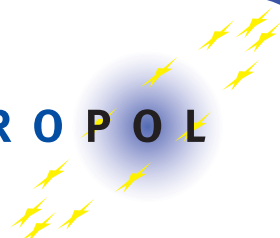


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Legislation on
Trafficking in Human Beings
and
Illegal Immigrant Smuggling

Europol 2005

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Executive Summary

An adequate legal framework at a national level is a pre-requisite for effective measures against trafficking and smuggling. The lack of a legal framework or loopholes in legislation provide traffickers and smugglers with the possibility to focus their activities on those countries where the penalties are low and the risk of being caught is minimal or non-existent.

It is still the case that 7 Member States (MS) have not ratified the United Nations Convention against Transnational Organised Crime, 10 MS have not ratified the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children" and 11 MS have not ratified the "Protocol against the Smuggling of Migrants by Land, Sea and Air". However, all the MS have signed them and are also adhering to the definitions of the Protocols. In spite of this, a lack of specific legislation for trafficking still exists in several countries, which has to be acknowledged as a clear inconsistency. Trafficking and smuggling are two different crimes and both should be dealt with via separate and specific legislation.

The difference in penalties for trafficking for the purpose of sexual exploitation in the Member States is notable. The penalties for an offence vary between a fine and 20 years imprisonment. If the crime has been committed in aggravating circumstances, the penalties vary between six months and a life sentence. The highest penalties in these cases vary between 10 years and a life sentence.

Regarding illegal immigrant smuggling, the penalties for smugglers in different countries also vary. The lowest penalty for smuggling in several Member States is a fine and the highest is 12 years. The biggest difference between highest penalties for an offence committed in aggravating circumstances is found in Italy where it is between 12 months and 15 years.

According to the UN Protocol, a "child" shall mean any person under eighteen years of age. In spite of this, some countries have different levels of penalty depending on the age of the child. It is debatable whether there should be any difference in penalties when the victim of trafficking in human beings for the purpose of sexual exploitation of any kind is a child of, for example, 11, 12, 13 or 14 years old.

Financial sanctions and penalties for carriers differ within the Member States. Financial penalties vary between €3,000 and €25,000 and imprisonment between 1 and 15 years. The responsibility of the carrier to return the third country alien to the country where he or she came from exists in the legislation of most countries. In some countries the confiscation of assets is still not possible.

Legislation related to extradition varies notably in the Member States. Several countries have bilateral agreements that make it possible to avoid normal procedures, which are frequently bureaucratic and complex. The European Arrest Warrant (EAW) has replaced the traditional extradition procedure, offering the possibility to transfer a person for criminal prosecution or to execute a custodial sentence or detention order more effectively and faster than the normal extradition procedure.

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The EAW came into force on 1 January 2004. Only eight of the previous 15 Member States implemented it into their national law in due time. However, by 1 November 2004 all the MS had implemented the Framework Decision except Italy, which still has its draft legislation before Parliament. Despite an undeniable initial delay, the EAW is now operational in most of the cases it was intended for. Its impact is positive, since the available indicators with regards to judicial control, effectiveness and speed are favourable, while fundamental rights are equally observed. This overall success should not make one lose sight of the effort that is still required by Italy and certain other MS to comply fully with the Framework Decision and for the Union to fill certain gaps in the system.¹ .

The Council Directive for the residence permit of limited duration to be issued to the victims of trafficking in human beings and to persons smuggled if they co-operate with the competent authorities as witnesses in criminal procedures was put forward on 11 February 2002. Currently, the practice of giving short-term residence permits within the Member States varies. In general, it is possible for a victim or smuggled person to have a residence permit or at least his/her duration of stay can be extended until the end of investigations in almost every country. However, it should be acknowledged that the procedures and the duration of the residence permit do not follow the Directive in most of the countries.

¹ Report from the Commission, Brussels, 23.02.2005

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1. Introduction

Every year, hundreds of thousands of men, women and children are trafficked and smuggled illegally all over the world. Available information about the real magnitude of the problem is limited. The estimations vary depending on different sources. For example, a recent US Government estimate indicated that worldwide, approximately 600,000–800,000 people are trafficked annually across international borders for sexual exploitation and forced labour; 70 percent are female and 50 percent are children.² However, the Organisation for Security and Co-operation in Europe has estimated that 1.2 million children (under 18 years of age) are trafficked throughout the world annually, bought and sold for exploitation in domestic and farm work, in mines and the commercial sex industry and being used for begging or petty crime.³ The IOM estimates that each year 500,000 women are trafficked to prostitution markets in Europe.⁴

An estimate of the scale of illegal immigration can only be derived from existing hard data which has a link to this phenomenon, such as refused entries/apprehensions of illegal immigrants at the border or in the country, rejected applications for international protection, applications for national regularisation procedures and escorted or forced returns.⁵ According to the Risk Analysis Report Eurostat statistics, more than 420,000 illegal aliens were apprehended within the EU in 2004.⁶ The use of statistics on logged asylum applications as a measurement of the illegal immigration flow into the EU is not the optimal choice. Most asylum applications are made inside the Member States and not at the borders when entering the countries. The statistics are, however, detailed and can be used to show trends. During the year 2004, 282,480 people applied for asylum within the Member States.⁷

The involvement of organised criminal networks in illegal immigrant smuggling and trafficking in human beings can be seen more and more as a rule rather than as an exception. Almost all countries around the world are currently affected by these forms of crime. The expansion of trafficking and smuggling and the cruelty, violence and ruthlessness of criminal organisations dealing with this human exploitation have reached such a level that the only way to combat these forms of crime is for law enforcement authorities to work in close co-operation.

Despite increasing efforts to combat trafficking in human beings and illegal immigrant smuggling, both continue to flourish and to increase. At the same time, legislation, policies and strategies have proven inadequate to prevent and suppress trafficking in human beings and illegal immigrant smuggling or to protect the human rights of the victims. The reasons for this are varied. First of all, different legislation in the countries restricts the effective prosecution of these forms of primarily international organised crime. It should also be acknowledged that trafficking for sexual exploitation and smuggling are mainly treated as prostitution or illegal immigration problems in the vast majority of the destination countries.

² U.S. Department of State, Trafficking in Persons Report 2004 (www.state.gov)

³ The organisation for Security and Cooperation in Europe (www.osce.org)

⁴ www.iom.org

⁵ EU Official Journal, 2002/C 142/02

⁶ 5th Periodical Risk Analysis of the EU Member States' External Border, Risk Analysis Centre, April 2005

⁷ *ibid*

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Consequently, most legislation targets the people who are trafficked and smuggled, not the criminal networks themselves. It is still victims of trafficking and the smuggled persons who are arrested and deported while the traffickers and smugglers continue to operate with near impunity. The focus should be on the smugglers, traffickers and criminal organisations involved, not the smuggled and trafficked persons themselves.

1.1. Objectives and Aims

It has been noted that the differences in legislation on trafficking in human beings and illegal immigration, especially the lack of knowledge in general within the law enforcement authorities of the EU Member States, is an obstacle in international police co-operation to fight these forms of organised crime effectively. In addition, when the 10 new Member States (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) joined the European Union in 2004, there was a special need for close co-operation and a comprehensive knowledge of the legislation on trafficking in human beings and illegal immigrant smuggling within all future 25 EU Member States.

As a European law enforcement organisation, Europol wants to assist common investigations within the EU Member States by providing a compilation of the relevant legislation on trafficking in human beings focusing on the sexual exploitation of women and children and illegal immigrant smuggling in these countries. This compilation also includes a selected comparison and legal aspects related to international investigations dealing with these forms of organised crime.

This document is not intended to be a manual or to provide instructions. The main objective is to enrich law enforcement's knowledge of legislation and further to assist the law enforcement authorities of the EU Member States in common investigations when combating trafficking human beings and illegal immigrant smuggling.

1.2. Methodology and Structure

This is an updated version of the compilation of legislation which was published by Europol at the end of March 2004. The content of this document is based on the contributions received from the MS, EU legislative documents, various reports of international organisations, open source articles and the analysis of gathered information in general. Furthermore, a request for updated legislation was sent out to the MS. In order to avoid old information which could cause confusion and even harm to the co-operation and common international investigations, this compilation does not contain legislation from Luxembourg and France (illegal immigrant smuggling legislation).

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General information was obtained from the following organisations and institutions:

- Organisation for Security and Co-operation in Europe (OSCE)
- Office for Democratic Institutions and Human Rights (ODIHR)
- United Nations High Commissioner for Refugees (UNHCR)
- United Nations Office on Drugs and Crime (UNODC)
- International Organisation for Migration (IOM)
- European Commission
- European Council

The document is organised into five main sections and four annexes. After the introduction, the second section is related to the definitions of trafficking in human beings and illegal immigrant smuggling. In this section, reference is made to the adopted protocols to the United Nations Convention against Transnational Organised Crime in December 2000 (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), Council Directive 2002 Defining the facilitation of unauthorised entry, transit and residence⁸, Council Framework Decision 2002 on combating Trafficking in Human Beings⁹ and the Europol definitions. The UN Protocols were selected because they are the first example where trafficking in human beings and smuggling in persons have been defined in an international instrument. The differences between the UN definitions and the definitions described in the above mentioned EU documents are also compared. Descriptions of other definitions used in the EU Member States are not provided in this document because of the large amount and the national character. Due to many variations on the terms of trafficking and smuggling it should be mentioned that this document follows the terms “illegal immigrant smuggling” and “trafficking in human beings” which are used in the Europol Convention.¹⁰

The third section gives a short overview of selected EU legislation dealing with trafficking in human beings and illegal immigrant smuggling, particularly concerning the European Council framework decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence; The European Council Framework decision on Combating Trafficking in Human beings; the European Council directive on carrier's liability;¹¹ the European arrest warrant (extradition)¹² and the European Council directive on the short-term residence permit.

The conclusions in section four present the main obstacles with regard to the different legislation on trafficking in human beings and illegal immigrant smuggling in the EU Member States.

Section five gives recommendations based on the findings of this report.

⁸ Council Directive 2002/90/EC, OJ L328/17

⁹ Council Framework Decision 2002/629/JHA, OJ L 203/1

¹⁰ Convention, based on Article K.3 of the treaty on European Union, on the Establishment of a European Police Office (Europol Convention), Annex Referred to in Article 2

¹⁰ Council Directive 2001/51/EC, OJ L 187/45

¹¹ Council Framework Decision 2002/584/JHA, OJ L 190/1

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A comparison between the different legislation can be found in Annex I and Annex II. To make such a comparison is difficult because of the different laws within states. To achieve this, the criteria of penalties and the aggravating circumstances in which an offence in trafficking in human beings and illegal immigrant smuggling was committed (e.g. if the offence was committed for financial gain or by a member of an organised gang) have been selected.

Furthermore, for legislation on trafficking in human beings, a specific comparison is made if the victim is a child/minor or has not reached the age of sexual consent. The aim is to highlight once more the gravity of the crime against a child/minor and to show possible gaps in the relevant legislation of a country. If there is no specific legislation in a country, further trafficking in human beings or illegal immigrant smuggling related criminal offences have been taken into account. It should also be noted that the relevant legislation in each country is frequently changing, so this comparison of legislation should be treated as a living document.

Annex III and Annex IV contain the whole wording of the relevant legislation on trafficking in human beings and illegal immigrant smuggling in the EU Member States. Compared to Annex I and Annex II, they are more extensive and do not just provide a quick overview between the relevant articles/sections and the penalties/aggravating circumstances.

2. Definitions

Trafficking in human beings and illegal immigrant smuggling have long been regarded as criminal acts, both nationally and internationally. Consequently, one of the responses to these phenomena has been to promote co-operation in criminal matters in order to suppress them and bring those responsible to justice. A number of treaties have been adopted for this purpose. In connection with this, it has become apparent that clear definitions for trafficking in human beings and illegal immigrant smuggling are important requirements in order to avoid overlaps and to fight these forms of serious crime effectively.

The terms “trafficking” and “smuggling” (related to illegal immigration) have been used interchangeably in the past without any clear distinction. Historically, “trafficking” has been defined in terms of the trade in women and children for prostitution or other immoral purposes. The term “smuggling” can be defined as the facilitated movement of illegal migrants across international borders. There is now a consensus that the two terms differ. It has been argued that while smuggling is an intermediary function which facilitates the illegal crossing of borders, usually with the consent of those smuggled, trafficking is characterised by coercion and the subsequent exploitation of those trafficked. It is further argued that trafficking is an issue of migration with human rights implications as it involves the protection of individuals, whereas smuggling is an issue of crime and border control as it encompasses the protection of states.

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Such views on the distinction between trafficking and smuggling were further strengthened when the United Nations adopted two Protocols to the United Nations Convention against Transnational Organised Crime in December 2000, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹³ and the Protocol against the Smuggling of Migrants by Land, Sea and Air¹⁴. The Protocols represented a major development in international law. It was the first time that trafficking in human beings and smuggling have been defined in an international instrument.

Some of the views on the distinction described above are reflected in the definitions of the two Protocols. While the definition of trafficking contains the element of coercion, that of smuggling does not. It is also the case that the definition of trafficking emphasises subsequent exploitation, whereas the definition of smuggling is characterised by the facilitated illegal entry of a person from one country into another. Since these two Protocols are the first legally binding instruments to have defined trafficking and smuggling and are gradually being accepted by States, they will be used to reinforce the distinction between trafficking and smuggling. Both Protocols can serve as a model for national legislation in proposing the severity of punishment and effective measures to combat and prevent trafficking and smuggling.¹⁵

In EU legislation, the definitions for trafficking and smuggling are stated in the Framework Decision on trafficking in human beings and Framework Decision on defining the facilitation of unauthorised entry, transit and residence. There are a few differences that are worth mentioning in this context: the EU definition on trafficking does not recognise the removal of human organs which is the case with the UN definition. One of the preconditions in the UN definition on smuggling is that a financial or other material benefit is obtained directly or indirectly. The EU definition requires either 'intentional assistance' (Article 1a) or 'intentionally assistance for financial gain' (Article 1b).

2.1. UN Definition of "Trafficking in Persons"

"Trafficking in Persons" is defined in Article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the first time that the international community has developed and agreed to a definition. Essentially, trafficking consists of actions in which offenders gain control of victims by coercive or deceptive means or by exploiting relationships, like those between parents and children, in which one party has relatively little power or influence and is therefore vulnerable to trafficking. Once initial control is gained, victims are moved to a place where there is a market for their services and where they often lack language skills and other basic knowledge that would enable them to find help. Destinations are commonly in foreign countries, but that is not always the case - international borders do not have to be crossed. Upon arrival at their destination, victims are forced to work in difficult, dangerous and usually unpleasant occupations, such as prostitution, the production of child pornography or general labour, in order to earn profits for the traffickers. Sometimes, victims are simply sold from one criminal group to another, but unlike other commodities, they can be made to work for long periods after arrival at their final destination, generating far greater profits for traffickers at all stages of the process.

¹³ Adopted by resolution A/RES/55/25 of 15 November 2000 at the 55th session of the General Assembly of the United Nations, (www.uncjin.org)

¹⁴ Ibid, (www.uncjin.org)

¹⁵ Trafficking and Smuggling in Europe (Tom Obokata, University of Nottingham), 2002

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Article 3 of the Protocol provides a definition for the crime of Trafficking in Persons:

- (a) "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, 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.
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article.
- (d) "Child" shall mean any person under eighteen years of age.

Several significant issues were resolved in developing this definition and other Protocol provisions. The broad range of forms taken by modern trafficking was difficult to cover in a single provision, particularly with the degree of clarity needed to form the basis of criminal laws adopted by national legislatures. The definition, criminalisation requirements and other elements of both the Convention and its Protocols, therefore, set only minimum standards, which countries can exceed or supplement in accordance with their needs. The role of victim consent was also a difficult issue. On the one hand, negotiators were aware that victims often consent to their initial recruitment based on deception or misinformation about where they will be taken and what will happen when they arrive. The reality is that any initial consent is usually rendered meaningless, if not by the initial deception, then by the use of force or other coercive or abusive conduct on the part of the traffickers. On the other hand, requiring countries to make the consent of victims completely irrelevant could exclude valid defences and raise constitutional or other problems in many countries. The solution was to specify that, while consent may initially be obtained by accused traffickers, consent to initial recruitment is not the same as consent to the entire course of trafficking and any alleged consent to exploitation must be deemed irrelevant if any of the means of trafficking listed in the definition have occurred (i.e. the threat or use of force, coercion, abduction, fraud, deception or the abuse of power).

A third issue was whether the Protocol should focus on women and children, who are the most common victims of trafficking, or be extended to all persons. Negotiators referred this question back to the General Assembly, which expanded the original mandate to include trafficking of all "persons", regardless of age or gender, and the Protocol was finalised on that basis.

Signature and Ratification

The current situation of the Member States on the signature and ratification of the Protocol¹⁶:

Signed: All Member States

Ratified: Belgium, Cyprus, Denmark, Estonia, France, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden.

3.2. UN Definition of “Smuggling of Migrants”

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air aims to criminalise the smuggling of migrants and those who practise it, while recognising that illegal migration itself is not a crime and that migrants are often victims needing protection. It requires countries to make migrant smuggling a criminal offence under their national laws, to adopt special measures to crack down on migrant smuggling by sea, to boost international co-operation to prevent migrant smuggling and to seek out and prosecute the smugglers.¹⁷ The protocol is a landmark in the fight against the smuggling of migrants and another milestone in the global effort to combat transnational organised crime. It is also an important international instrument in the area of co-operation in criminal justice matters following the Convention against Transnational Organised Crime, which came into force on 29 September 2003, and its Protocol against Trafficking in Persons, which entered into force on 25 December 2003.¹⁸

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air, which came into force on 28 January 2004¹⁹, provides a definition for the crime of illegal immigration:

Article 3:

- (a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;
- (b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

¹⁶ United Nations Office on Drugs and Crime (UNODC), a global leader in the fight against illicit drugs and international crime, (www.unodc.org)

¹⁷ European Commission, IP/03/1185

¹⁸ UN Information Service (UNIS)

¹⁹ Ibid

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- (c) "Fraudulent travel or identity document" shall mean any travel or identity document:
- That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or
 - That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
 - That is being used by a person other than the rightful holder.
- (e) "Vessel" shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a government and used, for the time being, only on government non-commercial service.

Signature and Ratification

The current situation of the Member States on the signature and ratification of the Protocol:²⁰

Signed: All Member States

Ratified: Belgium, Cyprus, Estonia, France, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain

2.3. The definition on Trafficking in Human Beings in accordance with the Council Framework Decision on combating Trafficking in Human Beings

Article 1

1. 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.

²⁰ United Nations Office on Drugs and Crime (UNODC), a global leader in the fight against illicit drugs and international crime, (www.unodc.org)

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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.

2.4. The definition of Illegal Immigrant Smuggling in accordance with the Council Directive on Defining the facilitation of unauthorised entry, transit and residence

Article 1

- a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
- b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2.5. Europol Definition for Trafficking in Human Beings and Illegal Immigrant Smuggling

The Europol definitions for trafficking in human beings and illegal immigrant smuggling have been supplemented by the Council decision taken in December 1998.

Definition for Trafficking in Human Beings:

"Subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children".²¹

The definition has been supplemented with the following text:

"These forms of exploitation also include the production, sale or distribution of child pornography material".

This extension of the mandate came into force on 1 January 1999.

²¹ Convention, based on Article K.3 of the treaty on European Union, on the Establishment of a European Police Office (Europol Convention), Annex Referred to in Article 2

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Europol Definition on Illegal Immigrant Smuggling:

“Activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the Member States of the European Union, contrary to the rules and conditions applicable in the Member States.”²²

Comments on the Europol Definitions

The Europol definitions for illegal immigrant smuggling and trafficking in human beings are described in Annex 2 of the Europol Convention. Due to the fact that the Europol definitions are not in line with any of the definitions that are internationally recognised and as Europol is the EU law enforcement organisation, a proposal to change Europol's

definitions on trafficking in human beings and illegal immigrant smuggling in accordance with the definitions of the Council Directive on defining the facilitation of unauthorised entry, transit and residence, and the Framework Decision on combating trafficking in human beings has been made and the procedure is currently ongoing within Europol.

Europol does not have any definition for child pornography, and as it is within Europol's mandated areas, it is also proposed that the definition stated in the ²³**Council Framework Decision on combating the sexual exploitation of children and child pornography** should be added to the Annex of Article 2 of the Europol Convention.

3. EU legislative tools

A large amount of Council Decisions and Directives relevant to this report exist on a European level. For this reason, only the following important documents will be explained in more detail, which are related to common international investigations and the harmonisation of penalties that aim to facilitate the prosecution of people smuggling and human trafficking. The documents referred to are the Council Framework decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence; the Council Framework decision on Combating Trafficking in Human Beings; the Council Directive on supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (Carriers liability); the European Arrest Warrant, and the Council Directive on the short-term residence permit for the victims of trafficking in human beings and smuggled persons who give evidence against the traffickers/smugglers. All documents improve the harmonisation of law within the EU Member States and aim to fight these forms of organised crime more effectively.

²² Ibid

²³ The Council Framework Decision, 2004/68/JHA, of 22 December 2003 on combating the sexual exploitation of children and child pornography

3.1. Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence²⁴

The aim of the Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence is to state the minimum for penalties, liability of legal persons and jurisdiction. As in two other documents related to penalties, the Council Framework decision on Combating Trafficking in Human Beings and the Council Directive on defining of unauthorised entry, transit and residence, this Decision does not indicate any specific penalties for an offence of this nature or for legal persons concerning imprisonment and financial penalties. However, the confiscation of the means, prohibition on practising the occupational activity and deportation can be accompanied by other measures. In aggravating circumstances, the penalty should be not less than eight years of imprisonment. In order to be consistent with national penalty systems, the maximum penalty could be different but not less than six years.

3.2. The Council Framework decision on Combating Trafficking in Human Beings

In accordance with the principles of subsidiarity and proportionality, the Council Framework decision on Combating Trafficking in Human Beings confines itself to the minimum required in order to achieve a common and comprehensive approach towards trafficking especially regarding sanctions. According to Article 3, the Member States should take the necessary measures to ensure that trafficking is punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition. In aggravating circumstances, the maximum penalties for imprisonment should be not less than eight years.

3.3. European Council Directive on carriers' liability²⁵

The aim of the Council Directive is to supplement the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, and to define certain conditions with respect to their implementation. According to Article 2, Member States shall take the necessary steps to ensure that the obligation is on carriers to return third country nationals in cases where the carrier that was to take the person to his country of destination refuses to take him on board or the authorities of the destination state have refused him entry and have sent him back to the Member State through which he transited. According to Article 4, the maximum financial penalty is not less than €5,000 and the minimum penalty is not less than €3,000 for each person carried or the maximum amount of penalty imposed as a lump sum for each infringement is not less than €500,000 irrespective of the number of persons carried. Furthermore, the Member States have the right to adopt other measures involving penalties of another kind, such as immobilisation, seizure and confiscation of the means of transport, or temporary suspension or withdrawal of the operating licence.

²⁴ Council Framework decision 2002/946/JHA, 28 November 2002

²⁵ Council Directive 2001/51/EC, 28 June 2001, supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, 9352/01, FRONT 41, COMIX 419

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According to the information received from the Member States (11 answers), the financial penalties vary between €3,000 to €25,000 and prison sentences range between 1 to 15 years. The responsibility of the carrier to return the third country alien to the country from whence they came exists in the legislation of these countries. Although these countries follow the Directive of Carriers liability, including the set penalties, there is a need for harmonisation. In some countries, there is no detention, just a financial penalty and in others aliens can be detained for up to 15 years.

Some Accession Countries have already implemented the Directive in their national law (e.g. Poland and Slovenia) and implementation is in process in Hungary. In Lithuania, the carrier is responsible for checking travel documents and is obliged to return the person to the country where he/she came from. Prison sentences are a maximum of 10 years for smuggling and 8 years for trafficking.

3.4. European Arrest Warrant (EAW)

On 11 December 2001, the EU reached a political agreement on a European Arrest Warrant valid for the entire territory of the European Union. Its purpose is to facilitate law enforcement right across the European Union. The European Arrest Warrant takes the form of a judicial decision handed down by an EU Member State for the apprehension and return by another Member State of a wanted person to be prosecuted or to have a sentence or a detention order against a wanted person carried out. It will replace the traditional extradition procedure. The judiciary of the EU Member States will no longer have to go through the formal extradition procedure in order to forcibly transfer a person from one Member State to another to conduct a criminal prosecution or to execute a custodial sentence or detention order. The EU Framework decision itself defines "European Arrest Warrant" as any judicial decision issued by a Member State with a view to the arrest or surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution; executing a custodial sentence; or executing a detention order.²⁶ The Warrant applies, where a final sentence of imprisonment or a detention order has been imposed for a period of at least four months, or for offences punishable by imprisonment or a detention order for a maximum period of at least one year. Each Member State may refuse to execute a European Arrest Warrant if final judgment has already been passed by a Member State upon the requested person in respect of the same offence; if the offence is covered by an amnesty in the executing Member State; or if the person concerned may not be held criminally responsible by the executing State owing to his age. For a list of 32 serious offences - punishable by deprivation of liberty of at least three years - the surrender of the person does not require the verification of the double criminality of the act. Dual discrimination requires that the facts which motivated the issuing of an arrest warrant in one Member State were also incriminating in the Member State where the surrender is to be carried out. Examples of serious offences subject to the European Arrest Warrant are, among others, trafficking in human beings, facilitation of unauthorised entry and residence, sexual exploitation of children and child pornography, participation in a criminal organisation, corruption, fraud and the illicit trade in human organs.²⁷

On 1 January 2004 the European Arrest Warrant entered into force in eight of the fifteen EU Member States: Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden and the United Kingdom.

²⁶ Council Framework Decision 2002 on the European Arrest Warrant and the surrender procedures between Member States, Chapter 1 (General principles), Article 1

²⁷ *ibid*

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As of 1 November 2004, all the Member States had transposed the Framework decision except Italy, which still has its draft legislation before the parliament.²⁸

3.5. European Council Directive on the short-term residence permit²⁹

This Directive introduces a residence permit intended for victims of trafficking in human beings or, if a Member State decides to extend the scope of this Directive, to third-country nationals who have been the subject of an action to facilitate illegal immigration to whom the residence permit offers a sufficient incentive to co-operate with the

competent authorities while including certain conditions to safeguard against abuse. The third country nationals should be informed of the possibility of obtaining a short-term residence permit and should be given a period in which to reflect on their position. During this period, the person may not be exiled, will have access to housing, medical and psychological care and will have access to free legal and language assistance. The residence permit will be valid for six months and may be renewed for a further six months if the conditions under which it was issued continue to be fulfilled. It will give its holder access to the labour market, vocational training and education. Furthermore, the Member States will remain free to make its issue conditional on the victim following an integration programme with a view to either settling in the host country or returning to their country of origin.

The Member States will have to take into particular consideration the conditions of certain more vulnerable categories. A prerequisite for getting a short-term residence permit is verification by the responsible authorities of whether the inclusion of the person in any legal proceedings would be of use, whether there is factual willingness for co-operation and whether the person has genuinely severed their links with the criminals. The Directive will be applicable only to persons who have reached the age of majority. Specific measures will be laid down for unaccompanied minors. On the expiry of the residence permit, ordinary aliens' law will apply.

Each year, the Member States must inform the Commission of the number of residence permits issued as well as information on the rehabilitation programmes (if applicable).

On 30 June 2007, the Commission must present a report to the European Parliament and the Council on the application of this Directive and propose any amendments that are necessary.

The current situation in the Member States concerning residence permits for victims of Trafficking and Smuggling

Belgium: Although there is no specific law, the commission for the protection of witnesses can grant a victim/witness and members of their family ordinary or special protection if threats have been made against them because of their testimony.

²⁸ Report from the Commission, Brussels, 23.02.2005

²⁹ Council Directive 2004/81/EC, 29 April 2004, (OJ L 626/19, 6.8.2004)

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If a victim/witness files a complaint after a 45-day “reflection delay” (suspended expulsion order), a 3-month “declaration of arrival” may be issued. This may be followed by a 6-month Certificate of Registration in the Immigration Register, which depends on the prosecutor’s decision to initiate legal proceedings and is renewed until the end of criminal proceedings. Permanent residence status may be granted, normally after trial.³⁰

Cyprus: The enactment of the protection of Witnesses Law No 95(I) of 2001 provides a comprehensive scheme for the protection of victims/witnesses and those who assist in the fight against crime (including residence permits).

Czech Republic: In the Czech Republic, victims/witnesses willing to testify against traffickers/smugglers may be offered temporary residence permits, a work permit, access to social assistance and, in extreme cases, police protection. The problem of regulating the stay of victims in the Czech Republic was not satisfactorily resolved in 2002, as the question was still regulated primarily by Article 35(1)(a), the granting of a visa in order to permit stay of Act No. 326/1999 Coll. “On the Residence of Aliens Act in the Czech Republic”. In practice, this visa is not guaranteed to all trafficked and smuggled persons, who are in many cases perceived as committing the crime of staying in the Czech Republic illegally and are expelled from the country.

Denmark: In the government’s action plan from 2002 on combating trafficking in women, the Danish Immigration Service decided that the time limit for an alien to leave Denmark can be extended to 15 days (Article 33 of the Aliens Act). The Danish Government is at present deliberating a possible prolongation of the time limit. Currently, Danish legislation does not provide the opportunity for smuggled persons to have a short-term residence permit. In practice, the time limit for leaving Denmark has been extended for those smuggled persons who assist in a prosecution.

Estonia: The new Witness Protection law came into force on 21 July 2005. Although the law does not mention the residence permit as such it can be understood that it is possible to have the permit issued.

Finland: In terms of witness protection, there is not yet any witness protection programme or provisions specific to victims/witnesses of trafficking/smuggling in Finland due to the new legislation which came into force on 1 August 2004.. More generally, temporary leave to remain in the country for a person co-operating with the criminal justice system may be possible in exceptional circumstances.. In relation to smuggling, almost all smuggled persons seek asylum and their applications are handled via the normal asylum procedure. However, in order to apply the Council Directive in due time, the proceedings to change the Aliens Act have already started.

Germany: Germany improved its victim assistance efforts in 2004 by amending immigration and victims’rights legislation. Following a four-week “reflection period,” trafficking victims who agree to testify against their traffickers may now obtain a temporary residence permit. The Victims’ Rights Reform Law, enacted in September 2004, expanded the rights of crime victims in criminal proceedings, including trafficking victims. The legislation entitles victims to interpreters and allows third parties to be present during police questioning.³¹

³⁰ Ibid

³¹ Trafficking in Persons Report, June 2005, Department of State, USA

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The decision for a residence permit for smuggled persons is made by the appropriate aliens office on behalf of the public prosecutor's office. The duration of the residence permit suspending deportation depends on several criteria such as the need for the smuggled persons to be available as witnesses in criminal proceedings, the importance of the evidence to be given or the actual risk.

Greece: A victim/witness of trafficking/smuggling in Greece can obtain a residence permit before the commencement of legal proceedings in order to decide whether or not to act as a witness. The residence permit granted is valid for as long as judicial and police authorities decide. It is impossible to predict the period of time that will be decided upon. During this time, administrative deportations are halted. During the legal proceedings, the person will receive a residence permit which will be valid until the proceedings are finally concluded.

Hungary: The Aliens Act 39/2001 on an alien's entry into and residence in Hungary allows short term relief from deportation and provides the Alien Police with the opportunity to grant a residence permit on humanitarian grounds to foreigners who cooperate with the criminal justice authorities to discover offenders of trafficking and smuggling.

Ireland: The Department of Justice, Equality and Law Reform is responsible for granting permission to remain in Ireland. It is also responsible for determining the length of the permission to stay. Within the terms of Irish immigration law, it is possible for a victim/witness to be granted temporary residency.

Italy: In Italy, victims/witnesses of trafficking and smuggling can get a short-term residence permit until the prosecution has been concluded. The Public Prosecutor holds the authority for this decision and gives the authorisation to the provincial police authority. If, after fifteen days, the Public Prosecutor has not replied, the person must be sent back to his/her country of origin. Regulations for victim/witness protection can be found in Article 18 of the Immigration Law 286/98.

Latvia: Article 106.3 of the Criminal Procedure Code determines the basis and reasons for special procedure protection. Special procedure protection can be granted if, due to the evidence given by victims, a real threat to their lives, property and legitimate interests has occurred or such threats have been expressed or there is a valid reason to believe that such a threat might occur.

Lithuania: Currently, there is no opportunity for the victims/witnesses of trafficking and smuggling to have a short-term residence permit. This is foreseen in the new Law on the Legal Status of Aliens which is under discussion. Smuggled persons are temporarily lodged in the Foreigners Registration Centre at the State Border Guard Service at the Ministry of Internal Affairs (by decision of the court).

Malta: In Malta, Title IV of the Police Act (Chapter 164) regulates the protection of witnesses and victims. Article 75 states, "where a person is the victim of a crime who is to be produced as a witness in any criminal proceedings against any principal or accomplice in the crime and that person is concerned for his safety, the Commissioner of Police may, subject to the provisions of Article 76, set up a witness protection programme hereinafter referred to in this part as "the programme".

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The programme includes the granting of residence permits".³² There is no legal provision which grants a residence permit to persons smuggled into the country.

Netherlands: Despite illegal entry, most victims/witnesses of trafficking and smuggling are not prosecuted, due to the use of discretionary powers. If they provide a witness report, they will be given a residence permit valid during the investigations.

Poland: The Act of 13 June 2003 regulates the protection to aliens within the territory of the Republic of Poland (Journal of Laws of 2003, No. 128, item 1176). Furthermore, Article 33 of the Aliens Act provides the opportunity for smuggled persons to have a short-term residence permit (issued for a maximum of 3 months, if necessary to support the purpose of the prosecution).

Portugal: In Article 137-B (Statutory Law n. 244/98), there is provision for a foreign national that co-operates with the investigation of criminal activities, namely the investigation of organised crime, to be given a residence permit without having to obtain a visa.

Slovakia: In early 2003, the government initiated an inter-agency task force, with NGO representation, to discuss improving witness protection and victim assistance for all crime victims, including the granting of residence permits. This initiative was rejected because of the legislative problems. The Witness Protection Service should provide witness protection based on the relevant law, but this law does not cover any foreigners without residence permit. Illegal Immigration Bureau is responsible for issuing the residence permits, but they were strongly against such proposal because potential witnesses and/or crime victims are located in the Refugee Camps with other refugees and that might cause problems. Illegal Immigration Bureau has proposed to the Government to find another solution.

Slovakia co-operates with foreign governments and has concluded bilateral co-operation agreements with its neighbours, which have facilitated joint law enforcement investigations. The government does not have mechanisms in place to protect victims/witnesses who could be detained and deported.

Slovenia: The Association KLJUC, an NGO, has concluded agreements on co-operation with the Ministry of the Interior and Supreme Public Prosecutors Office of the Republic of Slovenia. These agreements cite the possibilities and the ways of acquiring temporary residence for the victims of trafficking in human beings. Those victims that would like to co-operate with the judicial authorities and with the law enforcement authorities shall obtain permission for temporary residence for a period of one year, based on the findings and approval of the competent Prosecutor's office. This permission may be extended for the duration of penal procedures. Even before obtaining permission for temporary residence, a victim of trafficking in human beings may obtain permission to stay for six months, for the period of recovery, without the condition that she/he will co-operate with the law enforcement authorities. Based on the agreement on co-operation, permission to stay will be issued for a period of three months.

³² Legal-Malta, the Maltese portal 2004 (www.legal-malta.com)

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Permits to stay in the Republic of Slovenia are issued by the police, while the competent administrative body of the Ministry of the Interior issues permits for temporary residence to the victims of trafficking in human beings. Smuggled persons do not have the opportunity to get a short term residence permit if they assist in a prosecution.

Spain: In Spain, victim/witness protection is regulated in Article 59 of Aliens Law. If a victim/witness of trafficking in human beings or facilitated illegal immigration, prostitution or illegal labour co-operates during the investigation and judicial prosecution process, they will be provided with a residence permit in Spain for 1 year (renewable).

Sweden: A new provision regarding the possibility to issue a time-limited residence permit has been inserted in the Aliens Act in October 2004. A time-limited residence permit may be issued to a victim or witness if this is deemed necessary in order to

conclude a preliminary investigation or the main proceedings in a criminal case. Depending on the complexity of the investigation or if the judgement is appealed, the time-limited residence may be extended upon application by the prosecutor.³³

UK: The UK deals with all victims of trafficking on a case by case basis. There are no provisions to allow a person to remain solely on the basis that they have been trafficked. Those who claim to be trafficked to the UK are normally returned to their country of origin or to the country of embarkation (if the person has a valid residence permit in that country) if their claim to remain in the UK fails. If leave were granted due to the particular circumstances of the case, and it was later established that this leave was obtained by deception, the UK has provisions to take administrative removal action. The setting of removal directions would invalidate any leave that had been granted. For smuggled persons, again, each situation is looked at on a case by case basis. There is no automatic right to a short term residence permit if one assists in a prosecution.

³³ Ministry of Industry, Employment and Communications in Sweden, Regeringskansliet, October 2004

3. Conclusions

Trafficking in Human Beings and Illegal Immigrant Smuggling constitute a threat to public security with harmful social and economic consequences. For this reason, high level discussions on these forms of crime and especially a common approach for the harmonised legislation and penalties for facilitators should be a high priority within the new expanded European Union. Both of these criminal phenomena are currently in the hands of organised criminal networks. They involve persons operating simultaneously in the territories of several countries. Therefore, only concerted action by all EU Member States will work, as co-operation on matters relating to internal security reinforces stability at the regional level.

Illegal immigrant smuggling and trafficking in human beings can be seen as a most profitable business for criminal organisations because of the lack of criminalisation or the loopholes in legislation in these areas of crime in most of the countries. In order to combat organised crime effectively, basic justification for common investigations should exist.

Although there have been a lot of improvements in legislation on a national level, the lack of implementation of international agreements as well as European legislative tools, not only on a legislative level but also in practice, especially regarding the penalties, still exist.

The attached comparison of relevant legislation (Annex I and Annex II) identifies the countries that have a gap in specific legislation in these criminal fields. The levels and types of penalties vary considerably between the Member States which is contrary to the aim of European Union policy on the harmonisation of legislation. The sovereignty of each country gives them the right to decide about legislation on a national level but in order to combat trafficking and smuggling effectively within the EU, law enforcement authorities should at least have the same basic level of justification for their common actions against criminal organisations dealing with trafficking and smuggling. The differences in existence between sanctions within the Member States is an obstacle for essential and effective law enforcement co-operation and on a national level, only a few of the Member States have a legal framework which is suitable and effective enough to prevent organised trafficking and smuggling activity.

It should be remembered that a major cause of illegal immigrant smuggling and trafficking in human beings is low living standards in the states of origin and that investing in the development of these states will assist in the prevention of these activities. Thus, specific legislation on combating trafficking and smuggling can never totally suppress these forms of organised crime, but it can restrict them.

4. Recommendations

Based on the findings of this report, Member States law enforcement and especially decision makers should consider implementing the following recommendations which aim to harmonise the legislation which would further lessen the constraints for the successful combating of trafficking in human beings and illegal immigrant smuggling.

- The MS should, if not already done, consider implementing the following decisions as soon as possible:
 - Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence
 - Council Framework Decision on Combating Trafficking in Human Beings
 - European Council Directive on carriers' liability
 - European Arrest Warrant (Extradition)
 - European Council Directive on the short-term residence permit

Related to the above mentioned EU legislation the following recommendations are given:

- Specific and separate legislation for trafficking and smuggling should be implemented
- The age of a child should be defined as under 18 years of age.
- The penalties for traffickers and smugglers should follow at least the standards of EU legislation
- The obligations and sanctions against carriers should follow at least the standards of the European Council Directive on carriers liability
- Legislative measures should be taken to ensure appropriate protection for persons trafficked and smuggled
- A residence permit of limited duration should be issued to the victims of trafficking and persons smuggled if they co-operate with the competent authorities during investigations and as witnesses in criminal procedures
- All possible investigative methods should be allowed within the Member States