánica* 19/1994 for the protection of witnesses and experts in criminal proceedings and the *Ley Orgánica* 1/1996 of free legal assistance complete the legal framework on the matter.

The contents of the Directive of 2004 are basically the same as that of Article 59 of the *Ley Orgánica* 4/2000 [3] that regulates the rights and liberties of foreigners in Spain and their integration, and especially with the *Real Decreto* 2393/2004, the norm that explicitly transposes the Directive [4]. The aforementioned Article establishes the non-administrative liability and non-deportability of those aliens in illegal situation who were victims, witnesses or affected by illegal trafficking for purposes of labor or sexual exploitation, when they accepted to report the misconduct and collaborate in the investigation, providing essential details or participating as a witness, if necessary, during the proceedings. This law also enables the alien who cooperated

---

[3] On the interpretation of Article 59 in the context of the protection of the victim, see M. García Arán, "Normas afectantes a la perseguibilidad", *in* M. García Arán (coord.), *Trata de personas y explotación sexual*, Granada, Ed. Comares, 2006, p. 296 *et s*.

[4] A complete analysis of the administrative regulation on the matter in J. de Leon Villaba, *op. cit*., p. 397 *et s*.

to return to his country of origin or to obtain the work and residence permit. Such permit may be revoked, should the holder stop collaborating with the police or judicial authorities [5]. This opportunity of collaborating is also available for those aliens who are subject to a final or pending order of deportation [6]. If this order is enforced, it is possible to authorize the return to Spain during the time necessary to take part in the proceedings.

The Spanish legislation also provides for the possibility to issue temporary permits of residence for humanitarian reasons [7]. This is applicable to aliens who were victims of offences against the rights of workers, of domestic violence or any other offence involving the aggravating circumstance of racist motivation [8]. Strangely enough, it does not apply to victims of sexual exploitation.

2. Control of formal and substantive conformity

Article 318*bis* of the Spanish CC was reformed by the *Ley* 11/2003 and, as a result, the main contents of the FD of July 19th, 2002, were introduced. The norm came into force on October 1st, 2003.

The main amendments made by this law were:

– the introduction of the "purposes of sexual exploitation" as an aggravating element (Article 318*bis* 1). It was not autonomously present before, although it was punishable through Article 188.2 (prostitution) creating some sentencing problems due to the concurrence of crimes. This last reform eliminated Article 188.2;
– the increase of the penalties. Before the reform, the basic crime was punishable by a prison term of 6 months to 3 years and a fine. After it, the CC provides a penalty for the same conduct of 4 to 8 years. The increase of the penalties is also remarkable for the aggravated crimes. In the old version of Article 318*bis* the conducts defined in Article 1.1 of the FD were already included as aggravating elements. The penalties were prison terms ranging from 2 to 4 years or fine, and now, according to the new drafting they can reach a term of 8 to 12 years. This is, undoubtedly, the most characteristic aspect of the reform;
– the introduction of criminal liability of legal persons in accordance with the general rules set forth in Article 129 of the Spanish CC.

A. Definition of crime

There are several issues to tackle regarding the formal conformity of the Spanish definition of crimes.

In the first place, with regard to the material actions concerned, all conducts described (that is, recruitment, transportation, transfer, harbouring and subsequent reception of a person, including exchange or transfer of control over that person) are covered by Article 318*bis* 1 of the Spanish CC. It provides punishment for all those

[5] Article 117 *Real Decreto* 2393/2004.
[6] *Idem*.
[7] Article 54.4 *Real Decreto* 2393/2004.
[8] Article 22.4 CC.

who, directly or indirectly, promote aid or facilitate the illegal trafficking of persons or illegal immigration from, or in transit to Spain or any other country of the European Union [9].

The "means" referred to in Article 1, para. 1, a) to c) of the FD (coercion, deceit, abuse of authority, etc.) are present in section 3 of Article 318*bis* of the Spanish CC as the constituent elements of aggravated smuggling and aggravated trafficking for sexual exploitation These aggravated penalties, depending on the case, will range from 6 to 8 years (for aggravated smuggling) and 7 ½ to 10 years (for aggravated trafficking for the purpose of sexual exploitation). As for Section 4, it provides aggravated punishment for those who commit the crime taking advantage of their condition of public servant. There is no explicit mention in these sections, however, of "payments or benefits given or received to achieve the consent of a person having control over another person" (means referred to in Article 1, para. 1, d) of the FD).

The exploitation purposes referred to in Article 1, para. 1 of the FD are fully covered. Article 318*bis* 2 specifically criminalizes trafficking for the purposes of sexual exploitation as an aggravated offence. The concept of sexual exploitation includes all methods of submission, servitude or forced provision of sexual services, including prostitution and pornography. As for the conducts of trafficking for the purposes of labor exploitation, Article 318 does not mention them explicitly; they are sanctioned under the basic offence. The judge can take the purpose of exploitation into consideration for the sentencing. Trafficking in Spanish or European workers for the purpose of labor exploitation is punishable under Article 312.1 of the Spanish CC, which provides notably lower penalties ranging from 2 to 5 years of prison. In both cases, if the alien is forced to accept labor conditions inferior to those legally granted to them, a penalty from 2 to 5 years of prison is also applicable (Article 312.2 Spanish CC). This would be the case of exploitation referred to in the proposal of Franco Frattini for a Council directive on a common set of rights for third-country workers legally residing in a Member State (COM (2007) 638).

The victim's consent to such situation does not prevent the Judge from taking into consideration the purposes of sexual exploitation in the sentencing (Article 188.1 of the Spanish CC) or the concurrence of illegal trafficking. We should not forget that, besides personal legal interests, such as health, physical integrity or life, Article 318 protects a "supra-individual" interest as well. When the victim is younger than 18 years, the aggravation of the penalty is imposed even if none of the means described in Article 1.1. of the FD was used. All conducts of instigation, cooperation and complicity, as well as attempted offences are punishable under the general rules of Articles 28, 29 and 16 of the Spanish CC.

B. Penalties provided

Penalties provided under Article 318*bis* configure a severe punitive framework, similar to that provided for the more serious offences punishable under the CC. The penalties for the basic offence stipulated in Article 318*bis* (a prison term of 4 to 8

[9] This last reference to "any other country of the European Union" was added as recently as November 2007, together with a similar change in Article 313.1 of the CC. See *supra* footnote 1.

years) are similar to those set forth for grievous bodily injury. Spanish legal scholars are highly critical of such a punitive disproportion.

Is it worth analyzing more closely the penalties set forth in Article 318*bis*:

- Article 318*bis* 1: conducts of facilitation of illegal trafficking and clandestine immigration: prison terms of 4 to 8 years. Note that the definitional verbs used (to promote, to facilitate) confirm the assumption of a unitary concept of the perpetrator, and allow to punish as direct commission this kind of conducts that for other crimes would constitute participation or complicity and would therefore imply a less severe penalty;
- Article 318*bis* 2: when conducts of "trafficking or clandestine immigration" are committed for the purposes of sexual exploitation, the prison terms provided range from 5 to 10 years. Recent case-law of the Supreme Court indicates that if the same person engaged in trafficking activities commits, after that, offences of sexual exploitation, it is possible to apply the especial rules for the concurrence of crimes. However, in these cases the aggravating element of profit purpose provided in Article 318*bis* 2 would not be applicable, since it is considered inherent in and subsumed under the offence of forced prostitution [10];
- Article 318*bis* 3: the concurrence of any of the aggravating circumstances of Article 318*bis* 3, coincident with the means described in Article 1.1 of the FD, results in aggravated cases of the two previous conducts. This implies that, for example, if the victim's life was at risk while committing the offence described in Article 318, the prison term stipulated will be of 6 to 8 years, and of 7½ to 10 years in the case of Section 2.
  Besides the means stipulated in Article 1.1 of the FD, Article 318*bis* also considers as an aggravating element the existence of a profit purpose. As a consequence, facilitating illegal immigration for a profit purpose results in a punishment of 6 to 8 years. The "basic crime" therefore seems to be aimed at punishing the cases of trafficking without a profit purpose, that would potentially include cases of cooperation with illegal immigration on solidarity grounds;
- Article 318*bis* 4: if the perpetrators are members of an organization, the penalties increase in comparison with those of the previous conducts, and even more so in case they are leaders or persons in charge of such an organization. If this aggravating circumstance is present in the already aggravated offences of the previous sections, the prison terms set forth range from 8 to 12 (for aggravated smuggling) and 10 to 15 (for aggravated trafficking for sexual exploitation). When the perpetrator is a "leader, administrator or person in charge of the organization", the minimum term increases to 10 and 12 ½ years respectively to each aggravated offence. The judge can also decide to increase the prison term up to from 12 to 18 years for the first offence and 15 to 22 ½ for the second.

A peculiarity of the Spanish transposition explaining how severe the punishments are is that the means of commission referred to in Article 1.1 of the FD have been transposed as aggravating circumstances added to the basic offence (318.1). This

[10] See judgements of the Supreme Court *STS*, 484/2007, 29 May 2007; *STS*, 1080/2006, 2 November 2006; *STS*, 1087/2006, 10 November 2006.

basic offence already includes the penalty stipulated in the FD for the aggravated cases (maximum penalty of no less than eight years imprisonment). The aggravating circumstances referred to in Article 3 FD and the means used are considered equivalent, and only the participation in a criminal organization (Article 3d) is autonomously included as an especially aggravating element.

The penalties are so severe that the 2003 reform introduced the possibility for "the Tribunal taking into account the seriousness of the facts and their circumstances, the conditions of the perpetrator and his objectives" to reduce the penalty. However, this Section only affects "basic crimes", and therefore it does not mitigate the severity of punishment provided for the aggravated cases.

Finally, we have to remark that there is no definition of vulnerable victim in the Spanish transposition. The case-law understands vulnerability in a very broad way: "every person that due to his age, physical, psychological, personal or social conditions is situated in a position of inferiority or weakness to the perpetrator".

C. Criminal liability of legal persons

In the Spanish legal system, legal persons can be punished in three different ways:

- through administrative sanctions, normally fines;
- through the criminal sanctions provided in Article 129 of the CC [11];
- through the fines stipulated when formal or informal managers commit crime acting on behalf of the company (Article 31 of the CC).

Thus, regarding illegal trafficking, legal persons can be responsible in two different ways:

- criminally responsible under Section 5 of Article 318*bis* providing for the application of the security measures of Article 129 of the CC, when the trafficking or illegal immigration is achieved by an organization or illicit association dedicated to that kind of activities, even temporarily;
- administratively liable under the *Ley* 4/2000, January 11th, on the rights and liberties of aliens in Spain and their social integration, that provided for administrative sanctions consisting in fines amounting up to 60,000 €.

Conducts sanctionable under this act related to FD 2002/946 and Directive 2002/90 are:

---

[11] The sanctions for legal persons set forth in Article 129 are: closure of the company, its offices or headquarters, for a period of up to 5 years; judicial winding-up order of the society, association or foundation; stop of the activities of the society, company, foundation or association for a period of up to 5 years; incapacitation to engage in the future in business activities or commercial operation related to those involved in the commission, cover-up or facilitation of the offence; judicial supervision of the company in order to safeguard the rights of workers. A critical approach to this regulation of criminal liability of legal persons in A. Nieto, *La responsabilidad penal de las personas jurídicas: un modelo legislativo*, Madrid, IUSTEL, 2007.

- instigation to and assistance for clandestine immigration, when it is carried out for profit purposes or as a part of an organization [12];
- transportation of aliens without checking the validity of their passports, identity or travel documents;
- hiring foreign workers without the previous authorization that is necessary.

Finally, it has to be said that in cases of sexual exploitation the Article of the Spanish CC that criminalizes activities related to prostitution [13] also stipulates the possibility to apply the security measures for legal persons of Article 129 when the offences have been committed by a member or an organization, society or association engaged in such activities.

It is important to notice that the measures for legal persons provided under Article 129 are hardly applied in practice. Administrative sanctions have a much greater practical relevance. The non application of criminal measures has to do with the deficient regulation provided under Article 129, but also with the traditional relevance of the principle *societas delinquere non potest* in the Spanish law. Criminal responsibility of legal persons in Spain is still rare and exceptional. It is the opposite situation in administrative law.

The project of reform of the Spanish CC, currently in parliamentary procedure but with few chances of being adopted in the short term, provides a much more detailed regulation for the criminal liability of legal persons.

D. Jurisdiction and prosecution

The Organic Law on the Judicial Branch (*Ley Orgánica del Poder Judicial*) establishes the limits of the Spanish jurisdiction in its Article 23, according to the following principles:

- principle of territoriality;
- principle of active personality, that allows the trial of offences committed outside the Spanish territory by Spanish nationals or aliens who obtained the Spanish nationality after having committed the crime, when certain requirements concur (the double incrimination requisite);
- protective principle allowing for the trial of Spanish nationals or aliens who committed crimes affecting interests of the State;
- universal jurisdiction principle regarding, for example, genocide and other international crimes [14], including offences related to prostitution, corruption of minors or incapacitated persons and, since November 2007, those regarding human trafficking and smuggling [15].

It is important to notice that criminal actions in the Spanish criminal procedure have a public nature, and, therefore, can be brought by any person, according to Articles 100 *et s*. of the Law of Criminal Procedure. It is normally the Prosecutor Office who initiates the proceedings after having been informed by the police officers.

---

[12] Article 54.1.2 b CC.

[13] Article 189.

[14] See *supra* footnote 1.

[15] *Idem*.

Before the reform of late 2007, in accordance with these criteria, all conducts of human trafficking committed in the Spanish territory, as well as those committed outside Spain by Spanish nationals, fell under the Spanish jurisdiction. Consequently, the frequent cases of boats arrested or rescued outside the Spanish territorial sea remained initially outside the scope of the Spanish jurisdiction, unless they were involved in the commission of offences of "prostitution" or "corruption of minors and incapacitated persons" [16]. The Supreme Court, nevertheless, on the grounds of the integration of several international conventions ratified by Spain, especially the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Geneva Convention on the Law of the Sea and others, held a very broad interpretation of the Spanish jurisdiction in these particular cases. It ultimately justified the intervention of the Spanish Security forces and the reviewing role of the Spanish jurisdictional agencies [17].

In order to definitely clarify this situation and fulfill the provisions of Article 6 of the FD, the Spanish government initiated a legislative project for the reform of the above-mentioned Article 23 of the Organic Law of the Judicial Branch. It would establish the Spanish jurisdictional competence on the cases committed by Spanish nationals or aliens outside Spain that were considered constitutive of offences of human trafficking or human smuggling. This resulted in the enactment of the already mentioned *Ley* 13/2007, for the extraterritorial prosecution of human trafficking and smuggling, a norm that extended the scope of Article 318*bis* to all those cases where the immigrants tried to reach not Spain but the territory of any other Member State of the European Union.

An obvious problem of this latest reform is precisely that explicit limitation of jurisdiction to those cases somehow related to the territory of EU Member States. In a legislative framework supposed to be aimed at protecting the basic rights of the victims before any other consideration or interest (like the control of migratory flows), the exclusion of those cases where the immigrants are led to a non-EU-country (cases where the potential harm to the rights of the migrants is essentially identical), does not seem to be especially coherent.

3. Assistance to victims

As we already anticipated, except for Section 3 of Article 318*bis* of the Spanish CC, that provides for the aggravated character of those cases where the victim is younger than 18 years of age or incapacitated, there is no concrete normative development of the particularities of minors as victims of human trafficking.

In relation to the provisions of Article 7.3 of the FD, the norms on the protection of victims previously referred to provided for several procedural measures of children's protection.

Concerning the measures of assistance referred to in Article 7.3, social services have to provide the minor victims with adequate treatments and, as far as possible,

[16] Article 23.4 LOPJ. See also the introduction to Ley 13/2007, see *supra* footnote 1.

[17] See Judgment of the Supreme Court, *STS*, 582/2007, 21 June 21.

promote their social integration, as well as the adoption of the set of measures necessary to protect them as participants in criminal proceedings.

As for the fulfillment of this objective as well as for the general promotion of the best practices in treating minors, it is important to remark the strong criticisms received in June 2002 from the Committee on the Rights of the Child. They criticized the role of the Spanish authorities in relation to the situation and rights of children of certain ethnic and social groups, especially in relation to immigrant children alone in irregular situation. The criticism is based on the detection of some cases of police mistreatment, forced deportation to the country of origin, the impossibility to obtain residence permissions and the lack of places in reception centers and children's hospitals.

After these criticisms, the Spanish government proceeded to an intense activity of legislative reform, resulting mainly in the *Real Decreto* 2393/2004 December 30. This piece of legislation regulated the measures of protection and assistance of minors and the role of the prosecutor in such cases. Under Sections 1, 4 and 5 of Article 92, the interest of the child will prevail and can constitute the ground to deny the deportation to the country of origin and to concede a residence permit.

However, as for human trafficking for the purposes of sexual exploitation, we must remark the different *lacunae* highlighted by the recent observations reported by the Committee on the Rights of Children with regard to the report submitted by Spain. They are based on the first paragraph of Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. In Sections 6, 7, 9, 11, 12 and 33 and following, the report [18] points out the need to review the framework of cooperation in assistance issues between the central administration and the autonomous communities (regional states) of Spain. This framework should help to strengthen the interdisciplinary assistance; to improve the legal representation of children victims as well as the application of the Second National Action Plan on the matter, and to adopt other measures such as the establishment of a central database to keep records of violations and habilitate the evaluation and review of the enforcement of the policies on the subject.

As for the information rights included in Article 4 of the FD 2001/220, most of them are included in the protocol of conduct of the security forces when they assist the victim of an offence. However, there is no specific protocol for the victims of human trafficking, and the rules applied with general character are not based on the provisions of the FD.

Therefore, in general terms, we can say that the Spanish criminal law legislation has adopted the provisions of the FD, especially after the recent approval of the law introducing the offences of human trafficking and smuggling as subject to extraterritorial prosecution based on the principle of universal jurisdiction. Only the application of Article 7 of the FD would require a deeper development regarding the protection, assistance and information of the victims of trafficking, and independently of their role as collaborators with the authorities in the investigation of the facts. There

[18] Doc. ONU CRC/C/OPSC/ESP/CO/1, 17 October 2007.

is a Commission for the Reform of the Law of Criminal Procedure that is currently analyzing the introduction of a specific section on rights and duties of victims.

4. Control of application of the norm

From a quantitative point of view, there are no statistics on the enforcement of Article 318*bis* as the main result of the transposition of the FD. The Office of the Attorney General in his 2007 report highlights this problem, stating that the first remarkable thing when tackling the matter is the only availability of "a biased and uncompleted information on the more relevant data affecting the specific field of law on aliens".

Using as an approximate indication the number of cases in appeal dealt with in the Supreme Court, we can distinguish a notable degree of enforcement of Article 318*bis* in comparison with that of the previous regulation. Appeals in cassation are brought to the Supreme Court after having exhausted proceedings in the two lower territorial jurisdictions in charge of hearing and reviewing criminal cases, and constitute a last instance in issues of criminal law, also regarding human trafficking. Hence, since Article 318 entered into force and, up until July 2007, the Supreme Court has finally sentenced approximately eighty cases and approximately five hundred were sentenced in territorial Courts (*Audiencias Provinciales*).

From a qualitative point of view, the entry into force of the new regulation was a big step ahead in dealing with the problem. In the first place, because of the introduction of a norm regulating human trafficking in a specific and precise way. Secondly because it unified the treatment of all trafficking related activities with purposes of sexual exploitation. And, in the third place, because it shifted the attention and interest of the criminal justice system from the control of migratory flows – that used to be understood as the legal interest at stake – to the effective protection of the fundamental rights of the people affected by trafficking activities.

Before the introduction of Article 318*bis*, Courts hardly dealt with human trafficking activities, due to the need to articulate criminal proceedings affecting multiple legal interests and to apply several different norms in order to fully address the actual wrongness of the conducts. In most cases, there were neither sufficient means nor procedures to guarantee the presence of the victims – frequently the only witnesses – at the hearings. The transposition of the FD contributed to raise awareness on the importance of attending and protecting the victims, not only personally, but also as witnesses relevant for the criminal proceedings.

Regarding concrete cases, especially noteworthy are those cases of human smuggling using the so-called *cayucos* (small boats typically used by Mauritanian fishers). These cases have induced a need for a change in sensibility towards the transport means used by illegal immigrants and the risks they undergo; as we previously mentioned, a shift has occurred from the attention to controlling migratory flows to the protection of immigrants' basic rights. The massive arrival of illegal immigrants on these precarious boats, firstly at the coasts of Andalusia and more recently and notably at the Canary Islands, and especially the shocking number of victims these crossings leave behind, has shocked a Spanish society faced with particularly graphic media coverage. According to data collected by the Office of the Attorney General,

while there were in 2005 4,767 illegal entrances of aliens in the Canary Islands on those boats, in 2007 31,678 arrivals were detected: that is an increase of 26,911 (+ 564,53%).

In some other traditional entrance points to the Spanish territory (Ceuta, Melilla, Cádiz, Huelva y Almería, etc.) the trend has been a decline for the last months, especially in Andalusia. However, the influence of the increase of receptions in the Canary Islands and other Andalusian ports object of less vigilance have to be taken into account. Moreover, in Ceuta and Algeciras the arrival of illegal immigrants who attempt to circumvent frontier controls hiding in trucks coming from Morocco, often seriously risking their own personal safety, is still frequent. Those attempts occur frequently with the collaboration of truck drivers, who prepare compartments in their vehicles, susceptible of being prosecuted under Article 318*bis* of the Spanish CC in those cases. A new method of crossing the border lately used in Ceuta is especially dangerous. It consists in the utilization of the so-called "engine-men", expert swimmers equipped with diving suits who, in exchange for money, help the immigrants to reach he Spanish coast by swimming.

Despite the considerable improvement the implementation of the FD implied, there are still some unresolved *lacunae* in the Spanish legislation on illegal immigration. In this regard, the following are worth mentioning:

- unity of treatment and lack of conceptual and punitive differentiation between human trafficking (*trata de personas*) and people smuggling (*immigración ilegal*). Nevertheless, some Spanish legal scholars consider that it is not convenient to differentiate these two concepts completely. It is a highly controversial issue in the legal academic debate whether criminal law should intervene in cases of mere smuggling; this is, when there is only support or aid in crossing the border or staying in the country. For some scholars the State's interest in controlling the migratory flow is not a sufficiently relevant basis to justify criminal law regulation. Therefore, they propose the creation of a new offence against "moral integrity" consisting in trafficking activities understood as "trafficking with people from, in transit or to Spain, abusing their conditions of inferiority or cultural, social or economic vulnerability";
- the definition of "perpetrator" is too broad and does not allow differentiating between collaboration and commission;
- the notable severity of penalties is noticeable as well. This is in part due to the fact that, in most cases, the aggravating circumstance of Article 318*bis* 5 applies (providing a prison sentence of 8 to 12 years), since the very nature of the trafficking behavior normally requires some kind of organization able to facilitate the crossing of the border. In fact, it is difficult to guess the range of cases to which Article 318*bis* 1 is to be applied in practice (basic offence without reference to the organization requirement, with a penalty of 4 to 8 years), beyond really exceptional cases that usually involve humanitarian motivations for cooperating with immigrants;
- identifying the concept of victim with the concept of foreign citizen. In this regard, we should remember that the norm enshrined in Article 318*bis* was introduced in the Spanish CC by the *Ley Orgánica* 4/2000, and that the Title XV*bis* which

regulates the aforementioned article is entitled “Offences against the rights of foreign citizens”. A strict interpretation of the text makes us exclude from the scope of this offence those cases in which the victim is Spanish or national of a Member State of the European Union; this position was confirmed by the Supreme Court in its Judgment 625/2007 of July 2nd. In these cases, the applicable article would be Article 312 of the Spanish CC;

– the possibility to combine the application of the offences foreseen in Article 318 with those resulting from the final damage caused by the behavior and normally referred to individual protected legal interests: these other offences are commonly homicide, injuries, sexual aggression or abuse, etc. Several problems arise from the potential application of different provisions for the same or closely related acts. For example, it is incongruent to sanction more severely the conduct of trafficking with purposes of sexual exploitation (as an aggravated offence) than the concurrence of human trafficking and subsequent prostitution (two different offences that are sentenced under the rules of concurrence of crimes provided for cases in which one of the offences is considered to be instrumental for the commission of the other one: the so-called *concurso medial*). Such a situation, especially taking into account the importance of the “legal interests” protected, may be solved by accumulating the penalties provided for the two offences (*concurso real*) instead of applying this other rule of concurrence (*concurso medial*);
– finally, as for the aggravating circumstances provided in Article 318*bis*, it is possible to notice the lack of an adequate regulation of the *mens rea* element of “for-profit purpose” (*ánimo de lucro*) in terms of proportionality. Its existence equates with the use of violence despite the obviously different implications, and it makes difficult to consider adequately if there is a single applicable aggravating circumstance or several.

5. Control of effectiveness and efficiency

The main result of the entry into force of the reform inspired by the FD is threefold.

– At a general level, it has contributed to increase awareness in the Spanish government and other legal agencies, about the problem of human trafficking beyond the migratory control approach.
– It has provided for a unified sanctioning system and quite a complete legal system of management of trafficking problems, making possible an integral intervention by the judicial authorities. At the same time, this has contributed to increase the number and efficiency of criminal proceedings, notably increasing the number of cases related to these conducts dealt with in the Courts.
– It has promoted the idea of international cooperation between official agencies as a need at any level to fight against this particular form of slavery. This idea expressed the need for cooperation between administrative, judicial and security organs, forming cooperation networks able to facilitate the exchange of data and training at any level (both national and international).

It seems that the first stage of this new legal approach against human trafficking is characterized by some sense of necessity to strengthen the punitive system to stop the commission of these conducts. However, the severity of the penalties set forth by the transposition of the European legislation into the Spanish legal system has dramatically increased the significance of deterrence (or general prevention) as the main instrument against human trafficking. In practice, it has been verified that, for example, an adequate policy promoting cooperation for development of the countries of origin is much more efficient than criminal law. Equally, the role of Spanish authorities in facilitating the legal hiring of foreign workers in the countries of origin has been very successful. It is fundamental, on the other hand, to encourage judicial and police cooperation with these countries, which is not always easy to achieve. Generally, criminal recruitment networks work in very limited territorial areas and with certain kinds of persons; this should facilitate the adoption of action plans focused on recruitment. Initiatives based on informing the origin-countries' population about these networks and how they operate once they introduce a person into their structure should be encouraged.

Once the trafficking has taken place, the intervention model is till now not respectful enough of individual liberties and procedural rights of the victim, especially regarding his future. One does not pay adequate attention to the problems that lead most of these persons to victimization (poverty, lack of personal resources, family conflicts, situation of vulnerability, etc.) and the power of international trafficking networks makes necessary to create effective systems of protection and social integration of the victims at international level.

6. Reception and perception

A. Reception by practitioners and public authorities

In general, both academics and practitioners (including judges, prosecutors and attorneys) and security forces have evaluated positively the introduction of the new regulation into the Spanish CC. However, the severity of the penalties has been criticized by the Attorney General [19]. Other regional prosecutors have been critical because of the problems of proportionality arising when applying the penalties established, remarking the frequent necessity to assess their reduction under Section 6 of Article 318*bis*.

Illegal immigration and human trafficking is one of the most complex and daily criminal policy problems. That has contributed to increase the knowledge of the matter, despite its complexity and relative novelty. A proof of this is the high number of judgments that we previously referred.

Apart from the judges and security forces, the other public administrations show also a strong interest in the matter. This is especially reflected in the reports on trafficking in women for sexual exploitation that some of the Spanish regional governments have made or are currently drafting. In a similar way, in the academic

[19] See *Circular de la Fiscalia General de Estado* 2/2006.

and non-governmental sector, many congresses and conferences on the subject are held to contribute to solutions at national and international levels [20].

B. *Political reception*

As for the political reception, in the course of the parliamentary procedure of approval of the reform introducing the *LO* 11/2003, more than 15 speakers, representatives of the different parliamentary groups and political sectors, participated in the general debate on the reform [21]. This law was supported by almost every parliamentary group and is the result of the agreement on justice matters reached by the two major Spanish political parties (PP and PSOE).

However, during the process of legislative reform there were two different political discourses, also noticeable in the resulting legislation. Together with the vision of illegal immigration and human trafficking as a human rights problem, there was also a political discourse promoting a different agenda easily summarized in what the former Prime Minister called, "cleaning the streets of criminals", equating, therefore, illegal immigration and criminality. The result was that reform and the immediately posterior one [22], a notable increase of the severity of penalties for several offences and a defense of the measure of deportation of alien offenders, concreted in Article 89 of the Spanish CC.

An important aspect of the Spanish political discourse is the automatic justification of the increasing of severity of sanctions as the fulfillment of the requirements of international treaties on the matter, in this case of the FD. The introduction of the *Ley* 117/2003 is a good example of that practice. This way, the message sent to the public is that the increase of criminal law intervention comes from Brussels. As a consequence of the history of Spain and its international isolation during Franco's dictatorship, decisions coming from the European Union are never publicly questioned, and are accepted as some sort of "new natural law".

Normally the media do not pay attention to the legal approach to the matter. The severity of the punishment is only the subject of some comments, focusing on the coverage of personal experiences. There are news in the written press narrating the detention of some groups of persons dedicated to recruiting every day, transporting and exploiting women, specifying the nationalities of the perpetrators as well as the

---

[20] See as an example the website http://www.somalymam.org/congreso.html with the minutes of the last international congress on sexual exploitation and trafficking in women that was held in October 2005.

[21] Illustrative of the work done by the Parliament on the issue of trafficking during the 90s is the document included in the *Boletín Oficial de las Cortes Generales, Serie A*, nº 478, 15 September 2003. This document details the work done by the Section created for the study and monitoring of international trafficking in women and children, created within the Commission of the Rights of Women of the Parliament. The document shows, through the participation of many practitioners, the complexity of the phenomenon and the process of planning several policies at every level (police, judiciary, social assistance, protection of victims, integration programs, education, etc.) that are essential to fight these activities.

[22] *Ley Orgánica 15/2003, de 25 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.*

number and nationalities of the victims and the place where the exploitation center was located.

The enactment of Article 318*bis* in a time of reform and promotion of a new legislative approach to the problem of violence against women and to the integration of aliens resulted in the perception that the new criminal legislation was just another initiative to promote the social integration of immigrants.

C. Reception by civil society

We must differentiate the impact of the regulation on the population in general and the reception by the NGOs dedicated to immigration issues, that in the last years have increased in number.

As for the impact on society, the problem of human trafficking, *stricto sensu*, is perceived as related to other problems of the Spanish society: immigration, prostitution, and the increase of criminality perpetrated by aliens. These problems make the public rate the problem of immigration within the top 5 according to the opinion polls on perception of social problems that have been regularly carried out in the last years. It is difficult to know if these ratings are the result of the worries about the violation of fundamental rights and of human dignity in trafficking activities or of some other problems mentioned before.

The impact and treatment of the problem by the NGOs has been quite different. In the 90s, very few NGOs dealt with immigration issues in Spain, and only some international organizations tried to pay attention to the problem. Currently there are many organizations responsible for spreading knowledge about the issue, advocating for the approval of specific measures for the prosecution and the promotion of victims' assistance, etc. All these organizations focus their activities on the victims, their fundamental rights and their conditions of life. In this sense, their work is influenced by the intention of the Spanish administration to increase the resources for the assistance to victims, an increase that is usually assumed by NGOs.

D. Reception by legal scholars

Since the creation of public awareness of the problem and its perception by public opinion in the 90s, the number of studies tackling the problem with the intention to make policy proposals to reach its eradication has exponentially increased, both in a quantitative and qualitative way.

An important number of the Spanish criminal law scholars is very critical about the current regulation, mainly because of the disproportionate penalties provided and the problems of differentiation between human smuggling and human trafficking. Many proposals of alternative legislative solutions have been presented, which usually advocate for the re-localization of the offences related to human trafficking among the crimes against personal dignity. These scholars support, on the one hand, the orientation of criminal law intervention towards the protection of victims and, on the other, towards the creation of specific measures of assistance and cooperation to development, indicating that the increasing closure of borders furthers the business of *mafias* and of organizations engaged in exploitation. The criticisms are more aimed at the FD of November 28 2002, on the strengthening of the penal framework to

prevent the facilitation of unauthorized entry, transit and residence, than at the FD we analyzed in this paper.

Against the approach of the two FD, distinguishing trafficking and smuggling as if they were two different worlds, these authors defend that it is not possible to separate completely illegal immigration and human trafficking, since both activities are frequently connected in practice. There are cases of illegal immigration disconnected from any purpose of sexual or labor exploitation, where the offender, far from acting as a mere cooperator in the accomplishment of the immigrants' objectives, treats persons as an item of commerce, transporting them abusively taking advantage of their position of vulnerability [23].

Despite the criticisms of criminal law scholars about the current situation, they remark that the punitive disproportion of the Spanish CC in this matter is due to the intentions of the Spanish legislation and not to the requirements of the FD.

7. Conclusion

The criminalization of trafficking is nowadays an essential for the protection of the fundamental rights of the victims of these offences. An area of freedom, security and justice in which protection of fundamental rights is a central goal cannot overlook such harmful conducts.

In addition to all previously highlighted issues, the system of aggravating elements of the concerned FD and its transposition in national legal orders has underlined that criminal law intervention must aim at protecting fundamental rights, and not at controlling administrative or supra-individual interests as it occurs with illegal immigration. We cannot deny that, at least symbolically, and at internal level, the FD has greatly contributed to raising the awareness about human trafficking as a human rights problem [24] affecting seriously personal dignity [25].

However, this approach is not as present as it should be in the European legislation on illegal immigration. Such issue is tackled by the Directive 2000/90 and the FD 2002/629 and 2002/946 as a simple problem of borders control, and not as the humanitarian and human rights issue that it actually represents. The peculiarities of illegal immigration in Spain, where we witness every year thousands of deaths in the Straits of Gibraltar or the Atlantic Ocean, highlight the existence of cases of illegal immigration as alarming and tragic as those of human trafficking, even if the purposes of exploitation are not present [26].

---

[23] M. García Arán (coord.), *op. cit.*

[24] This is not a mainstream interpretation among the Spanish criminal law scholars, but it is the most assumed when trying to place teleologically Article 318*bis* of the CC. See J. de Leon Villaba, *op. cit.*, p. 244 *et s.*

[25] A. Pérez Cepeda, "Las normas penales españolas: cuestiones generales", *in* M. García Arán (coord.), *op. cit.*, p. 170-178. See also M. Alonso Alamo, "¿Protección penal de la dignidad? A propósito de los delitos relativos a la prostitución a la trata de personas para la explotación sexual", *Revista Penal*, 19, 2007, p. 3 *et s.*

[26] On the confusion created by the legislation between these different concepts, see M. Cancio Meliá and M. Maraver Gómez, "Derecho Penal español ante la inmigración: un estudio político-

As for human trafficking, especially for purposes of sexual exploitation, European legal orders already presented a remarkable degree of harmonization as a consequence of the United Nations conventions. The FD on human trafficking and illegal immigration have facilitated the task of tackling jointly such relevant criminal phenomena that, due to their novelty and the political and sociological peculiarities of every country, could have been regulated from very diverse perspectives.

The FD of 19 July 2002 on combating trafficking in human beings has become one of the elements of a very complex legislative policy that extends its ramifications over many social aspects, a policy developed in Spain from the 90s onwards, and especially after the entry into force of the Law on the Rights and liberties of aliens. The FD has not been perceived as an alien body in the Spanish legislative background, since criminalization was already an important element of it.

Although it is obvious that human rights policy cannot exclusively or mostly depend on criminal law, the Spanish criminal policy of the last years is generally characterized by a very punitive tendency. The increasing severity cannot be only attributed to the transposition of the European legislation. The Spanish legislators frequently explain the growing severity brought with the reforms as a requirement of the European Union or of the international law on the matter. However, analyzing the EU FD and Directives, it is easy to notice that Spain has gone far beyond the literal text of those instruments. This is the reason why it is extremely important to create, within the systems of legislative evaluation, a way of controlling not only the transposition "lacks", but also its "excesses". Otherwise, we run the risk of turning European criminal law into a scapegoat for the mistakes of national contemporary criminal policy. After all, neither the penalties nor the deficiencies of the Spanish regulation on the matter are attributable to "the European legislator" but to the national one, especially regarding immigration and illegal residence issues.

It is difficult to indicate if, thanks to the FD 2002/629 there has been an enhancement of penal and judicial cooperation with the other members of the Union. Besides, the most important part of cooperation is that affecting third countries, countries that often, and especially regarding immigration issues, have poorly effective, if not corrupt, judicial and police systems. In fact, the foreign policy of the Spanish government consists in granting economic aid in exchange for the implementation of due controls on illegal immigration and human trafficking in the country of origin.

From a strictly legal approach, the abandonment of the principle of double incrimination would be acceptable if there is a common approach to the criminalization of the conducts. If understood as the consequence of the principle of legality in international cooperation in criminal law matters, the existence of a common reference, a "euro-crime" [27], would contribute to achieve a degree of legal certainty similar to that granted by the principle of double incrimination. Undoubtedly, harmonization, through FD or Directives, increases mutual trust.

---

criminal", *in* E. Bacigalupo and M. Cancio Meliá, *Derecho Penal y política Transnacional*, Barcelona, Editorial Atelier, 2005, p. 343 *et s*., especially, 378 *et s*.

[27] See K. Tiedemann, *Wirtschaftsstrafrecht in der Europäischen Union*, Köln, Heymann 2002. Spanish Edition in *Eurodelitos. El derecho penal económico en la Unión Europea*, Cuenca, Ediciones de la Universidad de Castilla-La Mancha, 2003.

Nevertheless, there is still a considerable diversity, especially regarding mere illegal immigration. For example, the Spanish legal system does not provide criminal punishment for it, but only administrative sanctions, differing from the option adopted by other Member States. On the other hand, the mere facilitation of illegal residence or immigration without profit purposes is in many countries considered an administrative violation, while in others, like Spain, it constitutes a crime. Therefore, Spain could issue a European arrest warrant based on such conduct to countries where the same conduct is not considered as a criminal offence.

Annex. Legal texts

1. Código Penal

Título XV
De los delitos contra los derechos de los trabajadores.

Artículo 311

Serán castigados con las penas de prisión de seis meses a tres años y multa de seis a doce meses:

1. Los que, mediante engaño o abuso de situación de necesidad impongan a los trabajadores a su servicio condiciones laborales o de Seguridad Social que perjudiquen, supriman o restrinjan los derechos que tengan reconocidos por disposiciones legales, convenios colectivos o contrato individual.
2. Los que en el supuesto de transmisión de empresas, con conocimiento de los procedimientos descritos en el apartado anterior, mantengan las referidas condiciones impuestas por otro.
3. Si las conductas reseñadas en los apartados anteriores se llevaren a cabo con violencia o intimidación se impondrán las penas superiores en grado.

Artículo 312

1. Serán castigados con las penas de prisión de dos a cinco años y multa de seis a doce meses, los que trafiquen de manera ilegal con mano de obra.
2. En la misma pena incurrirán quienes recluten personas o las determinen a abandonar su puesto de trabajo ofreciendo empleo o condiciones de trabajo engañosas o falsas, y quienes empleen a súbditos extranjeros sin permiso de trabajo en condiciones que perjudiquen, supriman o restrinjan los derechos que tuviesen reconocidos por disposiciones legales, convenios colectivos o contrato individual.

Artículo 313

1. El que promoviere o favoreciere por cualquier medio la inmigración clandestina de trabajadores a España, o a otro país de la Unión Europea, será castigado con la pena prevista en el artículo anterior.
2. Con la misma pena será castigado el que, simulando contrato o colocación, o usando de otro engaño semejante, determinare o favoreciere la emigración de alguna persona a otro país.

(...)

Delitos contra los derechos de los ciudadanos extranjeros
Artículo 318*bis*

1. El que, directa o indirectamente, promueva, favorezca o facilite el tráfico ilegal o la inmigración clandestina de personas desde, en tránsito o con destino a España, o con destino a otro país de la Unión Europea, será castigado con la pena de cuatro a ocho años de prisión.
2. Si el propósito del tráfico ilegal o la inmigración clandestina fuera la explotación sexual de las personas, serán castigados con la pena de 5 a 10 años de prisión.
3. Los que realicen las conductas descritas en cualquiera de los dos apartados anteriores con ánimo de lucro o empleando violencia, intimidación, engaño, o abusando de una situación de superioridad o de especial vulnerabilidad de la víctima, o siendo la víctima menor de edad o incapaz o poniendo en peligro la vida, la salud o la integridad de las personas, serán castigados con las penas en su mitad superior.
4. En las mismas penas del apartado anterior y además en la de inhabilitación absoluta de seis a 12 años, incurrirán los que realicen los hechos prevaliéndose de su condición de autoridad, agente de ésta o funcionario público.

5. Se impondrán las penas superiores en grado a las previstas en los apartados 1 a 4 de este artículo, en sus respectivos casos, e inhabilitación especial para profesión, oficio, industria o comercio por el tiempo de la condena, cuando el culpable perteneciera a una organización o asociación, incluso de carácter transitorio, que se dedicase a la realización de tales actividades.
   Cuando se trate de los jefes, administradores o encargados de dichas organizaciones o asociaciones, se les aplicará la pena en su mitad superior, que podrá elevarse a la inmediatamente superior en grado.
   En los supuestos previstos en este apartado la autoridad judicial podrá decretar, además, alguna o algunas de las medidas previstas en el artículo 129 de este Código.
6. Los tribunales, teniendo en cuenta la gravedad del hecho y sus circunstancias, las condiciones del culpable y la finalidad perseguida por éste, podrán imponer la pena inferior en un grado a la respectivamente señalada.

2. Ley Orgánica del Poder Judicial

De la extensión y límites de la jurisdicción.
Artículo 23

1. En el orden penal corresponderá la jurisdicción española el conocimiento de las causas por delitos y faltas cometidos en territorio español o cometidos a bordo de buques o aeronaves españoles, sin perjuicio de lo previsto en los tratados internacionales en que España sea parte.
2. Asimismo conocerá de los hechos previstos en las Leyes penales españolas como delitos, aunque hayan sido cometidos fuera del territorio nacional, siempre que los criminalmente responsables fueren españoles o extranjeros que hubieren adquirido la nacionalidad española con posterioridad a la comisión del hecho y concurrieren los siguientes requisitos:
   a. Que el hecho sea punible en el lugar de ejecución, salvo que, en virtud de un Tratado internacional o de un acto normativo de una Organización internacional de la que España sea parte, no resulte necesario dicho requisito.
   b. Que el agraviado o el Ministerio Fiscal denuncien o interpongan querella ante los tribunales españoles.
   c. Que el delincuente no haya sido absuelto, indultado o penado en el extranjero, o, en este último caso, no haya cumplido la condena. Si solo la hubiere cumplido en parte, se le tendrá en cuenta para rebajarle proporcionalmente la que le corresponda.
3. Conocerá la jurisdicción española de los hechos cometidos por españoles o extranjeros fuera del territorio nacional cuando sean susceptibles de tipificarse, según la Ley penal española, como alguno de los siguientes delitos:
   a. De traición y contra la paz o la independencia del estado.
   b. Contra el titular de la Corona, su Consorte, su Sucesor o el Regente.
   c. Rebelión y sedición.
   d. Falsificación de la Firma o Estampilla reales, del Sello del Estado, de las firmas de los Ministros y de los Sellos públicos u oficiales.
   e. Falsificación de Moneda española y su expedición.
   f. Cualquier otra falsificación que perjudique directamente al crédito o intereses del Estado, e introducción o expedición de lo falsificado.
   g. Atentado contra autoridades o funcionarios públicos españoles.
   h. Los perpetrados en el ejercicio de sus funciones por funcionarios públicos españoles residentes en el extranjero y los delitos contra la Administración Pública española.
   i. Los relativos al control de cambios.

4. Igualmente será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos:
   a. Genocidio.
   b. Terrorismo.
   c. Piratería y apoderamiento ilícito de aeronaves.
   d. Falsificación de moneda extranjera.
   e. Los delitos relativos a la prostitución y los de corrupción de menores o incapaces.
   f. Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes.
   g. Tráfico ilegal o inmigración clandestina de personas, sean o no trabajadores.
   h. Los relativos a la mutilación genital femenina, siempre que los responsables se encuentren en España.
   i. Y cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España.
5. En los supuestos de los apartados 3 y 4 será de aplicación lo dispuesto en la letra c del apartado 2 de este artículo.

Other references

M. Acale Sánchez, "Mujeres inmigrantes víctimas de violencia de género en España", *in* L. R. Ruiz Rodríguez (coord.) *Sistema penal y exclusión de extranjeros*, Albacete, Bomarzo, 2006.

L. Arroyo, A. Nieto, P. Crespo, *La armonización del Derecho Penal español: Una evaluación legislativa*, Madrid, Ministerio de Justicia, 2006.

C. Cortazar Rotaeche, E. García Coso and A. Obregón García, "Trafficking in and smuggling of human beings: the Spanish approach", *in Immigration and Criminal Law in the European Union*, Leiden, Brill Academic Publishers, 2006.

J. de León Villalba, "El marco europeo de lucha contra el tráfico de personas y la legislación sancionadora española", *Boletín de Información del Ministerio de Justicia*, Año 60, 2006, Extraordinario 2015.

—, "Inmigración ilegal y tráfico de seres humanos", *in La orden de detención y entrega europea*, Cuenca, Ed. Universidad de Castilla-La Mancha, 2006.

—, "Una nota sobre la prostitución y la trata de blancas", *in La mujer como víctima: aspectos jurídicos y criminológicos*, Cuenca, Ed. Universidad de Castilla-La Mancha, 2000.

M. Diaz y García Conlledo (dir.), *Protección y expulsión de extranjeros en Derecho Penal*, Madrid, La Ley, 2007.

C. Gonzalez Enriquez, "The fight against illegal immigration, smuggling and trafficking in human beings in Spain: Ambiguities and rhetoric", *in Immigration And Criminal Law in the European Union*, Leiden, Brill Academic Publishers, 2006.

J. Guardiola García, "Tráfico ilegal o inmigración clandestina de personas: comentario a la reciente reforma del artículo 318 del Código penal", *Revista de Derecho y proceso penal*, 13, 2005, p. 13 *et s*.

M.J. Guardiola Lago, *El tráfico de personas en el Derecho penal español*, Pamplona, Ed. Thomson-Aranzadi, 2007.

M. L. Maqueda Abreu, *El tráfico sexual de personas*, Valencia, Ed. Tirant lo Blanch. 2001.

—, "¿Cuál es el bien jurídico en el nuevo artículo 318 bis 2? Las sinrazones de una reforma", *Revista de Derecho y proceso penal*, 11, 2004-1, p. 39 *et s*.

F. Navarro Cardoso, "Observaciones sobre los delitos contra los derechos de los ciudadanos extranjeros", *Revista penal*, 10, 2002, p. 41 *et s*.

H. R. Padilla Alba, "El delito de tráfico ilegal de personas tras su reforma por la LO 11/2003, de 29 de septiembre", *La Ley penal*, 14, 2005, p. 5 *et s*.

J. M. Paz Rubio, "Empleo de súbditos extranjeros sin permiso de trabajo en condiciones que restrinjan o supriman sus derechos laborales: análisis de la STS 2ª de 22 de noviembre de 2004", *La Ley penal*, 19, septiembre, 2005, p. 111 *et s*.

A. Pérez Cepeda, *Globalización, tráfico internacional ilícito de personas y Derecho penal*, Granada, Comares, 2004.

F. Pérez Ferrer, *Análisis dogmático y político-criminal de los delitos contra los derechos de los ciudadanos extranjeros*, Madrid, Ed. Dykinson., 2006.

E. Pomares Cintas, "La inmigración laboral del extranjero en el Derecho penal", *Cuadernos de Política Criminal*, 86, 2005, p. 221 *et s*.

—, "Las incongruencias del Derecho penal de la inmigración ilegal. Especial referencia al delito de promoción o favorecimiento de la inmigración clandestina de trabajadores a España (Artículo 313.1 CP)", *Revista General de Derecho penal*, 5, 2006.

L. Pozuelo Pérez, "Tráfico de personas y explotación sexual", AAVV, *Derecho penal y política transaccional*, Barcelona, Atelier, 2005.

C. Prat Westerlindh, "Inmigración ilegal de personas. Problemas de aplicación del artículo 313.1 y el nuevo artículo 318 bis CP", *La Ley penal*, 17, junio, 2005, p. 65 *et s*.

R. Sáez Valcárcel, "Inmigración clandestina, mafias y luchas contra los pobres: un tipo penal indecente", *Jueces para la Democracia*, 54, 2005, p. 12 *et s*.

J. M. Terradillos Basoco, "Inmigración, mafias y sistema penal. La estructura y la pátina", *in* L. R. Ruiz Rodríguez (coord.), *Sistema penal y exclusión de extranjeros*, Albacete, Bomarzo, 2006.

C. Villacampa Estiarte, "Consideraciones acerca de la reciente modificación del delito de tráfico de personas", *Revista penal*, 14, p. 182 *et s*.

—, "El "nuevo" delito de tráfico de personas", *La Ley*, 2004, p. 1877-1889.

Le Royaume-Uni

John Spencer et Giulietta Gamberini

1. Introduction

D'un point de vue général, le Royaume-Uni fait certainement figure de « bon élève » pour sa mise en œuvre de la décision-cadre (ci-après DC) sur la traite. Le droit national, en effet, s'avère conforme à l'instrument européen et est de plus en plus efficacement appliqué par les autorités. Une observation plus approfondie laisse néanmoins apparaître quelques dissonances que confirme la comparaison des textes européens et nationaux.

Ces asymétries, que nous détaillerons par la suite, ne semblent pas n'être que le fruit de simples distractions législatives. Elles résultent plutôt des contraintes imposées par l'ordre juridique interne, mais aussi d'un choix de politique criminelle assez précis, que le droit régissant des domaines proches de celui de la traite, ainsi que la mise en œuvre d'autres instruments internationaux, esquissent.

A. Le droit pénal matériel interne

Le contexte juridique dans lequel la mise en œuvre de la DC a dû s'inscrire exige quelques explications préliminaires.

Le Royaume-Uni présente tout d'abord la particularité de compter trois systèmes de droit, séparés mais liés entre eux : l'Angleterre et le Pays de Galles, l'Ecosse, l'Irlande du Nord. Certains textes s'appliquent à ces trois parties, d'autres pas : en termes généraux, les lois en matière d'immigration concernent tout le Royaume-Uni, alors que les lois pénales prévoyant des infractions sexuelles sont spécifiques à chacun des systèmes.

Concernant la classification des infractions pénales, il n'en existe aucune qui soit explicitement établie par le législateur. Néanmoins, deux distinctions peuvent être déduites implicitement du système.

Une première dépend du tribunal compétent et de la forme du procès. Les *purely indictable offences* sont celles réservées à la *Crown Court*, qui tranche sur les infractions les plus graves suivant la procédure traditionnelle de l'*indictment* – en Ecosse, la juridiction correspondante jugera *by solemn procedure*. Les *summary offences* sont celles qui ne peuvent être jugées que par la *Magistrates' Court* – ou, en Ecosse, par la juridiction équivalente –, tribunal inférieur adoptant la procédure simplifiée du *summary trial*. Un troisième groupe, les *either-way offences*, comprend celles qui sont susceptibles d'être jugées devant l'une ou l'autre de ces juridictions, selon la gravité des faits de l'espèce.

Une seconde classification distingue entre *statutory offences* et *common law offences*. Les premières renvoient aux origines largement jurisprudentielles du droit du Royaume-Uni. Jusqu'aux années 1970 – avant qu'une série de décisions de la *House of Lords* n'ait consacré l'acceptation du principe *nulla poena sine lege* –, les juges disposaient du pouvoir de créer de nouvelles infractions et d'en définir les limites. Comme legs de cette période, une infraction peut encore exister en dehors de tout texte législatif, du simple fait qu'elle a été reconnue dans le passé comme telle par les juges : ce sont les *common law offences*, particulièrement importantes en Ecosse. On tend toutefois de plus en plus à les remplacer par des infractions prévues dans des lois, les *statutory offences*. Pour ces dernières, le maximum de la peine est fixé par le texte, alors que les *common law offences* sont punies selon le pouvoir discrétionnaire des juges, à moins qu'une loi en dispose autrement – ce qui arrive rarement.

L'âge de la responsabilité pénale est fixé à dix ans en Angleterre, au Pays de Galles et en Irlande du Nord, à huit ans en Ecosse.

Quant au régime des peines en Angleterre et au Pays de Galles, il est largement codifié dans le *Powers of Criminal Courts (Sentencing) Act (PCC(S)A) 2000* – que, trois ans après, le *Criminal Justice Act 2003* a fort modifié. Beaucoup d'articles y détaillent les formes des peines ainsi que les procédures que doit suivre le tribunal pour les imposer. Rien n'est dit toutefois à propos de leur degré ou des circonstances aggravantes et atténuantes. La pratique du législateur, en effet, est normalement de créer pour chaque infraction une seule peine maximale très élevée, en laissant à la jurisprudence le soin de déterminer la peine concrètement applicable aux infractions de gravité moyenne, selon les circonstances de l'espèce. Dans ce cadre législatif, la jurisprudence profite évidemment d'un pouvoir discrétionnaire remarquable.

La peine « classique » est la prison. Elle s'applique en principe à un très grand nombre d'infractions et est rarement imposée avec sursis.

Juste en dessous dans l'échelle de gravité, la loi et la doctrine placent celles que le *PCC(S)A 2000* dénomme *community sentences.* Pour les adultes, ces peines sont les suivantes : (a) le *curfew order* : interdiction de sortir d'un endroit précisé par le tribunal, pendant certaines heures également déterminées ; (b) le *community rehabilitation order* : mise à l'épreuve, surveillée par des travailleurs sociaux ; (c) le *community punishment order* : sorte de travail d'intérêt général ; (d) le *community punishment and rehabilitation order* : combinaison des ordres (b), (c) et (e) ; (e) le *drug treatment and testing order* : injonction de s'inscrire à un programme de traitement pour toxicomanie.

La principale sanction pécuniaire est l'amende. Elle est toujours prononcée sous forme d'une somme globale et fixe. Néanmoins, selon l'article 128 du *PCC(S)A*, en déterminant ce montant, le tribunal devra prendre en compte les ressources du condamné ; le texte détermine en outre une amende maximale qui va augmenter jour après jour en cas d'infraction continue.

Les tribunaux pénaux disposent du pouvoir général d'émettre un *forfeiture order*, par lequel le condamné est privé de l'objet qu'il a utilisé pour commettre l'infraction, ou qu'il possédait avec une telle intention ; ce pouvoir, qui existe depuis longtemps, a été codifié par le *PCC(S)A 2000*. Depuis 1986, et notamment depuis le *Proceeds of Crime Act 2002*, les tribunaux disposent aussi du pouvoir de priver le condamné des bénéfices de certaines infractions.

Des interdictions, incapacités et déchéances sont prévues par des textes particuliers. Il faut notamment citer les interdictions de prendre part à l'administration d'une société, d'exercer tout emploi exposant le condamné à un contact avec des enfants, de garder des animaux, ainsi que l'annulation du permis de conduire. Le choix de la mesure dépend normalement – mais pas nécessairement – de l'infraction commise. L'affichage des décisions ne constitue qu'une sanction administrative, limitée à des cas particuliers.

Quant aux personnes morales, la fermeture d'établissement n'est possible que dans certaines hypothèses ; en dehors de ces cas, elle peut parfois être ordonnée par la juridiction civile. La dissolution forcée d'une société n'existe que sous cette dernière forme.

Ces considérations valent, en général, pour tout le Royaume-Uni ; en dehors de l'Angleterre et du Pays de Galles toutefois, les mêmes règles résultent de diverses lois et peuvent présenter des différences de détail.

Si ce contexte représente les contraintes s'imposant au législateur ayant mis en œuvre la DC sur la traite, l'état du droit dans des secteurs proches nous suggère en revanche les marges de liberté dont il disposait.

D'une part, le droit du Royaume-Uni incrimine, séparément de la traite, le trafic d'êtres humains. Sans les dénommer explicitement ainsi, l'*Immigration Act 1971* [1] (sections 25, 25A, 25B et 25C) considère en effet comme constitutifs d'infractions les faits suivants – commis sciemment ou par faute caractérisée :

- faciliter la violation des lois d'immigration par un non-citoyen de l'UE ;
- faciliter, afin d'en tirer profit, l'arrivée au Royaume-Uni d'un demandeur d'asile ;
- faciliter la violation d'un ordre de déportation par un citoyen de l'UE ;
- assister, lors de son arrivée, entrée ou séjour au Royaume-Uni, un citoyen de l'UE dont le *Secretary of State* a personnellement considéré l'exclusion du territoire comme favorable à l'ordre public.

Conformément à l'article 3 du protocole des Nations unies contre le trafic des migrants par terre, air et mer – accompagnant la convention contre la criminalité transnationale organisée, et que le Royaume-Uni a ratifié –, le trafic est donc le fait

[1] Loi modifiée en 1999 et encore en 2002.

de faciliter l'entrée illégale d'autrui sur le territoire national, par quelque moyen que ce soit. Plusieurs éléments le caractérisent : un mouvement international ; l'illégalité de celui-ci ; l'absence de contrainte et/ou fraude, les personnes trafiquées étant consentantes et les services des trafiquants se terminant lorsqu'elles atteignent leur destination [2].

D'autre part, le fait de se prostituer n'est pas illicite en lui-même et le paiement d'une prestation sexuelle n'est pas incriminé. Mais la prostitution est entourée d'un ensemble d'infractions qui rend difficile l'exercice de cette activité sans enfreindre la loi pénale.

Ces dernières peuvent varier dans les différentes parties du pays [3] :

- dans tout le Royaume-Uni est incriminé le fait de gérer un lieu de prostitution, de participer à sa gestion, ou de louer un bien immobilier pour qu'un établissement de prostitution y soit installé ; est aussi incriminé le fait de gagner de l'argent en causant, provoquant ou contrôlant la prostitution d'autrui. En Ecosse, cependant, les incriminations sont parfois plus limitées et les peines différentes ;
- l'offre et la demande publiques de prostitution constituent des infractions en Angleterre et au Pays de Galles – la demande sous certaines formes seulement – ainsi qu'en Ecosse – où les peines ne sont cependant pas les mêmes [4]. En Irlande du Nord, seule l'offre est incriminée [5] ;
- pour l'Angleterre et le Pays de Galles, le *Sexual Offences Act 2003* prévoit d'autres infractions concernant la prostitution des enfants – entendus comme toute personne n'ayant pas atteint l'âge de dix-huit ans –, punies d'une peine maximale de quatorze ans de prison : le fait de payer pour les services sexuels d'un enfant (section 47), le fait de causer ou provoquer (section 48), de contrôler (section 49), d'arranger ou de faciliter (section 50) la prostitution ou la pornographie enfantines. En Ecosse, ces infractions concernant la prostitution d'enfants ont été reprises dans le *Protection of Children (Scotland) Act 2005*.

Quelques points forts caractérisent donc la manière d'appréhender ces réalités criminologiques voisines de la traite.

---

[2] La seule fraude prise en compte est celle éventuellement perpétrée contre l'administration de l'Etat.

[3] On s'abstiendra de toute référence, la liste des textes en la matière étant longue et dispersée.

[4] Le gouvernement a récemment introduit un projet de loi (*Criminal Justice and Immigration Bill*, clauses 124-125) pour créer une sanction de « réhabilitation obligatoire » pour des personnes condamnées pour cette infraction. Mais s'étant heurté à une opinion publique très défavorable, il l'a abandonné.

[5] Le gouvernement du Royaume-Uni a récemment réfléchi à une modification législative pénalisant de manière spécifique le fait d'avoir un rapport sexuel avec une victime de traite. Il a toutefois conclu que la législation existante, insistant sur la nécessité d'un consentement libre, fournissait une protection légale suffisante. La création d'une incrimination spécifique aurait en effet pu produire l'effet paradoxal de déclasser le fait d'avoir un rapport sexuel avec une victime de traite sans son consentement en infraction moins grave que le viol.

La pénalisation est tout d'abord « garantie » lorsque deux facteurs sont – alternativement – présents : l'existence d'un mouvement, international et illégal, dans le cas du trafic ; l'exploitation d'enfants, dans le cas de la prostitution.

L'attitude législative au regard des victimes est en revanche beaucoup plus ambiguë. Pour celles du trafic, rien de spécifique n'est dit. En matière de prostitution, la licéité de la prestation sexuelle elle-même, accompagnée de la répression des activités collatérales, laisserait croire que les prostituées sont considérées comme des victimes devant être protégées de toute exploitation. Mais la faiblesse de vrais dispositifs d'assistance, ainsi que la répression indirecte découlant de la pénalisation de l'offre, contredisent cette interprétation.

La politique criminelle qui ressort de ces dispositions correspond à l'accueil réservé à quelques textes internationaux touchant plus ou moins directement à la traite.

B. La mise en œuvre d'instruments internationaux

Selon leur objectif, ces instruments ont fait l'objet d'un accueil différent.

Le pays s'est conformé assez facilement aux textes visant la mise en place par les Etats parties d'infractions et de sanctions pénales harmonisées. Le plus connu, le protocole additionnel à la convention des Nations unies contre la criminalité transnationale organisée, visant à prévenir, réprimer et punir la traite des personnes, a été signé le 14 décembre 2000 et ratifié le 9 février 2006. D'autres instruments pertinents ont aussi été ratifiés : certains adoptés par les Nations unies, comme la convention relative à l'esclavage et celle relative aux droits de l'enfant [6] ; d'autres provenant de l'Organisation internationale du travail, comme la convention n° 29 sur le travail forcé, la n° 105 sur l'abolition du travail forcé et la n° 182 sur les pires formes du travail des enfants.

Moins évidente a été la mise en œuvre d'autres textes, visant davantage la protection des victimes que la répression des auteurs.

L'exemple le plus significatif est celui de la convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains. Bien que le Royaume-Uni ait participé activement au projet et aux négociations de cet instrument, axé sur les droits humains notamment des victimes, maintes hésitations ont précédé sa signature, le 23 mars 2007 [7]. Le gouvernement a pris le temps d'évaluer l'impact possible de la convention sur le droit interne. Il craignait que certaines prévisions, en particulier l'allocation de périodes de réflexion et de permis de séjour aux victimes, ne se transforment en facteurs attirant les trafiquants.

---

[6] Le gouvernement a toutefois apporté deux réserves à cette convention, dont une en matière d'immigration et de nationalité. Quant au protocole facultatif à la convention des Nations unies relative aux droits de l'enfant, concernant la vente d'enfants, la prostitution d'enfants et la pornographie mettant en scène des enfants, le gouvernement du Royaume-Uni, considérant que l'état du droit interne en permet la ratification, a déclenché le processus nécessaire, comprenant un examen ministériel officiel et le vote parlementaire.

[7] La date de ratification, en revanche, reste encore incertaine. Le gouvernement attend en effet d'avoir adapté la législation et la pratique internes au contenu de la convention : il est en train d'examiner les interventions nécessaires.

Selon cette même logique, par ailleurs, le pays – conformément au protocole sur la position du Royaume-Uni annexé au traité sur l'Union européenne et au traité instituant la Communauté européenne – n'a pas participé à l'adoption de la directive 2004/81/CE du Conseil du 29 avril 2004, relative au titre de séjour délivré aux ressortissants de pays tiers qui sont victimes de la traite des êtres humains ou ont fait l'objet d'une aide à l'immigration clandestine et qui coopèrent avec les autorités compétentes. Il n'est donc pas lié par ce texte [8].

Cette approche se retrouve par ailleurs bien au-delà du domaine spécifique de la traite. La mise en œuvre de la DC 2001/220/JAI du 15 mars 2001 relative au statut des victimes dans le cadre des procédures pénales est ainsi plutôt fragmentaire. Ses dispositions les plus importantes ont été transposées, tout en étant éclatées dans plusieurs textes [9]. Beaucoup d'entre elles manquent toutefois de correspondants législatifs, leur mise en œuvre étant réalisée par des voies moins formelles [10] – comme, souvent, le travail de différentes agences et autorités officielles [11], et bien sûr des juges, des officiers de police, des interprètes. Les résultats visés sont donc essentiellement atteints, mais leur légitimation textuelle ne reste que partielle

Ces différents traitements ne manqueront pas de rejaillir sur la mise en œuvre de l'instrument européen que nous étudions.

---

[8] Le *Joint Committee on Human rights* des *House of Commons* et *House of Lords* a toutefois recommandé au gouvernement de se servir de ce texte en tant que modèle concernant l'allocation de permis de séjour aux victimes : voy. les rapports cités en annexe.

[9] Pour l'Angleterre et le Pays de Galles, ainsi que pour l'Irlande du Nord, voy. le *Criminal Injuries Compensation Act 1995 ;* la *Victim's Charter 1996* ; le *Human Rights Act 1998* ; le *Youth Justice and Criminal Evidence Act 1999* ; le *Criminal Justice and Court Service Act 2000*, le *Serious Organised Crime and Policing (SOCAP) Act 2005*. Selon le *Youth Justice and Criminal Evidence Act 1999*, en particulier, les adultes victimes d'infractions sexuelles ont automatiquement droit à des mesures spéciales, si celles-ci sont susceptibles de faciliter leur témoignage ; cette loi interdit aussi que les victimes d'infractions sexuelles soient interrogées directement par l'accusé, et que certaines questions sur leur histoire sexuelle antérieure leur soient posées. Le *Serious Organised Crime and Policing (SOCAP) Act 2005* prévoit également des formes de protection des témoins. Concernant l'Ecosse voy. le *Criminal Procedure (Scotland) Act 1995*, le *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002*, le *Vulnerable Witnesses (Scotland) Act 2004*.

[10] Un *Witness Service*, géré par l'association bénévole indépendante *Victim Support*, existe dans tous les tribunaux d'Angleterre et du Pays de Galles. Depuis mars 2005, dans chaque ressort du *Crown Prosecution Service*, il y a au moins une *Witness Care Unit*, servant de point de contact unique pour plaignants et victimes, les préparant au témoignage et répondant notamment aux besoins des témoins les plus intimidés et vulnérables. Le *Home Office* a aussi publié un *Code of Practice for Victims of Crime* ainsi qu'un *Memorandum of Understanding* entre plusieurs agences chargées de le mettre en œuvre. En pratique, en plus, l'Etat intervient dans le financement du *Victim Support*, et a pris de nombreuses initiatives en la matière, comme le lancement d'un *National Witness Mobility Service* et la mise en place d'un *Central Witness (Protection) Bureau (CWB)*. L'Ecosse finance d'autres organisations en faveur des victimes et des témoins – notamment le *Victim Support Scotland.* L'information sur tous ces dispositifs est assurée par des brochures, des sites Internet, ainsi que des lignes téléphoniques spécifiques.

[11] Par exemple, la *Witness Liaison Unit*, le *Victim Office Liaison*, la *Fines Enquiry Court*, le *Scottish Executive Justice Department*, le *Scottish Court Service* etc.

2. Conformité formelle et substantielle

La mise en œuvre de la DC du 19 juillet 2002 relative à la lutte contre la traite des êtres humains résulte au Royaume-Uni d'un ensemble de textes.

Le *Sexual Offences Act 2003* (sections 57-59), s'appliquant à l'Angleterre, au Pays de Galles et à l'Irlande du Nord, a criminalisé la traite vers, depuis ou dans le Royaume-Uni visant toute forme d'exploitation sexuelle [12] ; cette infraction en a remplacé une autre, transitoire, à savoir celle de traite à des fins de prostitution, introduite auparavant par le *Nationality, Immigration and Asylum Act 2002* (section 113). Des prévisions équivalentes pour l'Ecosse sont contenues dans le *Criminal Justice (Scotland) Act 2003* (section 22), incriminant la traite aux fins de prostitution ou de création de matériel obscène ou indécent.

Une infraction de traite aux fins d'exploitation non sexuelle – y compris pour le travail forcé et le vol d'organes – a été prévue dans le *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* (section 4), s'appliquant à l'ensemble du Royaume-Uni.

Malgré son éparpillement, cette mise en œuvre a été par ailleurs assez rapide, sans retard majeur par rapport aux délais imposés dans la DC.

Ainsi, le projet du *Nationality, Immigration and Asylum Act 2002* a été présenté au Parlement le 12 avril et a reçu l'assentiment royal le 7 novembre 2002 ; sa disposition provisoire incriminant la traite à des fins de prostitution est entrée en vigueur le 10 février 2003. Le *Sexual Offences Act 2003* a été introduit devant le Parlement le 29 janvier et a reçu l'assentiment royal le 20 novembre 2003 ; il est entré en vigueur le 1er mai 2004. Le *Criminal Justice (Scotland) Act 2003* a été présenté devant le *Justice Committee* du Parlement écossais le 8 mai 2002 et a reçu l'assentiment royal le 26 mars 2003 ; ses dispositions sur la traite sont entrées en vigueur le 27 juin suivant.

Le *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* a été soumis au Parlement le 27 novembre 2003 et a reçu l'assentiment royal le 22 juillet 2004 ; ses dispositions concernant la traite sont entrées en vigueur le 1er octobre de la même année.

Cette promptitude était aussi due à la nécessité de combler un vide. Avant le *Nationality, Immigration and Asylum Act 2002*, le Royaume-Uni ne comptait, en effet, aucune infraction spécifique de traite [13]. Les auteurs étaient parfois condamnés sur le fondement d'autres textes.

En Angleterre et au Pays de Galles, on appliquait le *Sexual Offences Act 1956* – remplacé par le *Sexual Offences Act 2003* –, incriminant différentes formes d'exploitation à des fins de prostitution, ainsi que l'*Offences against the Person Act 1861*, prévoyant des infractions – comme le viol ou le meurtre – susceptibles d'être perpétrées contre les victimes de traite. En Irlande du Nord, on se servait

---

[12] Le *Sexual Offences Act 2003* met aussi en œuvre la DC du 22 décembre 2003 sur la lutte contre l'exploitation d'enfants et la pédopornographie ; pour l'Ecosse, le texte de référence à ce propos est le *Protection of Children (Scotland) Act 2005*.

[13] L'action commune du 24 février 1997 adoptée par le Conseil sur la base de l'article K.3 du traité sur l'Union européenne, relative à la lutte contre la traite des êtres humains et l'exploitation sexuelle des enfants, n'avait pas non plus été transposée.

d'un ensemble complexe de *statutory offences*, dont celles prévues dans le *Criminal Law Amendment Act 1885* et l'*Offences against the Person Act 1861*. En Ecosse, on employait essentiellement des *common law offences*. Dans tout le pays, on recourait aussi parfois à l'*Immigration Act 1971* [14] – incriminant, comme on l'a vu, le fait de faciliter sciemment l'entrée illégale d'une personne au Royaume-Uni.

La transposition législative de la DC a donc introduit d'importants changements, notamment l'incrimination explicite – facilitant la poursuite des auteurs – de la traite sous ses différentes formes. L'absence de dispositions spécifiques dans les textes précédents constituait en effet un obstacle majeur à la lutte contre l'infraction.

Les poursuites fondées sur l'*Immigration Act 1971* et ensuite sur l'*Immigration and Asylum Act 1999* se heurtaient à la complexité des preuves exigées et au fait que toutes les victimes de traite n'immigrent pas illégalement.

Le *Sexual Offences Act 1956*, ainsi que la *common law* en Ecosse et les lois applicables en Irlande du Nord, contenaient des dispositions datées, fragmentaires, contradictoires – notamment en ce qui concernait les peines prévues – et exclusivement centrées sur la prostitution d'autrui ; de lourdes exigences jurisprudentielles en matière de preuve rendaient leur utilisation contre la traite encore plus difficile. La protection garantie aux enfants était incohérente et faible. Par rapport à cette situation, le *Sexual Offences Act 2003* et le *Criminal Justice (Scotland) Act 2003* présentent l'avantage d'avoir systématisé et complété l'ensemble des infractions d'exploitation sexuelle.

Le recours à d'autres fondements de responsabilité de droit commun, enfin, ne couvrait pas toutes les hypothèses envisageables.

La nécessité de combler ces lacunes, ainsi que la rapidité avec laquelle ces nouvelles lois ont été adoptées, peuvent sans doute expliquer en partie les correspondances et les écarts entre les textes du Royaume-Uni et celui de l'Union européenne. Le niveau de conformité à la DC semble néanmoins avoir été surtout dicté par un choix de politique criminelle, à l'origine du clivage caractérisant la transposition interne. En effet, si les discordances sont mineures en ce qui concerne la nécessité d'assurer la répression, elles deviennent beaucoup plus importantes en matière de protection des victimes.

A. *Exigences répressives*

Plusieurs aspects méritent d'être pris en compte [15].

1. *Incrimination*

Les descriptions de la traite des textes européen et nationaux, tout d'abord, ne coïncident que partiellement.

La construction matérielle des infractions prévues aux sections 57-59 du *Sexual Offences Act 2003*, à la section 22 du *Criminal Justice (Scotland) Act 2003* et à la section 4 du *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* est la même. Les actes incriminés consistent dans le fait d'arranger ou de faciliter :

---

[14] Dans sa forme actuelle, modifiée par l'*Immigration and Asylum Act 1999* et puis par le *Nationality, Immigration and Asylum Act 2002.*

[15] On traitera ici des différents éléments de l'infraction de traite les uns après les autres, en respectant la structure du questionnaire qui a constitué la trame de l'analyse. Pour une vision d'ensemble, nous renvoyons aux textes des lois, en annexe.

- l'arrivée au Royaume-Uni ;
- le voyage à l'intérieur du Royaume-Uni ;
- le départ du Royaume-Uni ;

d'une personne.

Les trois lois font donc référence à une forme de transfert physique de la victime, que ce soit vers le, du ou à l'intérieur du territoire national. L'acte incriminé étant toutefois décrit en termes de simple participation, il n'est pas nécessaire que ce déplacement ait effectivement eu lieu. Le recrutement, l'hébergement et l'accueil ultérieur de la personne mentionnés par la DC ne seront ainsi punis que lorsque, en accomplissant ces actes, l'auteur tombe sous le coup de la répression de la complicité par rapport au transport ou à l'exploitation, dans la mesure où ces derniers sont incriminés et que le fait principal punissable a été accompli – du moins sous la forme de la tentative.

D'autres dispositions pénales, en outre, incriminent parfois de manière autonome ces formes de participation à l'exploitation sexuelle ou du travail d'autrui [16]. En Angleterre, au Pays de Galles et en Irlande du Nord, des poursuites sont parfois menées sur le fondement des infractions de *common law* de *kidnapping* et de *false imprisonment*, consistant dans le fait d'enfermer quelqu'un, ou de le menacer pour l'empêcher de partir. Les infractions correspondantes en Ecosse sont les *common law offences d'abduction* et de *cruel and inhuman treatment*. Lorsque l'exploitation est sexuelle, d'autres *statutory offences* peuvent aussi être utilisées, contenues notamment dans le *Sexual Offences Act 2003* et, pour l'Ecosse, dans les *Criminal Law (Consolidation) (Scotland) Act 1995* et *Protection of Children (Scotland) Act 2005*.

Par rapport aux objectifs d'exploitation, prévus par l'article 1, par. 1 de la DC, la transposition interne révèle aussi un léger décalage.

La notion d'exploitation du travail d'autrui est précisée dans la section 4 (sous-section 4) de l'*Asylum and Immigration (Treatment of Claimants etc) Act 2004*. Cette définition comprend l'esclavage et le travail forcé, la transplantation d'organes, les services et les bénéfices acquis par la force, la menace ou la fraude, les activités obtenues de personnes vulnérables en profitant de leur fragilité. Par rapport à l'instrument européen, on ne constate donc pas de différence majeure. L'hétérogénéité et la combinaison complexe des termes utilisés pourraient néanmoins faire imaginer des cas, mineurs, tombant sous le coup de la DC mais exclus de l'application de la loi nationale.

Pour la traite à des fins d'exploitation sexuelle, il faut distinguer la situation écossaise de celle du reste du Royaume-Uni. En Ecosse, la section 22 du *Criminal Justice (Scotland) Act 2004* concerne l'exploitation ayant pour objet la prostitution ou la pornographie. Aucune autre forme d'exploitation sexuelle n'est donc en principe prise en compte, mais en pratique ces notions couvrent évidemment la quasi-totalité de la matière. En Angleterre, au Pays de Galles et en Irlande du Nord, en revanche, les sections 57-59 du *Sexual Offences Act 2003* exigent que la traite soit susceptible

---

[16] Ces observations suggèrent par ailleurs pourquoi les infractions de traite sont axées au Royaume-Uni sur le transfert physique : il s'agissait de la plus grave lacune du système antérieur.

d'impliquer la commission de l'une des infractions énumérées à la section 60. Cette liste, longue et variée, ne couvre toutefois pas la création de matériel pornographique impliquant des adultes – à moins qu'au long du processus une autre infraction sexuelle ne soit commise.

Des écarts divers par rapport aux contraintes européennes existent donc dans les différentes parties du Pays. Ces « décalages » seront aussi à prendre en compte lorsque la traite devra être appréhendée par le moyen de la complicité à un acte d'exploitation. Les infractions de *common law* de *kidnapping*, de *false imprisonment*, d'*abduction* et – en Ecosse – de *cruel and inhuman treatment* existent, en revanche, même en l'absence de toute finalité d'exploitation, et donc, *a fortiori*, en présence de celle-ci, quelle que soit sa forme.

Quant aux moyens utilisés, le *Sexual Offences Act 2003* (sections 57-59), le *Criminal Justice (Scotland) Act 2003* (section 22) et l'*Asylum and Immigration (Treatment of Claimants) Act 2004* (section 4) sont même plus répressifs que la DC. Aucune de ces lois n'exige en effet que les actes matériels constituant la traite soient accompagnés des moyens visés à l'article 1, par. 1, a) à d) du texte européen : l'infraction est caractérisée même en leur absence.

L'utilisation de ces moyens est néanmoins parfois implicitement contenue dans la notion d'exploitation, finalité de la traite. De ce point de vue, une différence doit être mise en exergue. Bon nombre des infractions auxquelles la définition de l'exploitation sexuelle renvoie dans le *Sexual Offences Act 2003* existent même en l'absence de toute forme de contrainte, de fraude ou d'abus d'autorité ; il en va de même, selon le *Criminal Justice (Scotland) Act 2003,* pour les infractions de prostitution et de pornographie qui doivent constituer la finalité de l'exploitation [17]. La notion d'exploitation du travail d'autrui, en revanche, telle qu'elle est définie dans l'*Asylum and Immigration (Treatment of Claimants) Act 2004*, semble présupposer, implicitement du moins, l'un des éléments mentionnés à l'article 1, par. 1, a) à d) de la DC. Selon la section 4 (sous-section 4, point d)), cependant, l'exploitation du travail d'autrui existe dès lors que la personne a été choisie « en raison du fait (…) qu'elle est jeune » : dans ce cas, l'absence de toute contrainte, fraude, abus etc. ne compte pas.

Pour les infractions de traite prévues par le *Sexual Offences Act 2003*, il faut aussi prendre en compte les indications publiées par le *Sentencing Guidelines Council* [18]. Cet organe a notamment établi que « le degré de la contrainte utilisée et le niveau de contrôle sur la liberté de la victime seront pris en considération pour déterminer la gravité du comportement de l'auteur », et donc la peine standard et la marge de liberté du juge, la présence de ces facteurs étant susceptible d'élever la peine jusqu'au maximum de quatorze ans. La fraude, la tromperie, l'utilisation de la force, des

[17] Ceci semble par ailleurs confirmer l'attitude ambiguë, déjà évoquée, du législateur britannique à l'égard des « victimes » de ces infractions.

[18] Cet organe officiel a été constitué par le *Criminal Justice Act 2003* (sections 167-173) Ses directives ne s'appliquent qu'à l'Angleterre et au Pays de Galles et constituent une sorte de « *soft law* », en ce sens qu'en principe elles ne sont pas obligatoires, les juges n'étant pas tenus de les appliquer. Selon la loi, en effet, le taux maximal textuellement fixé pour chaque infraction représente la seule limite du pouvoir des tribunaux de déterminer la peine.

menaces ou d'autres violences ont aussi été mentionnées parmi les circonstances aggravantes [19].

Pour les hypothèses où la traite ne peut être punie qu'en recourant au droit commun, il faut encore faire une distinction. Les infractions de *kidnapping*, de *false imprisonment* et – en Ecosse – d'*abduction* présupposent une forme de contrainte, de force ou de menace ; elles ne couvrent donc pas les autres moyens prévus par l'article 1, par. 1, b) à d) du texte européen. La complicité, en revanche, ne requiert rien de plus que la participation consciente au fait principal punissable, consistant dans le transport, qui n'exige aucun de ces moyens particuliers, ou dans l'exploitation, dont la construction subit les variations que l'on vient de voir.

Dans tous les cas où les éléments mentionnés à l'article 1, par. 1, a) à d) de la DC sont ainsi, plus ou moins directement, pris en compte, le consentement de la victime n'entre pas en ligne de compte : son absence est présupposée dès lors que la contrainte, la fraude etc. sont prouvées.

Ces remarques sont valables tant pour les adultes que pour les enfants [20] : la législation sur la traite, ainsi que les régimes de droit commun qui la complètent, s'appliquent indépendamment de l'âge de la victime.

Dans quelques situations, toutefois, ce dernier joue. L'exploitation du travail d'autrui, tout d'abord, est, comme nous l'avons vu, automatiquement présente – l'infraction de traite étant ainsi accomplie – lorsque la victime est choisie parce qu'elle est jeune [21]. Le *Sexual Offences Act 2003*, ensuite, comme nous l'avons aussi déjà remarqué, ne recouvre que la pornographie impliquant des enfants ; pour l'infraction de traite prévue par ce texte, en outre, le *Sentencing Guidelines Council* a recommandé que l'âge de la victime soit pris en compte dans la détermination de la peine concrètement applicable. Enfin, lorsque la traite au sens de la DC est punie en recourant au régime de la complicité, et que le fait principal punissable consiste en une infraction d'exploitation sexuelle, les peines prévues en cas d'enfants victimes par le *Sexual Offences Act 2003* (sections 45-53) et le *Protection of Children (Scotland) Act 2005* sont parfois plus lourdes et varient selon l'âge du mineur.

Conformément à l'article 2 de la DC, l'incitation, la participation, la complicité à ou la tentative de commettre l'infraction visée à l'article 1 sont punissables.

Dans tout le Royaume-Uni, en effet, est incriminé (*incohate offences*) le fait de :

- tenter de commettre une infraction ;
- inciter autrui à commettre une infraction (*incitement*) ;

[19] Voy. annexe.

[20] Selon le droit commun, au Royaume-Uni, on devient majeur à dix-huit ans. Les individus en dessous de cet âge sont juridiquement des « enfants » – mais, lorsqu'ils ont plus de quatorze ans, ils sont souvent traités plutôt de « jeunes ». L'âge de la majorité sexuelle, c'est-à-dire à partir duquel une personne peut validement consentir à un acte sexuel, est fixé à seize ans en Angleterre, au Pays de Galles et en Ecosse, à dix-sept ans en Irlande du Nord.

[21] Le mot « jeune » n'étant pas défini, on peut imaginer que les tribunaux s'en tiendront à une évaluation de fait, au cas par cas.

- conspirer avec autrui pour commettre une infraction (*conspiracy*) ;
- faciliter une infraction [22].

Ces incriminations opèrent indépendamment du fait que l'infraction en question ait été commise ou pas.

Dans tout le Royaume-Uni, en outre, ceux qui aident ou assistent une autre personne à la commission d'une infraction en sont responsables dans la même mesure que l'auteur principal [23]. Cette responsabilité par complicité est large. Elle s'étend non seulement aux actes d'encouragement ou d'assistance, mais aussi, dans une mesure mal définie, à des omissions, dès lors que l'on considère qu'un devoir de contrôle existait. Une assistance même très légère a été jugée suffisante pour que la complicité soit punissable.

Ce droit commun s'applique quelle que soit l'infraction en question. Pour cette raison, aucune mise en œuvre explicite de l'article 2 de la DC n'a été nécessaire.

En ce qui concerne l'incrimination de la traite, donc, quelques écarts entre les droits européen et interne existent ; ils sont toutefois assez marginaux. En matière de sanctions, les textes britanniques vont même au-delà des exigences européennes.

2. Sanctions

Les trois lois mettant en œuvre la DC créent des infractions assorties d'une peine d'au maximum quatorze ans de prison [24] : par rapport aux standards du Royaume-Uni, il s'agit d'une sanction lourde. Les infractions de *common law* susceptibles de combler les lacunes de la transposition – *kidnapping*, *false imprisonment*, *abduction* et *cruel and inhuman treatment* – sont punies à la discrétion du juge, sans limites : éventuellement même par la prison à vie. Le régime de la complicité, complétant dans certaines hypothèses la mise en œuvre du texte européen, applique au complice les mêmes peines qu'à l'auteur principal. Le législateur national a donc largement dépassé ce qui lui était demandé par la DC.

Il est vrai toutefois que les trois textes de transposition évoquent aussi la possibilité de prononcer une simple amende ou, lorsque la personne est jugée devant la *Magistrates' Court* – ou la juridiction correspondante en Ecosse –, une peine de prison de six ans au maximum. Cette prévision pourrait être considérée comme légèrement décalée par rapport aux exigences européennes. Cependant, selon le *Sentencing Guidelines Council*, les formes de traite prévues par le *Sexual Offences Act 2003* constituent des infractions graves*,* considérées comme répugnantes par la société tout entière, ce qui laisse présumer que la grande majorité de ces affaires sera jugée devant la *Crown Court* ; la peine standard pour ces infractions devrait en outre être la prison, une simple amende étant rarement adéquate.

---

[22] Cette dernière prévision est contenue dans le *Serious Crime Act 2007*, ayant reçu l'assentiment royal le 30 octobre 2007 et ne s'appliquant qu'à l'Angleterre, au Pays de Galles et à l'Irlande du Nord.

[23] En Ecosse, la terminologie est différente, mais le régime reste le même.

[24] *Sexual Offences Act 2003*, sections 57-59, sous-section 2 ; *Criminal Justice (Scotland) Act 2003*, section 22, sous-section 3 ; *Asylum and Immigration (Treatment of Claimants etc.) Act 2004,* section 4, sous-section 5.

Il faut aussi remarquer que le *Proceeds of Crime Act 2002* s'applique aux infractions de traite [25]. Les tribunaux sont donc légitimés à présumer que tous les biens des trafiquants sont des produits du crime, à moins que le défendeur ne prouve le contraire. Le *Sexual Offences Act 2003*, en outre, a été amendé par le *Violent Crime Reduction Act 2006* [26], qui a introduit des pouvoirs de confiscation des véhicules, navires et aéronefs utilisés pour la traite à des fins d'exploitation sexuelle.

Le *Sexual Offences Act 2003* (sections 57-59), le *Criminal Justice (Scotland) Act 2003* (section 22) et l'*Asylum and Immigration (Treatment of Claimants) Act 2004* (section 4) ne mentionnent pas les circonstances aggravantes prévues par l'article 3, par. 2 de la DC. Cependant, la peine que ces lois prévoient est, même dans le cas où ces circonstances sont absentes, supérieure à celle exigée par la DC lorsqu'elles sont présentes.

Pour les infractions de traite prévues dans le *Sexual Offences Act 2003*, le *Sentencing Guidelines Council* a néanmoins établi que deux circonstances aggravantes prévues par la DC peuvent mener la peine vers le maximum de quatorze ans. La première est la vulnérabilité de la victime [27], que la DC mentionne expressément. La deuxième est la participation à une entreprise commerciale à large échelle, comportant un haut niveau de planification, d'organisation ou de sophistication, et un gain financier – 5 000 livres sterling environ, voire plus – ou d'une autre sorte. La troisième est le grand nombre de victimes. Ces deux derniers facteurs évoquent la commission de l'infraction dans le cadre d'une organisation criminelle mentionnée par le texte européen.

Bien que la coïncidence ne soit pas parfaite, les sanctions établies par la DC ont donc été respectées, voire dépassées. Il en est de même pour la responsabilité pénale des personnes morales.

3. Responsabilité pénale des personnes morales

La responsabilité pénale des personnes morales et de certains autres « groupements » existe au Royaume-Uni depuis très longtemps et est considérée comme un acquis. Il s'agit d'une création jurisprudentielle du XIXe siècle qui n'a jamais été remise sérieusement en cause. Aujourd'hui une personne morale peut commettre, dans certaines circonstances, n'importe quelle infraction – même un vol ou un homicide.

Depuis un arrêt de la *House of Lords* de 1915 [28], cette responsabilité se fonde sur le principe d'identification : certains décideurs principaux au sein de la personne morale lui sont assimilés, de sorte que les actes qu'ils accomplissent pour le compte du groupement sont considérés comme commis par celui-ci, tout élément de culpabilité qui les accompagne lui étant également attribué.

La jurisprudence a ensuite développé l'application du principe d'identification en matière pénale dans deux sens, l'un limitatif, l'autre extensif. Tout d'abord, la *House of Lords* a déclaré que les seules personnes susceptibles de déclencher la

---

[25] Cette loi concerne tout le Royaume-Uni.

[26] Ses sections pertinentes sont entrées en vigueur le 12 février 2007.

[27] Il est précisé par ailleurs que lorsque la victime a moins de treize ans, on fera référence aux peines les plus graves prévues en ce cas pour l'exploitation sexuelle.

[28] *Leonard's Carrying Co v Asiatic Petroleum Co* [1915] AC 705.

responsabilité de l'organisation pour les infractions réalisées pour son compte sont les individus disposant d'un véritable pouvoir de décision centrale : le dirigeant de l'une des nombreuses succursales d'un grand magasin, par exemple, n'engage pas la responsabilité pénale de l'entreprise, du moins par cette voie de raisonnement juridique. Ensuite, il a été décidé que les types d'infractions pouvant être attribués à une personne morale ne se limitent pas aux infractions économiques, mais en incluent d'autres comme l'homicide par imprudence.

A d'autres égards, la jurisprudence du Royaume-Uni a montré une certaine prudence, car elle a rejeté le concept de « faute collective ». Ainsi, à l'heure actuelle, la théorie de l'identification exige que tous les éléments de la faute soient réunis dans le chef d'un seul dirigeant – lui-même par ailleurs susceptible d'être poursuivi pour cette infraction. Les tribunaux n'admettent pas de cumuler les fautes légères d'une série d'individus à l'intérieur de l'entreprise pour en faire une faute lourde pouvant être attribuée à la personne morale elle-même [29].

En ce qui concerne les groupements susceptibles d'être pénalement responsables, l'*Interpretation Act 1978* prévoit que, dans tout texte législatif, le mot « *person* » désigne non seulement les personnes physiques et morales, mais aussi toute *unincorporated association* – groupement dépourvu de personnalité morale. En pratique, néanmoins, il est rare qu'un groupement autre qu'une personne morale soit poursuivi.

L'article 4 de la DC n'a donc pas été expressément transposé en droit interne. Pour le premier paragraphe de cette disposition, ce n'était en effet pas nécessaire, car les critères qu'il établit correspondent au droit commun britannique. Le deuxième paragraphe soulève en revanche plus de doutes : si, de fait, le type de responsabilité pénale des personnes morales qu'il crée n'est pas inconnu au Royaume-Uni, il faut néanmoins que celle-ci soit prévue par une disposition législative particulière, ce qui n'est pas le cas.

La seule sanction qu'un tribunal pénal peut imposer à une personne morale sur le fondement du droit commun est une amende. Aucune dissolution ne peut ainsi être décidée par une décision de condamnation ; selon l'*Insolvency Act 1986*, toutefois, l'*Attorney General* peut déclencher une procédure civile contre toute personne morale devant être dissoute dans l'intérêt public [30]. Lorsque le procès a lieu devant la *Crown Court* – ou la juridiction écossaise équivalente –, le montant de l'amende que le tribunal pénal peut imposer à la personne morale pour les infractions de traite n'a pas de limites.

La répression des personnes morales voulue par la DC est ainsi sans doute assurée. Les exigences punitives européennes sont également respectées en ce qui concerne l'attribution de la compétence pénale aux tribunaux britanniques.

---

[29] *R v P & O Ferries (Dover) Ltd* (1990) 93 CrAppR 72. Pour contourner ce problème dans le cadre de l'homicide involontaire, le législateur a créé, par le *Corporate Manslaughter and Corporate Homicide Act 2007*, une nouvelle infraction spécifique.

[30] Le *Serious Crime Act 2007*, ayant reçu l'assentiment royal le 30 octobre 2007, permet en outre de demander la dissolution des sociétés condamnées pour les infractions auxquelles cette même loi s'applique ; mais ces dernières ne comprennent pas la traite.

4. Compétence et poursuite

Dans leur formulation originelle, les trois textes transposant la DC fondaient la compétence des tribunaux du Royaume-Uni sur les mêmes critères [31] : l'infraction devait avoir été commise soit à l'intérieur du pays, soit en dehors de son territoire par un de ses citoyens ou par une personne morale créée sous la loi britannique. Pour les infractions de traite, le Royaume-Uni avait ainsi choisi d'adopter les principes de territorialité et de personnalité active exigés par le texte européen [32]. Un amendement à la section 5 de l'*Asylum and Immigration (Treatment of Claimants) Act 2004* et à la section 60 du *Sexual Offences Act 2003*, contenu dans le *Borders Act 2007* (section 31), a toutefois introduit, en ce qui concerne le droit de l'Angleterre et du Pays de Galles et de l'Irlande du Nord, le principe d'universalité [33]. Le *Scottish Executive* est en train d'évaluer si des modifications similaires devraient être apportées aux incriminations écossaises correspondantes.

Etant donné l'ampleur de la compétence ainsi attribuée aux tribunaux britanniques, la faculté consacrée par l'article 6, par. 2 de la DC n'a donc à l'évidence pas été utilisée.

Néanmoins, dans les cas où les lacunes de la législation sur la traite sont comblées par les *common law offences* de *kidnapping*, de *false imprisonment*, d'*abduction*, de *cruel and inhuman treatment*, le principe de personnalité active n'étant pas explicitement prévu, il ne pourra pas opérer : le seul critère de droit commun au Royaume-Uni est en effet celui de la territorialité [34]. Cette hypothèse réalise ainsi implicitement la prévision de l'article 6, par. 2 de la DC, mais sa conformité avec l'article 6, par. 3 est de fait assurée, parce qu'en pratique le pays extrade traditionnellement ses nationaux.

En résumé, le *Sexual Offences Act 2003*, le *Criminal Justice (Scotland) Act 2003* et l'*Asylum and Immigration (Treatment of Claimants) Act 2004* transposent la DC sans en reprendre les termes exacts. C'est ce qui est à l'origine d'un décalage, les incriminations prévues par les textes nationaux étant à la fois plus larges et plus restreintes que celles de l'instrument européen.

Le droit commun suffit à combler une partie de ces lacunes. Néanmoins, restent non punissables au Royaume-Uni, contrairement aux exigences de la DC :

– le recrutement, l'hébergement et l'accueil ultérieur de la personne lorsque, n'étant accompagnés d'aucune forme de contrainte – même si éventuellement assortis de l'un des autres moyens énumérés à l'article 1, par. 1 du texte européen –, ils ne peuvent pas être appréhendés comme *kidnapping*, *false imprisonment*, ou – en Ecosse – *abduction* et, aucune infraction principale de traite ou de simple

---

[31] *Sexual Offences Act 2003*, section 60, sous-section 2 ; *Criminal Justice (Scotland) Act 2003*, section 22, sous-section 4 ; *Asylum and Immigration (Treatment of Claimants) Act 2004*, section 5, sous-section 1.

[32] Du fait de la complexité des lois en matière de nationalité, due au passé colonial du pays, la définition donnée de « citoyen britannique » dans les textes internes était bien large.

[33] Ces dispositions sont entrées en vigueur le 31 janvier 2008.

[34] Les tribunaux ont néanmoins récemment étendu cette notion : aujourd'hui, une infraction est considérée comme commise dans le pays dès lors qu'ont été perpétrés sur son territoire les actes matériels principaux, ou que s'y sont produits leurs effets.

exploitation n'ayant été accomplie, ils ne peuvent pas non plus constituer une forme de complicité ;

- en Angleterre, au Pays de Galles et en Irlande du Nord, le transport, ainsi que le recrutement, l'hébergement et l'accueil ultérieur, d'un adulte consentant aux fins de création de matériel pornographique.

Quelques écarts mineurs concernent aussi le concept d'exploitation à des fins de travail, les sanctions ainsi que l'article 2, par. 2 relatif à la responsabilité des personnes morales.

Ainsi, pour la mise en œuvre des dispositions européennes assurant la répression de la traite, le législateur britannique paraît avoir fait preuve de bonne volonté. L'objectif poursuivi était en effet sans doute partagé par le gouvernement et par la société civile. Il était en outre cohérent avec la nécessité de combler les lacunes du droit interne.

Les dispositions concernant les victimes, en revanche, ont reçu un accueil bien plus tiède.

B. Protection des victimes

Quant à l'article 7, par. 1 de la DC, tout d'abord, il faut savoir qu'au Royaume-Uni les enquêtes et les poursuites ne dépendent pas d'une plainte de la victime [35]. Même lorsque les *private prosecutions* – entamées par la victime, ou par tout citoyen – sont consenties en Angleterre, au Pays de Galles et en Irlande du Nord, l'autorité de poursuite conserve le droit de prendre la direction des poursuites, afin de les clore. Aucune dérogation au droit commun n'est prévue en matière de traite.

Les textes de transposition de la DC, en outre, ne comptent pas de mesures spécifiques de protection des enfants – ni, par ailleurs et plus généralement, de mesures spécifiques de protection des victimes de l'infraction. Pour évaluer la mise en œuvre de l'article 7, par. 2, il faudra donc faire référence aux lois ayant transposé la DC 2001/220/JAI du Conseil du 15 mars 2001, et notamment les articles de celle-ci auxquels la disposition en question renvoie.

Ainsi, l'article 2, par. 2, imposant la prévision d'un traitement spécifique pour répondre aux besoins des victimes les plus fragiles, ainsi que l'article 8, par. 4, prévoyant des conditions de témoignage pour les victimes particulièrement vulnérables, ont été partiellement transposés par le *Youth Justice and Criminal Evidence Act 1999*. Cette loi établit des mesures spéciales pour faciliter l'audition des enfants témoins et victimes devant les tribunaux [36]. Des formes de protection des témoins ont aussi été législativement reconnues par le *Serious Organised Crime and Police (SOCAP) Act 2005* [37]. En Ecosse, des dispositions correspondantes sont contenues dans le *Criminal Procedures (Scotland) Act 1995*, dans le *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* – en matière d'infractions sexuelles – ainsi que dans

---

[35] La plainte de la victime peut néanmoins jouer un rôle important en termes de preuve.

[36] On considère aussi que les enfants de moins de dix-sept ans, dans les cas d'infractions sexuelles ou violentes, d'enlèvement ou d'actes de cruauté, auront besoin d'une protection particulière.

[37] Cette loi est entrée en vigueur le 1er avril 2006.

le *Vulnerable Witnesses (Scotland) Act 2004*. Ces mesures de protection spécifique incluent l'utilisation d'écrans cachant les témoins à l'accusé, de vidéoconférences permettant l'audition à distance, d'enregistrements effectués avant le procès ainsi que d'auditions à huis clos [38]. Les enfants identifiés comme victimes de la traite sont en outre logés par les services sociaux locaux, selon les dispositions du *Children Act 1989* (section 20) en Angleterre et au Pays de Galles et du *Children (Scotland) Act 1995* (sections 22 et 25) en Ecosse.

Quelques dispositifs informels viennent compléter ce cadre législatif.

Bon nombre d'organisations fournissent un soutien aux témoins, notamment enfants. En novembre 2003, un *Multi-Agency Witness Mobility Scheme* – appelé ensuite *National Witness Mobility Service* – a été lancé, assistant la police et les travailleurs sociaux sur les questions de relogement. En avril 2006, un *Central Witness (Protection) Bureau (CWB)* a été mis en place pour l'Angleterre et le Pays de Galles – la protection des témoins étant gérée au niveau central en Ecosse. Le personnel du *Witness Service*, assisté de bénévoles, s'occupe de l'assistance le jour du procès ; il organise parfois des visites des lieux avant l'audition. Le *UK Human Trafficking Center (UKHTC)*, nouvelle agence intergouvernementale spécialisée dans la traite, est doté d'un coordinateur ainsi que d'un sous-groupe d'experts en matière de victimes, collaborant étroitement avec le *Child Exploitation and Online Protection Centre (CEOP)*.

Le *Home Office* a aussi publié en Angleterre et au Pays de Galles un *Code of Practice for Victims of Crime*, son équivalent écossais étant le *National Standards for Victims of Crime* : ils prennent particulièrement en compte les victimes vulnérables et sont parfois accompagnés de *Memorandums of Understanding*, fixant les règles de répartition des responsabilités entre les agences chargées de leur mise en œuvre.

Pour des interventions plus spécifiques, sous l'égide de l'opération *Paladin Child*, lancée en octobre 2005, un groupe multidisciplinaire a été créé visant à repérer les enfants non accompagnés arrivant à l'aéroport de Heathrow. Le *Assisted Voluntary Return for Irregular Migrants (AVRIM)*, mené en partenariat avec l'*International Organisation for Migration (IOM*), prévoit des mesures particulières pour les victimes vulnérables comme celles de la traite. La stratégie globale de lutte contre la prostitution publiée en janvier 2006 par le gouvernement prévoit aussi le développement de services spécialisés de soutien – médical, judiciaire, social – aux personnes prostituées.

D'autres instruments existent, mais ils sont axés sur la traite à des fins d'exploitation sexuelle et ne concernent que les femmes adultes. C'est le cas du *Poppy project*, financé depuis 2003 par le gouvernement du Royaume-Uni, ainsi que du *TARA Project*, établi

[38] Néanmoins, après l'affaire *Pupino*, il faut se demander si la loi en Angleterre, au Pays de Galles et en Irlande du Nord est compatible avec la DC 2001/220/JAI. Comme en Italie avant cette affaire, ou même pire, en effet, aucun moyen n'existe permettant aux enfants témoins de ne pas être auditionnés en personne devant le tribunal : la section 28 du *Youth Justice and Criminal Evidence Act 1999*, qui aurait rendu cela possible, n'est jamais entrée en vigueur. De manière surprenante, une consultation officielle récemment lancée par le gouvernement sur l'avenir de la preuve donnée par les enfants en Angleterre et au Pays de Galles ne mentionne nulle part l'affaire *Pupino*.

en Ecosse depuis 2004, destinés à fournir un support à ce seul groupe de victimes, et sous maintes conditions [39].

En ce qui concerne l'article 14, par. 1 de la DC 2001/220/JAI, exigeant que les personnes en contact avec les victimes reçoivent une formation spécifique, rien ne paraît être législativement prévu au Royaume-Uni, notamment lorsque des formes de traite sont perpétrées à l'encontre d'enfants.

Quelques palliatifs à cette lacune existent toutefois en pratique. Il faut signaler en premier lieu des guides, adressés surtout au personnel gouvernemental [40]. Des formations ont aussi été organisées : destinées aux professionnels susceptibles d'entrer en contact avec des enfants victimes de traite, elles portent sur la manière de reconnaître et d'interviewer ces mineurs ainsi que de faire face à leurs besoins. Le développement de ces instruments de formation est inscrit au calendrier du *Home Office* et d'autres autorités gouvernementales.

L'article 7, par. 3 renvoie aussi à l'article 4 de la DC 2001/220/JAI. Cette disposition, qui fixe les obligations des Etats membres en matière d'informations aux victimes, n'a pas non plus été législativement transposée.

Des dispositifs informels contribuent néanmoins à sa mise en œuvre. Le *Code of Practice for Victims of Crime* pour l'Angleterre et le Pays de Galles, ainsi que les *National Standards for Victims of Crime* pour l'Ecosse, comportent en effet quelques prévisions en matière d'information. Le *UK Human Trafficking Center*, en outre, mène maintenant un projet pilote visant à fournir aux personnes identifiées comme victimes de traite des lecteurs mp3 contenant des informations sur l'infraction, les soutiens disponibles et la procédure d'enquête, dans un nombre considérable de langues différentes. Le développement des informations aux victimes semble rentrer parmi les priorités du gouvernement.

L'article 7, par. 3 exige enfin l'apport d'une aide adéquate à la famille de l'enfant. Aucune disposition législative au Royaume-Uni ne répond explicitement à cette obligation.

Le déficit principal dans la transposition britannique de la DC sur la traite concerne donc sans doute les dispositions exigeant une protection particulière pour les enfants victimes, qui n'ont fait l'objet d'aucune mise en œuvre formelle. Les

[39] Dans le cadre du projet pilote *Poppy*, basé à Londres, les victimes sont notamment accueillies dans un abri sûr pendant quatre semaines, voire plus longtemps si elles décident d'aider les autorités à arrêter leurs trafiquants. Elles bénéficient durant leur séjour d'un soutien psychologique, des soins de première nécessité, d'un interprète/traducteur et d'un conseiller juridique. En raison de son succès, ce projet, à l'origine prévu pour six mois, vient d'être reconduit pour une durée indéterminée.

[40] Voy. par exemple le *Unaccompanied minors best practice document for immigration staff* ; le *Immigration and Nationality Directorate (IND) guidance on dealing with children in need* ; les livrets *Working together to safeguard children*, *Safeguarding children involved in prostitution* – dont le correspondant écossais s'appelle *Vulnerable children and young people* – et *Safeguarding children from abuse linked to a belief in spirit possession* ; le *Statutory guidance for local authorities in England to identify children not receiving education* – en Ecosse, le *Safe and well : good practice in schools and education authorities for keeping children safe and well* ; le *Children missing from care and from home : good practice guidance* ; etc.

quelques dispositifs pratiques, épars et incertains, paraissant susceptibles de combler ces lacunes ne suffisent pas toujours.

L'explication de ces divers décalages des textes internes par rapport à l'instrument européen, mineurs pour les dispositions réprimant les auteurs, majeurs pour celles protégeant les victimes, ne peut être la même.

Quant aux incriminations, les raisons pour lesquelles le législateur n'a pas repris mot à mot les dispositions de la DC restent difficiles à comprendre. La restriction sémantique du terme *trafficking*, cantonné aux seuls actes matériels de facilitation du transport, peut probablement s'expliquer par l'intention de ne combler que les lacunes majeures du système répressif préexistant. Les conceptions accueillies de l'exploitation, sexuelle ou du travail d'autrui, reprennent également les notions correspondantes de droit interne, ayant fait l'objet d'un débat dépassant la traite. Chaque fois qu'un instrument international doit être transposé au Royaume-Uni, en effet, le personnel parlementaire chargé de rédiger le projet de loi se montre particulièrement sensible à l'exigence de respecter les conceptions juridiques, les institutions et la terminologie nationales. De manière plus générale, le scepticisme de la presse tabloïd britannique à l'encontre de l'UE risque aussi d'avoir influencé le choix législatif de maintenir quelques décalages. L'ambiguïté de la DC peut également avoir joué un rôle : la plupart des termes utilisés, en effet, ne sont pas clairement définis, ni dans leur sens propre ni dans leurs rapports réciproques. Quelques « schizophrénies » législatives, encore, peuvent être mises en relation avec le fait que la législation britannique visait à mettre en œuvre le protocole à la convention de Palerme en même temps que l'instrument européen. D'autres écarts mineurs, enfin, semblent avoir été plutôt le fruit de simples distractions ou paresses du législateur du Royaume-Uni.

L'oubli des enfants, en revanche, est la conséquence de celui de toutes les victimes. Le législateur national semble considérer la lutte contre la traite surtout comme un problème d'ordre public, plutôt que de respect des droits humains ; l'approche répressive prévaut ainsi sur tout souci de prévention et de protection. Ce choix n'est d'ailleurs pas si éloigné de celui de la DC elle-même, qui se limite, en matière de victimes, à un renvoi vague, concernant les seuls enfants, à un texte précédent. Il semble renforcé par la mise en œuvre pratique des lois de transposition [41].

3. Mise en œuvre pratique

C'est surtout le volet punitif de la législation qui s'exprime aux divers stades de la procédure.

A. Enquêtes et poursuites

L'engagement gouvernemental dans la répression de la traite est confirmé par la mise en place de nombreux instruments et initiatives.

---

[41] Le 1er septembre 2008, la condamnation d'une jeune femme poursuivie pour une infraction d'immigration clandestine fut cassée en raison du fait qu'elle était en réalité la victime de traite, ayant agi sous la compulsion des autres. La Cour d'appel critiqua sévèrement le Crown Prosecution Service et les avocats pour n'avoir pas suffisamment investigué sa situation : RvO (CA Ref. 200802952 CL, *The Times*, October 2, 2008).

Afin de rassembler l'information, tout d'abord, des groupes réunissant diverses autorités – comme la police, les douanes, les services d'immigration et d'autres départements gouvernementaux – ont été créés.

En 2001 est ainsi né « Reflex », corps multi-agences [42] pour la concertation et le développement de stratégies efficaces contre le crime organisé lié à l'immigration. Janvier 2002 a vu la création du *National Counter Trafficking Steering Group (NCTSG)*, chargé de coordonner les actions contre la traite menées par les gouvernements central et locaux, les services de police et la société civile [43]. Un autre forum de partage de l'information, le *Consultative Group on Trafficking* [44], a été mis sur pied à la fin de l'année 2005.

Le 1er avril 2006 a vu la mise en place de la *Serious Organised Crime Agency (SOCA)*, ayant pour mission d'enrichir les renseignements et de focaliser l'action sur les groupements criminels les plus dangereux [45]. A la même date a aussi été établi le *Child Exploitation and Online Protection Centre (CEOP)*, affilié à la *SOCA* et destiné à prévenir et réprimer toute exploitation des enfants.

En octobre 2006, le gouvernement a établi une unité policière de renseignement travaillant sur toutes les formes de traite : le *UK Human Trafficking Center*, basé à Sheffield et réunissant plusieurs agences compétentes [46]. Il est chargé d'assurer le partage des informations entre toutes les parties intéressées ; il fournit aussi un service continu d'aide et de conseil. Sa compétence s'étend à l'Ecosse [47].

Diverses actions ont en outre été entreprises. Entre 2005 et 2006, un partenariat visant à mieux lutter contre la criminalité organisée, comportant aussi la mise en place d'une *Human Trafficking Team* [48], a été créé sous l'égide de l'opération « Maxim ». Le 21 février 2006 a vu le lancement de « Pentameter », la première opération de lutte

---

[42] Il rassemble le *Home Office*, l'*Immigration service*, le *National Crime Intelligence Service*, les bureaux de la Sécurité et des Renseignements, le *Foreign and Commonwealth Office*, *Europol*, les services des douanes et les forces de police ; il est supporté par l'*Association of Chief Police Officers (ACPO)* et son équivalent écossais – l'*ACPOS*.

[43] Il se divise en trois groupes qui se réunissent chaque mois : police et immigration ; ministère de l'Intérieur et départements administratifs – santé, affaires étrangères etc. – ; ONG et services sociaux.

[44] Il est présidé conjointement par le *Under Secretary of State for the Home Office* et le *Solicitor General*.

[45] La *Scottish Crime and Drug Enforcement Agency (SCDEA)*, responsable de la lutte contre la criminalité organisée en Ecosse, est aussi partenaire de la *SOCA*. L'*Organised Crime Task Force*, en Irlande du Nord, allie également plusieurs agences compétentes, ainsi que des représentants du gouvernement, du secteur des affaires et du *Northern Ireland Policing Board*.

[46] Elle comprend du personnel de la police de tout le Pays, ainsi que de la *Serious Crime Unit*, du *Immigration Service*, du *Crown Prosecution Service*, de la *SOCA*. Elle travaillera en coopération avec le *CEOP*. L'initiative a été lancée et est pilotée par l'*ACPO*.

[47] Le centre est aussi membre du *Trafficking Working Group* établi par la police écossaise ; il est en consultation avec le *Scottish Executive*.

[48] Situé à Londres, il réunit le *Metropolitan Police Service (MPS)*, le *UK Immigration Service (UKIS)*, le *Identity and Passport Service (IPS)* et le *Crown Prosecution Service (CPS)*.

contre la traite à des fins d'exploitation sexuelle coordonnée à l'échelle nationale [49] ; une campagne d'action « Pentameter 2 », poursuivant les mêmes objectifs, a été lancée le 3 octobre 2007 [50].

La synergie entre les nouvelles prévisions législatives et ces dispositifs pratiques a fait en sorte que, selon le *Home Office* et le *Joint Committee on Human Rights* [51], entre avril 2004 et mars 2005, 343 opérations ont eu lieu sous l'égide de « Reflex », ayant débouché sur 1 456 arrestations – dont 102 pour traite –, 149 interventions et la confiscation de bénéfices d'activités criminelles pour plus de 5,5 millions de livres sterling. Entre janvier 2005 et février 2006, les officiers de l'opération « Maxim » ont effectué plus de 150 arrestations ; entre avril 2006 et avril 2007, ces arrestations se sont élevées à 119. Même si seul un petit nombre de *massage parlours* déjà connus a été visé, l'opération « Pentameter » a abouti à 515 interventions, à l'arrestation de 232 personnes avec 134 poursuites engagées, et à l'identification de 84 victimes de traite, dont 12 étaient des mineurs ; 250 000 livres sterling environ ont été récupérées [52].

En revanche, il n'y avait pas encore eu en 2006 de poursuites pour traite à des fins d'exploitation du travail d'autrui, sur le fondement de la loi de 2004. Les autorités reconnaissent en effet que leurs stratégies anti-traite se concentrent essentiellement sur la traite aux fins d'exploitation sexuelle et que, dans l'hypothèse de soupçons de traite aux fins d'exploitation du travail d'autrui, les interventions policières visent surtout à mettre en œuvre les politiques contre l'immigration et le travail illégaux – les cas mêmes dont les autorités ont connaissance n'étant souvent pas identifiés comme des affaires de traite.

Les insuffisances des poursuites semblent alors dépendre non pas d'une formulation défectueuse des textes, mais de facteurs culturels. Les opérateurs – policiers, travailleurs sociaux, autres fonctionnaires publics, personnel des instances privées impliquées dans le secteur –, en effet, manquent d'informations et d'une formation adéquates pour leur permettre d'appréhender la traite dans sa réalité complexe, et ainsi de la reconnaître sans faille. Ils agissent donc sous l'empreinte de diverses « compulsions cognitives » :

- leur attention porte plus sur l'exploitation sexuelle que sur celle du travail d'autrui ;
- les victimes de traite – surtout de celle visant l'exploitation du travail – sont plutôt perçues comme des auteurs d'infractions, entre autres responsables de violations des lois en matière d'immigration ;
- traite et trafic sont souvent confondus ;

---

[49] Financée par « Reflex » et pilotée par l'*ACPO*, elle impliquait à la fois d'importantes forces de police – cinquante-cinq corps –, les services d'immigration, la *SOCA*, le *Crown Prosecution Service* et plusieurs ONG. Elle recouvrait une variété de mesures alliant prévention, répression, recueil d'informations, prise en charge des victimes, sensibilisation.

[50] Elle comporte aussi un partenariat entre les forces de police de tout le pays, les gouvernements central, régionaux et locaux et le secteur bénévole.

[51] Voy. annexe.

[52] Cet argent a été transféré au Trésor ; une moitié a ensuite été restituée aux agences d'enquêtes et de poursuites, l'autre moitié est utilisée par le *Home Office* pour financer ses initiatives en matière de traite.

- parfois, la traite est conçue comme nécessairement perpétrée dans le cadre d'une organisation criminelle.

Cette approche est source d'inefficacité :

- les victimes de la traite sont souvent placées dans des centres de détention ou déportées avant d'avoir pu dénoncer ce qu'elles ont subi ;
- avant d'être découvertes, elles cherchent donc rarement l'aide des autorités ;
- les ressortissants des pays de l'UE ne sont presque jamais identifiés comme victimes, car on les laisse immédiatement repartir après les raids, sans leur fournir d'assistance ou de conseil spécifiques ;
- les formes de traite perpétrées en dehors de toute organisation criminelle sont difficilement repérées.

Le *Home Office* affiche toutefois sa volonté de répondre à ces déficits. Le *UK Human Trafficking Center* est ainsi compétent pour informer et former – sur un plan tant stratégique qu'opérationnel – les officiers de police de différents niveaux sur le phénomène criminel de la traite et sur les exigences de protection des victimes [53]. Le *Crown Prosecution Service (CPS)* prépare les procureurs sur la manière de poursuivre les auteurs de traite [54] ; il a également mis en place un *Organised Crime Directorate* qui non seulement poursuivra les cas de traite les plus sérieux et les plus compliqués, mais conseillera aussi sur les meilleures pratiques et fournira un soutien pour les affaires mineures. En Ecosse, le *Crown Office and Procurator Fiscal Service (COPFS)* a établi une *Organised Crime Unit* : composée de juristes spécialisés et d'autres experts en la matière, elle sera chargée de poursuivre les affaires comportant la commission d'infractions de traite sous le contrôle de groupes de criminalité organisée [55].

Néanmoins, malgré cet effort, ces dysfonctionnements au niveau des poursuites produisent à l'évidence des effets devant les tribunaux.

B. Jugement

Du fait des disparités des enquêtes, les seules informations disponibles concernent des affaires jugées pour traite à des fins d'exploitation sexuelle.

On sait notamment qu'il y a eu, en juin 2006, plus de trente condamnations sur la base du *Sexual Offences Act 2003*. Leur gravité a varié selon celle des faits, des peines supérieures au maximum de quatorze ans ayant parfois été infligées, dans des cas sérieux où les poursuites étaient aussi engagées sur d'autres fondements.

---

[53] Il comprend un *Learning and Development Group* qui – composé de représentants des services de police et d'immigration, des ONG, de la *SOCA* et du *CEOP* – est chargé d'établir les lignes directrices et les moyens de réalisation des programmes d'apprentissage et de développement du centre. Un *First Responders Training Module*, en formats électronique et DVD, a été conçu pour les besoins de toute agence.

[54] Il est représenté au *UKHTC Learning and Development Group*, qui a produit pour le *CPS* une analyse des besoins de formation.

[55] Cette unité est partie intégrante de la *National Casework Division*. L'*International Co-operation Unit*, en outre, garantit le bon fonctionnement de la coopération judiciaire pour l'Ecosse dans les cas sérieux de criminalité internationale organisée.

Quelques décisions significatives illustrent l'utilisation judiciaire des anciennes et nouvelles dispositions.

Les premières poursuites régies par le *Sexual Offences Act 2003* ont frappé deux Albanais, Taulent Merdanaj et Elidon Bregu, qui, en décembre 2004, ont été condamnés pour traite dans et vers le Royaume-Uni [56]. D'autres chefs d'accusation comprenaient le viol et le *false imprisonment*. Merdanaj et Bregu se sont vu infliger, respectivement, dix-huit et neuf ans de prison.

En mars 2005 – après une enquête menée dans le cadre de « Reflex », en coopération avec Europol, Eurojust et les autorités lituaniennes –, trois hommes ont été poursuivis pour traite à des fins d'exploitation sexuelle vers le Royaume-Uni ainsi qu'à l'intérieur du Pays. La victime, une Lituanienne de quinze ans, avait été trompée et « vendue » à plusieurs reprises. A cela s'ajoutaient des infractions de *false imprisonment* et de viol. Les auteurs – Shaban Maka, Ilij Barjam et Xhevahir Pisha – ont été condamnés, respectivement et globalement, à dix-huit, quinze et cinq ans de prison. En novembre 2005, Maka a interjeté appel, mais en vain [57].

En octobre 2005 – toujours à la suite d'une opération soutenue par « Reflex » – la *Sheffield Crown Court* a condamné trois personnes pour traite vers le Royaume-Uni, ainsi que pour d'autres infractions, y compris *false imprisonment* et « contrôle de la prostitution pour gain ». Tasim Axhami – Kosovar –, coupable aussi de viol, a été condamné à vingt et un ans de prison, Emilijan Beqirat – Albanais – à seize ans et Vilma Kizlaite – Lituanien – à onze ans [58].

Quant aux résultats de « Pentameter », tous n'ont pas encore été jugés. Les deux décisions les plus récentes découlant de cette opération concernaient deux Albanais, Arjan Kanani et Erjan Javori ; ils ont été condamnés par la *Cardiff Crown Court* pour traite et pour d'autres infractions en février 2007 [59]. Kanani avait reconnu sa culpabilité quant aux accusations de contrôle de la prostitution pour gain et de traite dans et vers le Royaume-Uni à des fins d'exploitation sexuelle : il a écopé de sept ans de prison. Javori avait avoué les infractions de traite à l'intérieur du Royaume-Uni visant l'exploitation sexuelle, d'incitation à la prostitution pour gain et de contrôle de la prostitution pour gain : il a été condamné à cinq ans de prison. Dans cette affaire, les victimes étaient de jeunes Lituaniennes d'à peine vingt ans, dont une au moins avait été trompée.

Les arrêts des Cours d'appel révèlent encore mieux les critères fondant le jugement.

Le 17 février 2006, l'appel de Besmir Ramaj et Hasan Atesogullari, condamnés pour avoir géré un lieu de prostitution et, le premier, aussi pour traite vers le Royaume-

---

[56] Sheffield, 23 décembre 2004. Voy. *News in Brief*, *The Times*, 24 décembre, 2004, consultable sur www.timesonline.co.uk.

[57] [2005] EWCA Crim 3365, [2006] 2 Cr. App. R. (S.) 14.

[58] Sheffield, octobre 2005. Voy. C. Bennett, « It's all very well condemning the sex traffickers, but what about the punters who keep the trade going ? », *The Guardian*, 20 octobre 2005, consultable sur www.guardian.co.uk.

[59] Cardiff, 1er février 2007. Voy. *UK Action Plan on Tackling Human Trafficking*, cité en annexe.

Uni, a été admis [60]. Les peines ont été considérablement réduites : de dix à cinq ans de détention dans un centre pour jeunes délinquants quant à Ramaj, de dix-huit à trois mois de prison pour Atesogullari. Dans ce cas, on ne savait pas avec certitude si les prostituées avaient été forcées.

Le 6 mars 2007, deux cas distincts de traite ont été tranchés en appel [61]. Le premier concernait la condamnation de deux personnes – Elisabeth Delgado-Fernandez et Godwin Zammit – pour *conspiracy* par rapport aux infractions de traite vers le Royaume-Uni à fin d'exploitation sexuelle, de contrôle de la prostitution d'autrui pour gain et de facilitation de l'immigration illégale ; leurs peines ont été réduites respectivement de cinq à quatre ans et de sept à cinq ans de prison. La seconde affaire concernait la condamnation d'un homme – Thahn Hue Thi – pour *conspiracy* en matière d'infractions de traite vers le Royaume-Uni finalisée à l'exploitation sexuelle et de contrôle de la prostitution d'autrui pour gain. Des formes de contrainte avaient été exercées contre les prostituées et les profits avaient été importants. La peine de cinq ans de prison, dont l'autorité de poursuite demandait l'aggravation, a été maintenue.

Le 11 juillet 2007, le recours d'Atilla Makai, un Hongrois condamné à quarante mois de prison pour *conspiracy* par rapport à l'infraction de traite vers le Royaume-Uni à fin d'exploitation sexuelle, a été admis [62]. Il avait mis des annonces sur Internet et fait venir de jeunes Hongroises pour qu'elles travaillent dans des lieux de prostitution. Après avoir pris en compte divers facteurs, relatifs aux modalités de commission de l'infraction, la Cour a réduit la peine à trente mois. Cette décision dépendait surtout du fait que, dans ce cas, les victimes savaient qu'elles allaient travailler comme prostituées.

Cet ensemble d'affaires confirme plusieurs des observations déjà formulées.

Tout d'abord, l'infraction de traite est constituée dès lors que l'auteur a facilité l'arrivée au, le départ du ou le voyage à l'intérieur du Royaume-Uni de la victime, de quelque manière que ce soit [63] et indépendamment de tout consentement au déplacement et à l'exploitation.

Ensuite, les accusations de traite continuent d'être accompagnées d'autres chefs, de la même nature que ceux qui, avant l'entrée en vigueur des nouvelles lois, constituaient le seul fondement des poursuites : les infractions qui font l'objet de la traite elle-même – les différents types d'exploitation ou de violences sexuelles, le *kidnapping*, le *false imprisonment*, l'*abduction* et le *cruel and inhuman treatment* – ainsi que des formes diverses d'immigration clandestine. L'infraction de traite constitue souvent la plus grave en termes de peine.

En Angleterre et au Pays de Galles, en outre, pour la traite aux fins d'exploitation sexuelle, les juges s'en tiennent aux indications du *Sentencing Guidelines Council*. Ils prennent notamment en compte plusieurs éléments : l'existence et le niveau de formes de contrainte ou fraude ; le nombre, l'âge et la vulnérabilité des victimes ; la durée et

[60] [2006] EWCA Crim 448; [2006] 2 Cr. App. R. (S.) 83.

[61] [2007] EWCA Crim 762, [2007] 2 Cr. App. R. (S.) 85.

[62] [2007] EWCA Crim 1652; (2007) 151 S.J.L.B.

[63] Le fait d'aller chercher la victime à l'aéroport peut suffire.

le niveau de planification de l'infraction ainsi que le profit qui en résulte ; l'âge et le rôle de l'auteur.

Enfin, tous les juges prennent aussi en considération d'autres facteurs : le caractère, les précédents, l'attitude, l'éventuel plaider-coupable de l'auteur ; la nécessité d'assurer les fonctions de prévention générale et de protection des citoyens propres au droit pénal ; le traitement de la victime et les effets de l'infraction sur celle-ci – à la lumière aussi du fait qu'elle ait ou pas déjà travaillé comme prostituée ; la concomitance et la gravité d'éventuelles violations des lois d'immigration.

Ces particularités de mise en œuvre, ainsi que la conformité formelle et substantielle à la DC, entrent en compte dans l'évaluation de l'efficacité et de l'efficience des textes nationaux.

4. Efficacité et efficience

Sans doute, la transposition de l'instrument européen a-t-elle fourni aux autorités policières et judiciaires un outil de répression qui leur manquait auparavant. Indirectement, elle a aussi participé à la prise de conscience de leur part de la gravité du phénomène criminel de la traite. En ce sens, on peut considérer que l'objectif initial – de contribuer à la prévention et à la répression de l'infraction en complétant les dispositifs existants, et en réduisant ainsi les disparités entre Etats membres – a été atteint en partie.

Par ailleurs, la mise en œuvre de la DC ne paraît pas avoir eu d'effets négatifs sur les droits de la défense et les principes fondamentaux du droit pénal. Les trois lois de transposition exigent en effet un élément intentionnel véritable pour les nouvelles infractions, fondé sur la volonté et la connaissance de l'élément matériel, et ne créent aucun renversement de la charge de la preuve, donc aucune présomption. Cet équilibre est particulièrement remarquable, car il va à contre-courant de la plupart des lois émanant récemment du *Home Office* [64].

Néanmoins, en ce qui concerne le *Sexual Offences Act 2003*, il semble que les objectifs de la DC auraient pu être également remplis par des moyens moins restrictifs au plan des droits fondamentaux. Cette appréciation se fonde sur l'ampleur de la notion d'exploitation sexuelle, renvoyant à de nombreuses infractions, commises avec ou sans le consentement de la victime [65]. La même critique peut être adressée au *Criminal Justice (Scotland) Act 2003*, la traite qu'il incrimine pouvant avoir comme objet toute forme d'exploitation sexuelle aux fins de prostitution ou de pornographie. La définition de l'exploitation du travail d'autrui contenue dans l'*Asylum and Immigration (Treatment of Claimants) Act 2003*, en revanche, n'est pas aussi étendue : elle est au contraire presque trop restreinte, tant quant aux types qui sont énumérés qu'à l'exigence d'une forme de contrainte, fraude, etc.

Pour les trois lois, en outre, il ne faut pas oublier que dans un grand nombre de domaines – notamment dans celui des sanctions – le législateur national a dépassé les exigences punitives de l'acte européen. De manière plus générale, la législation

---

[64] Souvent celles-ci fondent la responsabilité pénale sur une simple faute non intentionnelle, en renversant ainsi la charge de la preuve.

[65] Ce n'est, d'ailleurs, que l'une des conséquences regrettables du reste de la loi, extrêmement répressive.

interne, comme la DC qu'elle met en œuvre, néglige la prévention et la protection des victimes, en faveur d'une approche essentiellement répressive. L'étude de la perception de ces instruments le confirme.

5. Perception

La politique criminelle du gouvernement n'est pas vécue de la même manière par les différents acteurs.

A. Praticiens

Les interviews de trois personnes – M. Evans, de la *Serious Organised Crime Agency* ; M. Gladwell, enquêteur des services de police de Cambridge ; Mme Hopkins, fonctionnaire du *Home Office*, travaillant dans l'unité qui coordonne la politique nationale sur la traite – confirment tout d'abord que la nouvelle législation répond aux besoins des policiers, auxquels elle donne les pouvoirs nécessaires. Plus particulièrement, il ressort qu'effectivement, pour que les poursuites aboutissent, l'acte matériel de facilitation du « transport » exigé par les textes d'incrimination internes doit pouvoir être prouvé. En pratique, toutefois, cette preuve se révèle assez facile, tout déplacement à l'intérieur du Royaume-Uni suffisant aux termes de la loi [66].

Les praticiens semblent aussi admettre que le gros de l'activité d'enquête est axé sur la traite à des fins d'exploitation sexuelle [67]. Les termes moins clairs de l'*Asylum and Immigration (Treatment of Claimants) Act 2004*, par ailleurs, paraissent compliquer le travail de la police. La difficulté consiste notamment dans la nécessité de prouver – et donc, auparavant, de détecter – l'exploitation telle qu'elle est définie par la section 4 de la loi. Lorsque le travail est effectué dans des conditions dégradantes ou qu'il n'est pas du tout rémunéré, aucune incertitude ne surgit ; mais d'autres situations pratiques – comme par exemple celle d'un adulte payé dix livres sterling pour une semaine de soixante heures, et affirmant avoir consenti à ce traitement – soulèvent bien plus de doutes.

Toujours d'après nos interviews, la connaissance par les forces de police des textes internes incriminant la traite est en train de s'améliorer [68]. Le *Crown Prosecution Service*, en revanche, serait malheureusement moins au courant des changements législatifs, et donc parfois sceptique vis-à-vis des initiatives policières.

---

[66] La police est au courant de cela, alors que les individus poursuivis et les avocats locaux ne le sont pas toujours. Ces derniers se contentent souvent de l'image qu'ils ont de la traite, impliquant un mouvement transfrontalier qui n'est pas requis par la loi. Ils admettent ainsi parfois que des déplacements internes ont eu lieu, sans savoir que cette confession va suffire à la caractérisation de l'infraction. Cet avantage dont la police bénéficie disparaîtra bien sûr dès que les avocats de la défense auront mieux étudié les textes.

[67] En matière de traite à des fins d'exploitation du travail d'autrui, M. Gladwell n'avait jusqu'à présent rencontré qu'une seule affaire.

[68] M. Evans a été lui-même impliqué dans l'organisation de formations destinées à des policiers d'autres services. Cette diffusion de l'information paraît être aussi due, au niveau national, au rôle joué par l'*ACPO* ainsi qu'au lancement des opérations « Pentameter » et « Pentameter 2 ».

Néanmoins, presque aucun praticien au Royaume-Uni ne paraît conscient des origines européennes de la législation interne [69].

L'attitude des politiques est moins homogène.

B. Politiques

Il faut distinguer la réaction du gouvernement de celle d'autres instances de contrôle.

Le *Home Office* a été parmi les promoteurs des politiques européennes visant à renforcer la répression de la traite. L'accueil qu'il a réservé à la DC a donc été, logiquement, plutôt enthousiaste et proactif ; malgré les quelques décalages textuels déjà soulignés, la politique interne ne fait d'ailleurs que refléter celle de l'UE. En mars 2007, le gouvernement a publié, après consultation, un *UK Action Plan on Tackling Human Trafficking* [70].

Le *Joint Committee on Human Rights* des *House of Commons* et *House of Lords* a reconnu et apprécié l'effort répressif du gouvernement. Il a néanmoins aussi souligné quelques lacunes dans cette approche :

- l'absence de formation et d'information adéquates du personnel chargé de mettre en œuvre la loi ;
- le manque de coordination entre les actions des diverses agences – gouvernementales ou pas, centrales ou régionales, etc. ;
- les carences dans la prise en compte des victimes ;
- le petit nombre des poursuites par rapport à l'ampleur estimée du phénomène criminel.

Selon cet organe, le gouvernement devrait donc revoir l'équilibre établi entre les impératifs de répression et les exigences de prévention, d'approche multidisciplinaire, de valorisation des droits des victimes. Ce point de vue est très proche de celui de la plupart des ONG.

C. Société civile

Les ONG impliquées dans la lutte contre la traite ont, de façon unanime, très bien accueilli le fait que les lois de transposition de la DC aient défini et sanctionné cette infraction. Les lacunes de la législation précédente avaient en effet été critiquées à plusieurs reprises, et la criminalisation exigée au niveau européen était ressentie comme particulièrement nécessaire au Royaume-Uni.

L'approche adoptée est néanmoins critiquée pour son insuffisance. Les ONG soulignent notamment que :

- l'investissement répressif a fait oublier l'utilité de la prévention ;
- les dispositions relatives aux victimes sont presque totalement absentes ;
- au contraire de ce qui est affiché, la lutte contre la traite n'est pas toujours élevée au rang de priorité dans les objectifs des services publics ;

---

[69] Selon Mme Hopkins, cela dépendrait du fait que le Royaume-Uni s'était déjà engagé dans la lutte contre la traite avant l'adoption de la DC, et dans un contexte international plus vaste que celui de la seule UE.

[70] Voy. annexe.

- l'application des lois est incohérente et défectueuse, souvent à cause de lacunes dans l'information et la formation des autorités compétentes.

De manière plus générale, on fait remarquer que la perspective gouvernementale est trop étroite, car :

- la traite n'est pas toujours une forme de criminalité organisée ;
- elle n'implique pas forcément la violation de lois d'immigration ;
- une prise en compte plus large des exigences de protection des droits humains n'impliquerait pas forcément de relâcher la répression, bien au contraire.

Ce sentiment de satisfaction de même que les critiques sont relayés par la presse.

D. Presse écrite

La presse que nous avons dépouillée [71] reporte quelques cas avérés de traite, surtout à des fins d'exploitation sexuelle. Elle s'attarde sur la situation de détresse des victimes, sur les proportions de plus en plus importantes du phénomène criminel en Europe, sur les problèmes d'ordre public qu'il suscite : les interventions policières et la gravité des peines prévues sont ainsi normalement estimées opportunes. Parfois on souligne que les lois de 2003 et 2004 sont venues heureusement combler un vide ; mais les textes législatifs fondant la répression sont rarement cités, et les références à la DC européenne sont peu nombreuses.

Les critiques du gouvernement mettent en avant les incohérences dans sa politique, appréhendant la traite sous le prisme de deux autres problèmes criminels considérés comme prioritaires : la violation des lois d'immigration et la criminalité organisée. On insiste, encore, sur les conséquences paradoxales de cette approche restrictive : retards et inefficacité dans la mise en œuvre des textes, ressources insuffisantes à la disposition de la police et des travailleurs sociaux, manque d'informations, méconnaissance des exigences – ou même pénalisation – des victimes, absence d'une protection adéquate des enfants, mesures de prévention négligées etc.

Ces réactions de l'opinion publique contrastent avec le silence presque absolu de la doctrine.

E. Doctrine

Il n'existe presque pas de littérature juridique sur la transposition au Royaume-Uni de la DC européenne [72].

A côté de ces variables, la perception des dispositifs sur la traite par les différents acteurs présente néanmoins quelques constantes. Ce qui ressort – comme de l'analyse de la mise en œuvre législative et pratique – c'est surtout le déséquilibre entre le volet répressif de la législation, bien développé, et celui de prévention et de protection des victimes, négligé. Sur ce fondement même nous allons formuler quelques conclusions.

---

[71] Il s'agit de *The Independent*, du *Times*, du *Guardian*.

[72] La recherche menée par les outils informatiques sur les principales revues juridiques ne nous a pas permis de trouver de commentaires détaillés de la nouvelle législation.

5. Conclusions

L'impact de la DC et de sa transposition sur le renforcement de l'espace de sécurité poursuivi par l'UE a ainsi sans doute été direct, les instruments de répression ayant été élargis. La mise en œuvre nationale du texte européen n'a produit en revanche aucun effet sensible sur l'espace de liberté et de justice, les seules dispositions de la DC portant sur ce volet – celles sur la protection particulière des enfants victimes tout au long du procès – n'ayant pas été spécifiquement reprises par la législation interne [73].

Quant à ses effets probables sur les rapports interétatiques, ce bilan laisse prévoir que la confiance des autres pays dans les capacités répressives du Royaume-Uni sera accrue [74]. Dans la mesure où elle a comporté l'incrimination interne de nouveaux comportements, on peut notamment imaginer que la transposition de la DC facilitera la répression lorsqu'un autre Etat membre devra vérifier le respect d'une condition de double incrimination par rapport à la législation du Royaume-Uni. La coopération entre autorités policières et judiciaires de l'UE [75] pourrait en être améliorée [76].

En revanche, lorsque la confiance devra porter sur d'autres aspects, comme la protection accordée aux victimes ou le respect des droits de la défense, la transposition britannique ne paraît pas pouvoir suffisamment rassurer les autres Etats membres.

Néanmoins, on ne pourrait pas soutenir que la mise en œuvre de la DC a affecté le niveau de protection des droits fondamentaux préexistant au Royaume-Uni [77] – si ce n'est, bien évidemment, dans la mesure où elle a comporté un élargissement de la répression. La notion du droit pénal comme *ultima ratio* n'est notamment pas remise en question, les comportements nouvellement incriminés se situant au sommet

---

[73] Ce manque d'attention pour les victimes reflète par ailleurs une conception bien publiciste de la fonction de répression : la protection des individus contre la criminalité tient moins compte des besoins primaires de ceux-ci que des exigences étatiques d'ordre public.

[74] Des résidus de méfiance pourraient toutefois s'appuyer sur les décalages susceptibles de résulter de différents facteurs : glissements sémantiques etc.

[75] Celle-ci constitue sans doute un objectif publiquement valorisé et activement poursuivi par le Royaume-Uni. Ainsi, le gouvernement a soutenu l'enrichissement des capacités d'Europol, l'introduction d'un *European Criminal Intelligence Model*, d'un *Organised Crime Threat Assessment Model*, ainsi que la reconnaissance d'un rôle important à Eurojust. Le UKHTC a déjà engagé des relations avec de nombreux partenaires opérationnels internationaux, parmi lesquels Europol et des groupes de spécialistes de la traite de certains Etats membres de l'UE. La SOCA a un réseau de plus de 110 *Liaisons Officers* en 40 pays. Le Royaume-Uni, à travers le UKHTC, est aussi parmi les promoteurs de la mise en place, entre les pays du G6, d'une opération commune de lutte contre la traite pour une période déterminée.

[76] Il faut aussi remarquer que la double incrimination ne constitue pas une condition de l'application du principe d'universalité – ni, avant que le *Borders Act 2007* n'entre en vigueur, du principe de personnalité active –, permettant aux tribunaux du Royaume-Uni de juger d'une infraction de traite commise à l'étranger.

[77] Le *Joint Committee on Human Rights* lui-même a reconnu la conformité du cadre législatif criminalisant la traite aux obligations liant le gouvernement en matière de droits humains. Selon ce comité, cependant, l'approche gouvernementale n'est pas suffisamment axée sur ces exigences de protection : bien que les nouvelles dispositions ne remettent pas en cause les droits individuels déjà établis, elles n'en créent néanmoins pas de nouveaux, notamment en faveur des victimes.

de l'échelle des atteintes aux droits individuels [78]. La consolidation de la légalité, tant formelle – prévision dans un texte législatif – que substantielle – précision des incriminations –, découlant de la transposition de la DC contribue sans doute à renforcer la fonction « bouclier » du droit pénal.

Ainsi, malgré les lacunes de l'instrument européen et de sa transposition interne, on peut affirmer que l'équilibre et la cohérence du système juridique du Royaume-Uni n'ont pas été affectés. L'élargissement de la répression reste en effet contrebalancé par l'ensemble des garanties résultant du droit commun, qui n'a subi aucune modification.

---

[78] Il s'agit en effet d'atteintes réelles à des biens fondamentaux de la personne, tels que la liberté individuelle et, parfois, l'intégrité physique ou la vie.

Annexe

1. Textes des lois

Sexual Offences Act 2003 (2003 Ch. 42)

s 57 Trafficking into the UK for sexual exploitation

(1) A person commits an offence if he intentionally arranges or facilitates the arrival in or the entry into the United Kingdom of another person (B) and either –
  (a) he intends to do anything to or in respect of B, after B's arrival but in any part of the world, which if done will involve the commission of a relevant offence, or
  (b) he believes that another person is likely to do something to or in respect of B, after B's arrival but in any part of the world, which if done will involve the commission of a relevant offence.

(2) A person guilty of an offence under this section is liable –
  (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
  (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

s 58 Trafficking within the UK for sexual exploitation

(1) A person commits an offence if he intentionally arranges or facilitates travel within the United Kingdom by another person (B) and either –
  (a) he intends to do anything to or in respect of B, during or after the journey and in any part of the world, which if done will involve the commission of a relevant offence, or
  (b) he believes that another person is likely to do something to or in respect of B, during or after the journey and in any part of the world, which if done will involve the commission of a relevant offence.

(2) A person guilty of an offence under this section is liable –
  (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
  (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years

s 59 Trafficking out of the UK for sexual exploitation

(1) A person commits an offence if he intentionally arranges or facilitates the departure from the United Kingdom of another person (B) and either –
  (a) he intends to do anything to or in respect of B, after B's departure but in any part of the world, which if done will involve the commission of a relevant offence, or
  (b) he believes that another person is likely to do something to or in respect of B, after B's departure but in any part of the world, which if done will involve the commission of a relevant offence.

(2) A person guilty of an offence under this section is liable –
  (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
  (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

60 Sections 57 to 59: interpretation and jurisdiction

(1) In sections 57 to 59, "relevant offence" means –
  (a) an offence under this Part,
  (b) an offence under section 1(1)(a) of the Protection of Children Act 1978 (c. 37),
  (c) an offence listed in Schedule 1 to the Criminal Justice (Children) (Northern Ireland) Order 1998 (S.I. 1998/1504 (N.I. 9)),

(d) an offence under Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 (S.I. 1978/1047 (N.I. 17)), or
(e) anything done outside England and Wales and Northern Ireland which is not an offence within any of paragraphs (a) to (d) but would be if done in England and Wales or Northern Ireland.

(2) Sections 57 to 59 apply to anything done whether inside or outside the United Kingdom.

Criminal Justice (Scotland) Act 2003 (asp 2003, 7)

§ 22 Traffic in prostitution etc.

(1) A person commits an offence who arranges or facilitates –
(a) the arrival in the United Kingdom of, or travel there (whether or not following such arrival) by, an individual and –
(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or
(ii) believes that another person is likely to exercise such control or so to involve the individual, there or elsewhere; or
(b) the departure from there of an individual and –
(i) intends to exercise such control or so to involve the individual; or
(ii) believes that another person is likely to exercise such control or so to involve the individual, outwith the United Kingdom.

(2) For the purposes of subsection (1), a person exercises control over prostitution by an individual if the person exercises control, direction or influence over the prostitute's movements in a way which shows that the person is aiding, abetting or compelling the prostitution.

(3) A person guilty of an offence under this section is liable –
(a) on conviction on indictment, to imprisonment for a term not exceeding fourteen years, to a fine or to both; or
(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

(4) Subsection (1) applies to anything done –
(a) in the United Kingdom; or
(b) outwith the United Kingdom –
(i) by an individual to whom subsection (6) applies; or
(ii) by a body incorporated under the law of a part of the United Kingdom.

(5) If an offence under this section is committed outwith the United Kingdom, proceedings may be taken in any place in Scotland; and the offence may for incidental purposes be treated as having been committed in that place.

(6) This subsection applies to –
(a) a British citizen;
(b) a British overseas territories citizen;
(c) a British National (Overseas);
(d) a British Overseas citizen;
(e) a person who is a British subject under the British Nationality Act 1981 (c.61); and
(f) a British protected person within the meaning of that Act.

(7) In this section, "material" has the same meaning as in section 51 of the Civic Government (Scotland) Act 1982 (c.45) and includes a pseudo-photograph within the meaning of section 52 of that Act, a copy of a pseudo-photograph and data stored on a computer disc or by any other electronic means which is capable of conversion into a photograph or pseudo-photograph.

Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (2004 Ch. 19)

4 Trafficking people for exploitation

(1) A person commits an offence if he arranges or facilitates the arrival in the United Kingdom of an individual (the "passenger") and –
  (a) he intends to exploit the passenger in the United Kingdom or elsewhere, or
  (b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.

(2) A person commits an offence if he arranges or facilitates travel within the United Kingdom by an individual (the "passenger") in respect of whom he believes that an offence under subsection (1) may have been committed and –
  (a) he intends to exploit the passenger in the United Kingdom or elsewhere, or
  (b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.

(3) A person commits an offence if he arranges or facilitates the departure from the United Kingdom of an individual (the "passenger") and –
  (a) he intends to exploit the passenger outside the United Kingdom, or
  (b) he believes that another person is likely to exploit the passenger outside the United Kingdom.

(4) For the purposes of this section a person is exploited if (and only if) –
  (a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour),
  (b) he is encouraged, required or expected to do anything as a result of which he or another person would commit an offence under the Human Organ Transplants Act 1989 (c. 31) or under section 32 or 33 of the Human Tissue Act 2004,
  (c) he is subjected to force, threats or deception designed to induce him –
    (i) to provide services of any kind,
    (ii) to provide another person with benefits of any kind, or
    (iii) to enable another person to acquire benefits of any kind, or
  (d) he is requested or induced to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that –
    (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and
    (ii) a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement.

(5) A person guilty of an offence under this section shall be liable –
  (a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or
  (b) on summary conviction, to imprisonment for a term not exceeding twelve months, to a fine not exceeding the statutory maximum or to both.

s 5 Section 4: supplemental
[Original version, as still in force in Scotland]

(1) Subsections (1) to (3) of section 4 apply to anything done –
  (a) in the United Kingdom,
  (b) outside the United Kingdom by an individual to whom subsection (2) below applies, or
  (c) outside the United Kingdom by a body incorporated under the law of a part of the United Kingdom.

(2) This subsection applies to –
  (a) a British citizen,

(b) a British overseas territories citizen,
(c) a British National (Overseas),
(d) a British Overseas citizen,
(e) a person who is a British subject under the British Nationality Act 1981 (c. 61), and
(f) a British protected person within the meaning of that Act.

(3) In section 4(4)(a) "the Human Rights Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4th November 1950.

(4) Sections 25C and 25D of the Immigration Act 1971 (c. 77) (forfeiture or detention of vehicle, &c.) shall apply in relation to an offence under section 4 of this Act as they apply in relation to an offence under section 25 of that Act.

(5) At the end of section 25C(9)(b), (10)(b) and (11) of that Act add "or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation)".

(6) After paragraph 2(n) of Schedule 4 to the Criminal Justice and Court Services Act 2000 (c. 43) (offence against child) insert –
"(o) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation)".

(7) At the end of paragraph 4 of Schedule 2 to the Proceeds of Crime Act 2002 (c. 29) (lifestyle offences: England and Wales: people trafficking) add –
"(3) An offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (exploitation)".

(8) At the end of paragraph 4 of Schedule 4 to the Proceeds of Crime Act 2002 (lifestyle offences: Scotland: people trafficking) add "or under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (exploitation)".

(9) At the end of paragraph 4 of Schedule 5 to the Proceeds of Crime Act 2002 (lifestyle offences: Northern Ireland: people trafficking) add –
"(3) An offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (exploitation)".

(10) After paragraph 2(l) of the Schedule to the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 (S.I. 2003/417 (N.I. 4)) (offence against child) insert –
"(m) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation)".

(11) In so far as section 4 extends to England and Wales, subsection (5)(b) shall, until the commencement of section 154 of the Criminal Justice Act 2003 (c. 44) (increased limit on magistrates' power of imprisonment), have effect as if the reference to twelve months were a reference to six months.

(12) In so far as section 4 extends to Scotland, subsection (5)(b) shall have effect as if the reference to twelve months were a reference to six months.

(13) In so far as section 4 extends to Northern Ireland, subsection (5)(b) shall have effect as if the reference to twelve months were a reference to six months.

[Amended version of section 5, applicable in England and Wales, and Northern Ireland, but not Scotland; in force from 31 January 2008]

5 Section 4: supplemental

(1) Subsections (1) to (3) of section 4 apply to anything done whether inside or outside the United Kingdom.

(2) (...)

(3) In section 4(4)(a) "the Human Rights Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4th November 1950.

(4) Sections 25C and 25D of the Immigration Act 1971 (c. 77) (forfeiture or detention of vehicle, &c.) shall apply in relation to an offence under section 4 of this Act as they apply in relation to an offence under section 25 of that Act.

(5) At the end of section 25C(9)(b), (10)(b) and (11) of that Act add "or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation)".

(6) After paragraph 2(n) of Schedule 4 to the Criminal Justice and Court Services Act 2000 (c. 43) (offence against child) insert –

"(o) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation)".

(7) At the end of paragraph 4 of Schedule 2 to the Proceeds of Crime Act 2002 (c. 29) (lifestyle offences: England and Wales: people trafficking) add –

"(3) An offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (exploitation)".

(8) At the end of paragraph 4 of Schedule 4 to the Proceeds of Crime Act 2002 (lifestyle offences: Scotland: people trafficking) add "or under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (exploitation)".

(9) At the end of paragraph 4 of Schedule 5 to the Proceeds of Crime Act 2002 (lifestyle offences: Northern Ireland: people trafficking) add –

"(3) An offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (exploitation)".

(10) After paragraph 2(l) of the Schedule to the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 (S.I. 2003/417 (N.I. 4)) (offence against child) insert –

"(m) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation)".

(11) In so far as section 4 extends to England and Wales, subsection (5)(b) shall, until the commencement of section 154 of the Criminal Justice Act 2003 (c. 44) (increased limit on magistrates' power of imprisonment), have effect as if the reference to twelve months were a reference to six months.

(12) In so far as section 4 extends to Scotland, subsection (5)(b) shall have effect as if the reference to twelve months were a reference to six months.

(13) In so far as section 4 extends to Northern Ireland, subsection (5)(b) shall have effect as if the reference to twelve months were a reference to six months.

s 6 Employment

(1) For section 8(4) of the Asylum and Immigration Act 1996 (c. 49) (employment: penalty) substitute –

"(4) A person guilty of an offence under this section shall be liable –

(a) on conviction on indictment, to a fine, or

(b) on summary conviction, to a fine not exceeding the statutory maximum".

(2) Section 8(9) of that Act (extension of time limit for prosecution) shall cease to have effect.

s 7 Advice of Director of Public Prosecutions

In section 3(2) of the Prosecution of Offences Act 1985 (c. 23) (functions of Director of Public Prosecutions) after paragraph (eb) insert –

"(ec) to give, to such extent as he considers appropriate, advice to immigration officers on matters relating to criminal offences".

2. Documents officiels

Union européenne

Commission of the European Communities, *Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings*, Brussels, 02/05/2006, COM (2006) 187 final, 10 p.

—, *Commission staff working document Annex to the Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings*, Brussels, 02/05/2006, SEC (2006) 525, 21 p.

Gouvernement

Home Office, *Secure Borders, Safe Haven, Integration with Diversity in Modern Britain*, Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, February 2002, CM 5387, published by The Stationery Office Limited, London, 138 p.

Home Office, Scottish Executive, *Tackling Human Trafficking – Consultation on Proposals for a UK Action Plan*, January 2006, 36 p.

—, —, *UK Action Plan on Tackling Human Trafficking*, March 2007, 114 p.

Comités parlementaires

House of Lords, House of Commons, Joint Committee on Human Rights, *Human trafficking*, Twenty-sixth Report of Session 2005–06, Volume I, HL Paper 245–I HC 1127–I, published on 13 October 2006 by authority of the House of Commons, London, The Stationery Office Limited, 84 p.

—, —, —, *Human Trafficking : Update*, Twenty-first Report of Session 2006-07, HL Paper 179 HC 1056, Published on 18 October 2007 by authority of the House of Commons, London, The Stationery Office Limited, 26 p.

House of Commons, *Government Response to the Committee's Twenty-First Report of Session 2006-07 : Human Trafficking: Update*, Fourth Report of Session 2007-08, HL Paper 31 HC 220, published on 15 January 2008 by authority of the House of Commons, London, The Stationery Office Limited, 15 p.

—, Home affairs Committee, *Minutes of evidence taken before Home affairs Committee : human trafficking, Ms Klara Skrivankova, Tuesday 5 February 2008*, uncorrected transcript of oral evidence to be published as HC 318-House of Commons, evidence heard in Public, Questions 1 – 49.

Sentencing Guidelines Council

Sentencing Guidelines Council, *Sexual Offences Act 2003-Definitive Guideline*, 144 p.

3. Documents non officiels

ECPAT UK

Somerset Carron, *What the Professionals Know : The trafficking of children into, and through, the UK for sexual purpose*s, London, ECPAT UK, 2001, 54 p.

—, *Cause or concern ? London social services and child trafficking*, London, ECPAT UK, 2004, 73 p.

Anti-Slavery International

ANTI-SLAVERY INTERNATIONAL, *Anti-Slavery International's views on Tackling Human Trafficking, Consultation on proposals for a UK action plan*, London, Anti-Slavery International, 2005, 9 p.

—, *Trafficking for Forced labour in Europe, Report on a study in the UK, Ireland, the Czech Republic and Portugal*, London, Anti-Slavery International, 2006, 38 p.

K. SKRIVANKOVA, *Trafficking for Forced labour in Europe, UK country report*, London, Anti-Slavery International, 2006, 47 p.

Conclusions

Anne Weyembergh et Veronica Santamaria

1. Introduction

Les présentes conclusions visent à faire la synthèse horizontale des douze contributions qui précèdent de même que des trois autres rapports nationaux (Finlande, Luxembourg et Portugal) qui ne sont pas repris dans le présent ouvrage mais peuvent être consultés sur le site du réseau ECLAN [1]. Elles ne portent pas sur les questions générales liées aux systèmes nationaux mais se concentrent exclusivement sur les aspects intimement liés à la mise en œuvre de la décision-cadre (ci-après DC) sur la lutte contre la traite des êtres humains et à son impact sur les droits internes. Elles envisagent successivement la ratification/transposition des principaux autres instruments relatifs à la traite et la distinction entre « traite » et « trafic » d'êtres humains (2), le texte légal transposant la DC (3), le contrôle de conformité formelle et substantielle (4), l'effectivité et la mise en œuvre pratique (5), l'efficacité et l'efficience (6), la réception et perception (7). Elles se clôturent par quelques remarques finales relatives à la contribution de la DC aux objectifs du rapprochement des législations pénales, et plus généralement à l'espace de liberté, de sécurité et de justice et relatives à l'apport de l'étude à l'exercice d'évaluation (8).

2. Ratification/transposition des principaux autres instruments relatifs à la traite et distinction entre « traite » et « trafic » d'êtres humains

A. Ratification

A la date du 1er octobre 2008, le protocole additionnel sur la traite des êtres humains de la convention de Nations unies contre la criminalité transnationale organisée du 12 décembre 2000 a été signé et ratifié par la quasi-totalité des quinze Etats membres

[1] http://www.eclan.eu.

considérés dans la présente étude. Seuls deux Etats font encore exception, à savoir la Grèce et le Luxembourg [2].

Quant à la convention européenne de 2005 sur la lutte contre la traite des êtres humains, si la plupart des Etats membres évalués l'ont signée, seule une petite minorité d'entre eux – la France et le Portugal – l'ont ratifiée [3].

Pour ce qui est de l'action commune 97/154 du 24 février 1997 relative à la lutte contre la traite des êtres humains et l'exploitation sexuelle des enfants, certains Etats (comme l'Espagne, la Finlande, la Grèce, le Luxembourg, les Pays- Bas, l'Italie) l'ont mise en œuvre – dont certains seulement en partie – dans leur droit interne.

B. Différence entre la « traite » et le « trafic » des êtres humains

Les notions juridiques de traite (*trafficking*) et de trafic (*smuggling*) des êtres humains ont progressivement été de plus en plus nettement distinguées sous l'impulsion des travaux menés au sein des Nations unies [4]. L'Union européenne fait désormais elle aussi la distinction entre les deux notions : la « traite des êtres humains » fait l'objet de la DC évaluée tandis que le « trafic des êtres humains » fait l'objet de deux autres instruments fondés sur des bases juridiques différentes, à savoir la directive et la DC du 28 novembre 2002 relatives à l'aide, à l'entrée, au transit et au séjour irréguliers.

Des différents rapports nationaux, il ressort qu'une très vaste majorité des lois internes des Etats membres étudiés fait une distinction claire entre les deux notions. Dans plusieurs de ces Etats, tandis que la traite constitue une infraction contre la liberté individuelle, le trafic figure plutôt parmi les infractions contre l'ordre public (voy. notamment Hongrie, Finlande, Pays-Bas, etc.). Parmi les principaux éléments permettant de distinguer les deux notions, on relèvera le fait que, tandis que le trafic implique le franchissement d'une frontière, la traite peut avoir lieu à l'intérieur des frontières d'un Etat, son critère distinctif étant la finalité d'exploitation de la personne, ou le fait que, tandis que le trafic est volontaire dans le chef de celui qui en fait l'objet, la traite implique au contraire l'usage de la force ou de la contrainte.

Toutefois, plusieurs rapports soulignent que, bien que la distinction puisse paraître *a priori* claire dans les textes, la pratique témoigne des difficultés à différencier clairement les deux phénomènes (voy. notamment Finlande, Grèce), et ce entre autres parce que traite et trafic entretiennent des rapports étroits [5]. Pareille confusion peut emporter des conséquences gênantes, vu que les règles applicables dans l'un et l'autre

---

[2] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=375&chapter=18&lang=en.

[3] http://www.conventions.coe.int.

[4] La différence entre les deux termes a été faite pour la première fois dans le rapport du Secrétariat des Nations unies de 1995 lors de la 50e session de l'Assemblée générale. Elle a été reprise par les deux protocoles additionnels à la convention de Nations unies contre le crime organisé de décembre 2000 : l'un porte sur la lutte contre la traite et l'autre sur la lutte contre le trafic de migrants.

[5] Ne fût-ce que parce que bien souvent ce qui est au départ du trafic d'êtres humains se transforme par la suite en traite des êtres humains. Les « clients » des réseaux de passeurs deviennent en effet souvent par la suite des victimes de traite des êtres humains.

cas ne sont pas nécessairement les mêmes : à cet égard, il convient notamment de songer aux règles de protection spécifiquement prévues pour les victimes de la traite, qui ne s'appliquent pas nécessairement aux personnes faisant l'objet de trafic d'êtres humains (à ce sujet, voy. notamment Finlande).

Le cas espagnol est particulier dans la mesure où la distinction entre les deux infractions de traite et de trafic et les sanctions prévues pour chacune d'entre elles n'est pas clairement faite dans le Code pénal (ci-après CP) lui-même, ce qui ne fait bien entendu que renforcer la confusion existante et l'embarras des praticiens.

3. Le texte légal transposant la décision-cadre

La grande majorité des Etats membres évalués ont formellement transposé la DC dans leur droit interne. Certains l'ont fait tardivement. C'est entre autres le cas de l'Allemagne, de la Belgique et des Pays-Bas, qui ne présentent aucun motif spécifique justifiant ledit retard. C'est aussi le cas du Portugal, qui n'a pas adopté une loi de transposition spécifique mais a pris en compte les exigences de la DC dans le cadre d'une réforme plus ample de son Code pénal (ci-après CP), qui n'est entrée en vigueur qu'en 2007.

Certains Etats n'ont pas procédé à la transposition formelle de l'instrument. C'est par exemple le cas de la Hongrie et de la Pologne. Le législateur hongrois avait déjà modifié le CP en 2001 afin de se conformer au protocole des Nations unies ; aucune modification ultérieure visant à se conformer aux exigences du texte européen ne fut considérée comme nécessaire. Quant à la Pologne, aucune loi de transposition de la DC concernée n'est intervenue, le législateur polonais ayant considéré que les dispositions du CP de 1997 en la matière étaient suffisantes. Le cas de la Grèce est, lui aussi, particulier puisque l'introduction des principales dispositions nationales sur la traite s'est faite en 2002 et fut donc quasi concomitante à l'adoption de la DC elle-même. Elles ont néanmoins tenu compte des travaux alors en cours dans le cadre de l'Union. Quant au Luxembourg, les travaux législatifs de transposition formelle sont toujours en cours. Un projet de loi (n° 5860) a été déposé le 26 mars 2008 et a fait l'objet d'un avis du Conseil d'Etat le 7 octobre 2008. Les motifs de cette incorporation tardive sont principalement de deux ordres : d'une part, les travaux entamés poursuivent une approche multidisciplinaire qui vise à l'incorporation du texte de l'Union européenne mais aussi d'autres instruments internationaux, d'autre part des spécificités découlent de la « petite » taille de l'Etat concerné. En ce qui concerne ce deuxième aspect, une petite administration est plus facilement surchargée lorsqu'il s'agit de la mise en œuvre de la législation européenne.

En général, la transposition s'est faite par le biais d'une loi interne principale qui a amendé, voire abrogé d'anciennes dispositions ou introduit de nouvelles dispositions dans le CP. A cet égard, on relèvera la particularité du Royaume-Uni, où plusieurs actes ont été adoptés : pour l'Angleterre, le Pays de Galles et l'Irlande du Nord, le « Sexual Offences Act 2003 » a criminalisé la traite à finalité d'exploitation sexuelle ; quant à l'Ecosse, des prévisions équivalentes sont contenues dans le « Criminal Justice (Scotland) Act 2003 » et, en ce qui concerne la traite à exploitation non sexuelle, comprenant le travail forcé et le vol d'organes, une infraction a été prévue dans le

« Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 » s'appliquant sur tout le territoire du Royaume Uni.

La plupart du temps, les lois de transposition ont apporté des changements importants aux droits nationaux.

Ces changements se remarquent surtout au plan de l'incrimination de la traite. Dans certains Etats, l'incrimination spécifique de la traite, qui n'existait pas auparavant comme telle, a été introduite (voy. par exemple Finlande, France et Royaume-Uni). La traite y constitue désormais une incrimination explicite et spécifique, de nature à améliorer la lutte contre ce type de criminalité. Dans d'autres Etats, où pareille incrimination préexistait, l'on observe le plus souvent un élargissement de celle-ci. On remarque ainsi par exemple un élargissement de la notion de « traite » notamment en Allemagne, en Belgique, aux Pays-Bas, au Portugal et en Slovénie. Dans la plupart de ces cas, le champ d'application a été étendu à d'autres formes d'exploitation sexuelle que celles antérieurement couvertes, mais surtout à l'exploitation de travail. Dans plusieurs de ces Etats, on note également une extension permettant de couvrir les actes commis à l'encontre des victimes « nationales » de la traite et/ou les actes préparatoires des infractions visées. De cet élargissement résulte souvent un changement de localisation dans le CP concerné : on observe ainsi dans plusieurs cas un déplacement de la traite, insérée auparavant dans la section « crimes contre la liberté sexuelle », vers la section « crimes contre la liberté personnelle » (par exemple l'Allemagne ou les Pays-Bas). Dans un cas, celui de la Lituanie, la transposition a entraîné un certain resserrement ou une définition plus précise de l'incrimination.

Outre les changements relatifs aux incriminations, l'on observe aussi d'importantes modifications en termes de sanctions : dans une très large majorité d'Etats membres, on remarque une augmentation générale des sanctions pénales prévues.

4. Le contrôle de conformité

A. Le contrôle de conformité formelle

1. Articles 1 et 2 DC (incriminations)

De manière générale, ces deux dispositions ont été transposées correctement. Toutefois, la façon dont l'incrimination de la « traite » l'a été varie selon les Etats membres. Certains pays ont opté pour une transposition presque littérale de l'incrimination. C'est notamment le cas de la Finlande, de la Lituanie et des Pays-Bas. D'autres, comme la France, la Grèce et le Portugal s'y sont conformés de près. Quelques différences mineures ont été repérées mais sont le plus souvent justifiées par des raisons d'ordre et de cohérence interne. On remarque également certains « ajustements » linguistiques ou terminologiques effectués afin de s'adapter aux termes nationaux connus (voy. par exemple la Grèce, la Finlande ou le Portugal).

D'autres Etats membres se sont davantage éloignés du texte.

Faisant usage de la latitude laissée par la DC d'aller au-delà des standards minimaux qu'elle prévoit, plusieurs Etats membres ont donné une définition plus large de la traite que la DC. Ils se sont ainsi montrés plus « répressifs » dans la définition retenue. Parmi eux, l'on relèvera que certains Etats, comme l'Espagne et la Hongrie, ont opté pour une infraction que l'on pourrait qualifier de « formelle » dans la mesure où la définition de la traite n'exige aucun moyen ni aucun objectif d'exploitation concret. Dans ces cas,

le recours à certains moyens couverts par la définition de la DC serait implicitement couvert par la notion de « traite ». Ces moyens ou objectifs d'exploitation sont, pour la plupart, repris comme circonstances aggravantes. D'autres Etats, en particulier la Slovénie et la Belgique, reprennent les objectifs d'exploitation dans l'incrimination simple ou de base mais n'exigent pas le recours à un des moyens visés par la DC. Ces moyens interviennent, pour la plupart, en tant que circonstances aggravantes. Quant à la Pologne, si le CP de 1997 parle bien de « traite des être humains », il n'en donne toutefois pas de définition et, n'énumérant ni les actes matériels, ni les objectifs ou les moyens constitutifs de l'infraction, il apparaît plus large dans l'appréhension de la notion de traite que la DC.

Deux pays méritent encore une mention particulière car ils se sont quelque peu éloignés de la philosophie de l'incrimination telle qu'elle apparaît dans la DC : il s'agit de l'Allemagne et du Royaume-Uni. En droit allemand, l'objectif d'exploitation constitue l'élément phare de l'infraction principale de traite. Deux infractions sont distinguées : l'une fort grave à savoir la « traite », définie comme acte d'exploitation, et l'autre moins grave à savoir la « promotion de l'exploitation », qui couvre les actes de « traite » tels le recrutement, transport, transfert, etc., mais sans exiger qu'une infraction d'exploitation ait été commise. Quant au Royaume-Uni, dans les trois lois applicables, le fait principal punissable est le « transfert » physique de la victime, lequel peut s'effectuer exclusivement à l'intérieur du Royaume-Uni. Le « recrutement », l'« hébergement » et l'« accueil » ultérieur de la personne visés par la DC ne sont couverts que lorsque l'auteur tombe sous le coup de la répression des infractions précitées. D'autres incriminations peuvent toutefois trouver à s'appliquer comme les infractions de *common law* de « *kidnapping* », « *false imprisonment* », « *abduction* », « *cruel and unhuman treatment* », etc. Aucune des trois lois n'exige que les actes matériels constituant la « traite » soient accompagnés des moyens visés par le texte européen. L'infraction existe même en leur absence. Dans certains cas toutefois, ces moyens sont implicitement couverts.

Au plan des moyens, mis à part quelques exceptions et certains écarts terminologiques, ceux-ci sont de manière générale couverts par les lois de transposition. Comme nous l'avons vu, dans quelques droits internes, ils ne font toutefois pas partie intégrante de la définition de l'infraction de base (voy. Espagne, Hongrie, Slovénie, Belgique, Royaume-Uni et Pologne) mais sont parfois exigés implicitement ou interviennent explicitement au titre de circonstances aggravantes.

Quant aux objectifs d'exploitation, mis à part quelques exceptions et certains écarts terminologiques, ils sont eux aussi globalement couverts par les dispositions nationales. Pour rappel, ils ne font parfois pas partie intégrante de la définition de l'infraction de base (voy. Espagne, Hongrie et Pologne) mais interviennent parfois alors au titre de circonstances aggravantes ou, au contraire, constituent l'élément principal de l'infraction de la « traite » (voy. le cas particulier de l'Allemagne). Certains Etats ont élargi la définition des objectifs d'exploitation. C'est par exemple le cas de la Belgique et de la France, qui ont ajouté l'objectif de « contraindre une personne à commettre tout crime ou délit » ; c'est encore le cas de la Belgique, de la Finlande et de la Slovénie qui ont repris un des objectifs d'exploitation couverts par le protocole des Nations unies, à savoir le « trafic d'organes ou de tissus humains ». D'autres ont

rétréci les objectifs d'exploitation, comme la Grèce par exemple qui exige un but « de profit » dans le chef de l'auteur de l'infraction si celle-ci a pour objectif l'exploitation sexuelle. L'on notera aussi le cas des Pays-Bas notamment où, suite à la légalisation de la prostitution, une distinction est faite entre l'exploitation légale et l'exploitation excessive de la prostitution.

Nombreux sont les textes nationaux qui ne comportent aucune disposition spécifique sur le consentement des victimes de la traite. L'appréhension générale du consentement de la victime diverge selon les Etats. Tandis que le droit pénal général de certains Etats membres exclut le consentement de la victime comme élément permettant d'écarter la responsabilité de l'auteur de l'infraction, à tout le moins lorsque les infractions revêtent une certaine gravité (en Finlande par exemple, on considère qu'il est impossible de donner un consentement valide à des atteintes graves), d'autres, comme le droit pénal hongrois, admettent le consentement de la victime comme circonstance excluant la responsabilité pénale de l'auteur. Ainsi, en Hongrie, lorsque la victime est un adulte (plus de dix-huit ans), son consentement entraînerait l'exclusion de l'infraction de traite mais la plupart des formes aggravées de traite impliquant le recours à la violence physique ou mentale, elles excluent la prise en compte de tout « consentement » de la victime. En Allemagne, une majorité de commentateurs considèrent que l'infraction principale de traite ne peut être constituée si le consentement de la victime n'a pas été influencé par le comportement de l'auteur mais relève de sa libre volonté. Toutefois, le recours aux moyens prévus par la DC exclut en principe par lui-même qu'un consentement valide au regard du droit pénal interne ait été donné. L'absence de consentement valide est en effet inhérente à la traite lorsque la contrainte, la fraude etc. sont prouvées. Ainsi, en Allemagne, si le consentement a été obtenu par des moyens visés par l'article 1, par. 1 a) à c) de la DC, il est vicié et ne peut emporter l'impunité de l'auteur.

Dans la plupart des Etats membres, lorsque la victime est un enfant, les moyens prévus par la DC ne sont pas exigés. Quelques Etats font toutefois exception, comme la Grèce et l'Italie. Dans ces deux cas, l'infraction nationale exige le recours aux moyens prévus, et ce sans exception, indépendamment de l'âge de la victime, que celle-ci soit un adulte ou un enfant. Cette situation est néanmoins susceptible d'être compensée, à tout le moins en Grèce, où les enfants sont considérés – par voie d'interprétation – comme des victimes particulièrement vulnérables.

De manière générale, l'incitation, la participation, la complicité et la tentative sont incriminées sur la base des dispositions pénales générales. Ces dernières varient selon les Etats quant aux sanctions prévues : souvent, certains de ces comportements sont punis moins sévèrement que l'infraction consommée elle-même. Dans de plus rares cas, ces comportements sont punis sur la base de dispositions spécifiques à la traite. A cet égard, le cas de l'Allemagne est particulier puisque le législateur allemand incrimine, d'une part, l'infraction de traite définie comme un acte d'exploitation et, d'autre part, la promotion de l'exploitation, qui couvre les actes matériels de traite, tels le recrutement, transport, transfert, etc., qui sont punis même en l'absence d'exploitation et sont perçus comme des éléments « de participation » en vue de commettre l'infraction d'exploitation concernée.

2. Article 3 DC (sanctions)

De manière générale, l'article 3 de la DC a été correctement transposé dans le droit interne des Etats membres évalués. Mais les sanctions prévues par les Etats varient considérablement.

Les peines prévues n'étant que des standards minimaux, nombreux sont les Etats membres qui ont été au-delà de ce qu'exige l'Union européenne. Les peines prescrites dépassent en effet souvent les exigences de la DC : c'est par exemple le cas en Espagne, en France, en Grèce, en Italie, en Pologne, au Portugal et au Royaume-Uni. Le seuil minimal de la peine maximale de huit ans prévu par la DC pour les cas aggravés de traite est souvent déjà satisfait pour l'infraction de base, indépendamment des circonstances aggravantes. De manière générale, l'on observe qu'à l'occasion de la transposition de la DC, les législateurs nationaux ont nettement élevé le niveau des peines réprimant la traite. Par comparaison avec les sanctions prévues pour d'autres types d'infractions, les peines prévues dans le cas de la traite sont fort élevées par rapport à l'échelle des peines nationales. Si ces peines présentent globalement les caractéristiques requises de l'effectivité et de la dissuasion, des critiques ont été émises dans plusieurs des Etats évalués quant à leur proportionnalité : à cet égard, il convient de renvoyer tout particulièrement au cas de la Grèce, de la Hongrie et de la Lituanie.

Les circonstances aggravantes énoncées dans la DC ont globalement été correctement transposées par les droits nationaux évalués. A certains égards, plusieurs droits internes ont été au-delà des exigences de la DC. C'est tout d'abord la conséquence de ce qui a été dit précédemment, certains Etats membres ayant « transformé » en circonstances aggravantes certains des éléments constitutifs de l'infraction de base dans la DC (voy. Espagne, Hongrie, Slovénie, Belgique). C'est également la conséquence de ce que des Etats prévoient parfois des circonstances aggravantes supplémentaires (voy. par exemple Espagne, France et Pays-Bas). Dans certains cas – y compris dans les Etats précités –, les termes nationaux choisis pour transposer les circonstances aggravantes diffèrent de la formulation retenue par la DC (voy. notamment le cas de l'Allemagne, de l'Espagne, de la France, de la Grèce, de la Hongrie, du Portugal et de la Slovénie). La notion de « victime particulièrement vulnérable » est à cet égard représentative. En ce qui la concerne, les Etats ont eu recours à diverses formules. Le plus souvent, ces variations sont dues à la volonté des Etats de s'ajuster à la terminologie nationale.

Parfois, certaines circonstances aggravantes n'ont été que partiellement transposées. Toutefois, pareille défaillance ne porte généralement pas atteinte aux objectifs poursuivis par la DC. En effet, le niveau de peine prévu en droit interne est fréquemment conforme aux exigences européennes, indépendamment de l'intervention d'une quelconque circonstance aggravante. Par ailleurs, on notera qu'en pratique les autorités judiciaires prennent en compte les circonstances aggravantes visées pour fixer le niveau de peine. En droit néerlandais, par exemple, l'infraction commise à l'encontre d'une victime particulièrement vulnérable à des fins d'exploitation sexuelle n'a pas été transposée telle quelle dans le droit interne, mais elle est prise en compte par le juge au cas par cas. Au Royaume-Uni, si les circonstances aggravantes liées à la vulnérabilité de la victime par exemple n'apparaissent pas non plus expressément

dans les lois concernées, mais conformément aux « *Sentencing Guidelines* », elles constituent néanmoins une circonstance aggravante à prendre en compte par le juge au moment d'établir la peine.

3. Articles 4 et 5 DC (responsabilité des personnes morales et sanctions)

Excepté certaines lacunes constatées dans quelques dispositions nationales, les exigences prévues par la DC concernant la responsabilité des personnes morales sont globalement satisfaites par les dispositions nationales.

Dans bien des Etats, ces exigences n'ont pas fait l'objet de dispositions spécifiques à la traite mais sont couvertes par les règles générales relatives à la responsabilité des personnes morales, qu'il n'a pas été nécessaire de modifier parce qu'elles étaient déjà conformes à la DC. On retrouve ici deux groupes d'Etats : ceux qui admettent le principe de la responsabilité pénale des personnes morales (certains depuis très peu de temps seulement comme la Lituanie) et ceux qui ne l'admettent pas, comme l'Allemagne, l'Espagne, la Grèce et la Hongrie qui se basent sur le principe de droit pénal « *societas delinquere non potest* ». Dans ces derniers Etats, les personnes morales peuvent faire l'objet de sanctions administratives, voire même de « mesures pénales » (voy. le régime particulier organisé par la Hongrie).

A certains égards, quelques Etats membres vont plus loin que les exigences européennes, comme la Finlande, la Grèce ou la Belgique.

4. Article 6 DC (juridiction et poursuite)

De manière générale, les transpositions nationales sont largement conformes aux exigences de la DC. Tous les systèmes nationaux connaissent bien entendu le principe de la compétence territoriale. Tous connaissent aussi certains titres de compétence extraterritoriale, soit de manière générale, soit pour certaines infractions seulement dont fait habituellement partie la traite des êtres humains. Tous connaissent en tout cas la compétence personnelle active. Certains connaissent également d'autres titres de compétences extraterritoriales, telles la compétence personnelle passive et/ou la compétence universelle (voy. notamment Grèce, Allemagne, Finlande, Belgique, Espagne, Portugal et Royaume-Uni, sauf Ecosse).

Toutefois, dans certains cas, l'exercice de compétences extraterritoriales est soumis à certaines conditions ou limitations (voy. notamment les cas de la Hongrie, des Pays-Bas ou du Portugal), celles-ci ayant d'ailleurs mené quelques Etats à faire usage de la possibilité qui leur est reconnue par l'article 6, par. 2 de la DC de limiter les titres de compétences extraterritoriales prévues par l'article 6, par. 1. Parmi les conditions ou limitations auxquels les titres de compétences extraterritoriales sont parfois soumis, on notera l'exigence de la double incrimination (voy. entre autres le cas de la Hongrie pour la compétence personnelle active et des Pays-Bas pour les cas de traite sur des adultes). Dans le cas du Royaume-Uni, on notera que la compétence universelle (non encore applicable en Ecosse) et le principe de personnalité active (Ecosse) ne s'appliquent qu'aux infractions pour lesquelles un tel titre de compétence est expressément prévu, entre autres les infractions de traite. Toutefois, comme on l'a vu précédemment, la définition de la traite étant particulière au Royaume-Uni, les lacunes de la législation sur la traite sont comblées par les « *Common law offences* ».

Or les titres de compétence extraterritoriale n'étant pas expressément prévus pour ces infractions, ils ne pourront pas jouer dans leur cas.

Quelques limites apparaissent aussi quant aux compétences extraterritoriales lorsqu'il s'agit de personnes morales. C'est par exemple le cas de l'Italie qui a fait usage de la possibilité prévue par l'article 6, par. 2 de la DC en ne reconnaissant pas la compétence de ses autorités lorsque l'infraction a été commise par une personne morale établie sur le territoire national.

5. Article 7 DC (protection et assistance aux victimes)

En ce qui concerne le paragraphe 1er de cet article, les législations internes de tous les Etats évalués semblent s'y être conformées : aucun d'entre eux ne subordonne en effet les enquêtes et poursuites de l'infraction de traite à la déclaration ou à l'accusation de la victime.

Si le paragraphe 2 de cet article paraît avoir fait l'objet d'une transposition variable selon les Etats membres, son paragraphe 3, concernant l'aide à la famille des victimes mineures, n'a pour ainsi dire pas été mis en œuvre par les Etats évalués. Même dans un Etat comme la Finlande, qui a fait des efforts particuliers pour développer la protection et l'assistance des victimes, cet article 7, par. 3 n'a pas été transposé. En Finlande, cette non-transposition a été justifiée par l'idée que, si la victime de la traite est un enfant, elle est en principe arrivée en Finlande sans sa famille. De nombreuses mesures de protection y ont été prises mais pour protéger la victime mineure elle-même : elles portent entre autres sur la désignation de représentants. Dans certains autres Etats, comme la Hongrie, cette non-transposition de l'article 7, par. 3 peut être compensée par l'interprétation large qui est donnée de la notion de victime.

Indépendamment des exigences de la DC elle-même, qui, à la différence d'autres instruments internationaux comme la convention du Conseil de l'Europe de 2005, se montre particulièrement timide à ce sujet, on constate de manière générale que le régime de protection des victimes de la traite reste très insuffisant. Nombreux sont les Etats qui n'ont pris aucune mesure spécifique à l'égard de la protection des victimes de la traite et se basent sur leurs dispositions générales pour la protection des victimes (voy. par exemple l'Allemagne, l'Espagne ou la Pologne). Certaines de ces règles découlent de la transposition de la DC de 2001 relative au statut des victimes, d'autres de la transposition de la directive du 29 avril 2004 concernant le permis de résidence octroyé à des ressortissants des pays tiers victimes de la traite des êtres humains [6]. La subordination de l'octroi d'un titre de séjour à la condition de collaboration avec les autorités fait cependant l'objet de nombreuses critiques, adressées entre autres par les associations de protection des victimes. A ce propos, il convient de relever que certaines législations nationales sont particulières : c'est le cas du droit italien et du droit grec qui ne subordonnent pas la délivrance d'un permis de séjour à la collaboration avec les autorités.

Toutefois, on remarque, dans quasiment tous les Etats membres, une prise de conscience quant à la nécessité d'améliorer la protection et l'assistance des victimes. Par ailleurs, quelques Etats membres évalués font des efforts particuliers pour

[6] *JO*, n° L 261, 6 août 2004, p. 19.

améliorer la protection et l'assistance des victimes de la traite. Ces efforts portent sur l'adoption de règles légales et/ou sur l'adoption de mesures d'ordre plus opérationnel ou pratique. A cet égard, on relèvera entre autres le cas de la Finlande, de la Belgique, de la Lituanie, de la Grèce et du Luxembourg qui cherchent à développer une approche « plus globale » en matière de traite en portant une attention particulière aux victimes.

B. Le contrôle de conformité substantielle

L'objectif du contrôle de conformité substantielle vise à permettre aux évaluateurs de vérifier si les éléments de non-conformité formelle ne sont pas éventuellement corrigés ou compensés par d'autres dispositions nationales. Il vise aussi à permettre d'expliquer les raisons éventuelles de la non-conformité si elle est « substantiellement » confirmée.

Certaines lacunes identifiées par rapport aux exigences européennes ne sont ni corrigées ou compensées par d'autres dispositions nationales ni même fondées sur une quelconque raison permettant de les expliquer.

En revanche, d'autres sont corrigées ou compensées, si pas entièrement, à tout le moins partiellement ; c'est par exemple le cas précité du Royaume-Uni, où les lacunes de la législation sur la traite sont partiellement comblées par les « *Common law offences* » ou le cas de la Hongrie, où la non-transposition de l'article 7, par. 3 peut être corrigée par l'interprétation large donnée à la notion de victime… Lorsque le manque de conformité du droit interne aux exigences européennes est – partiellement ou complètement – confirmé, il est souvent susceptible d'être expliqué. Ainsi, qu'elles affectent ou pas la conformité de la transposition aux exigences européennes, les disparités terminologiques sont souvent dues à la volonté de respecter les conceptions juridiques nationales, d'adapter le texte à la terminologie nationale afin de l'intégrer au mieux dans l'ordre juridique interne. Certaines disparités découlent des différences terminologiques présentes dans les diverses versions linguistiques du texte européen lui-même. Certains autres écarts sont dus au souhait de respecter les conceptions juridiques nationales : il suffit à cet égard de songer par exemple aux raisons sous-tendant la définition particulière de la traite en Allemagne, celle-ci étant liée à la volonté de conserver la vision traditionnelle de la traite dans le droit pénal national ou aux raisons du régime particulier d'incrimination au Royaume-Uni. D'autres écarts sont dus au souhait de remédier à ce qui est perçu par certains législateurs nationaux comme des défauts de la DC elle-même : c'est par exemple le cas au Portugal, où des précisions ont été apportées à certains termes de la DC en vue de se conformer au principe de légalité du droit pénal.

5. Effectivité et mise en œuvre pratique

L'évaluation de l'effectivité (*implementation*) vise à examiner le niveau d'application, d'utilisation de la norme. La DC sur la traite avait entre autres été choisie comme objet d'études parce qu'elle était en vigueur depuis un certain temps, ce qui devait donner le recul nécessaire afin de permettre une évaluation de son effectivité

et de sa mise en œuvre pratique [7]. Le recul s'est cependant encore révélé souvent trop réduit pour permettre une évaluation approfondie de l'effectivité et de la mise en pratique. C'est évidemment en particulier le cas pour les Etats qui ont transposé la DC avec retard.

L'examen de la pratique s'avère néanmoins très intéressant. Il permet de dégager d'importants constats.

Le premier est que le niveau d'application ou d'utilisation des normes concernées reste très variable en pratique. Dans certains Etats membres, un nombre significatif de poursuites, jugements et/ou condamnations rendus sur la base de l'infraction de « traite » a été répertorié. C'est notamment le cas en Allemagne, en Espagne, en Grèce et au Royaume-Uni. Toutefois, il n'y a pas toujours pour autant une nette augmentation des cas pratiques par rapport à la situation précédant la transposition/insertion des nouvelles incriminations. Dans plusieurs autres Etats membres évalués, le nombre de poursuites, de jugements et/ou de condamnations rendus sur la base de l'infraction de « traite » est extrêmement limité. Les raisons de cet « insuccès » sont variées. Dans certains Etats membres, comme au Portugal par exemple, aucune décision judiciaire n'avait encore été rendue au 1er décembre 2007 vu la mise en œuvre tardive et l'entrée en vigueur récente de la loi interne. Dans d'autres cas, comme en France et en Hongrie, les autorités judiciaires préfèrent continuer d'appliquer des infractions préexistantes (comme les infractions liées à la prostitution ou au proxénétisme) qu'elles ont l'habitude d'utiliser et qu'elles connaissent donc mieux. Le niveau similaire des peines prévues pour réprimer l'infraction de la traite et les autres infractions explique aussi partiellement ce choix. Les autorités y ont toutefois malgré tout rarement recours et en donnent même parfois une définition extensive lorsqu'elles n'ont pas d'autres qualifications à disposition. La décision française sur la vente de bébés bulgares est particulièrement représentative à cet égard. Dans quelques Etats, les éléments constitutifs de l'infraction ont été interprétés de manière fort restrictive, comme l'illustre fort bien la jurisprudence néerlandaise ou lituanienne. Il en va de même pour la pratique finlandaise, ayant surtout eu recours à d'autres infractions « similaires à la traite ». Pareille interprétation restrictive soulève une série de questions, entre autres quant à l'utilité réelle des nouvelles dispositions, utilité parfois contestée compte tenu du fait que les comportements auraient de toute façon pu être sanctionnés sur la base d'autres dispositions préexistantes. L'interprétation restrictive précédemment évoquée tranche avec l'interprétation plutôt large des infractions de traite ou de certains de ses éléments constitutifs donnée dans d'autres Etats, comme en Belgique par exemple où les juridictions ont plutôt interprété largement les termes « travailler dans des circonstances contraires à la dignité humaine ».

Il convient aussi de noter les difficultés particulières rencontrées en Pologne, où les praticiens sont confrontés à une disposition du CP, qui se réfère à la traite mais n'en donne aucune définition précise.

Un autre constat est que les recours aux dispositions sur la traite à des fins sexuelles sont plus fréquents que ceux aux dispositions sur la traite à des fins de travail (voy. par exemple l'Allemagne et le Royaume-Uni). Cette tendance s'explique, en partie,

[7] Voy. sur ce point l'introduction au présent ouvrage.

en tout cas, par le fait que, souvent, les dispositions sur la « traite non sexuelle » sont plus récentes et que les autorités compétentes manquent encore d'expérience pratique quant à leur application et quant à l'identification des cas.

Parmi les difficultés pratiques, on notera également certains chevauchements/ confusions avec d'autres infractions qui sont dus aux contours parfois flous de la traite et aux rapports complexes qu'elle entretient avec d'autres infractions similaires, comme le proxénétisme par exemple (voy. entre autres le rapport hongrois). La coexistence de la traite avec d'autres infractions est même parfois paradoxale, comme l'illustre la coexistence de la traite des êtres humains et du délit de *racolage passif* en France. D'autres difficultés ont encore été relevées comme celles liées à la structure complexe de l'incrimination (trois éléments : les actes matériels, les moyens et les objectifs d'exploitation), à la terminologie utilisée qui s'adapte mal au contexte légal interne, aux divergences des définitions retenues dans le protocole des Nations unies et dans la DC, différences qui peuvent entraîner de mauvaises interprétations. Les difficultés liées à l'administration de la preuve des différents éléments constitutifs de la traite ont été soulignées par certaines autorités de police ou de poursuite. Mais, comme le relèvent très justement quelques évaluateurs dans leurs rapports nationaux, les infractions ne doivent en principe pas être définies en fonction des difficultés de preuve rencontrées ou pour permettre de les contourner.

Enfin, l'examen de la pratique confirme la nécessité de développer des politiques plus protectrices des victimes de la traite des êtres humains. Parmi les éléments relevés à ce sujet, on rappellera que la « coexistence paradoxale » de la traite avec certaines autres infractions comme le racolage *passif* en France est au détriment de la protection des victimes de la traite. On notera aussi que les interprétations restrictives de l'infraction de la traite et le recours à d'autres infractions sont défavorables aux victimes, en particulier lorsqu'une protection ou assistance spécifique est réservée aux victimes de la traite (sur ce point, voy. par exemple la Finlande).

6. Efficacité et efficience (proportionnalité, subsidiarité et adéquation)

Tandis que l'évaluation de l'efficacité (*effectiveness*) consiste à apprécier le degré de réalisation des objectifs de l'instrument, l'évaluation de l'efficience (*proportionality* ou *adequacy*) consiste à examiner la relation entre les moyens utilisés et les résultats obtenus, et entre autres à se poser la question de savoir si d'autres mesures, plus proportionnées et plus adéquates, n'auraient pas pu être adoptées. Le manque de recul nécessaire pour évaluer convenablement l'efficacité et l'efficience de la DC et de ses lois de transposition a été souligné à maintes reprises dans les différents rapports nationaux. Certains constats peuvent toutefois d'ores et déjà être tirés.

A. En ce qui concerne l'efficacité

Au plan de l'efficacité, malgré un certain nombre de bémols (entre autres liés aux constats précités sur l'effectivité et la mise en pratique), l'évaluation de l'efficacité s'avère plutôt positive : une amélioration quant à la capacité de lutter spécifiquement contre la traite des êtres humains est constatée. Cette appréciation se fonde sur les facteurs principaux suivants :

– l'incrimination spécifique du phénomène a amélioré la situation dans plusieurs Etats membres au sein desquels la traite n'était pas réprimée en tant que telle mais seulement de façon indirecte, par le biais d'autres infractions « relais » non conçues à cette fin. Le fait que l'enquête, la poursuite en justice et la condamnation puissent se faire ou se fassent explicitement sur la base de l'infraction spécifique de la traite des êtres humains constitue un grand changement pratique et/ou symbolique. Des doutes ont cependant été soulevés dans certains Etats quant à l'utilité de la nouvelle infraction (voy. *supra* et *infra*) ;
– la DC mais aussi les autres instruments adoptés par l'Union ou d'autres enceintes en la matière, comme le protocole de Nations unies, et l'adoption de lois de transposition ou de mise en œuvre ont entraîné une véritable prise de conscience globale de l'existence et de la gravité du phénomène criminel concerné, laquelle a effectivement permis d'accroître l'importance accordée à la lutte contre la traite. Dans plusieurs Etats, cette prise de conscience a induit des changements tant au niveau législatif qu'au sein des autorités gouvernementales et judiciaires. Des initiatives, notamment de caractère non pénal, en vue de renforcer la prévention et la lutte contre la traite se sont multipliées (par exemple en Finlande, en Grèce, en Lituanie, aux Pays-Bas, au Portugal, en Slovénie ou encore au Royaume-Uni). Des plans d'action, des stratégies nationales, des mesures opérationnelles ont ainsi notamment été adoptés, des groupes d'experts et des corps gouvernementaux spécialisés ont été créés… Toutefois, ces démarches s'avèrent encore limitées, le volet préventif devant être davantage développé, de même que la protection des victimes.

B. En ce qui concerne l'efficience

Si quelques rapports nationaux ne relèvent aucun problème de proportionnalité ou d'adéquation des mesures adoptées, nombreux sont ceux qui se montrent plus critiques. Dans certains cas, la proportionnalité et l'adéquation de la DC et/ou des lois nationales la transposant sont controversées, voire contestées.

Parmi les problèmes soulevés à ce propos, on relèvera tout d'abord ceux liés au principe de la légalité, tant dans sa dimension formelle (déficit démocratique au sein de l'UE) que dans sa dimension matérielle. En ce qui concerne cette dernière, un certain nombre d'Etats, parmi lesquels la Grèce, ont estimé que les imprécisions du texte européen et/ou des lois de transposition affectent ce principe. Si dans quelques Etats les effets négatifs ont été corrigés par la loi nationale de transposition, dans d'autres ce ne fut pas le cas. Dans d'autres encore, comme en Lituanie, la transposition de la DC a, au contraire, eu un effet positif sur le principe de légalité, les nouvelles dispositions sur la traite apportant davantage de précisions et de clarté.

C'est sans doute la proportionnalité et l'adéquation du niveau de sanctions qui sont le plus controversées/contestées. Comme nous l'avons déjà relevé précédemment, dans une très large majorité d'Etats membres, on remarque une augmentation générale des sanctions pénales prévues. Leur manque de proportionnalité/adéquation est fréquemment dénoncé (voy. entre autres les rapports allemand, espagnol, français, grec, hongrois ou lituanien). Une question fondamentale se pose toutefois : celle de savoir si ces problèmes proviennent du texte européen lui-même ou des lois

nationales. Dans plusieurs cas, cette tendance répressive n'est manifestement pas due à la DC puisque les lois nationales l'ont précédée (voy. par exemple la Hongrie). Par ailleurs, nombreux sont les Etats qui ont fait usage de la marge de manœuvre laissée par la DC pour aller au-delà des niveaux minima de sanctions qu'elle prévoit et imposer des sanctions plus sévères. Dans certains autres cas, elle provient aussi du choix du législateur national qui a « instrumentalisé » le texte européen (voy. le cas de l'Espagne par exemple) ou a, à tout le moins, saisi l'occasion de sa transposition pour faire passer ses priorités nationales. Toutefois, la technique utilisée par la DC en vue de rapprocher les sanctions (fixation du « minimum de la peine maximale ») favorise plutôt la tendance répressive notée dans plusieurs systèmes pénaux internes. Elle ne la contre en tout cas aucunement. Cette technique européenne visant à fixer le « minimum de la peine maximale » est en outre également critiquée en raison des difficultés de transposition dans le système punitif interne auxquelles elle donne parfois lieu.

Enfin, la proportionnalité des sanctions prévues par la DC elle-même a fait l'objet de critiques dans la mesure où elle prévoit le même niveau de sanction pour tous les types de circonstances aggravantes, sans distinction, par exemple, entre le fait de « mettre en danger la vie d'une personne » ou l'« imprudence grave ».

7. Réception et perception

Mis à part les critiques précitées portant en particulier sur la proportionnalité et l'adéquation des peines, on constate que, dans de nombreux Etats membres, l'accueil général réservé à l'introduction ou à la modification de l'incrimination spécifique de la traite des êtres humains est favorable. Il en est entre autres ainsi de l'accueil par les acteurs et praticiens de la justice ou par la société civile, notamment par les ONG travaillant dans le secteur.

Toutefois, trois points communs aux divers rapports nationaux sont à signaler.

Tout d'abord, la méconnaissance ou la connaissance limitée de l'existence même de la DC, et *a fortiori* de son contenu. C'est ce qui explique notamment la rareté des références à la DC elle-même dans les décisions judiciaires rendues en matière de traite. Cette méconnaissance ou cette connaissance limitée est due, en partie à tout le moins, au fait que les dispositions relatives à la traite ne sont pas spécifiques à l'Union européenne (à la différence des DC sur le mandat d'arrêt européen ou sur le terrorisme, qui sont bien plus spécifiques à l'UE et sont donc beaucoup plus connues au sein des Etats membres). Le protocole des Nations unies semble beaucoup mieux connu que la DC.

Ensuite, malgré des efforts réalisés à cet égard dans plusieurs Etats membres, le manque de formation des acteurs de la justice dans le secteur de la traite et le besoin de développer pareille formation ont été soulignés de manière générale.

Enfin, bien que l'accueil soit généralement favorable aux changements intervenus en matière de traite, la nécessité d'accorder davantage d'attention aux victimes et de développer la protection et l'assistance qui leur sont apportées a été mise en exergue, non seulement par la société civile et les ONG travaillant dans le secteur mais aussi par les autres acteurs concernés.

8. Remarques finales

A. Contribution de la DC aux objectifs du rapprochement des législations pénales, et plus généralement à l'espace de liberté, de sécurité et de justice

De manière générale, il ressort des rapports nationaux qu'un rapprochement des droits pénaux internes est effectivement intervenu. S'il est clair que la DC de l'UE a contribué à cet effet de rapprochement, il est néanmoins difficile d'évaluer son impact exact à cet égard. Elle s'inscrit en effet dans un contexte plus vaste d'adoption de textes internationaux sur le même sujet. Le protocole des Nations unies a indéniablement aussi joué un rôle dans le rapprochement intervenu.

Le degré d'harmonisation atteint est toutefois encore limité [8]. Les transpositions de la DC sont à géométrie variable, entre autres parce que les Etats membres ont fait usage de la possibilité qui leur était donnée d'aller au-delà des standards minimaux fixés, et ce tant en ce qui concerne les incriminations qu'en ce qui concerne le niveau des sanctions.

Quant à la question de savoir si la DC et les lois qui la transposent permettent de réaliser les objectifs principaux que poursuit le rapprochement des législations, il est malaisé d'y répondre vu le manque de recul pour évaluer avec précision les effets et l'impact des textes en pratique (voy. *supra*). Les rapporteurs nationaux se sont donc montrés particulièrement prudents dans leur évaluation, la plupart soulignant que des vérifications ultérieures sont souhaitables.

La majorité des rapporteurs sont d'accord pour dire que, théoriquement, le rapprochement des législations pénales matérielles renforce la lutte contre la traite parce qu'il empêche les criminels de tirer avantage des diversités légales en choisissant le système qui leur est le plus favorable (sur la prise en compte des dispositions légales sur la traite par les criminels, voy. en particulier le rapport lituanien). Même si certains rapporteurs dénoncent la logique qu'il y a à renforcer la coopération en recourant au rapprochement des droits matériels parce que ce sont en principe les procédures qui sont au service du droit matériel (sur ce point, voy. en particulier le rapport grec), la plupart reconnaissent que le rapprochement est de nature à simplifier et à renforcer la coopération de même qu'à promouvoir et à développer la confiance mutuelle entre les autorités nationales compétentes. Pareille confiance se base sur la conscience qu'ont les autorités judiciaires de l'existence, dans les autres systèmes légaux, d'une incrimination très proche de celle en vigueur dans l'Etat membre concerné. Quelques interviews (voy. notamment aux Pays-Bas les déclarations du « porte-parole » du Groupe d'experts sur la traite) et quelques exemples concrets (voy. notamment les rapports lituanien et finlandais) vont dans le sens d'un certain renforcement de la coopération en la matière.

Toutefois, les rapporteurs constatent que, dans le cas de la DC concernée, les limites précitées du rapprochement réalisé réduisent logiquement son impact positif sur la coopération et la confiance mutuelle. Cet impact est d'autant plus restreint, que comme nous l'avons signalé, une majorité de rapports notent la méconnaissance de la DC de l'UE, ce qui est de nature à limiter la conscience des autorités compétentes de

---

[8] Dans le même sens, voy. le Rapport de la Commission européenne au Conseil et au Parlement européen du 2 mai 2006 (COM (2006) 187 final).

la proximité des autres droits. Certains rapporteurs (voy. notamment les rapports grec, espagnol, portugais et allemand) notent par ailleurs que, pour accroître la confiance mutuelle, il est important que la DC et les lois de transposition respectent les principes généraux du droit pénal, comme les principes de proportionnalité ou de légalité. Le mépris de ces principes et l'absence d'évaluation au niveau européen sur ces aspects risquent d'entraîner l'effet contraire, à savoir, la perte de confiance dans les systèmes pénaux nationaux et la « méfiance mutuelle ».

Pour les raisons précitées (en particulier le manque de recul…), l'évaluation de la DC sur la traite s'est révélée malaisée quant à son impact général sur les objectifs de l'Union européenne, et en particulier sur la mise sur pied de l'espace de liberté, de sécurité et de justice, les droits fondamentaux et les systèmes pénaux des Etats membres.

En ce qui concerne l'espace de liberté, de sécurité et de justice, malgré les bémols précités, la DC et les lois nationales évaluées témoignent de la volonté commune des Etats membres de lutter contre cette forme de criminalité grave et entraînent un certain renforcement de la lutte contre la traite des êtres humains. De manière générale, elles sont perçues comme des instruments utiles pour combattre la traite. Toutefois, plusieurs contributions attirent l'attention sur le risque de construire un espace de liberté, de sécurité et de justice déséquilibré. A cet égard, plusieurs rapporteurs relèvent que la tendance répressive est moins due à la DC qu'aux choix des lois nationales, celles-ci allant au-delà de ce qui est requis par le texte européen. La sévérité excessive des peines prévues par les lois internes est en particulier dénoncée (voy. *supra*). Comme nous l'avons déjà dit, la technique des textes européens pour rapprocher le niveau de sanction (minimum de la peine maximale) favorise plutôt la tendance répressive observée dans plusieurs systèmes pénaux internes. Elle ne la contre en tout cas aucunement. Cette tendance des Etats n'est pas contrée non plus par une évaluation qui serait menée au niveau européen sur les éventuels excès des Etats en matière de proportionnalité lorsqu'ils transposent les DC. L'instauration de telles évaluations se révèle donc nécessaire. Parmi les autres facteurs potentiels de déséquilibre de la construction d'un espace de liberté, de sécurité et de justice, on relèvera encore la plus grande sévérité des Etats membres quant à la définition des incriminations, de même que la multiplication des critères de compétences sans établir des règles claires et obligatoires prévenant les conflits positifs de juridiction.

En ce qui concerne plus précisément les principes du droit pénal et les droits fondamentaux, plusieurs rapports n'ont pas relevé d'effets problématiques. D'autres ont souligné certains problèmes, de différentes natures. Parmi eux, on rappellera les difficultés d'intégration des nouvelles infractions dans le droit interne, leur articulation avec les infractions préexistantes, les difficultés d'interprétation de termes méconnus en droit national, etc. Par ailleurs, outre les problèmes de proportionnalité relevés précédemment, on rappellera aussi les préoccupations soulevées quant au principe de la légalité, et ce qu'il s'agisse de la légalité dans ses aspects formel (déficit démocratique) ou substantiel.

Enfin, et à nouveau, la timidité de la DC de même que les limites et insuffisances des régimes nationaux quant à la prise en compte et à la protection/assistance des victimes de la traite sont soulignées. Certes la réponse pénale est indispensable pour

combattre la traite. Elle ne suffit toutefois pas. Des efforts doivent être poursuivis afin de mieux protéger les droits des victimes et de développer ainsi les objectifs de liberté et de justice que l'Union européenne s'est donnés. C'est ce qui ressort d'ailleurs également du document de la Commission intitulé « Evaluation and monitoring of the implementation of the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings » (COM (2008) 657 final). Espérons que ces aspects soient davantage pris en compte lors de la révision de la DC de 2002 qui a été annoncée au mois d'octobre 2008 par Jacques Barrot.

B. Contribution de l'étude à l'exercice d'évaluation

L'étude réalisée a permis d'affiner sensiblement la réflexion sur la méthodologie de l'évaluation [9] et s'est en particulier révélée représentative des difficultés de l'exercice d'évaluation. Parmi celles-ci, on relèvera principalement le manque de recul disponible, qui a rendu malaisé l'examen de l'effectivité, de la mise en œuvre pratique et de l'efficacité des textes, mais aussi le fait qu'il n'a pas toujours été simple de distinguer et d'isoler ce qui relevait précisément de la mise en œuvre et de l'impact de la DC de 2002 de la mise en œuvre et de l'impact d'autres instruments adoptés dans le secteur – surtout des instruments adoptés en la matière par les Nations unies –, d'évaluer cette mise en œuvre et cet impact sans évaluer plus largement les politiques nationales relatives à la lutte ou la prévention de la « traite », d'isoler ce qui relève de la traite, telle que définie par la DC de 2002, d'autres phénomènes qui en sont proches ou qui y sont liés comme la prostitution, le proxénétisme, le trafic d'êtres humains, l'immigration clandestine etc. Si ces difficultés ont considérablement compliqué la tâche des évaluateurs, elles s'avèrent toutefois, par elles-mêmes, riches d'enseignements et témoignent en tout cas de la nécessité de ne pas sous-estimer l'ampleur de l'exercice d'évaluation.

Enfin, les rapports nationaux font apparaître des aspects qui n'avaient pas encore été soulevés dans les rapports résultant des autres évaluations se rapportant à ce même instrument réalisées jusqu'ici. Cette complémentarité de l'évaluation académique, globale et impartiale, par rapport aux exercices d'évaluation préexistants est, à nos yeux, tout à fait essentielle. Elle contribue à plaider pour son développement.

[9] A ce sujet, voy. l'introduction au présent ouvrage.

Liste des acronymes, abréviations et sigles

ACPO	Association of Chief Police Officers
ACPOS	Association of Chief Police Officers of Scotland
AFSJ	Area of Freedom, Security and Justice
AJDA	Actualité juridique. Droit administratif
Amén.	Aménagement & Environnement
AN	Assemblée nationale
ARSIS	Association for the Social Support of Youth (NGO)
AVRIM	Assisted Voluntary Return for Irregular Migrants
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BvR	Bundesverfassungsgericht
CAO	Code of Administrative Offences
Cass. pen.	Cassazione Penale
CC	Criminal Code
CCEM	Comité contre l'esclavage moderne
CCP	Code of criminal procedure
CCTV	Closed-circuit television
CDE	Cahiers de droit européen
CE	Communauté européenne
CEDAW	Convention of 1979 on the Elimination of All Forms of Discrimination against Women
CEDH	Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales
CEE	Communauté économique européenne
CEOP	Child Exploitation and Online Protection Centre
CESEDA	Code de l'entrée et du séjour des étrangers et du droit d'asile
CETS	Council of Europe Treaty Series
CJ	Cour de justice des Communautés européennes

CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
COPFS	Crown Office and Procurator Fiscal Service
CP	Code pénal
CP	Criminal Procedure
CPS	Crown Prosecution Service
CrimJust	Criminal Justice
CRVT	Center for Rehabilitation of Victims of Torture and other Forms of Abuse
CVME	Research and Support Center for Victims of Maltreatment and Social Exclusion
CWB	Central Witness (Protection) Bureau
DC	Décision-cadre
DCC	Dutch Criminal Code
DVD	Digital Video Disc
EAW	European arrest warrant
EC	European Community
ECJ	European Court of Justice
ECLAN	European Criminal Law Academic Network
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
ECR	European Court Reports
EDPA	Epitheorissi Dikaiou Prosfygon kai Allodapon (Law Review for Foreigners and Refugees)
EE	Elliniki Epitheorisi (Hellenic Review)
EEEvrD	Elliniki Epitheorisi Evropaïkou Dikaiou (Greek Journal of European Law)
EKANA	National List of Alerts
EU	European Union
EuConst	European Union Constitution
EUR	Euro
Europol	European Police Office
FD	Framework Decision
FRONTIDA	International Society for Family Support
GA	Goltdammers Archiv für Strafrecht
GCR	Greek Council for Refugees
Giur. cost.	Giurisprudenza constituzionale
GP	Gazette du Palais
GSGE	General Secretariat for Gender Equality
HCC	Hungarian Criminal Code
HUF	Hungarian Forint
ILO	International Labour Organization
IND	Immigration and Nationality Directorate
Interpol	International Criminal Police Organization
IOM	International Organisation for Migration
IPA	International Police Association
IPS	Identity and Passport Service
ISO	Organisation internationale de normalisation (International Organisation for Standardisation)
IWG	Interdepartmental Working Group

JAI	Justice et affaires intérieures
JCP	Juris-Classeur périodique. La semaine juridique
JDJ	Journal des jeunes
JHA	Justice and Home Affairs
JLMB	Jurisprudence Liège, Mons, Bruxelles
JO	Journal officiel des Communautés européennes (jusqu'au 31 janvier 2003) Journal officiel de l'Union européenne (à partir du 1er février 2003)
JORF	Journal officiel de la République française
JT	Journal des tribunaux
JTDE	Journal des tribunaux. Droit européen
JZ	Juristenzeitung
KEDE	Center for Research and Action on Peace
KEPAD	Human Rights Defense Center
KLIMAKA	NGO for the Development of Social and Human Potential
KZ-B	Act amending the Penal Code
LECr	Ley de Enjuiciamiento Criminal
LTL	Lithuanian Litas
MB	Moniteur belge
MD	Ministerial Decree
MFHR	Marangopoulos Foundation for Human Rights
MMW	Minimum monthly wage
MPS	Metropolitan Police Service
NCHR	National Commission for Human Rights
NCSS	National Center for Social Solidarity
NCTSG	National Counter Trafficking Steering Group
NGO	Non Governmental Organisation
NJW	Neue juristische Wochenschrift
NjW	Neue Juristische Wochenschrift
NoV	Nomiko Vima (Legal Tribune)
NStZ	Neue Zeitschrift für Strafrecht
OCRTEH	Office central pour la répression de la traite des êtres humains
OECD	Organization for Economic Cooperation and Development
OJ	Official Journal of the European Communities (until 30 January 2003) Official Journal of the European Union (since 1 February 2003)
OKEA	Task Force for Combating Human Trafficking
ONG	Organisation non gouvernementale
OSCE	Organisation pour la sécurité et la coopération en Europe
Pas.	Pasicrisie
PC	Penal Code
PCC(S)A	Powers of Criminal Courts (Sentencing) Act
PChr	Poinika Chronika (Penal chronicals)

PIF	Protection des intérêts financiers des Communautés européennes
PLN	Polish Zloty (the currency)
PoinDik	Poiniki Dikaiosyni (Penal Justice Law Review)
PoinLog	Poinikos Logos (Criminal logos)
PP	Partido popular
PSOE	Partido socialista obrero español
RDPC	Revue de droit pénal et de criminologie
Rev. interdisc. d'ét. jur.	Revue interdisciplinaire d'études juridiques
RIDP	Revue internationale de droit pénal
RIEJ	Revue interdisciplinaire d'études juridiques
Riv. pen.	Rivista Penale
RSC	Revue suisse de criminologie
RW	Rechskundige Weekblad
SCDEA	Scottish Crime and Drug Enforcement Agency
SECI	Southeast European Cooperative Initiative
SOCAP	Act Serious Organised Crime and Policing Act
Stb	Staatsblad des Koningrijk der Nederlanden
StBG	Strafgesetzbuch
STE	Série des traités européens
STS	Sentencia del Tribunal Supremo
T. Strafr.	Tijdschrift voor strafrecht
T. Vreemd.	Tijdschrift voor Vreemdelingenrecht
TA	Tribunal administratif
TEU	Treaty on European Union
TFUE	Traité sur le fonctionnement de l'Union européenne
TJK	Tijdschrift voor Jeugdrecht en Kinderrechten
ToS	To Syntagma (The constitution)
Trb	Tractenblad van het Koningrijk der Nederlanden
TVW	Tijdschrift voor Wetgeving
UE	Union européenne
UK	United Kingdom
UKHL	United Kingdom House of Lords Decisions
UKHTC	UK Human Trafficking Center
UKIS	UK Immigration Service
UN	United Nations
YEL	Yearbook of European Law
Yper	Yperaspissi (Defense)
ZIS	Zeitschrift für Internationales Strafrecht
ZRP	Zeitschrift für Rechtspolitik
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

Liste des auteurs

Matjaž AMBROŽ, Ph.d., Assistant Professor, Faculty of Law University of Ljubljana.

Laura C. BOSCH, LL.B Maastricht University.

Martin BÖSE, Professor of Criminal Law, Criminal Procedure and International and European Criminal Law, University of Bonn.

Nikolaos CHATZINIKOLAOU, Scientific Researcher, Aristotle University of Thessaloniki.

Paul DE HERT, Professeur, Vrije Universiteit Brussel.

Francisco JAVIER DE LEÓN, Professor of criminal law, University of Castilla-La Mancha.

Giulietta GAMBERINI, doctorante, Université de Paris 1.

Athina GIANNAKOULA, PhD-Candidate at the Aristotle University of Thessaloniki.

Giovanni GRASSO, professeur, Université de Catania.

Maria KAIAFA-GBANDI, Professor, Aristotle University of Thessaloniki.

Adam LAZOWSKI, Senior Lecturer in EU LAW, School of Law, University of Westminster.

Katalin LIGETI, Ass. Prof. Dr., Eötvös Lorand University, Budapest.

Annalisa LUCIFORA, PhD student en Politiques pénales européennes (Université Paul Cézanne Aix-Marseille III/Université des études de Catane).

Manuel MAROTO, PhD-Candidate, Researcher, Institute of European and International Criminal Law, University of Castilla-La Mancha.

Jürgen MILLEN, collaborateur scientifique, Vrije Universiteit Brussel.

Theodor PAPAKYRIAKOU, Lecturer, Aristotle University of Thessaloniki.

Mojca M. PLESNIČAR, LL.B. Junior researcher, Institute of criminology at the Faculty of Law Ljubljana.

Maïtena POELEMANS, ingénieur de recherches, CDRE de l'Université de Pau et des Pays de l'Adour.

Miguel ÁNGEL RODRÍGUEZ, PhD-Candidate, Researcher, Institute of European and International Criminal Law, University of Castilla-La Mancha.

Robert ROTH, professeur, Université de Genève.

Veronica SANTAMARIA, chercheuse, Institut d'Etudes européennes de l'Université libre de Bruxelles.

John SPENCER, QC, professeur, Université de Cambridge.

Doc., Dr. Gintaras ŠVEDAS, Vilnius University, Faculty of Law, Criminal law Department.

Anne WEYEMBERGH, professeur, Institut d'Etudes européennes de l'Université libre de Bruxelles et assesseur au Conseil d'Etat.

Table des matières

Avertissement.. 7

Introduction
Anne Weyembergh et Veronica Santamaria.. 9

1. Le contexte dans lequel s'inscrit l'ouvrage 9
   A. Un modèle standard d'évaluation académique..10
   B. Le test pilote 11
2. L'instrument qui a fait l'objet du test pilote : la décision-cadre 2002/629/JAI du 19 juillet 2002 sur la lutte contre la traite des êtres humains 12

Politiques pénales et évaluation : des défis renouvelés
Robert Roth 41

1. La tradition pénale 41
2. L'évaluation propre et l'évaluation multilatérale... 42
3. Objet et contenu 46
4. Perspectives critiques.. 47

Combating trafficking in human beings in Belgium
Conformity of the transposition of the Council Framework Decision?
Paul De Hert and Jürgen Millen 51

1. Introduction... 51
2. The international legal framework.. 52
3. The Belgian implementation of the FD... 54
4. Conformity of the transposition of the Council FD of 19 July 2002 56
   A. The incrimination of trafficking in human beings (Articles 1 and 2 FD).... 56
   B. The sanctions for natural and legal persons (Articles 3-5 FD) 61

C. (Universal) jurisdiction and prosecution (Article 6 FD) 63
D. Protection of and assistance to victims (Article 7 FD) 67
5. Legal practice 71
6. Conclusion 72

La transposition en France de la décision-cadre 2002/629/JAI du 19 juillet 2002 sur la traite des êtres humains
Maiténa Poelemans 85

1. Introduction 85
2. La conformité formelle et substantielle de la transposition en droit français de l'incrimination de traite des êtres humains 88
A. La conformité formelle des dispositions du Code pénal français quant aux actes matériels et aux moyens utilisés 90
B. Contrôle de conformité substantielle 97
3. Contrôle d'effectivité et examen de la mise en pratique du texte 98
4. Contrôle de l'efficacité et de l'efficience du texte 99
5. La réception et la perception en France de la norme spécifique incriminant la traite des êtres humains 100
6. Conclusion 102

Trafficking in human beings in Germany
Martin Böse 109

1. Introduction 109
2. International and national legal framework 109
3. Conformity of the internal transpositing measures to the Framework Decision 111
A. Formal conformity 112
B. Substantive conformity 119
4. Legal practice 120
5. Effectiveness and proportionality 121
6. Reception and perception 122
7. Conclusion 124

The FD on combating trafficking in human beings. Evaluating its fundamental attributes as well as its transposition in Greek criminal law
Maria Kaiafa-Gbandi, Nikolaos Chatzinikolaou, Athina Giannakoula, Théodor Papakyriakou 131

1. Introduction 131
A. Basic features of Greek substantive criminal law 132
B. Other international and European instruments related to trafficking in human beings 142
2. The transposition of the FD on combating trafficking in human beings in Greek criminal law – appraisal of formal and substantive conformity 145
A. General remarks 145
B. Formal conformity 147
C. Substantive conformity 166
3. Practical application of the norm 170

A. Greek case-law and practical use of the text ... 170
B. Specific difficulties encountered regarding the practical use of the text.... 173
4. Appraisal of effectiveness and efficiency ... 174
A. Appraisal of effectiveness ... 174
B. Appraisal of efficiency ... 175
5. Reception and perception ... 179
A. Reception and perception by practitioners ... 179
B. Reception and perception by politicians ... 180
C. Reception and perception by the media ... 183
D. Reception and perception by social groups ... 184
E. Reception and perception in legal literature ... 186
6. Conclusion ... 186
A. The impact of the FD in terms of building up cooperation between the authorities of Member States ... 186
B. The impact of the FD on the double criminality requirement ... 187
C. The impact of the FD in terms of building mutual trust ... 188
D. The impact of the FD and of Statute No. 3064/2002 as to the general objectives of AFSJ ... 189
E. The impact of the FD and of Statute No. 3064/2002 on the protection of human rights ... 190
F. The impact of the FD and of Statute No. 3064/2002 on the Greek criminal law system and its fundamental principles ... 190

Trafficking in human beings in Hungary
Katalin LIGETI ... 197

1. Criminological background ... 197
2. Hungary's international and European obligations in regard to the criminalisation of trafficking in human beings ... 199
3. Some general remarks on Hungarian criminal law ... 200
A. The classification of offences and the age of majority in Hungarian criminal law ... 200
B. Typology of criminal sanctions in Hungarian criminal law ... 201
4. The general framework of criminalisation in Hungary ... 204
A. Trafficking in and smuggling of human beings ... 204
B. Pandering ... 204
C. Prostitution ... 205
5. The offence of trafficking in human beings in Hungarian criminal law ... 205
6. The conformity of Hungarian law with the FD ... 207
A. The victim's consent ... 207
B. Specially vulnerable victims and child victims ... 208
C. Instigation of, aiding, abetting or attempt to commit trafficking in human beings ... 209
D. Penalties against natural persons ... 209
E. Penalties against legal persons (Articles 4 and 5 FD) ... 211
7. Jurisdiction and prosecution (Article 6 FD) ... 212
8. Protection of and assistance to victims (Article 7 FD) ... 214

9. Shortcomings of Hungarian law in regard to the criminalisation of trafficking in human beings 216
10. Practical application 216
11. Reception of the FD in Hungary and concluding remarks 216

Evaluation of the impact in Italy of the 19th July 2002 Framework Decision against trafficking in human beings
Giovanni GRASSO and Annalisa LUCIFORA 219

1. Introduction 219
2. Internal legal context 220
3. Control of formal and substantive conformity 221
4. Practical application of the norm 227
5. Control of effectiveness and efficiency 228
6. Reception and perception 229
7. Conclusion 230

Evaluation of the impact of the Framework Decision of 19 July 2002 on combating trafficking in human beings: Lithuania
Gintaras ŠVEDAS 233

1. Introduction 233
2. Lithuania's international and European obligations 234
3. General considerations on Lithuanian criminal law 236
   A. Classification of criminal offences 236
   B. Typology of criminal sanctions 236
   C. Age of majority 239
   D. General framework of criminalisation in Lithuania: trafficking and smuggling in human beings, prostitution 239
4. Control of formal and substantive conformity 240
   A. Incriminations 240
   B. Penalties against natural persons 244
   C. Liability of and sanctions against legal persons 245
   D. Jurisdiction, investigation and prosecution 246
   E. Protection of and assistance to victims 249
   F. General assessment 255
5. Practical application of the norm 255
6. Control of effectiveness and efficiency 258
7. Reception and perception 259
   A. Practitioners 259
   B. Politicians 260
   C. Media and written press 262
   D. Civil society 263
   E. Legal litterature 264
8. Conclusions 264

Trafficking in human beings in the Netherlands
Laura Bosch 267
1. Introduction 267
A. International legislation 267
B. Dutch penal law 270
2. Control of formal and substantive conformity of the transposition of the 2002 FD in national law 271
A. Conformity 271
B. Formal conformity 272
C. Substantive conformity 275
3. Practical use of the norm 275
4. Control of effectiveness and efficiency of the text 277
5. Reception and perception 278
6. Conclusion 279

Poland: implementation without transposition
Adam Łazowski 285
1. Introduction 285
2. Setting the stage – an overview of international treaties on combating trafficking in human beings to which Poland is a party 286
3. Implementation with(out) transposition – compliance of Polish law with EU legislation 287
A. An overview 287
B. Control of formal conformity 288
4. The legislation in practice 294
A. General overview of case-law 294
B. Case-studies 296
C. Activities aimed at combating the trafficking in human beings 298
5. Conclusions 299

Slovenia
Matjaž Ambrož and Mojca M. Plesničar 301
1.Introduction 301
2. A rough outline of the Slovenian substantive penal law 303
A. General considerations 303
B. Penal provisions related to trafficking in human beings 305
3. Substantive and formal conformity 306
A. General considerations 306
B. Formal conformity 308
C. Substantive conformity 310
4. Practical application of the norm and control of effectiveness and efficiency 310
5. Reception and perception 311
6. Conclusion 312

Spanish legislation on combating trafficking in human beings
Francisco Javier DE LEÓN, Manuel MAROTO, Miguel ÁNGEL RODRÍGUEZ 315
1. Introduction 315
2. Control of formal and substantive conformity 320
A. Definition of crime 321
B. Penalties provided 322
C. Criminal liability of legal persons 323
D. Jurisdiction and prosecution 324
3. Assistance to victims 325
4. Control of application of the norm 327
5. Control of effectiveness and efficiency 329
6. Reception and perception 330
A. Reception by practitioners and public authorities 330
B. Political reception 331
C. Reception by civil society 332
D. Reception by legal scholars 332
7. Conclusion 333

Le Royaume-Uni
John SPENCER et Giulietta GAMBERINI 341
1. Introduction 341
A. Le droit pénal matériel interne 341
B. La mise en œuvre d'instruments internationaux 345
2. Conformité formelle et substantielle 347
A. Exigences répressives 348
B. Protection des victimes 356
3. Mise en œuvre pratique 359
A. Enquêtes et poursuites 359
B. Jugement 362
4. Efficacité et efficience 365
5. Perception 366
A. Praticiens 366
B. Politiques 367
C. Société civile 367
D. Presse écrite 368
E. Doctrine 368
5. Conclusions 369

Conclusions
Anne WEYEMBERGH et Veronica SANTAMARIA 379
1. Introduction 379
2. Ratification/transposition des principaux autres instruments relatifs à la traite et distinction entre « traite » et « trafic » d'êtres humains 379
A. Ratification 379
B. Différence entre la « traite » et le « trafic » des êtres humains 380
3. Le texte légal transposant la décision-cadre 381

4. Le contrôle de conformité ... 382
A. Le contrôle de conformité formelle ... 382
B. Le contrôle de conformité substantielle ... 388
5. Effectivité et mise en œuvre pratique ... 388
6. Efficacité et efficience (proportionnalité, subsidiarité et adéquation) ... 390
A. En ce qui concerne l'efficacité ... 390
B. En ce qui concerne l'efficience ... 391
7. Réception et perception ... 392
8. Remarques finales ... 393
A. Contribution de la DC aux objectifs du rapprochement des législations pénales, et plus généralement à l'espace de liberté, de sécurité et de justice ... 393
B. Contribution de l'étude à l'exercice d'évaluation ... 395

Liste des acronymes, abréviations et sigles ... 397
Liste des auteurs ... 403
Table des matières ... 405