

The European Union and the Fight against Human Trafficking: Comprehensive or Contradicting?

MENG-HSUAN CHOU

Human Trafficking from a Migration Perspective

Human migration is an eternal phenomenon. Although we may consider various motivations for human migration, it has largely been driven by the human instinct for survival. This motivation is the basic framework through which we must understand all movements of people, even human trafficking. This paper addresses the politics of human trafficking from an EU migration perspective.¹ It shows that recent efforts by European governments to use the EU²—a multilateral and supranational platform—to combat trade in persons has not resulted in putting a comprehensive approach into practice. The comprehensive approach proposes to hold the interests of migrants, sending and receiving countries on an equal basis. By contrast, current EU efforts can be characterized as securitarian. The securitarian approach aims to maintain ‘security’ within the Union at the expense of sending and transit countries, and even those who have been trafficked into the EU. As a result, current EU migration cooperation cannot fully address the underlying factors behind the human trafficking phenomenon. Rather than eliminate these factors, EU efforts perpetuate them.

To substantiate this claim, this paper first examines the main EU migration policy instrument adopted for the fight against human trafficking, namely the Council Directive for ‘the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who co-operate with the competent authorities’³ (hereafter victim of trafficking Directive). Here, the brief analysis shows that the victim of trafficking Directive is unlikely to achieve its objective when implemented. This assessment is made based on the observation that in formulating this Directive, EU member states decided to water down the provisions so that national preferences may still be exercised in practice. This strategy renders a ‘European’ approach meaningless. Moreover, EU member states also ‘tightened’ these provisions so that migrants to whom they would ordinarily apply are

Meng-Hsuan Chou, ‘The European Union and the Fight against Human Trafficking: Comprehensive or Contradicting?’, *STAIR* 4:1 (2008): 76-95

unlikely to avail themselves to protection. As a result, this paper suggests that European authorities are unlikely to obtain the valuable information necessary to prosecute suspected traffickers. To explain how a well-meaning EU proposal for victims of trafficking has resulted in a measure that contributes to perpetuating the human trafficking phenomenon, section two provides an overview of the institutional framework for EU migration cooperation. This overview starts by identifying the nexus between illegal migration and human trafficking within the political discourse of EU migration co-operation. The institutional framework of EU migration co-operation has been such that whilst the EU advocates a comprehensive approach for such co-operation, in practice the institutional framework lends itself towards implementing the security-maintenance aspect of this approach rather than victim protection and rehabilitation. Yet recent developments reveal that there is a concerted effort on the part of the European institutions to advance beyond this impasse. The final section of this paper addresses this development by considering how the Commission proposal for circular migration might potentially serve as part of a wider EU strategy against future human trafficking.

What EU Protection for Victims of Trafficking?

The victim of trafficking Directive is a unique measure because it is the only adopted EU policy instrument that explicitly addresses human trafficking from a migration perspective.⁴ This Directive is the culmination of more than a decade of developing EU strategy to combat illegal migration and it remains a cornerstone of a common EU migration policy.⁵ At the core is this simple objective: to encourage victims of trafficking to come forward and co-operate with European authorities in prosecuting suspected traffickers. In exchange, recognised victims of trafficking will be given a temporary residence permit that would entitle them to 'legality' and a range of associated benefits. By analysing the evolution of this EU Directive from proposal to negotiation and adoption, we may assess the effectiveness of this policy instrument when put into practice and its implications for the global fight against trade in persons.

The draft victim of trafficking Directive identifies two groups of migrants who qualify for protection as victims: those who have suffered at the hands of facilitators and those who have been trafficked.⁶ A facilitator is defined as a person who assists or tries to assist a migrant, usually for financial gain, in entering or moving within the EU or Schengen territories in situations where such an act would be in violation

of national migration law. Migrants are considered victims of trafficking if they have been exploited for their labour in conditions that can be equated with slavery, servitude, prostitution, or sexual exploitation (i.e. pornography) through one of the following ways: coercion, force, threat, and abduction, deceit or fraud, abuse by an authority (i.e. the victim had 'no real and acceptable alternative but to submit to the abuse involved'), 'payments or benefits are given or received to achieve the consent of a person having control over another person.'⁷ The draft victim of trafficking Directive applies only to those who are of age, but member states are free to extend these provisions to younger victims. Information concerning the short-term residence permits—valid for six months—may be given by investigating or prosecuting authorities, associations, or individual non-governmental organisations.

According to the draft Directive, victims of trafficking will be granted a thirty-day reflection period during which to decide if they want to co-operate with the authorities. If member states allow younger victims to testify, the reflection period may be extended. The reflection period officially starts when the victim has severed all ties with suspected traffickers. During this period, victims will be given suitable accommodation, emergency medical care, psychological treatment, necessary social welfare and means of subsistence, free legal aid and translation and interpreting services. Victims may not be deported during the reflection period, although expulsion orders can be issued against them. The reflection period can be terminated before the expiration of the 30 day period if the victims renew contact with suspected traffickers, if there are public order and national security reasons or if the authorities no longer find the victims 'useful.' Once the victims of trafficking have obtained short-term residence permits, they are entitled to access the labour market, undergo vocational and educational training, and obtain primary medical care, with special care given to pregnant or disabled victims as well as victims of rape and other forms of sexual violence. Younger victims may enroll in the member states' public educational system.

The draft Directive stipulates that the residence permit may be renewed for an additional six months if circumstances for its initial issuance remain valid or if judicial proceedings are ongoing. However, the renewal may depend on the victims' participation in a rehabilitation programme, which aims to either integrate the victims into the host society, or to prepare them for the return to their home, or another third country. Authorities may withdraw the short-term residence permit if they believe that the victims' complaints or testimonies are fraudulent, if the victims re-establish contact with suspected traffickers, or for

national security reasons. Member states' migration law will apply after the short-term residence permit expires. If member states fail to apply the provisions of the victim of trafficking Directive, they will be subject to penalties, to be collectively decided by member states at a later point in time.

The draft Directive underwent two years of intense debate, negotiation, and revision. On 29 May 2002, the Economic and Social Committee (ESC) gave its opinion, arguing that the permit should be issued for at least one year to all irregular migrants possessing information to prosecute traffickers and that it ought to be renewable.⁸ The European Parliament approved the proposed Directive with amendments on 5 December 2002. The Council working party on migration and expulsion examined the draft Directive twice—on 17 July 2003 and 1 September 2003—before transmitting it to the Strategic Committee on Immigration, Frontiers and Asylum, which debated the Directive on 22 September 2003.⁹ On 6 November 2003, the Justice and Home Affairs Council approved the new amendments. Member states formally adopted the victim of trafficking Directive on 29 April 2004. At the time of writing, Denmark does not participate in this Directive, and the UK and Ireland have not exercised their 'opt-in.'¹⁰

By examining the changes introduced to the draft Directive, as discussed below, we may make several observations concerning the overall EU strategy towards victims of trafficking. These observations in turn allow us to assess the likely effectiveness of the Directive in terms of its intended goal. Firstly, the provisions of the victim of trafficking Directive are 'watered down' to enable EU member states to maintain flexibility regarding the restrictions placed on their national administrations. Whilst the Directive will now apply to 'all third country nationals' who qualify, the non-discrimination clause has been moved from the main text to the preamble; thereby rendering its legal effect less direct. Moreover, the Council working party deleted the penalty clause, so EU member states that do not implement this Directive will not incur additional costs. EU member states are only required to provide 'an appropriate standard of living and access to emergency medical treatment as well as, where appropriate, psychological assistance' to victims of trafficking during the reflection period. What 'an appropriate standard' entails is not specified, and—given the diversity of health care systems throughout the EU—it is likely to vary. When they have obtained residence permits, victims are authorised to 'exercise an economic activity' rather than have access to the labour market. This ambiguity allows EU member states to impose the requisite work permit and the associated legal challenges should they wish to do so. Also, EU member states are only liable for

providing the 'necessary' health care required for the 'average' victim; again, no details are given as to what 'necessary' or 'average' mean in practice.¹¹ By decreasing the precision of the legal phrasing of the victim of trafficking Directive, EU member states increase the possibility that the Directive can be implemented quite differently throughout the Union. Moreover, the ambiguous phrasing in the Directive hinders the European Commission from monitoring its implementation in an effective manner. The uneven application of the Directive may lead traffickers, often part of complex and multilayered criminal networks,¹² to exploit the regulatory differences between EU member states and to relocate their 'businesses' to those European countries where there is least control of such activities. In such a scenario, watering down the provisions might contribute to both the ineffectiveness and the incoherency of the overall EU strategy against human trafficking.

Secondly, the changes made suggest that EU member states are more interested in having their current legislation adopted at the EU level than in a 'new' policy. This is best exemplified by the debate concerning the duration of the reflection period. The final adopted victim of trafficking Directive does not specify the duration of the reflection period because member states could not agree on how long it should be. For instance, the Netherlands argued that it should be three months—as in the current Dutch legislation—whilst Belgium supported a period of 45 days as in the Belgian legislation. France upheld the Dutch position. Greece, Spain, and Austria all voiced that a reflection period of 30 days was far too long. The Spanish delegate went even further in suggesting that seven days was a more appropriate period. Germany and Sweden both advocated a more 'flexible' approach. The German government proposed to alter the text to 'at least thirty days' and the Swedish delegate indicated that member states should fix what they perceived to be an appropriate reflection period.¹³ Whilst consistent with all EU negotiations, this development reveals that when it came to the 'nuts and bolts' of the victim of trafficking Directive, the emphasis was less on how to ensure that victims will come forward to help European authorities and more on how to reconcile the different positions of EU member states. In fact, this example is representative of the approach towards formulating this Directive. In the introduction to the victims of trafficking Directive, the Commission has explicitly stated that the directive is 'not a victim protection or witness protection measure.'¹⁴ This statement allows us to ask how effective a counterintuitive approach can be in practice, an aspect addressed more at length in the next section.

Finally, the changes introduced to the victim of trafficking Directive reveal that EU member states removed several key incentives that might

have encouraged victims to come forward and co-operate with competent authorities. For instance, EU member states eliminated the possibility that victims' family members could also obtain short-term residence permits. Translation and interpretation are no longer provided free of charge; free legal aid is also removed. In addition, the duration of the short-term residence permit has been altered to not exceed six months 'or as long as it is deemed necessary for the proceedings.' These changes suggest that EU member states decided to 'tighten' these provisions so that they will not be open to abuse by unscrupulous 'victims.' This contradictory approach reflects the inconclusiveness of the current debate concerning the nature of irregular migration, in which an unauthorised migrant can be seen as both criminal and victim.¹⁵ Another important change made by EU member states is that only competent national authorities may inform victims on how to obtain a short-term residence permit. Given that religious associations and other migrant non-governmental organisations are usually quite involved in this process, this change is likely to result in a narrow application of the Directive.¹⁶ Moreover, we may also question how many victims of trafficking are likely to come forward as it has been firmly established in the literature that migrants who are trafficked do not ordinarily trust authority figures.¹⁷ Added to this is the possibility that recognised victims of trafficking may be deported at any time during or after they have fully co-operated with authorities. In sum, by removing some of the critical incentives for victims of trafficking to duly co-operate with European authorities, the valuable insider information necessary to prosecute suspected traffickers might not be forthcoming from this source.

The analysis presented in this section suggests that the victim of trafficking Directive will not be as effective in practice as it sets out to be. This conclusion is reached by situating the changes introduced to the draft EU Directive in both the wider EU and human trafficking contexts. Within the EU framework, by watering down the provisions EU member states undermine the creation of a common European approach towards human trafficking. Given the elusive nature of trade in persons, it will become increasingly difficult to regulate the abuse of unauthorised migrants within an internally borderless EU. Moreover, as scholars have empirically demonstrated, by 'strengthening' the EU external border EU member states also increase the likelihood that migrants will turn to traffickers for entry into the Union.¹⁸ In the human trafficking context, by removing important incentives that might encourage victims of trafficking to co-operate with competent authorities, EU member states detract from the intended goal of the victim of trafficking Directive. If the sole contribution of the EU Directive is to legalize co-operative victims'

stay whilst proceedings against traffickers are ongoing, it will certainly be ineffective because in practice many migrants who are victims of traffickers enter the EU legally and overstay. Hence, it is unlikely that these very same migrants will jeopardize their assured, yet 'illegal' residence and labour 'opportunities' for a status they confidently know to be both transient and insecure. If a comprehensive EU counter-trafficking strategy were to consist of three elements—prosecution, protection, and prevention¹⁹—the formulation of the victim of trafficking Directive could be seen as a manifestation of the *prosecution* component of this approach. The evaluation presented in this section does not purport that a victim-focused approach is the best strategy forward. However, the analysis does suggest that without being comprehensive, the EU strategy towards combating human trafficking remains contradictory and likely to perpetuate the phenomenon. To identify the source of this securitarian approach, the next section considers the institutional framework chosen for EU migration co-operation.

Institutionalizing the Non-Comprehensive Approach

This section explains how a securitarian approach for EU migration co-operation emerges in policy formulation and negotiation even though the EU advocates a comprehensive approach. It is argued that this outcome has been the result of the nexus between human trafficking and illegal migration and that the institutional framework chosen for EU migration co-operation perpetuates this nexus. By subsuming human trafficking under illegal migration concerns, the security discourse EU member states use to debate illegal migration has permeated discussions concerning victims of trafficking. Moreover, the institutional arrangement for EU migration co-operation until 2005 was such that the security discourse dominated. It is important to stress that given the scope of this paper, the following discussion only presents a snapshot of the evolution of EU migration co-operation. This brief overview suggests that by examining the political discourse concerning illegal migration and human trafficking and the institutional context within which EU migration co-operation is conducted, we can better explain the preference for the securitarian approach identified earlier.

The confidential Strategy Paper on Migration and Asylum Policy tabled by the Austrian presidency during the latter half of 1998 embodies the security discourse commonly found in EU debates concerning illegal migration.²⁰ To start, the strategy paper criticizes EU progress in the field of migration, finding the results lacking with regard to the intended effects. For instance, the strategy paper notes that 'the Union is still not

able to give accurate information regarding *the number of third country nationals* illegally on the territory of its member states.²¹ Ironically, in light of this statement, the strategy paper then asserts that 'since 1994 numbers of asylum-seekers have stabilized ... *but without a drop in the total number of illegal immigrants.*'²² The strategy paper observes that there has been a general shift in EU member states' policy focus from asylum and temporary protection to 'general questions of migration, *problems of combating facilitator networks and expulsion issues.*'²³ Finally, the strategy paper suggests that 'solutions can only be European, and in two senses: on the one hand, the migration problems in Europe can be solved only by all its countries acting together and, on the other, Europe will have to solve these problems itself and not expect any help from outside.'²⁴ Interestingly, in view of this proclamation, this 'European' strategy will require close co-operation with third countries.

The Austrian strategy paper proposes that the EU adopt a 'model of concentric circles of migration policy.'²⁵ At the heart of this model is the migration control already in place by the Schengen countries for border regulation. The northern EU member states and Schengen members will constitute the first circle. Associated states and Mediterranean EU members will act as the second circle; their primary task will be to bring their migration control up to Schengen standards. The third circle will include the former Soviet states, Turkey, and North African countries; they will be asked to implement 'transit checks and combat[ing] facilitator networks.' Lastly, China and countries in the Middle East and sub-Saharan Africa will make up the fourth circle; they will be assigned the task of addressing push factors that encourage migrants to leave. To ensure that these countries will comply with the EU request, the strategy paper suggests that EU member states make economic aid to third countries conditional on the re-admission of their nationals or persons who have transited through their countries using facilitator services. In fact, the strategy paper recommends that all future bilateral agreements the EU concludes with third countries incorporate a 'migration clause' outlining such obligations. By making aid subject to third countries' co-operation in the return of migrants, the approach proposed by the Austrian strategy paper appears to prioritize EU migration objectives at the expense of transit and sending countries.

After the Austrian strategy paper was leaked in September 1998, public pressure led to the revision of its controversial recommendations,²⁶ but we still find its security discourse within the subsequent policy agenda for EU migration co-operation. For instance, this is the case for one of the key elements of the 1999 Tampere Programme, the 'management of migration flows.'²⁷ To manage migration flows, the Tampere European Council suggested that the EU engage in extensive co-operation with

third countries. More specifically, it suggested using a comprehensive approach. According to the Tampere declarations, this comprehensive approach would address the 'political, human rights and development issues in countries and regions of origin and transit' such as 'combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states, and ensuring respect for human rights, in particular rights of minorities, women and children.'²⁸ This broad strategic overview proposes that the comprehensive approach is mainly concerned with addressing the 'root' causes which force migrants to leave their countries of origin for the EU. Yet reading further we may identify another element pertaining to the comprehensive approach. To improve the management of migration flows, the Tampere European Council also suggested that the EU assist third countries in the voluntary return and readmission of migrants. Moreover, the Council was asked to conclude readmission agreements and introduce similar clauses into future agreements with third countries.²⁹

The unique institutional framework for EU migration co-operation under the Amsterdam Treaty ensures that the security preference of EU member states remains intact. It has been suggested that the Amsterdam Treaty established EU competence in migration regulation when it 'communitised' migration co-operation.³⁰ However, the decision-making procedure for EU migration co-operation post-1997 did not reflect the Community Method³¹ as it is commonly understood. Indeed, EU member states 'froze' the decision-making procedure for supranational migration co-operation as agreed under the Maastricht Treaty. The Maastricht Treaty stipulated that all policies originating from EU migration co-operation could only be adopted after unanimity had been reached in the Council and solely after the Parliament had been consulted and its opinion taken into consideration. The right to initiate EU migration policy proposals was to be shared by the Commission and EU member states. Given the legal nature of the policy instruments available for EU migration co-operation under Amsterdam, the Court of Justice exercised its traditional role, but legal scholars such as Peers remarked that the Amsterdam Treaty did not make this clear.³² This decision-making procedure lasted until 2005, although it was scheduled to expire in May 2004.³³ In sum, before 2005 the decision-making power in the field of migration largely remained in the hands of EU member states, and, by implication, the security discourse underpinning illegal migration was sustained.

The choice for this unique decision-making procedure for EU migration co-operation stems from the unresolved question of competence, i.e. whether the EU truly has authority in regulating entry, movement, and residence of non-nationals. Within EU law, third country nationals

have an ambiguous legal status. As family members of EU citizens, they are entitled to free movement within the Union in situations where EU nationals exercise their right of free movement. The privilege accorded to family members of EU nationals sets this group of third country nationals apart from other migrants. This legal ambiguity provided the context for the Commission to successively claim EU competences in migration regulation throughout European integration since its early years.³⁴ Whilst we may advance arguments concerning both the relative success and failure of European institutions in this endeavour, the debate remains ongoing. What is more crucial for our current discussion is the response that the competence debate provoked. Beyond the formal decision-making procedure for EU migration co-operation post-Amsterdam, EU member states also extended their control over this development by institutionalizing working groups outside the traditional framework for such co-operation.

EU member states institutionalized the High Level Working Group on Asylum and Immigration (HLWG) in 1998 to provide cross-pillar support by bridging the internal and external dimensions of migration policies. More specifically, the HLWG was to 'help reduce the influx of asylum seekers and migrants into the Member States of the European Union. Its main aim is to analyse and combat the reasons for flight taking account of the political and human rights situation.'³⁵ Interestingly, given its mandate, the HLWG is institutionally situated within the General Affairs and External Relations Council (GAERC) rather than the Justice and Home Affairs Council, which ordinarily addresses all migration issues. Moreover, in contrast to its GAERC colleagues, who tend to be from member states' foreign ministries, HLWG officials are usually from ministries of justice or the interior.³⁶ What this means in practice is that justice/interior officials continue to determine all policies containing a migration component, even if some of these aspects have traditionally been decided by foreign ministry officials.

The institutionalisation of the HLWG has important implications for subsequent EU migration policies, because, given that their mandate is to ensure 'safety' within the country, justice/interior officials tend to be more security-oriented than their foreign ministry colleagues.³⁷ The preference for maintaining security is reflected in the five country-specific action plans adopted by the HLWG and submitted to the Tampere European Council. The process through which the action plans were formulated suggests that in practice the EU notion of 'partnership with countries of origin' is less about both partners obtaining shared advantages, rather than about enforcing a unilateral EU strategy for achieving its migration objectives. For instance, the 'Introductory Note' submitted to

the Committee of Permanent Representatives in 2000 remarked that it had been difficult to establish conversations with Afghani officials since the EU and its member states had severed diplomatic relationships with Afghanistan.³⁸ It is hard to imagine how *'partnership with countries of origin'* could be implemented if the EU cannot even establish contact with one of the partners concerned.

The brief overview given in this section suggests that the institutional context matters in explaining the usage of the securitarian approach in addressing the human trafficking phenomenon. The entrenchment of the security preference and the issue of competence have been such that, at the time of writing, the EU has yet to adopt any measure concerning labour migration, which has been argued to be critical in implementing a truly comprehensive approach.³⁹ Indeed, a proposal for a Council Directive on 'the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities' was not approved even after the Council debated it for over two years; the Commission finally withdrew the proposal on 17 March 2006.⁴⁰ Yet there has been a concerted effort on the part of the European Commission to move beyond this impasse. For example, the Commission issued a Green Paper on an EU approach to managing economic migration in January 2005.⁴¹ The Green Paper was transformed into a Commission communication on a 'Policy plan on legal migration' in December 2005.⁴² These two documents in turn formed another Commission communication in 2006, when migration issues were explicitly linked with development objectives.⁴³ Although the Commission will table several proposals for Council Directives concerning legal migration in 2008 (seasonal workers and remunerated trainees) and 2009 (intra-corporate transferees), the outcome remains to be seen. Yet these recent efforts on the part of the European Commission illustrate that there is a push towards a comprehensive approach. The next section considers one of the newest Commission proposals in the field of legal and labour migration in light of its possible contribution towards the global fight against human trafficking.

Circular Migration as Key to Counter-Trafficking

This section starts from the premise that given the structural differences in international economies and governance, the push and pull factors⁴⁴ underlying human migration are likely to persist if no internationally coordinated effort is made. Put simply, unless all countries and state agents are willing to co-operate fully, and with appropriate measures, in

the fight against human trafficking, the phenomenon will continue and even grow in proportion. Such a starting position does not mean that engaged political actors such as the EU should not, or could not, attempt to eliminate (some of) its effects. In fact, by focusing on the EU, this paper is particularly interested in how it can independently contribute to the global fight against human trafficking. Here, it is argued that the notion of 'circular migration' could serve as part of the foundation for all future EU counter-trafficking policies because it fosters the possibility of labour migration for third country nationals.

The concept of circular migration has recently gained currency in the EU. The Commission proposed in a 2007 communication that certain EU member states could engage in a 'mobility partnership' with interested third countries.⁴⁵ The aim of mobility partnerships is twofold: first, to allow EU member states participating in such a scheme to engage the co-operation of third countries in readmitting illegal migrants who are their nationals or who have been found to transit through their territories; second, in return, to permit nationals of these co-operative third countries to legally migrate to the EU for employment, study, or training purposes. The latter aspect, the Commission explains, would also help EU member states address labour shortages. Hence, it is implied, a mobility partnership results in a 'win-win' scenario for the EU. Central to mobility partnership is the notion of circular migration, which the Commission defines as 'a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries.'⁴⁶

According to the Commission communication, two groups of third country nationals will be encouraged to participate in the circular migration scheme: those currently residing in third countries and those in the EU. More specifically, third country nationals falling into the former category may enter the EU for the following activities: seasonal employment, study, training, research, intercultural exchange, and unremunerated voluntary service. The EU may facilitate their entry by establishing a 'fast track' visa application procedure, which will grant them certain rights and obligations. For instance, multi-annual and multi-entry visas and special 'statuses' will be issued to and conferred on migrants who participate in the circular migration scheme; the Commission considers that these will act as incentives for migrants to return to their home countries at the end of their current stay. Moreover, the Commission envisages establishing joint EU visa processing centres in countries where it is currently difficult to obtain consular services. The Commission believes that third country nationals in the latter group—such as doctors and professors—can help mitigate effects of 'brain drain'

by conducting part of their professional activities in their countries of origin. To encourage this possibility, the Commission suggests that member states ensure that these third country nationals will not lose their legal status upon their temporary absence from the EU.

Circular migration is a provocative idea simply because it advocates the creation of legal labour migration channels through which third country nationals may enter the EU. Whilst its current conception also hinges on third countries being involved in the mobility partnership schemes to 'do their part' in readmitting their nationals or those who have been found to transit through their territories, EU member states should still be encouraged to consider the notion given the circumstances of migrants who use trafficking routes to gain entry into and employment within the EU. Research in the field of human trafficking has shown that not all migrants who use the services of traffickers are coerced or tricked. According to Andrijasevic, 'women are rarely kidnapped or coerced into migrating but [...] rely on trafficking networks to realize their migration projects *whether geared towards sex work or some other type of work*.'⁴⁷ This finding suggests that the lack of opportunities for work in their home countries and the availability of work elsewhere, coupled with the increase in restrictive border regimes, prompted these female migrants to use the services of traffickers. In fact, this paper proposes that it might be more useful to consider traffickers as providers of services, i.e., traffickers aid migrants—for profit—in entering a third country where their entry, movement, employment, and residence may or may not be illegal. By creating labour migration channels through which third country nationals may enter the EU legally, European countries effectively enter into competition with traffickers who provide such services.

In promoting circular migration as part of a future EU counter-trafficking strategy, this paper addresses two elements inherent to the human trafficking phenomenon: the availability of labour opportunities and the question of legality. This perspective stems from the observation that migrants do not take unnecessary risks if they can control their political, economic and social environments. To better explain this and also illustrate how circular migration can apply to migrants who use services of traffickers for employment purposes, two examples will be given. First, as a result of few (desirable) job opportunities, migrants who can ordinarily enter the EU legally decide to use traffickers because they provide a comprehensive package consisting of transport, housing, and employment. In this instance, circular labour migration can act as a competing *option* by presenting the migrants with an alternative possibility to realize their economic objective. Second, also due to the

minimal availability of labour opportunities, migrants who cannot enter the EU legally use traffickers both to gain entry and for employment. In this scenario, circular labour migration presents these migrants with a choice to achieve their economic goal. What these migrants ultimately do remains to be seen, but the existence of a circular labour migration scheme introduces or strengthens the element of agency often missing or weak in the current reality of human trafficking.

By focusing on legal labour migration opportunities, this paper does not intend to make light of the physical and psychological abuse often suffered by those who use the services of traffickers or the political and social realities underpinning migrants' reasons for leaving their countries of origin. Rather, the proposal of circular migration is an attempt to challenge the binary perception in the political discourse of irregular migrants as both victims and criminals; the current debate needs to move beyond this dichotomy.

Circular migration is proposed as a *part* of an overall future EU counter-trafficking strategy. Only a comprehensive approach can effectively combat global trade in persons. Indeed, a truly comprehensive approach must also include informational campaigns in third countries, criminal prosecution against traffickers, and development assistance in sending and transit countries.⁴⁸ Moreover, EU member states must also face difficult questions concerning the regulation of the labour sectors in which most irregular migrants using the services of traffickers find themselves. These sectors include domestic health care services, sex work and entertainment, construction, food processing, and hotel services as well as garment manufacturing. These labour sectors are often marked by informality and, in the case of prostitution, characterized by an intense moral and social debate concerning the nature of the 'work.' EU countries interested in addressing global trade in persons must confront the ethnic and gender divide in their labour markets as part of a truly comprehensive approach against human trafficking.

Migration and Human Trafficking

People migrate to improve their economic, social, and political positions or those of their families. Migrants who are trafficked—whether or not they exercised a choice in this process—are no exception. This paper unpacks the political discourse surrounding the debate on human trafficking at the EU level, identifies the explicit and implicit policy objectives and evaluates the key EU migration policy instrument adopted to fight trade in persons. It demonstrates that the debate has been framed

within a security-maintenance discourse, which contradicts the implicit objective of victim protection. Although this paper did not argue that a victim-focused approach is the best and only option, it suggests that victim protection, i.e. a *protection* component, should be a key objective within any comprehensive approach. Only a truly comprehensive approach can effectively address the phenomenon of human trafficking. The paper concludes by explicating how current EU considerations on circular migration may assist ongoing EU efforts against human trafficking. Circular migration serves as a viable legal and labour migration channel for third country nationals who would like to enter and—temporarily—reside in the EU to work. To conclude, if European countries are serious about combating human trafficking through the EU framework, they need to open up more labour migration routes for those third country nationals who are not the most educated, financially stable or well-off, or politically privileged citizens in their countries of origin. ■

Notes

¹ Other perspectives include human rights, crime, health, gender and police. By analysing these efforts strictly from a migration viewpoint, this paper adopts a different approach than the feminist critique of human trafficking, which emphasizes the role of violence, coercion and gender in this development (for an overview, see Andrijašević, R. 'Problematizing Trafficking for the Sex Sector: A Case of Eastern European Women in the E.U. in S. van Walsung, and T. Spijkerboer eds. *Women and Immigration Law: New Variations on Classical Feminist Themes*, (London: Glasshouse Press, 2007), Askola, H. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union, Modern Studies in European Law* (Oxford, Portland, Oregon: Hart Publishing, 2007). In so doing, this paper intends to engage the reader in examining how migration regulation can simultaneously exacerbate and alleviate the human trafficking phenomenon.

² The EU is the current manifestation of over fifty years of close economic, and subsequently political and social, co-operation between a group of European countries. It officially came into existence after its member states signed the Treaty on European Union, also known as the Maastricht Treaty, in 1992. Before 1992, it was variably referred to as the European Community (EC), European Communities, or European Economic Community (EEC) depending on the specific policy area and treaty. The 1957 Rome Treaty established the EEC, one of the three European Communities. The Maastricht Treaty changed the name of the EEC to EC in an attempt to differentiate existing cooperation from defence and police cooperation. To avoid confusion and for simplicity, in this paper I will use the abbreviation 'EU' to refer to both the organisation formed in 1957 and the forum in which cooperation continues to this day.

³ European Commission, '(71 Final) Proposal for a Council Directive on the Short-Term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration

or Trafficking in Human Beings Who Co-operate with the Competent Authorities,' (Brussels: Office for Official Publications of the European Communities, 2002).

⁴ Whilst the EU has adopted measures concerning illegal migration and expulsion of irregularly resident third country nationals, the victims of trafficking Directive is the only migration policy instrument specifically concerned with trade in persons.

⁵ We may trace the origin of the victim of trafficking Directive to a Belgian initiative following the Vienna conference in June 1996, see European Commission, '(567 Final) Communication from the Commission to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation,' (Brussels: Office for Official Publications of the European Communities, 1996). The Belgian proposal suggested the possibility of issuing a temporary permit of stay for recognised victims of trafficking. After the political impetus given to EU migration co-operation by the 1999 Tampere summit, the Commission tabled a proposal for a Council Directive on victims of trafficking on February 11 2002.

⁶ In so doing, the EU approach conflates the difference between 'trafficking' and 'smuggling' and contributes to the tension underpinning the ongoing political debate on irregular migration. Human trafficking and smuggling are traditionally understood as two distinct phenomena by EU member states. For instance, the UK defines people smuggling as the 'facilitation of illegal entry, entering the UK in breach of immigration law,' Great Britain, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (London: Stationery Office, 2001). It follows that those who have solicited the services of human smugglers are considered 'complicit and are effectively customers ... [this] can be a simple business transaction between the criminal and the illegal entrant,' Ibid. By contrast, the UK describes human trafficking as the 'transporting [of] people in order to exploit them, using deception, intimidation or coercion. Those who can truly be described as trafficking victims have usually been treated as little more than a commodity,' *ibid*. See also Wijers, M. and Doorninck, V.M. 'Only Rights Can Stop Wrongs: A Critical Assessment of Anti-Trafficking Strategies,' (available at <http://www.nswp.org/pdf/WIJERS-ONLYRIGHTS.PDF>). I thank one of the reviewers for pointing this out.

⁷ OJ L 203/1, 'Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings,' (Brussels: Official Journal of the European Communities, 2002).

⁸ OJ C 221/18, 'Opinion of the Economic and Social Committee on the "Proposal for a Council Directive on the Short-Term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings Who Co-operate with the Competent Authorities,'" (Brussels: Official Journal of the European Communities, 2002).

⁹ Council Document, '(12958/03) Outcome of Proceedings from Strategic Committee on Immigration, Frontiers and Asylum on 22 September 2003 for "Proposal for a Council Directive on the Short-Term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings Who Co-operate with the Competent Authorities,'" (Brussels: Council of the European Union, 2003).

¹⁰ Whilst they fully participate in the negotiations of all EU migration policies, adopted EU justice and home affairs measures are not automatically applicable to the

UK, Ireland, and Denmark. The rules governing their differentiated participation are outlined in two protocols annexed to the Amsterdam Treaty.

¹¹ Council Document (2003), 12958/03, Council Document, '(11698/03) Outcome of Proceedings from Working Party on Migration and Expulsion on 17/18 July 2003 for "Proposal for a Council Directive on the Short-Term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings Who Co-operate with the Competent Authorities,'" (Brussels: Council of the European Union, 2003), Council Document, '(12228/03) Outcome of Proceedings from Working Party on Migration and Expulsion on 1/2 September 2003 for "Proposal for a Council Directive on the Short-Term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings Who Co-operate with the Competent Authorities,'" (Brussels: Council of the European Union, 2003).

¹² Three studies commissioned by the European Commission illustrate the penetration of criminal networks in human trafficking and how traffickers frequently relocate—both internally within an EU country and also between EU member states—to escape detection, see European Commission, 'Research Based on Case Studies of Victims of Trafficking in Human Beings in 3 E.U. Member States, I.E. Belgium, Italy and the Netherlands,' (Brussels: European Commission, DG Justice and Home Affairs, Hippocrates programme, project number JAI/2001/HIP/023, 2001).

¹³ Council Document (2003), 12958/03.

¹⁴ European Commission (2002), emphasis added, 7. We may assume that this is a Commission strategy given the legal basis cited for the Directive, i.e., Article 63 of the Amsterdam Treaty, which states that the Council is to adopt 'measures on immigration policy within the following areas: (a) conditions of entry and residence...; (b) illegal immigration and illegal residence.' At the time of writing, the Commission does not have competence in witness protection matters.

¹⁵ This dichotomy is highlighted by Aradau, C. 'The Perverse Politics of Four-Letter Word: Risk and Pity in the Securitisation of Human Trafficking,' *Millennium* 33 (2004).

¹⁶ See studies commissioned by the European Commission in three EU member states.

¹⁷ See Andrijasevic 'Problematizing Trafficking,' Anderson, B. and O'Connell Davidson, J. *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study* (Geneva: IOM International Organisation for Migration, 2003).

¹⁸ According to Andrijasevic, 'Quite paradoxically then, increased control over migrants' mobility is not likely to curb transnational crime, but rather to heighten its involvement in migration, due to the increased profits that accrue from trafficking activities,' 'Problematizing Trafficking,' 92.

¹⁹ Askola, 4. The 1996 European Resolution stated that it 'considers that a common policy on trafficking in human beings must be aimed at *prevention, deterrence, prosecution and rehabilitation*,' emphasis added, paragraph 7, OJ C 032, 'Resolution on Trafficking in Human Beings,' (Brussels: Official Journal of the European Communities, 1996).

²⁰ Austria, 'Strategy Paper on Immigration and Asylum Policy,' (1998).

- ²¹ Austria, emphasis added, paragraph 10.
- ²² *Ibid.*
- ²³ Austria, emphasis added, paragraph 14.
- ²⁴ Austria, paragraph 31.
- ²⁵ Austria, paragraphs 59 and 60.
- ²⁶ Sterkx notes that other controversial measures include ‘supplementing, amending or replacing the 1951 Geneva Convention; the enforcement of repatriation of illegal immigrants to their countries of origin; the military interventions to prevent migratory flows since they can dramatically affect the security interests of the Member States,’ see Sterkx, S. ‘The Comprehensive Approach Off Balance: Externalisation of E.U. Asylum and Migration Policy,’ University of Antwerpen Working Paper, Department of Politieke Wetenschappen PSW Paper 2004/4 (2004): 12.
- ²⁷ Council Document, ‘Tampere European Council Conclusions, 15-16 October 1999,’ (Brussels: Council of the European Union, 1999).
- ²⁸ Council Document (1999), paragraph 11.
- ²⁹ Practitioners question the efficacy of readmission agreements, see Bouteillet-Paquet, D. ‘Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States,’ *European Journal of Migration and Law* 5 (2003).
- ³⁰ Oudenaren, J.V. *Uniting Europe: An Introduction to the European Union* (Lanham, MD: Rowman & Littlefield, 2005).
- ³¹ The Community Method refers to the decision-making procedure where the European Commission possesses the sole right of initiative, the Council of Ministers and European Parliament share joint legislative power and the Court of Justice has judicial review over all policies adopted.
- ³² Peers, S. *E.U. Justice and Home Affairs Law* (Harlow: Longman, 2000).
- ³³ Currently, the following decision-making procedure applies: the Commission possesses the sole right of initiative, but it must also consider any proposals from EU member states. The Parliament and the Council jointly decide future EU asylum and migration policies (i.e., the ‘co-decision procedure’). Hence, we may conclude that until 2005, the European institutions could not exercise their traditional competence in EU migration cooperation.
- ³⁴ For elaboration of these so-called ‘competence skirmishes,’ please see Papagianni, G. *Institutional and Policy Dynamics of E.U. Migration Law* (Leiden: Martinus Nijhoff Publishers, 2006).
- ³⁵ Council Document, ‘(5337/99) Strategy on Migration and Migration Policy,’ (Brussels: Council of the European Communities, 1999).
- ³⁶ Chou, M-H. ‘E.U. And the Migration-Development Nexus: What Prospects for E U-Wide Policies?’ *Centre on Migration, Policy and Society*, Working Paper WP-06-37 (2006).
- ³⁷ Interview with British Home Office official, June 28, 2006.

³⁸ Council Document, '(8939/00) Introductory Note: Adoption of the Action Plan for Albania and the Region and Implementation of the Action Plans for Afghanistan and the Region, Iraq, Somalia and Sri Lanka,' (Brussels: Council of the European Communities, 2000).

³⁹ See Tampere Conclusions. Member states have adopted legal migration measures such as Council Directives that aid third country nationals wishing to pursue their studies or conduct their research in the EU, see respectively Council Document, '(71/05) Council Directive on the Admission of Researchers,' (Brussels: Commission of the European Communities, 2005), Council Document, '(114/04) Council Directive on the Admission of Third Country Nationals for the Purposes of Studies, Pupil Exchanges, Unremunerated Training or Voluntary Services,' (Brussels: Commission of the European Communities, 2004). However, in practice these Council Directives would not address the human trafficking phenomenon because migrants are rarely trafficked into the EU for research and studying purposes.

⁴⁰ European Commission, '(386 Final) Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities,' (Brussels: Office for Official Publications of the European Communities, 2001).

⁴¹ European Commission, '(811 Final) Green Paper on an EU Approach to Managing Economic Migration,' (Brussels: Office for Official Publications of the European Communities, 2005).

⁴² European Commission, '(669 Final) Communication from the Commission: Policy Plan on Legal Migration,' (Brussels: Office for Official Publications of the European Communities, 2005).

⁴³ European Commission, '(735) Communication from the Commission to the European Parliament and the Council: "the Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy,"' (Brussels: Office for Official Publications of the European Communities, 2006).

⁴⁴ For example, the following reasons are cited in the 1996 Commission communication on trafficking of women for sexual exploitation: 'the lack of opportunity in the countries of origin, extreme poverty in many developing countries and marginalisation of women in the source countries. Poor or non-existent education is also of critical importance, and in areas where unemployment is high, women tend to be more severely affected than men,' 5; we may consider these as 'push' factors. The comparatively robust EU economies and the existence of 'employment' in turn serve as 'pull' factors. European Commission, '(567 Final) Communication from the Commission to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation.'

⁴⁵ European Commission, '(248 Final) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Circular Migration and Mobility Partnerships between the European Union and Third Countries,' (Brussels: Office for Official Publications of the European Communities, 2007). Mobility partnership is the Commission's term for 'mobility packages,' as mentioned in the Communication on 'the Global Approach to migration one year on,' European Commission (2006).

⁴⁶ European Commission, '(Memo/07/197) Circular Migration and Mobility Partnerships between the European Union and Third Countries,' (Brussels: Office for Official Publications of the European Communities, 2007). In the actual communication, the Commission acknowledges that it will be necessary to establish a 'common definition of the concept of circular migration,' 8.

⁴⁷ Andrijasevic, 'Problematizing Trafficking,' emphasis in original, 95. Indeed, in proposing that EU member states engage in mobility partnerships with interested third countries, the Commission communication implicitly acknowledges that the 'strengthening' of the EU external border, i.e., the creation of border regimes, has led to the increased usage of traffickers.

⁴⁸ In highlighting these three elements, this paper does not propose that these different aspects are unproblematic. Indeed, in a recent contribution Andrijasevic highlights the challenges facing an effective counter-trafficking campaign: 'By exaggerating the perils of migration, counter-trafficking campaigns identify all prostitution as forced and advocate the private sphere as the safest location for women.' Andrijasevic, R. 'Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns,' *Feminist Review* 86 (2007): 42.