

THE EUROPEAN UNION'S STRUGGLE TO REALIZE A HUMAN RIGHTS-BASED APPROACH TO TRAFFICKING IN HUMAN BEINGS

A Call on the EU to Take THB-Sensitive Action in Relevant Areas of Law

*Conny Rijken**

*Eefje de Volder***

I. INTRODUCTION

Reliable data on the number of persons being trafficked is difficult to collect, but it is estimated that every year at least 600,000 people are trafficked worldwide.¹ Virtually every European state is affected by the crime of trafficking in human beings (“THB”), be it as a country of origin, transport, or destination. Although the fight against THB is already part of the political agenda of many states and of regional and international organizations, the number of persons being trafficked is not declining.²

The most objectionable element of trafficking is its severe violation of the victim’s human rights. Therefore, approaches to combating THB must be based on human rights law. This view has been advocated both at the national level by states, as well as at the regional level by the European Union (“EU”). At the EU level, the European Commission (“Commission”) and the Council of the European Union (“Council”) have stated that an integrated approach based on respect for human rights is needed in order to effectively address THB.³ However, as this article will demonstrate, such an approach is absent in the measures adopted by the EU. EU action to combat THB has primarily been a criminal justice response aimed at the prohibition of THB and the prosecution of traffickers. The protection

* Associate Professor in International and European Public Law, Tilburg University (The Netherlands); Research Fellow at the International Victimology Institute Tilburg (“INTERVICT,” www.tilburguniversity.nl/intervict/).

** Cultural Anthropologist, Research Assistant at the Department of European and International Public Law, and Student in the Research Master of Law, Tilburg University.

1. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2005), available at <http://www.state.gov/g/tip/rls/tiprpt/2005>.

2. See *id.* at 8.

3. *Communication from the Commission to the European Parliament and the Council, Fighting Trafficking in Human Beings – An Integrated Approach and Proposals for an Action Plan*, at 3, COM (2005) 514 final (Oct. 18, 2005); *The Stockholm Programme-An Open and Secure Europe Serving and Protecting the Citizens*, Council of the EU, Doc. 16484/1/09, 25 November 2009, section 4.4.2 [hereinafter *Stockholm Programme*].

of victims has been a secondary goal, and the causes and consequences of THB have mostly been neglected thus far.

In order to realize a human rights-based approach to THB, the prosecution of traffickers, the protection of victims, and the prevention of THB must be addressed more equally. This means that counter-trafficking measures must be taken in fields other than merely criminal law, with the goal of preventing violations of human rights.⁴ These other fields include labor law, migration law, external relations, and development policy. Yet in these areas, THB is largely neglected, and other interests carry more weight. For instance, these fields place more emphasis on factors such as controlling the flow of migration and gathering victims' testimonies than on the protection of those victims. Instead of combating THB, these measures may have a reverse effect and cause collateral damage.⁵ Furthermore, because of the complexity of the crime of THB and the extension of its definition to labor exploitation, the suggestion that counter-trafficking strategies must be developed in all of these areas of law, and in a coordinated fashion, is gaining ground among academics and policy makers. This strategy is known as an "integrated approach" to THB.⁶

This article will explore how the EU's actions in the aforementioned areas of law affect the combating of THB. It will demonstrate that the EU has addressed THB in a fragmented way, and that the adoption of measures to combat THB in the fields of labor law, migration law, external relations, and development policy has been of secondary importance to the EU, at best. This article will also make suggestions regarding how the EU's fight against THB can be made more successful through the use of an integrated and human rights-based approach.

Part II will examine the definition and the relevance of a human rights-based and integrated approach to combating THB. Thereafter, this article will explore the specific relevant legal fields in detail. Part III will focus on criminal law, after which Part IV will deal with labor law. Part V will then address migration law, and Part VI will look at external relations and development policy. Finally, Part VII will present a variety of conclusions and suggestions with respect to EU THB policy. In discussing EU measures that have been taken in specific fields, this article will focus on legally binding instruments.⁷

4. See EU EXPERTS GROUP, REPORT OF THE EXPERTS GROUP ON TRAFFICKING IN HUMAN BEINGS, 62-63 (2004) [hereinafter EU EXPERTS GROUP] (arguing that the need for a holistic and integrated approach is based upon the fact that such an approach has the respect and promotion of human rights as its foundation).

5. E.g., GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD (2007) [hereinafter GAATW COLLATERAL DAMAGE].

6. See EU EXPERTS GROUP, *supra* note 4, at 62-63; see also Council, EU Plan on Best Practices, Standards and Procedures for Combating and Preventing Trafficking in Human Beings of 9 Dec. 2005, art.1, 2005 O.J. (C 311) 1 [hereinafter EU Plan on Best Practices]; see also *Stockholm Programme*, *supra* note 3, section 4.4.2.

7. Proposals and non-binding instruments will only be referred to when relevant.

II. A HUMAN RIGHTS-BASED APPROACH TO THB

Assessment of the extent to which the EU complies with a human rights-based approach to THB requires a clear understanding of this approach, as well as of the phenomenon that is THB.

A. *The Definition of THB*

Until recently, THB generally was thought of as only referring to sexual exploitation. This has changed with the adoption of an international definition of THB in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Palermo Protocol”),⁸ which extends the scope of THB to include labor exploitation. “Trafficking in persons” is defined in Article 3(a) as:

[T]he recruitment, transportation, transfer, harboring 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.⁹

Furthermore, Article 3(a) defines “exploitation” as “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹⁰ This definition of THB emphasizes force, coercion, or deception as distinguishing features. For children, however, it is irrelevant whether or not these factors exist.

The Palermo Protocol also distinguishes trafficking from smuggling, for which a separate protocol was adopted.¹¹ With respect to this distinction, the issue of consent is decisive because the relationship between the smuggled person and the smuggling agent is seen as a voluntary one.¹² In practice, however, the distinction is not so easy to make. People who are willing to work in another country because of substantial wage differentials and limited job opportunities in their home countries may agree to be smuggled, but they may not agree to the exploitative labor conditions in the country of destination. These abusive labor conditions can

8. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, art. 3, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter *The Palermo Protocol*].

9. *Id.*

10. *Id.*

11. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

12. Roger Plant, *Forced Labour, Migration and Trafficking*, in *LABOUR EDUCATION 2002/4, NUMBER 12.9: MIGRANT WORKERS* 58, 60 (Bureau for Workers' Activities ed., International Labour Organization 2002).

be fairly subtle, involving the confiscation of papers, late or no payment of wages, and “the ever-present threat of denunciation to the authorities followed by deportation.”¹³

At the EU level, the definition set forth in the Palermo Protocol has been adopted almost in its entirety by the EU Framework Decision on Combating Trafficking in Human Beings (“FD on THB”).¹⁴ The definition in the FD on THB is unique in that it does not include the removal of organs, and it includes a limited list of means of coercion (in contrast, the list of means in the Palermo Protocol definition is non-exhaustive).¹⁵ Furthermore, in the context of the EU, and contrary to the Palermo Protocol, the crime of THB need not be transnational in nature or committed by an organized crime group.¹⁶

B. A Human Rights-Based Approach to Trafficking

It is generally acknowledged that THB is both a cause and a consequence of the violation of human rights and, therefore, that THB should be explicitly characterized as a “human rights violation.”¹⁷ According to the Preamble of the Palermo Protocol, THB must be addressed through a comprehensive approach that involves measures to protect victims of trafficking, including protecting their internationally recognized human rights.¹⁸ Furthermore, in the Recommended Principles and Guidelines on Human Rights and Human Trafficking of 2002, the United Nations High Commissioner for Human Rights (“UNHCHR”) emphasized that human rights should “be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.”¹⁹ At the EU level, THB is prohibited under Article 5(3) of the Charter of Fundamental Rights.²⁰ Furthermore, a plan containing common standards, best practices, and mechanisms to prevent and combat THB was established²¹ in accordance with The Hague Programme.²² One of the implementation guidelines of this action plan was the

13. *Id.*

14. Council Framework Decision on Combating Trafficking in Human Beings, 2002/629/JHA of 19 July 2002, art. 1, 2002 O.J. (L 203) 1, 2; Conny Rijken & Dagmar Koster, *A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice 2* (May 20, 2008) (Soc. Sci. Research Network, Working Paper No. 1135108), available at <http://ssrn.com/abstract=1135108>.

15. The Palermo Protocol, *supra* note 8.

16. The criteria of transnationality and being committed by an organized crime group are consequences of the fact that The Palermo Protocol is a protocol to the UN Convention on Transnational Organized Crime.

17. *E.g.*, U.N. Econ. & Soc. Council, Report of the U.N. High Comm’r for Human Rights [UNHCHR], *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 5, U.N. Doc. E/2002/68/Add.1 (May 20, 2002) [hereinafter *UNHCHR Recommended Principles*].

18. The Palermo Protocol, *supra* note 8, pmb.

19. UNHCHR *Recommended Principles*, *supra* note 17, at 3.

20. Charter of Fundamental Rights of the European Union of 18 Dec. 2000, art. 5, 2000, O.J. (C 364) 1, 9.

21. EU Plan on Best Practices, *supra* note 6, at 1.

22. The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Annex I, 2005 O.J. (C 53) 1, 25 (Nov. 4-5, 2004).

recognition of the importance of taking a human rights-based and victim-centered approach.²³

In relation to THB, the most serious infringements of human rights are the violations of the right to personal and physical dignity, the right to personal freedom and security, and the principle of non-discrimination.²⁴ Since these violations cover a broad social spectrum and are linked to different kinds of THB-related activities, such as recruitment, transportation and exploitation, efforts to minimize the occurrence of these violations require a multi-layered approach, with the protection of victims' human rights as the common goal.²⁵ The prevention of human rights violations should be decisive in any measures taken to combat trafficking. The best means of imposing such measures is through the imposition of Member States' existing obligations, which have been imposed through various human rights instruments.²⁶

In general, a human rights-based approach is said to be founded upon a number of core principles: universality and inalienability; indivisibility; interdependence and inter-relatedness; non-discrimination and equality; participation and inclusion; and accountability and the rule of law.²⁷ These principles ought to structure a human rights-based approach, but the substance of such an approach should be based on the human rights legal framework. According to Tom Obokata, a prominent scholar on THB, and in line with the human rights legal framework, four obligations can be identified to establish a human rights-based framework of action: (i) the criminalization of THB, (ii) the prosecution of THB, (iii) the assistance and protection of THB victims, and (iv) attention to the root causes of THB.²⁸ These obligations correspond with the means to combat THB: prosecution (obligations 1 and 2), protection (obligation 3), and prevention (obligation 4), better known as the "three Ps."

Under current international human rights law, state actors are the accountable parties.²⁹ The Human Rights Committee has stated that, "obligations are binding upon States and do not, as such, have direct horizontal effect as a matter of international law."³⁰ As a result, human rights law cannot be directly enforced

23. *Id.*

24. See EU EXPERTS GROUP, *supra* note 4, at 10, 18, 138 (discussing rights affected by human trafficking).

25. See *id.* at 62-64 (stating that the need for a holistic and integrated approach is based on the foundation of such an approach in the respect for and promotion of human rights).

26. UNHCHR *Recommended Principles*, *supra* note 17, at 3.

27. United Nations Second Interagency Workshop on Implementing a Human Rights-Based Approach in the Context of UN Reform, May 5-7, 2003, *The Human Rights-Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies*, attachment 1, at 17, 18; UNITED NATIONS DEVELOPMENT PROGRAMME, POVERTY REDUCTION AND HUMAN RIGHTS: A PRACTICE NOTE 5 (June 2003).

28. Tom Obokata, *A Human Rights Framework to Address Trafficking of Human Beings*, 24 NETH. Q. HUM. RTS. 379, 387 (2006).

29. See ANTONIO CASSESE, *INTERNATIONAL LAW* 71 (2d ed. 2005).

30. Human Rights Comm., *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶18, U.N. Doc. CCPR/C/74/CPR.4/Rev.6 (March 29, 2004).

against non-state actors. Although EU Member States, and not the EU itself, are parties to international human rights treaties, in relation to THB, the Commission and the Council have committed themselves to international human rights standards by stating that an integrated approach based on respect for human rights is needed in order to effectively address THB.³¹

C. The Need for an Integrated THB Policy

At the EU level, THB was initially seen as a product of organized crime and, to a lesser extent, as a migration issue.³² Increased knowledge of the complexity of THB at the regional and international levels heightened awareness within the EU that, in order to address THB more effectively, strategies should no longer be limited to the fields of criminal and migration law.³³ The institutions of the EU realized that, to deal with THB more successfully, counter-trafficking strategies must be developed in all relevant legal fields, and in a coordinated way.³⁴

Thus, even though the focus of policies may vary, all strategies used to combat THB in the relevant fields of law must address prevention, protection and prosecution. Such an integrated approach can create an environment that is conducive to the prevention of THB in countries of origin and countries of destination. As emphasized by the EU Experts Group on Trafficking in Human Beings, an integrated approach consists of a number of elements.³⁵ First, equal attention needs to be paid to both the prosecution of traffickers and the protection of victims.³⁶ Second, strategies can only be developed and implemented in a coordinated manner when all of the actors concerned with preventing and combating trafficking—at all levels—are involved.³⁷

The following sections will underline how the fields of criminal law, labor law, migration law, external relations, and development policy are affected by THB countermeasures at the EU level and, conversely, how measures taken in these fields affect people's vulnerability to becoming THB victims. For the purposes of this article, the aforementioned fields will be considered separately. However, as will soon become apparent, in many cases, these fields cannot easily be viewed in separation, as legal measures impact more than one field at the same time.

31. *Communication from the Commission to the European Parliament and the Council, supra* note 3, at 3.

32. *See id.* at 4-6.

33. *See id.* at 4.

34. Respectively, criminal law, labor law, migration law, external relations, and development policies.

35. EU EXPERTS GROUP, *supra* note 4, at 18-20.

36. *Communication from the Commission to the European Parliament and the Council, supra* note 3, at 5.

37. EU EXPERTS GROUP, *supra* note 4, at 63.

III. CRIMINAL LAW

As previously mentioned, EU action to combat THB has primarily been a criminal justice response aimed at prohibiting THB and prosecuting traffickers.³⁸ This is reflected in the limited scope of the FD on THB, the main legal document at the EU level concerned with THB.³⁹ However, recent developments indicate an increased awareness within the EU that measures to combat THB must be multifaceted. For example, they should address the protection of victims as well as the prevention of THB, thus focusing also on the third and fourth obligations.⁴⁰ For that reason, the Commission has prepared a proposal to amend the FD on THB in a way that reflects this increased awareness.

A. *The EU Framework Decision on Combating Trafficking in Human Beings*

With the enactment of the Treaty of Amsterdam, the EU acquired the ability to adopt Framework Decisions (“FDs”) that enforce the approximation of national laws of Member States.⁴¹ FDs are binding upon Member States regarding the result to be achieved, but the choice of form and method is left to the national authorities.⁴² FDs do not have direct effect, which means that EU citizens in principle cannot directly invoke the provisions. However, since the European Court of Justice (“ECJ”) applied the principle of uniform interpretation to an FD in *Pupino v. Italy*, it is argued that FDs can have indirect effect if certain requirements are met.⁴³

The FD on THB was adopted on July 19, 2002.⁴⁴ It seeks to contribute to the fight against THB through the promotion of a common approach to trafficking. The FD on THB obliges all EU Member States to harmonize their domestic criminal legislation on trafficking by 2004. This harmonization includes the adoption of a commonly agreed upon definition of THB, which is based on the

38. See *supra* Parts I, II.C.

39. See generally Council Framework Decision on Combating Trafficking in Human Beings, *supra* note 14.

40. See, e.g., Commission of the European Communities Proposal for a Council Framework Decision on Preventing and Combating Trafficking in Human Beings, and Protecting Victims, Repealing Framework Decision 2002/629/JHA, at 3.2, COM (2009) 136 final (Mar. 25, 2009) [hereinafter *Commission Proposal*] (focusing on a criminal justice response to trafficking in human beings).

41. Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, art. 34(2), Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EU Treaty]; Tom Obokata, *EU Action Against Trafficking of Human Beings: Past, Present and the Future*, in 9 IMMIGRATION AND CRIMINAL LAW IN THE EUROPEAN UNION: THE LEGAL MEASURES AND SOCIAL CONSEQUENCES OF CRIMINAL LAW IN MEMBER STATES ON TRAFFICKING AND SMUGGLING IN HUMAN BEINGS 387, 390 (Elspeth Guild & Paul Minderhoud eds., 2006).

42. EU Treaty, *supra* note 41, art. 34(2)(b).

43. Case C-105/03, *Pupino v. Italy*, 2005 E.C.R. I-5285; Maria Fletcher, *Extending “Indirect Effect” to the Third Pillar: The Significance of Pupino?*, 6 EUR. L. REV. 862, 864 (2005).

44. Council Framework Decision on Combating Trafficking in Human Beings, *supra* note 14.

Palermo Protocol, and therefore covers trafficking for labor exploitation.⁴⁵ Article 1 defines THB as:

The recruitment, transportation, transfer, harboring, 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 labor or services, including at least forced or compulsory labor 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.⁴⁶

Although the definition of THB in the FD on THB is based on the Palermo Protocol, the protection and assistance it provides for victims is by no means as detailed as that in Article 6 of the Palermo Protocol.⁴⁷ Article 7 of the FD on THB mandates minimal protection of and assistance to victims.⁴⁸ According to Article 7, the FD on THB only requires “adequate legal protection and standing in judicial proceedings,” in accordance with the EU FD on the Standing of Victims in Criminal Proceedings.⁴⁹ Thus, the protection of victims is controlled by their participation in criminal proceedings, and serves the higher interest of prosecuting and punishing traffickers. Although it is generally recognized that ordinary protective measures for crime victims are not sufficient for THB victims, neither the FD on THB, nor the FD on the Standing of Victims in Criminal Proceedings provide for specific protective measures and assistance for victims of THB.⁵⁰

An important EU measure that was drafted specifically for victims of THB is the Council Directive on Temporary Residence Permits for Victims of THB who Cooperate with the Authorities.⁵¹ Although this Directive was enacted as part of the EU's migration policy, it is relevant to EU criminal policy as well. It conditions the issuance of temporary residence permits upon victims' cooperation with national authorities in criminal proceedings against their traffickers. With this

45. *Id.* at 1-2.

46. *Id.* at 2.

47. The Palermo Protocol, *supra* note 8, at 3.

48. *Id.*

49. Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings, 2001 O.J. (L 082).

50. *Commission Proposal*, *supra* note 40, at 10-11.

51. Council Directive 2004/81, art. 1, 2004 O.J. (L 261) 19 (EC).

Directive, the EU's interest in combating organized crime seems to prevail over the protection of victims' rights.

B. The Proposal to Amend the FD on THB

In March 2009, increased awareness of the limited focus of the FD on THB led the Commission to issue a proposal to repeal it.⁵² The Explanatory Memorandum to the proposal recognizes that an effective response to THB must "be aimed at preventing and prosecuting the crime, and protecting its victims."⁵³ This aim reflects the "three Ps," which follow from the fundamental human rights obligations related to THB.⁵⁴ The proposal is based on the Council of Europe Convention on Action Against THB,⁵⁵ but additionally provides for, among other things, the prevention of secondary victimization and higher standards for assistance to victims.⁵⁶ More ambitious and binding legislation has been proposed by the Commission in order to improve the protection of and assistance to victims, to impose obligations under applicable human rights standards, and to provide the best means of securing an essential source of evidence in criminal proceedings.⁵⁷ On October 23, 2009 agreement on this proposal was reached within the Justice and Home Affairs Council of the EU.

The amendment to the FD on THB must be considered supplementary to other instruments addressing THB, such as the Council Directive on Temporary Residence Permits for Victims of THB who Cooperate with the Authorities.⁵⁸ The amendment reaffirms victims' rights in criminal proceedings and improves support for victims. According to Article 9(2), victims may be considered "vulnerable" after an individual assessment by the competent authorities pursuant to the FD on the Rights of the Victims.⁵⁹ This status will provide victims with additional procedural rights, which can be found in paragraph three, and include the right to avoid (i) visual contact with the offender, (ii) questioning concerning the victim's private life, (iii) giving evidence in open court, and (iv) unnecessary repetition of interviews.

Assistance to victims is described in Article 10.⁶⁰ The text of Article 10 is unclear because of a discrepancy between the first and second paragraphs. The first paragraph seems to make assistance dependent on the institution of criminal proceedings, and refers to the rights provided under the FD on the Standing of

52. *Commission Proposal*, *supra* note 40, at 9. After the Lisbon Treaty entered into force on December 1, 2009, Framework Decisions could no longer be adopted, therefore the proposal will be changed into a directive before it will be adopted.

53. *Id.* at 2.

54. *Id.*; *see* Obokata, *supra* note 28, at 387 (discussing the human rights obligations of states and the three Ps).

55. *See Commission Proposal*, *supra* note 40, at 10.

56. *Id.* at 7.

57. *See id.* at 16-17.

58. *See id.* at 3.

59. *Commission Proposal*, *supra* note 40, at 16.

60. *Id.* at 17.

Victims in Criminal Proceedings. The second paragraph, however, states that “[a] person shall be treated as a victim as soon as the competent authorities have an indication that she/he might have been subjected [to THB],” thus indicating a broader application of the assistance measures.⁶¹

The amended FD on THB indicates that the fourth obligation, the duty to address the root causes of THB, should also be taken into account.⁶² The amendment includes measures to reduce the demand for trafficking by punishing individuals who use trafficked persons’ services, if those individuals were or should have been aware that the trafficked persons had been trafficked.⁶³ The Directive Providing for Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals (“TCNs”) also helps address the fourth obligation.⁶⁴ Although this directive has been adopted within the sphere of migration law, it indisputably has a criminal law aspect as well, as it recognizes the potential criminal liability of employers of irregular migrants. The Directive aims to discourage employers from hiring irregular migrants, consequently addressing one of the root causes of THB: the need for cheap labor in the EU.⁶⁵

Security within the EU and procedural safeguards in criminal proceedings seem to remain the primary concern of the amended FD on THB. That said, the assistance and protection of victims appear to have higher priority in the amended document than in the original FD on THB. This more proper balancing of priorities reflects the core aim of a human rights-based approach to trafficking. In other words, the amendment takes into account all four human rights obligations more equally in order to more effectively address THB.

C. Council of Europe Convention on Action Against Trafficking in Human Beings

Although the Convention on Action Against THB was adopted within the Council of Europe and not the EU, its impact and revolutionary approach are worth mentioning in this context. Increased awareness of the severe violations of THB victims’ human rights prompted the drafting of this legally binding instrument by the Council of Europe.⁶⁶ On May 3, 2005 the Committee of Ministers adopted the Council of Europe Convention on Action Against Trafficking in Human Beings (“CoE Convention” or “Convention”).⁶⁷ It was opened for signature in Warsaw on May 16, 2005, and entered into force on February 1, 2008.⁶⁸

61. *Id.*

62. *See id.* at 2.

63. *Id.* at 17.

64. Council Directive 2009/52, 2009 O.J. (L 168) 24 (EC).

65. *See id.*

66. *See* Council of Europe Convention on Action Against Trafficking in Human Beings, pmbl., May 16, 2005, C.E.T.S. No. 197 [hereinafter Convention Against Trafficking].

67. *Id.* at 1.

68. Homepage of the Council of Europe Action Against Trafficking in Human Beings, <http://www.coe.int/trafficking> (last visited Oct. 8, 2009); Council of Europe Action Against Trafficking

Article 1 of the CoE Convention incorporates a human rights-based approach to trafficking. It sets forth that the Convention deals with the prosecution of traffickers (the first and second obligations), the protection of trafficking victims (the third obligation), and the prevention of trafficking (the fourth obligation). The main focus of the Convention, however, is the protection of victims' rights and overall well-being. Taking the Palermo Protocol as its starting point, the Convention imposes measures to increase the protection of trafficking victims' human rights.⁶⁹ The enhanced assistance and protection of victims laid out in Chapter III consists of, *inter alia*, recognizing victims as such (Article 10), physical and psychological assistance (Article 12), reintegration support (Article 16), and a reflection period of thirty days (Article 13).⁷⁰ Also important is the revolutionary Article 19, which allows the contracting states to punish consumers of services provided by THB victims.⁷¹

The implementation of the Convention will be supervised by the Group of Experts on Action Against Trafficking in Human Beings ("GRETA"). GRETA was established through a resolution by the Committee of Ministers (the "Resolution").⁷² In accordance with Rules 3 and 6 of the Resolution, GRETA consists of thirteen independent experts elected by the Committee of Parties for a period of four years. The first group was established in 2009. GRETA has the task of drawing up reports that evaluate the measures taken by the parties to the CoE Convention.⁷³ Parties that do not fully respect the measures contained in the Convention will be urged to take action.⁷⁴ In addition, on the basis of GRETA reports, a committee composed of representatives of the contracting parties may make recommendations to a party.⁷⁵ A questionnaire has been prepared for the first round of evaluation.⁷⁶

D. Summary

In criminal law, the EU is taking noteworthy steps to realize a human rights-based approach to THB. At first, EU counter-trafficking measures were mainly

in Human Beings: CoE Convention, http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/FSAction_en.asp (last visited Dec. 3, 2009).

69. Convention Against Trafficking, *supra* note 66, art. 39; Explanatory Report of the Council of European Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197 ¶¶ 6, 10 [hereinafter Explanatory Report].

70. Convention Against Trafficking, *supra* note 66, arts. 10, 12, 13, 16; Explanatory Report, *supra* note 69, at 10-13. The reflection period gives victims the ability to reconsider whether they want to cooperate with the national authorities in the prosecution of their traffickers.

71. Convention Against Trafficking, *supra* note 66, art. 19.

72. Committee of Ministers Resolution, CM/Res (2008)7 on rules on the election procedure of the members of the Group of Experts on Action Against Trafficking in Human Beings (GRETA).

73. Convention Against Trafficking, *supra* note 66, art. 36.

74. *See id.* art. 38.

75. *Id.*

76. Rules of Procedure for Evaluating Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by the Parties, 17 June 2009, Council of Europe: THB-GRETA, R. 3.

driven by an ambition to prosecute perpetrators. Recent legislative initiatives, however, have included measures to help protect victims of THB and, to a lesser extent, have attempted to tackle THB through addressing its root causes.

IV. LABOR LAW

Until recently, EU THB policy has been focused on prostitution, within a framework of international organized crime. In accordance with its internationally adopted definition in the Palermo Protocol, THB must now be defined as including labor exploitation.⁷⁷ Consequently, in some cases, migrants working under harsh labor conditions can be considered victims of trafficking. Therefore, in order to combat human trafficking effectively—particularly with respect to labor exploitation—a minimum standard of protection for social security rights has to be guaranteed within the EU, and compliance with this standard has to be monitored. Although there are certain EU measures that indeed focus on securing social security rights within the EU,⁷⁸ the freedom to provide services and free movement of workers remain the primary concerns of EU labor policy. As this article will demonstrate, the level of protection provided by EU law is even more limited for TCNs, as the freedom to provide services is restricted to EU nationals. Before exploring this issue, the following section will set forth some general observations on the relation between labor and THB.

A. *The Relation Between Labor and THB*

Migrant workers are often forced to take risks in their migration strategies because they are desperately in need of a better life and they have a limited chance of obtaining legal work in the EU. Traditionally, the terms “push” and “pull” are used to explain (i) what incentives may force someone to leave their country of origin (“push factors”), and (ii) what circumstances may draw them to a country of destination (“pull factors”).⁷⁹ Migrant workers often share common characteristics which may explain why they end up in forced labor through trafficking.⁸⁰ Among these factors are the experience of isolation, lack of knowledge of rights, and multiple dependencies.⁸¹ A related factor is the threat of violence—either to the migrant workers themselves or to their families at home—which puts migrant workers in a position where they are unable to escape their exploitative situations.⁸² Another relevant issue is the increasing demand for cheap labor in the EU, which is partly met by exploiting the labor force.⁸³ The restrictive nature and complexity of labor and migration regulations in destination countries add to migrant workers’

77. The Palermo Protocol, *supra* note 8.

78. *See generally* Council Directive 96/71, 1996 O.J. (L 018) 1 (EC).

79. J.J. SCHOORL ET AL., PUSH AND PULL FACTORS OF INTERNATIONAL MIGRATION 3 (2000).

80. AUDREY GUICHON & CHRISTIEN VAN DEN ANKER, TRAFFICKING FOR FORCED LABOUR IN EUROPE 1 (2006).

81. *Id.* at 10.

82. *Id.* at 15.

83. *Id.* at 17.

vulnerability. These restrictions, combined with migrant workers' desire to work in a more prosperous country, lead them to look for other means to reach their goals. These factors often have the effect of luring migrant workers into the hands of intermediaries or agents.⁸⁴

How must forced labor be defined in relation to trafficking? When do poor labor conditions become labor exploitation? The above-mentioned trafficking documents all define exploitation as entailing forced labor or services, at the very least.⁸⁵ These definitions furthermore explain labor exploitation as "a continuum, with forced labor as the least severe form of exploitation, and slavery as the most aggravated circumstance."⁸⁶ In order to determine whether a situation can be labeled as labor exploitation, forced labor must be more explicitly defined. Article 2(1) of the 1930 International Labor Organization Forced and Compulsory Labour Convention defines forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."⁸⁷ This definition contains two essential elements: a penalty and involuntarily offered labor. Penalties not only include penal sanctions, but also the loss of rights and privileges.⁸⁸ They can range from "physical violence, restraints, or even death threats, to more subtle actions, such as threats to declare victims to migration services, non-payment of wages, or confiscation of documents."⁸⁹

In *Siliadin v. France*, which came before the European Court of Human Rights ("ECtHR" or "Court"), the Court added that a penalty does not necessarily have to be imposed on an individual for them to be considered a victim.⁹⁰ According to the ECtHR, it is adequate that the victim feels that she has been penalized by the perceived seriousness of the threat she was under.⁹¹ The unwillingness of the victim to provide services should be seen as a subjective element. According to the European Commission on Human Rights, services cannot be treated as voluntarily accepted beforehand.⁹² Even when people voluntarily accept work, they may eventually revoke their consent because of abysmal working conditions. The *Siliadin* case is of particular importance in the context of labor exploitation for TCNs because it obliges state parties to the European Convention on Human Rights to prevent forced labor not only for their own citizens, but for all people within

84. *Id.* at 11.

85. The Palermo Protocol, *supra* note 8; Convention Against Trafficking, *supra* note 66, art. 4; Council Framework Decision 2002/629, art. 1(d), 2002 O.J. (L 203) 2 (EU).

86. Jill E.B. Coster Van Voorhout, *Human Trafficking for Labour Exploitation: Interpreting the Crime*, 3 UTRECHT L. REV. 59 (2007); 1930 ILO Forced and Compulsory Labour Convention, 26 June 1930, C29.

87. Int'l Labor Org. [ILO], *Forced Labor Convention*, art. 2, ILO Doc. C29 (June 10, 1930).

88. *Id.*

89. Coster Van Voorhout, *supra* note 86, at 59-60.

90. *Siliadin v. France*, 43 Eur. Ct. H.R. 16, 36 (2006).

91. *Id.*

92. *Van der Müsselle v. Belgium*, 6 Eur. Ct. H.R. 163, 175 (1984).

their jurisdiction.⁹³ Member States have a positive obligation to enforce this policy.⁹⁴

The definition of forced labor outlined above can be instructive when considering EU measures taken within the field of labor law that might impact THB. Two directives—the Posting (of Workers) Directive and the Service Directive—are particularly relevant in the context of THB.⁹⁵ The former is important because it aims to impose certain minimum labor standards, which in practice seem to be subordinated to the economy-driven focus of the EU.⁹⁶ The Posting Directive only applies to EU nationals, but this article will show that it can affect TCNs as well. The Service Directive is relevant since self-employed service providers are predominately subject to the law of their home country.⁹⁷ Because this law is often less restrictive, workers may be forced to work as self-employed service providers when, in practice, they are in an employment relationship. The employer is then able to get around the employment regulations of the host state. Before dealing with the two directives in more detail, the next section will discuss differences between posted workers and service providers, as this differentiation determines which directive will apply in the case of a given worker

B. Distinguishing Posted Workers from Service Providers

Within the EU a distinction is made between the free movement of workers and the freedom to provide services. This distinction is important because for the former category the labor laws of the Member State in which the worker is employed applies, while for the latter category the two aforementioned directives are relevant. The Posting Directive concerns the core labor conditions for non-self-employed service providers who temporarily work abroad.⁹⁸ With regard to other issues, the Service Directive applies.⁹⁹ The Service Directive further applies to service providers and those who make use of the freedom of establishment.¹⁰⁰ It primarily deals with public law concerning the requirements for the establishment of service providers; labor and consumer laws are explicitly excluded.¹⁰¹

Although posted workers and service providers are not always easy to distinguish in practice, there are two reasons why the distinction has important

93. *Siliadin*, 43 Eur. Ct. H.R. at 24.

94. Member States should not only refrain from any measure which would jeopardize the attainment of the objectives of the Treaty (negative obligations), but should also take all the appropriate measures to ensure the fulfillment of obligations either arising out of the Treaty or from actions taken by the institutions of the Community (positive obligations).

95. Council Directive 96/71, 1997 O.J. (L 018) 1 (EC); Council Directive 2006/123, 2006 O.J. (L 376) 36 (EC).

96. See Council Directive 96/71, *supra* note 95, art. 3, ¶ 1.

97. See Council Directive 2006/123/EC, *supra* note 95, recital, ¶¶ 91-92.

98. Council Directive 96/71/EC, *supra* note 95, art. 1, ¶ 1.

99. Council Directive 2006/123/EC, *supra* note 95, recital, ¶ 47.

100. The principle of freedom of establishment, laid out in Article 43 of the EC Treaty, enables a European economic operator (whether a person or a company) to carry on an economic activity in a stable and continuous way in one or more Member States.

101. Council Directive 2006/123/EC, *supra* note 95, recital, ¶¶ 50-51.

legal implications.¹⁰² First, service providers can offer their services in any Member State without being subject to local labor standards.¹⁰³ They provide services for a limited amount of time and, therefore, are not considered part of the labor force in the country in which they offer their services.¹⁰⁴ Posted workers (non-self-employed service providers), on the other hand, are only subject to the labor standards of the host state with regard to the so-called core provisions.¹⁰⁵ Second, the distinction is important in the context of EU enlargement. When states become members of the EU, the Accession Treaty authorizes other Member States to impose temporary limitations on the free movement of workers from the new Member State, while allowing the immediate free movement of services.¹⁰⁶ As a result, independent service providers can enter another country without having to observe the host country's labor standards, and will still be able to freely determine their fees, working hours and labor conditions. The fact that service providers in a host country may be working under less restrictive labor conditions than their domestic counterparts may lead to exploitative situations.¹⁰⁷ Since the labor standards of the host country cannot be imposed, it is impossible to monitor the potentially exploitative nature of the labor conditions under which the self-employed service provider is working.

Despite revelations of the poor conditions under which some service providers from new EU Member States work, these service providers are generally cast as persons who are taking jobs of citizens of pre-existing Member States, rather than as persons who need protection. As a result, provisions imposed by the EU to regulate the labor market tend to focus on protecting the domestic labor markets of individual Member States, rather than the people who may be working under substandard labor conditions. These provisions tend to reinforce barriers against workers from "new" EU Member States and, in effect, create categories of semi-legal, second-class European citizens; this reduces the value of the right to work for people from the new Member States.¹⁰⁸ EU Member States seem to neglect the fact that such policies may have the side effect of forcing people to work under bad labor conditions, or to be self-employed in another EU Member State to avoid being bound by a host country's labor standards. The tension between the free movement of services and social security rights contributes to an environment in which exploitative and abusive labor conditions can flourish and potential victims of THB are not protected.

102. See Marc de Vos, *Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: A Bermuda Triangle for National Labour Standards?*, 7 ERA FORUM 356 (2006).

103. *Id.*

104. *Id.* at 360.

105. See *infra* Part IV.C.

106. de Vos, *supra* note 102, at 358.

107. See *id.* at 357.

108. Maggy Lee, *Introduction: Understanding Human Trafficking*, in HUMAN TRAFFICKING 1, 18-19 (Maggy Lee ed., 2007).

C. *The Posting Directive*

The Posting Directive (“Directive”) was adopted in 1996 in connection with Article 52 of the treaty that established the European Community (“EC Treaty”). The Directive constituted an integral part of the EC Action Programme. It has been in force since December 1999.¹⁰⁹ The Directive was adopted to ensure the freedom to provide services within the EU,¹¹⁰ and aims to balance economic freedoms enshrined in the EC Treaty with the rights of employees during posting.¹¹¹ The Directive seeks to ensure that workers who are temporarily employed in another Member State are subject to and protected by the laws of that state, in particular, the so-called core conditions of employment.¹¹² Article 3(1) of the Directive includes the mandatory rules that make up the core conditions of employment: maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay, health, safety and hygiene at work; equal treatment of men and women; and other non-discrimination provisions.¹¹³ According to Article 3(1), the host country has an obligation to provide labor standards for posted workers that are at least comparable to the labor standards of its own workers.¹¹⁴ In practice, host countries adjust the core conditions applicable to posted workers to their own labor standards. In this way, the Directive protects posted workers, but also serves as a protective measure against social dumping of wages and bad working circumstances in countries with proper working conditions.¹¹⁵ By aiming to establish a protection threshold of core employment conditions, the Directive facilitates, among other things, the fight against labor exploitation in the Member States.¹¹⁶

In practice, however, the social aspect of the Posting Directive seems to be diminishing. This is particularly evident when one considers recent judgments of the ECJ. In the *Laval* case, trade unions blocked a building in Voxholm, Sweden against a Latvian company that was refusing to observe the collective bargaining agreement applicable to the building sector.¹¹⁷ The Court held that the freedom to provide services prevailed over collective bargaining rights.¹¹⁸ In the *Rüffert* case, the Court found the German State Land of Lower Saxony guilty of imposing a minimum salary requirement on a construction company working under a procurement contract. Although the Polish subcontractor of a German construction company paid its workers less than half of the prescribed minimum wage, the Court

109. Jan Cremers, Jon Erik Dolvik & Gerhard Bosch, *Posting of Workers in the Single Market: Attempts to Prevent Social Dumping and Regime Competition in the EU*, 38 INDUS. REL. J. 524, 527 (2007).

110. Council Directive 96/71/EC, *supra* note 95, recital, ¶ 3.

111. *Id.* recital 5.

112. *Id.* recital 14.

113. *Id.* art. 3, ¶ 1.

114. *Id.* art. 3, ¶ 2.

115. Cremers, Dolvik & Bosch, *supra* note 109, at 527.

116. *See id.* at 538.

117. Case C-341/05, *Laval v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767.

118. *Id.* ¶ 101.

decided that setting a minimum wage for the subcontractor was not in compliance with the Posting Directive and was a breach of the free movement of services.¹¹⁹ The Posting Directive was also implicated in a third case, *Commission v. Luxembourg*.¹²⁰ There, Luxembourg wanted to apply the public order clause of Article 3(10) and impose additional requirements on posted workers.¹²¹ However, the Court found the requirements in violation of Article 3(10).¹²²

Concerns over poor labor standards in the above cases were mainly driven by a fear of social dumping of wages. But these cases also cast a different light on protection against labor exploitation. Higher labor standards were upheld with regard to the countries where the workers were to be posted. The workers were allowed to provide their services under worse labor conditions than their domestic counterparts, which could have resulted in an exploitative situation, regardless of the obligations in the Posting Directive. Therefore, in 2008, the Commission decided to set up the Committee of Experts on Posting of Workers to monitor the Directive and help facilitate cooperation between Member States.¹²³

D. The Service Directive

While the Posting Directive applies to non-self-employed service providers, the Service Directive is the main EU legislation regarding self-employed service providers. The Service Directive attempts to balance the free movement of services with the social protection of service providers. On October 15, 2006 the European Parliament approved the Service Directive (“Directive”) after more than two years of debate on a number of issues that significantly impact workers’ rights.¹²⁴ The most contentious issues surrounded the country of origin principle and the role of labor law.¹²⁵ According to the country of origin principle, the labor standards of the country where a self-employed service provider is registered apply.¹²⁶ In February 2005, the European Economic and Social Committee (“EESC”) adopted an opinion on the Commission’s proposal and warned, in particular, that application of the country of origin principle would lead to a watering down of standards.¹²⁷ After many amendments, the Service Directive entered into force on December 28, 2006; it had to be implemented by Member States before December 28, 2009.¹²⁸ One of the amendments to the Directive was

119. Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-01989.

120. Case C-319/06, *Commission v. Luxembourg*, 2008 E.C.R. I-04323.

121. *Id.* ¶ 3.

122. *Id.* ¶ 97.

123. Commission Decision (EC) No. 17/2009 of 19 Dec. 2008, art. 5-7 2009 O.J. (L8) 26.

124. See Council Directive 2006/123/EC, *supra* note 95, recital 1.

125. Anni Weiler, EUROPEAN INDUSTRIAL RELATIONS OBSERVATORY ONLINE, *Parliament Adopts Service Directive* (2006), <http://www.eurofound.europa.eu/eiro/2006/12/articles/EU0612039I.htm>.

126. *Id.* at 2.

127. *Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market*, at 5, COM (2004) 2 final (Feb. 10, 2005).

128. See Council Directive 2006/123/EC, *supra* note 95, recital, ¶ 67.

the replacement of the country of origin principle, which is based on the principle of mutual recognition, with the principle of the freedom to provide services.¹²⁹ In line with the latter principle, Member States must enable European citizens to offer services on a temporary basis in another Member State without any further requirements.¹³⁰ Restrictions can only be justified by overriding concerns of general interest, such as public policy, national security, or public health. Furthermore, such restrictions can only be imposed when they are proportionate.¹³¹ Provisions on labor law and consumer law have been excluded from the Directive.

In this area too, the ECJ seems to give preference to economic over social interests.¹³² In the *Viking* case, a trade union took action against a Finnish shipping company—Viking Line—to prevent it from registering a ferry in Estonia in order to reduce workers' wages.¹³³ Following this case, workers were deprived of their basic right to collective action because the Court formally allowed Viking to relocate its assets in a country where salaries and benefits were lower.¹³⁴ The trade union's action was perceived by the ECJ to be an intolerable restriction on the freedom of establishment, a fundamental freedom guaranteed under Article 43 of the EC Treaty.¹³⁵

The Service Directive is important in the context of THB, as it applies to persons who are offering their services in other Member States as self-employed service providers—workers who determine their own working hours and working conditions. This can lead to exploitative practices when people are working under worse labor conditions than their domestic counterparts. Many citizens from the new EU Member States commonly wish to work in other EU Member States and are willing to provide services under worse labor conditions, particularly with regard to income. They might be willing to work in other countries as self-employed service providers when, in fact, they are de facto employees.¹³⁶ This unintended consequence of the Service Directive increases the risk of abusive labor conditions since the rights of employees are no longer secured.

E. Social Security for Third-Country Nationals?

The economic focus of EU labor law has undermined the prevention of labor exploitation. Together with the other freedoms (free movement of goods and capital), the free movement of workers and the freedom to provide services within the EU are seen as the most important features of the internal market, which need to be protected at all costs. The implications of these freedoms for labor exploitation seem to have been overlooked. The fact that, in general, only EU

129. Council Directive 376/36, art. 16, 2006 O.J. (L376) 37 (EC).

130. See Council Directive 2006/123/EC, *supra* note 95, recital, ¶ 57.

131. *Id.* at 58.

132. Case C-438/05, *Int'l Transp. Workers' Fed'n. v. Viking Line ABP*, 2007 E.C.R. 1372, 1 C.M.I.R. 51 (2008).

133. *Id.* at 1373.

134. *Id.* at 1383.

135. *Id.* at 1414-15, ¶ 90.

136. See Weiler, *supra* note 125.

citizens have the opportunity to make use of the freedom to provide services and the free movement of workers within the EU puts TCNs at risk. TCNs, searching for a better life and hardly ever being able to work legally in the EU,¹³⁷ are forced to look for strategies to illegally enter and work in the EU. This is highly problematic since illegal work situations are difficult to monitor. Illegality can have disastrous effects, as evinced in the United Kingdom's Morecambe Bay cockle-pickers' case, in which twenty-three inexperienced, illegal migrant workers died.¹³⁸

Since labor laws primarily focus on laborers in a general sense, most related legislation only indirectly influences THB. The Service Directive and the Posting Directive do not address the prosecution or prevention of THB, or the protection of THB victims. Furthermore, these Directives may have unintended negative effects on trafficking. The freedom to provide services, combined with insensitivity to THB, may lead to an increase, rather than a decrease in THB.

V. MIGRATION LAW

Within the EU, THB has been, and often still is considered an issue of irregular migration. To some extent, this confusion is understandable, as many victims of THB enter the EU illegally, whether willfully or not. It cannot be denied that irregular migration often precedes THB. That said, focusing on the issue of irregular migration diverts attention from the central problems associated with the crime of THB. Furthermore, in doing so, people run the risk of confusing THB with the smuggling of persons.

A. *The Relation Between Migration and THB*

EU migration law plays a role in two phases of the trafficking chain. First, it comes into play when TCNs want to enter the EU. Migration law has the potential to create opportunities for individuals who want to improve their living conditions and financial situations, or those of their dependent family members.¹³⁹ In this phase, migration law effectively helps determine which TCNs will enter the EU, and under what conditions. Second, if a TCN has become a victim of THB in the EU, migration law plays a role in assisting and protecting him/her. It does so through the provision of residence permits and the imposition of the principle of *non-refoulement*. The principle of *non-refoulement* prevents states from returning victims to places where their lives or freedoms will be threatened.

137. Only certain groups of TCNs are allowed to come to the EU solely for economic purposes, such as academics, researchers or highly qualified personnel.

138. John Meadowcroft & John Blundell, *The Morecambe Bay Cockle Pickers: Market Failure or Government Disaster?*, 24 *ECONOMIC AFFAIRS* 69, 69 (2004).

139. See BARBARA EHRENREICH & ARLIE RUSSEL HOCHSCHILD, *GLOBAL WOMAN: NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY* Passim (2003) (Rule 3.1); SADHNA ARYA & ANUPAMA ROY, *Series Introduction*, 2 *WOMEN AND MIGRATION IN ASIA* 7, 9-10 (Sadhna Arya & Anupama Roy eds., 2006).

People's motives in migrating generally relate to their desire to find a better life.¹⁴⁰ In a world of increasing economic and social inequality, rising unemployment, and with a mounting discrepancy between rich and poor countries, there are a significant number of individuals who aspire to migrate to prosperous states within the EU, and to other developed states.¹⁴¹ Migrants are, however, very limited in their ability to legally migrate and find jobs in the regular labor market, especially when they have little or no education, or solely vocational training. Consequently, most low-skilled migrant workers are pushed into low-end jobs, or into the illegal or quasi-legal markets, thereby amplifying their vulnerability to exploitation by traffickers.¹⁴² Due to the nature of the work and the limited forms of migration available to migrants, they are forced to use the services of dubious agencies and middlemen who offer illegal routes to enter the EU. These agencies and middlemen make migrants dependent on them by, for example, confiscating their papers and controlling their money.¹⁴³ Migrants have become even more vulnerable to these practices because of the increasingly restrictive migration policies of developed countries, including those within the EU. Most developed countries have responded to recent increases in migration by adopting restrictions on legal migration, especially for low-skilled workers. At the same time, however, these countries have created opportunities for highly educated and skilled personnel in, for example, the information technology sector and academia.¹⁴⁴

Although the EU is aware of the detrimental effects of its present migration policies,¹⁴⁵ it has not yet adjusted its activities accordingly. As will be shown below, most efforts undertaken by the EU in the field of migration law have been aimed at managing migration flows and controlling external borders to exclude migrants.¹⁴⁶ It would seem that, in the field of migration law, the economic and security interests of the EU dominate over humanitarian interests.

The second role of migration law—providing assistance and protection to THB victims—comes to the fore when TCNs have entered the EU and have been recognized as THB victims. Here too, as will be demonstrated below, the economic and security interests of the EU, or of its Member States, are the primary reasons for allowing exceptions to the strict migration laws. Lastly, the sections

140. See EHRENREICH & HOCHSCHILD, *supra* note 139, at 28.

141. See generally SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* (1998); BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION AND EMANCIPATION* (2d ed. 2002).

142. MANUEL CASTELLS, *END OF MILLENNIUM 179-80* (2d ed. 1998).

143. See *id.*; EHRENREICH & HOCHSCHILD, *supra* note 139, at 16; Saskia Sassen, *Women's Burden: Counter-Geographies of Globalization and the Feminization of Survival*, 71 *NORDIC J. INT'L L.* 255; Christina Boswell, *The 'External Dimension' of EU Immigration and Asylum Policy*, 3 *INT'L AFFAIRS* 619, 619 (2003); WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION, *A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL* 70-71 (2004).

144. See Council Directive 2005/71, 2005 O.J. (L 289) (EC).

145. See *infra* Part VI.B.

146. Thomas Spijkerboer, *The Human Costs of Border Control*, 9 *EUR. J. MIGRATION & L.* 127 (2007); see, e.g., *Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy*, at 13, COM (2000) 757 final (Nov. 22, 2000).

below will discuss the first steps taken by the EU toward greater awareness of the impact of migration laws on THB.

B. Restrictive Migration Laws for Labor Migration

Only since the Tampere European Council of 1999 has the management of migration flows become an issue.¹⁴⁷ At that time, the European Council stressed the need for more efficient management of migration flows at all stages of migration, close cooperation with countries of origin and transit, and the prevention of all forms of THB.¹⁴⁸ The measures taken in that regard can be divided into two categories based on their underlying goals. The first category consists of measures that aim to control migration flows, such as restrictive policies for economic migration and return facilities.¹⁴⁹ The second category consists of measures aimed at addressing the causes of migration; these measures concern development policies.¹⁵⁰ Both categories of measures have an impact on THB. In preventing potential migrants from leaving their country in a legal manner, the first category of measures may induce potential migrants to use illegal means of entry. This could, in turn, push them into the hands of smugglers and traffickers. The second category of measures aims to reduce the need to migrate by improving the situation in potential migrants' home countries, particularly for women. Although the aims of both categories of measures discussed have been endorsed in many documents, there seems to have been more effort devoted to the first category of measures than to the second.¹⁵¹

In 2000, the Commission issued a communication that formed a common community migration policy which, in 2001, was followed by a proposal for a directive on the conditions of entry and residence for paid employees and self-employed workers.¹⁵² After heated debate in the Council, the proposal was officially withdrawn in 2006.¹⁵³ It appeared that a horizontal approach was not attainable, and the Commission therefore decided to aim for a sectoral approach.¹⁵⁴ The first instrument of this sectoral approach was a directive consisting of measures which permitted migration for highly qualified TCNs and was adopted in

147. Tampere European Council, Presidency Conclusions (Oct. 15-16, 1999), available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm.

148. *Id.* Part IV, ¶ 22.

149. *See id.*

150. *Id.* Part I, ¶ 11.

151. *See* Boswell, *supra* note 143, at 630; *see also* *Communication from the Commission to the Council and the Parliament on Integrating Migration Issues in the European Union's Relations with Third Countries*, COM (2002) 703 final (Dec. 3, 2002).

152. *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*, COM (2001) 386 final (July 11, 2001).

153. *Communication from the Commission to the Council and the European Parliament, Outcome of the Screening of Legislative Proposals Pending Before the Legislator*, at 12, COM (2005) 462 final (Sept. 27, 2005).

154. *Commission of the European Communities, Policy Plan on Legal Migration*, at 5, COM (2005) 669 final (Dec. 21, 2005).

May 2009.¹⁵⁵ The fact that this first measure regulates the entry of highly qualified persons is an indication that the financial interests of the EU are the primary concern motivating EU migration policy. However, the measure's explanatory memorandum sets forth that:

The proposal also complies with EU's development policy with its central focus on eradication of poverty and the achievement of MDGs [Millennium Development Goals] [It] seeks to minimize negative and maximize positive impacts of highly skilled migration on developing countries that already face lack of human resources in certain sectors.¹⁵⁶

This concern over ethical recruitment is reflected in Recitals 22 and 24,¹⁵⁷ and is laid out in Article 3(3), which reads as follows:

This Directive shall be without prejudice to any agreement between the Community and/or its Member States and one or more third countries, that lists the professions which should not fall under this Directive in order to assure ethical recruitment, in sectors suffering from a lack of personnel, by protecting human resources in the developing countries which are signatories to these agreements.¹⁵⁸

The creation of a directive to punish employers of irregular TCNs provides further illustration of the mixed and sometimes opposing policies of restrictive migration laws and efforts to combat THB.¹⁵⁹ The directive to punish employers of irregular TCNs (the "Directive") relates to THB because the more potential there is for illegal work, the higher the risk of exploitative and slavery-like practices. Interestingly, the Directive states that it is concerned with migration policy, not with labor, social or criminal policy.¹⁶⁰ However, the Directive aims to introduce

155. See Council Directive 2009/50, 2009 O.J. (L 155) (EC). Further proposals can be expected on seasonal workers, remunerated trainees and intra-corporate transferees. See *Policy Plan on Legal Migration*, COM (2005) 669 final (Dec. 21, 2005); see generally Helen Oosterom-Staples, *Regulating Labour Migration: The EU Saga on Third Country Nationals Seeking Access to the European Labour Market*, in *MIGRATION LAW AND SOCIOLOGY OF LAW, COLLECTED ESSAYS IN HONOUR OF KEES GROENENDIJK* 121, 121-130 (A. Böcker et al. eds., 2008).

156. *Commission Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment*, at 4, COM (2007) 637 final at 4 (Oct. 23, 2007).

157. Council Directive 2009/50, *supra* note 155. Recital 22 states that, "[i]n implementing this Directive, Member States should refrain from pursuing active recruitment in developing countries in sectors suffering from lack of personnel." *Id.* This concern is further expressed in Article 3(3), but conflict with ethical recruitment is not formulated as a ground for refusal. *Id.* art. 3(3).

158. *Id.* art. 3(3).

159. Council Directive 2009/52, *supra* note 64, at 24. Other instruments that might be illustrative include the Council Directive Providing for Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals, (Council Directive 2001/51, 2001 O.J. (L 187) (EC)), and the Council Directive on the Obligation of Carriers to Communicate Passenger Data, (Council Directive 2004/82, 2004 O.J. (L 261) (EC)).

160. Council Directive 2009/52, *supra* note 64, at 24.

sanctions for employers.¹⁶¹ It is questionable whether this goal falls within the field of migration policy. It would, perhaps, be better situated within the field of employment and social affairs. The Directive also explicates the relationship between irregular migration and THB. It states that if certain requirements are fulfilled, irregular migration can constitute the more serious criminal offence of THB.¹⁶² The Directive further states that the employer concerned will be punished, not the illegal TCN performing the work.¹⁶³ However, in some cases a Member State might be obliged to issue a return decision in accordance with its national laws or the Return Directive. In such cases, the Member State would have to expel the TCN from its territory.¹⁶⁴ Furthermore, sometimes, such as when the TCN has become a victim of particularly exploitative working conditions, criminal sanctions may be imposed and the victim may be granted protective measures comparable to measures available for THB victims.¹⁶⁵ In such situations, the TCN may be granted, for example, a temporary residence permit.¹⁶⁶ From the viewpoint of combating THB, these policies provide a great advantage. What is more, according to the Directive, the mere exploitation of a person is sufficient to invoke rights comparable to the rights laid out in Directive 2004/81. Forced recruitment is not required.¹⁶⁷

Although the Directive's aim to contribute to the eradication of exploitative situations in working relations is a noble ambition, it is questionable whether the Directive will have that effect. First, the Directive focuses only on TCNs, not on nationals, EU citizens, or others who are allowed to work in the EU and may also become victims of exploitative working conditions. Without access to legal work within the EU, TCNs who want to work in the EU will end up in criminal circles and employers will continue to have difficulties satisfying their labor needs.¹⁶⁸ This is especially true for low-skill and low-wage migrant workers. It is unfortunate that this directive is only concerned with "migration policy," and does not aim to implement an integrated approach. Here, the EU seems to have missed a valuable opportunity. It would have been wise to include measures characteristic of an integrated approach, such as parallel provisions to work legally in the EU, provisions on the protection of THB victims, and social policy measures.

161. *Id.*

162. *Id.* at 26.

163. *Id.* art. 1.

164. Council Directive 2008/115, Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 2008 O.J. (L 348) 102 (EC).

165. Council Directive 2004/81, 2004 O.J. (L 261) 21 (EC).

166. Council Directive 2009/52, *supra* note 64, art. 13(4).

167. The definition of THB as agreed upon in The Palermo Protocol is a complex one, as it considers both forced recruitment and exploitation. Meanwhile, the most objectionable element of THB is often considered to be the exploitative working conditions. The Directive can, therefore, be seen as a step forward, as it focuses on the exploitative working conditions.

168. See Sergio Carrera & Elspeth Guild, *An EU Framework on Sanctions Against Employers of Irregular Immigrants: Some Reflections on the Scope, Features & Added Value*, CENTRE EUR. POL'Y STUD., Aug. 2007, at 1.

C. External Border Control by Frontex

The EU is also taking other steps to prevent migrants from entering its territory. When national borders within the EU were abolished, controlling external borders became important for security reasons. Although controlling external borders has largely remained the duty of Member States, coordination of external border controls has now been mandated to Frontex, a European Agency.¹⁶⁹ Frontex was established on May 1, 2005 by Council Regulation 2007/2004.¹⁷⁰ The aim of Frontex is to improve the integrated management of the external EU borders, thereby ensuring a uniform and high level of control and surveillance. Such control and surveillance is seen as fundamental to the maintenance of freedom, security, and justice within a large region, such as the EU.¹⁷¹ The agency's main tasks are the coordination of relevant activities of Member States, the training of border guards, and the provision of technical and operational assistance. Regulation 2007/2004, amended by Regulation 863/2007, established a mechanism for the creation of Rapid Border Intervention Teams, the so-called "Rabit teams."¹⁷² Such a team can be put together in "a situation of urgent and exceptional pressure, especially the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of the Member State illegally."¹⁷³

On the basis of Regulation 2007/2004, some joint operations coordinated by Frontex were conducted in accordance with Article 3.¹⁷⁴ The so-called "Hera Operations" are worth mention because they clearly demonstrate the EU's interest in and dedication to dealing with migration.¹⁷⁵ The Hera Operations were launched following an influx of TCNs into the Canary Islands, and the number of casualties that occurred during their journey from West Africa.¹⁷⁶ The Hera Operations consisted of two activities. The first was assisting the Spanish authorities with

169. Council Regulation 2007/2004, Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 3 (EC).

170. *Id.* at 11.

171. *Id.* at 3.

172. Council Regulation 863/2007, 2007 O.J. (L 199) (EC); *see also* Steve Peers, *Key Legislative Developments on Migration in the European Union*, 10 EUR. J. MIGRATION L. 77 (2008); *Frontex and Rabits: The European Union is Stepping up its Operational Efforts Combating Illegal Immigration*, EUROPA, Apr. 20, 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/142&format=HTML&a>.

173. Council Regulation 863/2007, *supra* note 172.

174. So far, three Rabit teams have been established: The first on November 6, 2007 at Francisco Sa Carneiro Airport, Portugal; the second on April 10, 2008 on the border between Slovenia and Croatia; and the third on October 29, 2008 on the Romanian-Moldovan border. All teams shared the aim of testing the new Rabit team mechanism.

175. Hera I took place from July 17, 2006 to October 31, 2006, Hera II from August 11, 2006 to December 15, 2006, and Hera III from February 12, 2007 to April 12, 2007. *See* Frontex Examples of Accomplished Operations, http://www.frontex.europa.eu/examples_of_accomplished_operati/art5.html (last visited Oct. 9, 2009).

176. *See generally* Sergio Carrera, *The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands* 20-27 (Centre for European Policy Studies, Working Document No. 261, 2007).

interviewing the illegal migrants, with the ultimate goal of returning them and creating national measures against the facilitators of the migration.¹⁷⁷ The second consisted of joint patrols by Frontex and authorities of West African states along the coast of West Africa.¹⁷⁸ Several Member States, as well as Senegal and Mauritania, participated in these patrols based on agreements with Spain.¹⁷⁹ The aim of these patrols was to prevent migrants from commencing their often dangerous journeys to the Canary Islands.¹⁸⁰ Frontex's main concerns in carrying out these actions were the prevention of irregular migration and the return of illegal migrants.¹⁸¹ As was demonstrated above, such practices have an impact on the prevalence of THB. These activities seem to be motivated by a protectionist perspective—the desire to protect the EU from criminal networks and irregular migration. A human rights-based perspective—one which places more emphasis on the victims of criminal activities, and which addresses the root causes of THB—appears to have been absent in the development of the Hera Operations.

D. Migration Law and Victim Assistance and Protection

In relation to THB, migration law also plays (and must play) a role when a TCN has become a victim of THB in the EU. In these cases, concerted action at the EU level has the potential to have positive effects. For example, the Directive on Temporary Residence Permits for Victims of THB who Cooperate with the Authorities (“Directive”) is one of these actions.¹⁸² The primary goal of this directive is to fight irregular migration, especially smuggling and THB.¹⁸³ Combating irregular migration involves collecting evidence from victims for legal proceedings against traffickers. In return for their assistance, victims are given time to reflect on whether they wish to continue cooperating with the authorities (the “reflection period”); if they do, they will be granted temporary residence permits.¹⁸⁴ These permits give the victims access to care and assistance facilities, which help them recover from their traumatic experiences and start a new life. However, the residence permits will expire when the relevant legal proceedings end, regardless of the reasons for the proceedings’ termination.¹⁸⁵ Furthermore, the Directive only applies to TCNs, and not to EU citizens.¹⁸⁶

177. *Id.* at 20-21.

178. *Id.* at 21.

179. *Id.*

180. See Frontex Examples of Accomplished Operations, *supra* note 175.

181. *Id.*

182. Council Directive 2004/81, *supra* note 165. The title suggests that both victims of THB, and those TCNs who were assisted with their illegal entry into the EU are covered by the Directive. It needs to be emphasized, however, that the Directive covers only THB victims and that Member States can choose to extend the application to TCNs who were assisted. What is relevant for this section is how the provisions work for THB victims.

183. Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321) art. 63(3).

184. Council Directive 2004/81, *supra* note 165, art. 6.

185. *Id.* art. 8.

186. *Id.* art. 3.

The residence permits granted under the Directive also are restricted in two ways. First, they are temporary permits, which means that, in the end, victims will have to leave the Member State unless national migration law provides grounds for an extension of their stay.¹⁸⁷ Second, residence permits can only be granted if victims cooperate with the authorities.¹⁸⁸ The severity of the violence or threats encountered by a victim is not taken into account. In addition, issuing or extending a permit must be beneficial for the criminal investigation or the legal proceedings, and victims must sever all relations with those suspected of THB or of facilitating irregular migration.¹⁸⁹ These limitations and requirements reflect a focus on the interests of the EU, as opposed to the well-being of the victims; as long as the EU seems to gain from the victim's residence (or at least not be burdened by it), the victim is allowed to remain within EU borders. Under other circumstances, victims have to leave. The CoE Convention is more generous in this regard, as assistance to THB victims cannot be made dependent upon cooperation.¹⁹⁰

E. Steps Towards a More Sensitive Migration Policy

Especially since 2007, there seems to have been an increase in indirect sensitivity to a comprehensive approach to THB.¹⁹¹ This trend is visible in the Directive on Highly Qualified Employment,¹⁹² which addresses the brain drain and ethical recruitment in countries of origin.¹⁹³ It is also reflected in the Communication on Circular Migration, a document in which circular migration is put forward by the Commission as a new way to adjust the supply and demand for labor on an international level. The aim of circular migration is to allow both countries of origin and countries of destination to profit from the temporary migration of workers.¹⁹⁴ In the Communication on Circular Migration, the

187. *Id.* art. 13(2).

188. *Id.* art. 8(1)b.

189. *Id.* art. 8(1)(a), (c).

190. Convention Against Trafficking, *supra* note 66, art. 12.

191. See Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament: The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, at 2, COM (2006) 735 final (Nov. 30, 2006).

192. Council Directive 2009/50, *supra* note 155, at 22.

193. See Commission Green Paper on an EU Approach to Managing Economic Migration, at 11, COM (2004) 811 final (Jan. 11, 2005); *Communication from the Commission on Policy Plan on Legal Migration*, at 7, 10-11, COM (2005) 669 final (Dec. 21, 2005); *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Migration and Development: Some Concrete Orientations*, at 8-9, 31-34, COM (2005) 390 final (Sept. 1, 2005) [hereinafter *Communication on Concrete Orientations*]; *Communication from the Commission to the Council and the European Parliament, Integrating Migration Issues in the European Union's Relations with Third Countries*, at 15-16, COM (2002) 703 final (Dec. 3, 2002); *Communication from the Commission to the European Parliament and the Council, a European Programme for Action to Tackle the Critical Shortage of Health Workers in Developing Countries (2007-2013)*, at 6-7, COM (2006) 870 final (Dec. 21, 2006).

194. *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*, at 13, COM (2007) 248 final (May 16, 2007).

Commission proposes that the EU establish mobility partnerships with third countries if they are willing to combat irregular migration and contribute to reintegration.¹⁹⁵ These partnerships can only be initiated if third countries commit to taking measures that will prevent TCNs from remaining in the EU permanently.¹⁹⁶ Although the obligations associated with each partnership can differ, they may include the following six elements: (i) identification of nationals, (ii) return agreements, (iii) discouragement of irregular migration, (iv) measures to increase the efficacy of border controls, identity document usage, and information exchange, (v) measures to combat irregular migration and THB, and (vi) improvement of the economic and social situation in the countries of origin.¹⁹⁷ Obligations of the EU may include (i) the extension of opportunities for legal migration, (ii) assistance in governing legal migration (e.g., through adjusting supply and demand, supplying information on conditions for legal migration, providing language courses), (iii) measures to limit brain drain effects by supporting circular migration and remigration, and (iv) the improvement and simplification of visa acquisition procedures.¹⁹⁸ While it should be recognized that the EU is attempting to limit the negative effects of the brain drain, in concluding these partnerships, the EU clearly is also motivated by its desire to limit the number of TCNs that permanently remain in the EU. That said, it is important to acknowledge the importance of the fact that, with the Communication on Circular Migration, the EU has taken into consideration the effects of its policy on third countries, and has tried to optimize policy benefits in both the EU and the countries of origin. As such, the Communication constitutes a positive addition to EU development policy.

VI. EXTERNAL RELATIONS AND DEVELOPMENT POLICY

One of the root causes of THB is the inequality of living standards both between as well as within states in different parts of the world. As has been shown, a lack of legal migration opportunities further contributes to the THB problem. People are more likely to take disproportionate risks and become vulnerable to illegal practices when they have a limited number of legal migration options. In order to effectively combat THB, the EU must strengthen its cooperation with third countries to prevent irregular migration, to facilitate legal migration, and to fight THB by addressing its other root causes, in both countries of origin and countries of destination. To this end, the EU has adopted an Action Oriented Paper on Strengthening the EU External Dimension on Action Against THB (“Paper”).¹⁹⁹ In the Paper, various suggestions for the implementation of the external dimension are made with concrete steps to help realize them. The Paper discusses victim

195. *Id.* at 3-4.

196. *Id.* at 4.

197. *Id.*

198. *Id.* at 5-8.

199. *See generally* COUNCIL OF THE EUROPEAN UNION, ACTION ORIENTED PAPER ON STRENGTHENING THE EU EXTERNAL DIMENSION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS 1 (2009).

protection only briefly, but also includes, for example, information on how to mobilize society to combat THB. However, this paper is a non-binding instrument.

A. *Addressing THB in the European Neighbourhood Policy*

The European Neighbourhood Policy (“ENP”) was launched at the Thessalonica European Council in May 2003. It was established in order to create more coherence in the EU approach towards third countries in the immediate geographical vicinity of the EU.²⁰⁰ Developing the ENP has been a transpillar process in which the Commission has taken the lead. Action Plans are important instruments provided for in the ENP, which address economic, political, and security-related issues.²⁰¹ The objectives set forth in the Action Plans concern, for example, improved data collection, training programs, and improved support for victims.²⁰² Besides these Action Plans, the ENP also mandates the composition of Country Reports, in which the external policy of a country is assessed with respect to various issues. In the ENP Country Reports, a separate Justice and Home Affairs section deals with, among other things, organized crime. In many Country Reports, this section also specifically addresses THB.²⁰³

The protection of human rights is one of the goals of the ENP, and is a condition for cooperation with third countries.²⁰⁴ Addressing THB through ENP-related initiatives, thus, would both contribute to accomplishment of the underlying goals of the ENP, and would serve as an indicator of further cooperation between the EU and third countries. THB has been explicitly mentioned, in particular, in the Action Plans for THB victims’ countries of origin.²⁰⁵ Also important, resolving the THB issue is related to other pressing issues, such as organized crime reduction and improving equality between men and women in order to reduce the vulnerability of women.²⁰⁶ Gender equality is addressed both generally, and specifically in relation to THB, in the Action Plans. If the EU wants to implement an integrated approach to combating THB in its ENP, it should focus more on eradicating the root causes of THB, and should increase efforts to empower women in countries of origin. Instituting measures to combat THB can even be viewed as

200. See Marise Cremona, *The European Neighbourhood Policy: More than a Partnership?*, in DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW 244 (Marise Cremona ed., 2008).

201. See Elisabeth Johansson-Nogués, *The EU and its Neighbourhood: An Overview*, in GOVERNING EUROPE’S NEIGHBOURHOOD: PARTNERS OR PERIPHERY? 21 (Katia Weber et al. eds., 2007).

202. John David Occhipinti, *Justice and Home Affairs: Immigration and Policing*, in GOVERNING EUROPE’S NEIGHBOURHOOD 114, 127 (Katia Weber et al. eds., 2007).

203. See, e.g., *Communication from the Commission to the European Parliament and the Council: Implementation of the European Neighbourhood Policy in 2008*, at 6-7, COM (2009) 188/3 (Apr. 23, 2009).

204. See *Communication from the Commission, European Neighbourhood Policy: Strategy Paper*, COM (2004) 373 final (May 12, 2004).

205. See, e.g., EU/Moldova Action Plan, §§ 2.1, ¶ 5, 2.5, ¶ 51 (2005); EU/Ukraine Action Plan, § 2.4 (2005); Sylvia Maier & Frank Schimmelfennig, *Shared Values: Democracy and Human Rights*, in GOVERNING EUROPE’S NEIGHBOURHOOD 39, 51-52 (Katia Weber et al. eds., 2007).

206. See, e.g., EU/Moldova Action Plan, *supra* note 205, § 2.1, ¶ 8; EU/Ukraine Action Plan, *supra* note 205, § 2.1, ¶ 9.

a precondition for EU accession, being that observation of human rights is formulated as a prerequisite for accession to the EU.

B. EU Development Policy in Relation to THB

Migration and development have been hotly debated since 2002 within and outside of the EU.²⁰⁷ It is now widely recognized that there needs to be strong cohesion between EU migration and development policy.²⁰⁸

EU authority in the field of development cooperation is found in the Lisbon Treaty, in particular, in Articles 208 to 211.²⁰⁹ The EU's authority is rather limited because, under Article 208, it is shared with Member States.²¹⁰

The aims of EU development policy include eradicating poverty, institution and capacity building, and conflict prevention.²¹¹ Each of these goals is directed at improving circumstances for people who are vulnerable to trafficking. As such, development policy directly addresses some of the root causes of THB. This has been recognized at the EU level, as well as in documents such as the Ouagadougou Action Plan to Combat THB ("Action Plan"), and the Communication on Policy Priorities in the Fight Against Illegal Migration.²¹² The Action Plan advocates a comprehensive regional and international approach.²¹³ The Action Plan is comprised of a list of recommendations and political commitments made by the EU to individual African states. The recommendations and commitments are sometimes quite far-reaching and innovative, even if the Action Plan fails to indicate how EU development policy must be shaped, or how the EU can help address the root causes of THB. Nevertheless, this document must be seen as a starting point for new initiatives because it involves cooperation between the EU and African states on important THB-related issues. African and EU states have also adopted the Joint Africa-EU Declaration on Migration and Development

207. See generally *Communication from the Commission to the Council and the European Parliament Integrating Migration Issues in the European Union's Relations with Third Countries*, COM (2002) 703 final (Dec. 3, 2002); *Communication on Concrete Orientations*, supra note 193; U.N. GAOR, 61st Sess., Agenda item 55(b), U.N. Doc. A/61/515 (Oct. 13, 2006); Global Comm'n on Int'l Migration [GCIM], *Migration in an Interconnected World: New Directions for Action*, 23-31 (2005).

208. See, e.g., ACP-EU Joint Parliamentary Assembly 100.012/07/fin., Resolution on Migration of Skilled Workers and its Effect on National Development, 2007 O.J. (C 254).

209. Treaty on the Functioning of the European Union (Lisbon Treaty), 2008 O.J. (C 115) 49, 141-42 (EU).

210. The relevant provision reads as follows:

Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other.

See *id.* art 208(1).

211. See *id.*

212. See Commission of the African Union, *Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, as Adopted by the Ministerial Conference on Migration and Development* (Nov. 22-23, 2006) [hereinafter *Ouagadougou Action Plan*]; *Communication from the Commission on Policy Priorities in the Fight Against Illegal Immigration of Third-Country Nationals*, at 4-5, COM (2006) 402 final (July 19, 2006).

213. See *Ouagadougou Action Plan*, supra note 212, at 3-5.

("Declaration"),²¹⁴ whose language is occasionally a bit stronger, and whose cooperative actions are more concrete than those of the Action Plan. For instance, the Declaration reaffirms that all EU and African countries have a duty to cooperate fully in the prevention and control of illegal and irregular migration.²¹⁵ The Declaration has resulted in the establishment of the Migration Information and Management Center in Mali, which was inaugurated on October 6, 2008, and which is financed by the EU.²¹⁶ This pilot project aims to enhance Mali's capacity to deal with migration issues in partnership with Europe and with its neighboring countries.²¹⁷ It has been set up to fight irregular migration through job counseling for would-be and returned migrants.²¹⁸ This initiative can be seen as a means to better prevent and control irregular migration, to Europe in particular, thereby frustrating the activities of smugglers and traffickers.

Another example of EU development policy which has affected THB is the partnership between the EU and Morocco. The EU has sought to boost Morocco's development in order to reduce migration flows from Morocco to the EU.²¹⁹ In 1996, Morocco signed the European Mediterranean Association Agreement ("EMAA") with the EU, setting out the conditions for economic, social and cultural cooperation between the EU and Morocco.²²⁰ The Mésures d'Accompagnement, or Accompanying Measures Program ("MEDA"), aims to increase economic competition within Morocco by developing the private sector and promoting good governance.²²¹ Although the Moroccan government formally complies with MEDA, and more generally with the EU's fight against irregular migration, serious doubts remain about the effectiveness of these measures.²²² The intent of both EMAA and MEDA is, first and foremost, to curb migration, rather than to address the root causes of THB. The content of these agreements demonstrates, yet again, that most measures that affect THB are ultimately protectionist in nature, intended primarily to promote the EU's economic goals.

VII. CONCLUSION

Until recently, the EU's efforts to combat THB were largely comprised of criminal law initiatives. The focus of these measures was, primarily, the prohibition of THB and the prosecution of perpetrators of THB, rather than the protection of THB victims or the elimination of the root causes of THB. Increased awareness that THB should be approached from a human rights-based perspective

214. Commission of the African Union, *Joint Africa-EU Declaration on Migration and Development* (Nov. 22-23, 2006).

215. *Id.* at 4.

216. Press Release, European Commission, Top News from the European Commission 6 October to 2 November 2008 3 (Oct. 3, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=AGENDA/08/34&format=HTML&aged=0&language=EN&guiLanguage=en>.

217. *Id.*

218. *Id.*

219. EU/Morocco Action Plan, § 2.4(47).

220. Decision of the Council and Commission 2000/204, 2000 O.J. (L 70) 1 (EC).

221. Council Regulation 1488/96, 1996 O.J. (L 189) 5-7, 12-13 (EC).

222. Hein de Haas, Title 28, *Global Comm'n on Int'l Migration* (2005).

has marked a significant change in EU policy in recent years. Increasingly, EU policy tends to tackle all four human rights obligations outlined by Tom Obataka—prohibition, prosecution, and prevention of THB, and protection of THB victims—in accordance with the “three Ps” of counter-THB activity. Given the complexity of the crime, counter-trafficking measures must approach THB from various angles. As this article has shown, counter-trafficking measures must not only be derived from criminal law, but also from various other fields, such as labor law, migration law, external relations, and development policy. When policy makers are unable to integrate policies made in various fields when developing their agendas, anti-trafficking measures will inevitably have unintended, mutually defeating effects, and may even cause additional damage. A recent report by the Global Alliance Against Traffic in Women has provided proof of this phenomenon.²²³ The fact that assistance for trafficked persons is made conditional on cooperation with law enforcement officials will, in the long run, have counterproductive effects with respect to the fight against THB. Such policies may only have limited short-term benefits for law enforcement. At the same time, the conditionality of the assistance provided will inevitably make trafficked persons suspicious of law enforcement agencies, unwilling to talk to them and, thereby, will hinder rather than help with the prosecution of traffickers.²²⁴

This article has assessed the effect of a variety of EU measures on THB. The EU does not address THB prevention in an integrated, coordinated way. The EU has relegated prevention and protection in combating THB to a lower rank than prosecution. If the EU truly wants to implement the integrated, human rights-based approach it preaches, it must give equal attention to the prevention of THB, the protection and assistance of THB victims, and the prohibition and prosecution of persons involved in THB. Furthermore, the EU must assess the effects of proposed measures on THB when conducting policy making in, at the very least, the policy areas discussed in this article. To that end, the EU could develop a human rights sensitivity test or a THB sensitivity test consisting of a set of standards that each new legally binding measure would have to meet. Such a test would help prevent collateral damage in policy making, and would help implement a genuinely integrated and human rights-based approach to THB. In sum, while the EU has made, and continues to make, some significant progress in its fight against THB, it still faces a long road ahead.

223. GAATW COLLATERAL DAMAGE, *supra* note 5, at 12.

224. *Id.* at 14.

