

Human trafficking for labour exploitation: Interpreting the crime

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1. Introduction

What does human trafficking entail? One generally thinks of the immigration offence undertaken by organised crime groups that transfer women and girls illegally from their home to a country in which they are forced into prostitution, the escort branch, sex entertainment, web cam sex, or pornography.² However, nowadays, the crime encompasses human trafficking for *labour exploitation*, following implementation of international,³ pan-European⁴ and European⁵ legislation. The definition has thereby expanded to also include the crime of forcing others into work in other – generally legal⁶ – sectors and industries. However, how do we interpret this newer definition of the crime in the European Council Framework Decision?

This indicates a crucial legal problem; behaviour has already been criminalised, or at least European Union (EU) Member States are obliged to criminalise this behaviour, yet the definition does not unequivocally describe what constitutes it. However, legal certainty requires a precise definition for persons to reasonably understand what it exists of. This entails two issues: the crime has to be specifically and coherently based on criminal elements of the behaviour, as the *corpus delicti* requires, and persons should be able to know what it entails before they possibly

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2 This perspective is formed by the earlier international conventions and EU approach. The latter is shown in Joint Action 97/154/JHA and Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA), but also by Europol's mandate that is restricted to sexual exploitation (Convention based on Art. K.3 of the treaty on European Union (Europol Convention), Annex Referred to in Art. 2, *OJC* 316, 27.11.1995, p. 2). Also Europol, *Trafficking of Human Beings for sexual exploitation in the EU: a Europol perspective*, January 2006. International conventions are: International Convention for the Suppression of the White Slave Traffic, 18 May 1904, 35 Stat. 426, 1 L.N.T.S. 83, as amended by the Protocol of 4 May 1949, 92, U.N.T.S. 19; International Convention for the Suppression of the White Slave Traffic, 4 May 1910 III L.N.T.S. 278; International Convention for the Suppression of the Traffic in Women and Children, 30 Sept. 1921, as amended in Protocol, 93 U.N.T.S. 43; International Convention on the Suppression of the Traffic of Women of Full Age, 11 Oct. 1993; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted in G.A. Res. 317 (IV) of 2 December 1949, 25 July 1951, 96 U.N.T.S. 272; Convention on the Elimination of All Forms of Discrimination Against Women, 12 U.N.T.S. 14, Art. 6, Convention on the Rights of the Child, 1577 U.N.T.S. 3.; Also G.A. Res. A/52/637 (12 December 1997).

3 Art. 3, Para. (a) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Protocol), Supplementing the United Nations Convention Against Transnational Organized Crime (UNTOC), G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, UN Doc. A/45/49 (Vol. I) (2001).

4 Art. 86 of Council of Europe Convention on action against trafficking in human beings, CETS No. 197, 16 May 2005, Warsaw (CoE Convention).

5 Council Framework Decision, *OJ L* 203, 1.8.2002. (Does neither include sexual exploitation of children and child pornography (CNS/2001/0025) nor organ removal).

6 To highlight two questions: may forced committing of crimes be part of it as well? And what about the countries that consider prostitution to be legal, e.g. the Netherlands?

might undertake it, as follows from the *lex certa*-principle of legal certainty. This contribution therefore tries to resolve the question: *How does the Framework Decision's definition on human trafficking for labour exploitation have to be implemented by legislators, and the crime interpreted by police, prosecution and judiciary in European Union Member States?*

1.1. Outline

This article aims to debate the necessary clarification of the Framework Decision's definition of human trafficking for labour exploitation by not only highlighting problems with it, but by also trying to resolve some. The first section, therefore, provides the definition, and comments on it. Thereafter, Section 3 provides an overview of empirical research that challenges the general assumptions underlying this crime so as to enable a true appraisal of the crime's nature. From that true perspective, Section 4 offers a synopsis of national legislation and adjudication in three Member States. Two of these have implemented the Framework Decision, Belgium and the Netherlands, and one has not – yet – done so, the United Kingdom. Thereafter in Section 5, elements of the Framework Decision's definition that remain unexplained in earlier sections, will be interpreted using international, pan-European and European legislation and adjudication. In Section 6, the suggested interpretation of the Framework Decision's definition is accounted for.

2. Difficulties with the Framework Decision's definition and lack of interpretative solutions

The Framework Decision's definition is purposefully drafted 'as broad as possible so that the term may also cover modern forms of exploitation resulting from trafficking in human beings, such as forced marriages and debt bondage'.⁷ It aims at addressing '(...) serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion'.⁸ Lastly, the definition provides clarity to better understand the crime⁹ and encourage minimum harmonisation.¹⁰ Minimum harmonisation¹¹ involves a synchronised combat of human trafficking in and between the Member States through: (a) transnational co-operation in criminal matters, (b) uniform sentencing within the EU, and (c) comparable adjudication following the Framework Decision's definition:

- (1) 'the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:
 - (a) use is made of coercion, force or threat, including abduction, or
 - (b) use is made of deceit or fraud, or
 - (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
 - (d) payments or benefits are given or received to achieve the consent of a person having control over another person

7 European Parliament report 2000, Justification under Amendment 15, Art. 1a (new).

8 *Ibid.* under Amendment 3, Recital 3.

9 European Parliament, Resolution on trafficking in human beings (OJ C 032, 5.2.1996, p. 88).

10 Harmonisation is a specific imperative of this Framework Decision, which was drafted in reply to failure of full implementation of the Joint Action of February 1997 (OJ L 63, 4.3.1997, pp. 2-6). Also Joint Action (98/699/JHA, OJ L 333, 9.12.1998) and Joint Action (98/733/JHA, OJ L 351, 29.12.1998, p. 1).

11 Although only binding for its end result, and thus leaving room for Member States to choose types of legislation, a lack of criminal law at least undermines co-operation in criminal matters. Art. 34 Treaty on the European Union (OJ C 321E, 29.12.2006). See otherwise, T. Obokata, "Trafficking" and "Smuggling" of Human Beings in Europe: Protection of Individual Rights or States' Interests?, 2001 *Web Journal of Current Legal Issues*.

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

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

However, this definition is imprecise, mainly because it lacks separation of actions and outcomes, and uses general legal acts and undefined elements. To highlight crucial questions: When does a person traffic another for labour exploitation? Does this require an accumulation of actions (under (1)), means (under a-d), and actualised exploitation? Can intended exploitation¹² suffice? Does it entail forced marriages, removal of organs, child soldiers, fraudulent doption, forced begging, obliged performance of sports, and/or forced criminal activity? Does this definition require perpetration by an organised criminal group or it is possible for 'unorganised' individuals to also traffic? Does it involve an aspect of trade as follows from the term trafficking?¹³

With regards the actions, when does a perfectly legal act, for instance, recruitment, become the criminal act of trafficking? What is required for behaviour to constitute means, e.g. abuse of authority or of a position of vulnerability? Does payment include parents who accept money for their child to be educated and nationalised abroad? Furthermore, how can we use all elements in the non-exhaustive list of forced labour and other notions that are generally criminalised in all jurisdictions (national, supranational, and international)? Thus, how is the element of forced labour defined in its relation to trafficking? In other words, does it include communal services and/or prison work? How do we use the undefined term of servitude?¹⁴ Finally, how can we use slavery in a present-day context without controversy; does slavery exist today? More generally, how can we distinguish between labour that is performed somewhat unwillingly from human trafficking for labour exploitation?

The above-raised questions cannot be solved through interpretation¹⁵ on the basis of the Framework Decision's Explanatory Memorandum¹⁶ or even that of the legislative guide to the United Nations (UN) Protocol on which this definition is largely based.¹⁷ The Memorandum refers namely to the legislative guide, which does not define the elements, but instead refers to various international documents.¹⁸ A comparable solution is proposed by the United Nations Office on Drugs and Crime (UNODC) that makes the elements of crime dependent on national legal definitions of associated criminal offences.¹⁹ However, these encourage different national definitions and thus not harmonisation. The latter is, however, crucial. Not because it is an end in and of itself, but because it (a) avoids that traffickers can make use of gaps in the legislation

12 *Oxford English Dictionary*, 'exploitation', v.: 'action of turning to account for selfish purposes, using for one's own profit'.

13 *Oxford English Dictionary*, 'traffic', v.: 'To carry on a trade in, to buy and sell; to dispose of (or acquire) in the way of trade; to deal in; often with sinister implication'.

14 See Section 5.

15 Arts. 31 and 32 Vienna Convention on Law of Treaties.

16 Memorandum of the bill amending various provisions in order to step up action against trafficking in and smuggling of human beings, Parl. Doc., House, 2004-2005, 51-1560/1 (Memorandum Framework Decision); UNODC, *Legislative Guide on the United Nations Convention on Transnational and Organised Crime*, New York, 2004; and UNODC *Trafficking in human beings: Global Patterns*, April 2006 (UNODC 2006).

17 Also because of E. Klamt, *Report on the proposal for a Council Framework decision on combating trafficking in human beings* in Consultation procedure PE 302.228/DEF, A5-0183/2001, 30 May 2001.

18 No definitions for servitude and/or practices similar to slavery. For forced labour and slavery it refers to several, mostly international, documents (see Section 5).

19 Offences related to, amongst other offences, slavery, involuntary servitude, forced or compulsory labour, unlawful coercion, unlawful threats, extortion, and false imprisonment. UNODC uses a working definition of trafficking for labour exploitation with an explicit reference to Art. 2.1 ILO Forced Labour Convention 1930 (No. 29) in UNODC 2006, p. 19.

of other countries or other types of legislation, and (b) enables unique measures for an effective combat.

Firstly, criminal legislation on human trafficking for labour exploitation necessarily also poses problems in other legal areas such as labour, migration, and human rights law. These problems inescapably exist worldwide, but are even more complicated within the EU due to its unique nature. Within the EU, citizens can freely move as workers²⁰ since there are no border controls, and they are offered labour standards in labour and human rights law. It is argued, regardless of its truthfulness, that immigration into the EU is restricted so as to protect this area of free movement. Within this context, criminal legislative measures, such as the Framework Decision, affect migration issues. This is the case, even though this particular legislative measure has been drafted under the third pillar, Justice and Home Affairs, that also covers migration law. This effect is even more prone when labour markets require more workers, but nationals are unwilling to perform the job. Another effect or even conflict exists in measures on labour markets and other economic sectors under the EU's first pillar of the Economic community. Such possible clashes also may arise where common foreign policy-issues, under the second pillar, are directed at so-called source, transit and destination countries of human trafficking.

Secondly, even though the EU faces these difficulties, it also possesses unparalleled tools for the effective combat of human trafficking for labour exploitation, when harmonised. Criminal investigations can, for instance, be facilitated by transnational co-operation in Joint Investigation Teams of Member States' police forces,²¹ as well as with support at the EU-level by virtue of the European police office, Europol.²² These can also involve: (a) money investigations into legal persons²³ that enable confiscation of criminal gain,²⁴ and (b) measures directed at criminal organisations.²⁵ Also prosecutorial joint efforts with help from Eurojust²⁶ enable an effective combat. Both possibly with use of European arrest warrants that permit effectuation of another Member States' judicial authority's arrest warrants for alleged traffickers.²⁷ Lastly, EU measures also extend to trial. Extensive victim protection and assistance exist, even though this may not be deemed wholly satisfactory, because it appears to effectuate criminal investigation more so than actually providing effective victim protection.²⁸

Both reasons indicate the need to come to uniform interpretation of the definition. The method to reach that is indicated below.

2.1. Research method; outline of the remainder of this article

Uniform interpretation of the Framework Decision's definition on human trafficking for labour exploitation firstly entails preventing a more restrictive interpretation than reality requires.

20 Also *Schengen-area*, incorporated into EU law on 1 May 1999.

21 However, an earlier JIT (Art. 13 of the European Union Convention on Mutual Assistance in the Member States, *OJ C* 197, 12.7.2005) investigating trafficking for sexual exploitation did not reach the operational phase mainly, because of a lack of legislation in place. See C. Rijken, (2006) 'Joint Investigation Teams: principles, practice, and problems. Lessons learnt from the first efforts to establish a JIT', 2006 *Utrecht Law Review* 2, pp. 99-118.

22 As done already, as shown in Europol, *Annual Report 2006*, and B. de Jonge, *Eurojust and human trafficking, the state of affairs*, Eurojust, October 2006; home.student.uva.nl/boudewijn.dejonge/Eurojust&HumanTrafficking.pdfArticle.

23 The Framework Decision effectuated the need for 'effective, proportionate and dissuasive' by imposing imprisonment sanctions that are no less than eight years to enable these investigation techniques, and settling criminal and civil liability of both legal and natural persons. Penalties on legal persons include criminal or non-criminal fines and specific sanctions such as a temporary or a definitive ban on commercial activities, a judicial dissolution measure or the exclusion from public benefits or advantages.

24 98/699/JHA, *OJ L* 333, 9.12.1998. However, not all EU Member States have uniform sentences, see Section 4.

25 98/733/JHA, *OJ L* 351, 29. 12. 1998, p. 1.

26 Joint Action 98/428/JHA *OJ L* 191, 7.7.1998, pp. 4-7.

27 Art. 2 (2) Council Framework Decision (2002/584/JHA, *OJ L* 190/1, 18.7.2002).

28 Council Framework Decision (2001/220/JHA, *OJ L* 82/1, 22.3.2001) and Joint Action 98/733/JHA. Implementation by all EU Member States of the CoE Convention, which offers more victim and witness protection, is recommended.

Therefore, other sources than criminal case law will be examined prior to, secondly, reviewing legislation and adjudication in three EU Member States. Lastly, disparities of national case law with the Framework Decision's definition will be explained with complementary research on non-national legislation and adjudication. This will all lead to a uniform interpretation of the definition.

3. A true appreciation of the crime of human trafficking for labour exploitation

Several researches on human trafficking for labour exploitation tackle five common assumptions about this crime.

Firstly, although it would appear to be generally accepted that human trafficking for labour exploitation neither happens often nor on a large scale,²⁹ this has been proven wrong. At least 2.45 million people world wide are currently in forced labour resulting from human trafficking.³⁰ Although it is difficult to estimate the magnitude of this crime, due to the illegal nature of this employment and its recent criminalisation,³¹ nonetheless the International Labour Organisation (ILO) has reached this figure on the basis of a safe approximation. The ILO adds that in industrialised countries – including the three EU Member States in this research – more than 75 per cent of forced labour is performed by victims of trafficking.³² With regards the entire population of trafficked victims³³ – hence including sexual exploitation – the proportion that ends up in labour exploitation is less clear. According to ILO figures this figure is almost one-quarter, 23 per cent,³⁴ whereas research that bases its estimate on figures of the United Nations reports about three-quarters.³⁵

Moreover, the victims of this crime, both female and male, are to be found in almost all sectors and industries imaginable.³⁶ For instance: (i) domestic work, including care/nursing, au pairs, and in forced marriages working for different 'relatives'; (ii) construction work, also renovation; (iii) hospitality services, e.g. restaurants, bars, cafeterias, and night shops; (iv) agriculture and horticulture, e.g. the fruit sector and greenhouse farming, in the Netherlands; (v) food industry work, ranging from food processing and packaging to slaughter work;

29 E.g. interview with Mrs Kangaspunta (UNODC) on 26 April 2007 on <http://usinfo.state.gov>

30 Remark that forced labour arising from trafficking represents a significant proportion of the total, but not the majority.

31 Western Europe is generally reported as a destination sub-region, pp. 19 and 33 in UNODC 2006. Levels of reporting to UNODC may possibly vary because of various biases. Also F. Laczko, *Human Trafficking: The Need for Better Data*, International Organisation of Migration, 2002, on www.migrationinformation.org

32 ILO, *A global alliance against forced labour, Report of the Director-General, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, International Labour Conference, 93rd Session 2005, Report I (B), p. 14.

33 Human trafficking for both purposes is thought to involve nationals from 127 countries who are trafficked for subsequent exploitation in 137 countries (UNODC 2006). ILO mentions it as one of the fastest growing worldwide problems in recent years. This author has neither found statistical justification for this claim on 'slave labour' of ILO (see note 36 and Chapter 5) nor statistical backings in other sources. Two more regional sources confirm: CoE estimates that it is the third largest illicit money making venture in the world after trafficking of weapons and drugs (*Explanatory Report – Action against Trafficking in Human Beings*, 16 May 2005) and Europol states it as one of the most lucrative organised crime activities in the EU, *Annual Report 2006*.

34 As opposed to 40 per cent who end up in sexual exploitation.

35 D.M. Hughes, 'The "Natascha" Trade: The Transnational Shadow Market of Trafficking in Women', 2000 *Journal of International Affairs*, Vol. 53, quoting UN figures.

36 First research in this area: Germany: N. Cyrus, *Trafficking for Labour and Sexual Exploitation in Germany*, ILO, Geneva, 2005 (uses same ILO definition, note 36). Belgium: Centre of Equal Opportunities and Opposition to Racism (CEOOR), *Trafficking in human beings, Annual Report, Belgian Policy on Trafficking in and Smuggling of Human Beings: Shadows and Lights*, 2005, p. 81. Social Inspection (*Sociale Inspectie (FOD Sociale Zekerheid)*) of 2003 and A. Bucquoye & W. Cruysberghs, *Internationaal huispersoneel in België, een exploratief-kwalitatief onderzoek*, 2003. The Netherlands: J. van der Leun & L. Vervoorn, *Slavernij-achtige uitbuiting in Nederland*, 2004, p. 34, and Bureau of the National Rapporteur on Human Trafficking, presented at conference '21st Century Slavery, issues and responses', in Hull (not published), also fifth publication of the Bureau in 2006. UK: K. Skrivánková, *Trafficking for forced labour, UK Country Report*, Anti-Slavery International 2006, B. Anderson & B. Rogaly, 'Forced Labour and Migration to the UK. Study prepared by COMPAS in collaboration with the Trades Union Congress', 2005, and UK Home Office, *tackling human trafficking – Consultation on Proposals for a UK Action Plan*, 2006.

(vi) automotive and ship work, such as professional transport by road, cabs, car washes, and work in ports; (vii) the textile industry, such as laundry work and sorting out second-hand clothes. Some were forced to commit crimes, for instance, shoplifting, pick-pocketing and the sale of pirate CDs and DVDs.³⁷ Additionally, anecdotal information is available on cleaning companies, private employment agencies including illegal labour subcontractors, door-to-door distribution of advertisement leaflets, and exploitation of foreign football players, in Belgium.³⁸

Secondly, whereas the combat of this crime³⁹ emerges in light of human smuggling⁴⁰ – the crime of transnational transportation of non-nationals for criminal gain – or other so-called illegal migration acts,⁴¹ there is not necessarily a nexus between human trafficking and illegal immigration. Firstly, some migrant workers that were trafficked internationally came through legal channels; one study found use of regular migration routes and work visas.⁴² Nonetheless, many of these workers believed that they were dependent on their employer for legal residence, e.g. for visa extensions. Cynically, in some cases this belief eventually became reality; they became illegal in the country because traffickers retained their documents until these documents became outdated.⁴³ Additionally, it is not only a cross-border crime, for instance, research suggests asylum seekers, students, persons in forced marriages, legal residents but without the required work permit or with no work permit at all, to be trafficking victims.⁴⁴ Finally, this also points to the other possible victims: nationals.⁴⁵ Hence, even though, and this is stressed, the abovementioned research focused on immigrants, nonetheless nationals were found. This also emphasises the importance that more research is undertaken in relation to nationals. Until now, Dutch literature research points to two categories of possible national victims: extremely unassertive women, who face all kinds of social and psychological problems, and women in forced marriages. There appears no reason why male nationals cannot be victimised as well, as also addressed separately below.⁴⁶

Thirdly, because of the lack of emphasis on this type of human trafficking, a category of victims appears unrealised: men and boys, but also women not involved in sexual exploitation. As mentioned above, all these groups can be found in the victims of trafficking. Additional problems are also conceivable: men, for instance, cannot be sheltered with female victims of trafficking for sexual exploitation.⁴⁷ Furthermore, not only has this perspective on victims given a new viewpoint, the same accounts for found perpetrators.

Fourthly, although the combat of human trafficking concentrates on measures to investigate organised criminal groups,⁴⁸ these groups do not appear to be the only traffickers: also ‘unorganised’ individuals emerge. One specific category of ‘unorganised’ individuals is ‘employers’ of

37 Cf. Belgian criminal law provision on coercion into criminal acts and these German and Dutch findings. Also Section 4.

38 CEOOR, *Beeldvorming van de mensenhandel en analyse van de rechtspraak*, Jaarverslag 2000, pp. 90-106.

39 Implementing The Hague Programme: the way forward, (COM/2006/0331 final). *Ibid.* note 3.

40 *I.e.* transborder transportation of non-nationals for criminal gain.

41 I. Omelaniuk, ‘*Trafficking in human beings*’, New York, 6-8 July 2005, UN Expert Group Meeting on International Migration and Development, United Nations Secretariat. It is questionable whether the UN Protocol requires an element of transborder movement, because of Art. 1 (2) requiring provisions of the UNCTOC to apply, *mutatis mutandis*, to the Protocol unless otherwise provided herein, even though the definition does not require it.

42 This indicates the need for information provision on residence permits.

43 K. Skrivánková, *Trafficking for forced labour*, UK Country Report, Anti-Slavery International 2006.

44 H. De Jonge van Ellemeet, ‘Slecht werkgeverschap of “moderne slavernij”’, handhaving van een nader af te bakenen verbod’, 2007 *Justitiële verkenningen* 7, p. 107, and National Bureau Report 2006, *supra* note 36.

45 *Ibid.*, and Van der Leun & Vervoorn, *supra* note 36.

46 Van der Leun & Vervoorn, *supra* note 36.

47 A problem for instance found in the practice of BlinN (Bonded Labour in the Netherlands), www.blinn.nl

48 E.g. Objectives under Policy sub-area 1 in *Evaluation of EU Policies on Freedom, Security and Justice* (COM/2006/0332 final), and Point 45. under 1.3.2. in *Report on the implementation of the Hague programme for 2005* (COM/2006/0333 final).

domestic workers. Individuals in this category are found to sometimes hire the victims directly.⁴⁹ However, if not, these ‘employers’ indicate they do not object to paying others, other than the employee, whether such a third party is a relative or an agency.⁵⁰ Indications of other individuals independently taking care of entry and/or refuge and/or accommodation are slum landlords and illegal accommodation and camping field exploiters.⁵¹ Additionally, fraud identity paper-makers and deliverers might work autonomously.⁵² The same accounts for individuals faking a marriage so as to allow victims to work and/or gain the host country’s nationality, or that of another *Schengen*-country so as to enable free movement. Additionally, both legal and semi-legal companies appear involved. For example, intermediary companies serve as loan companies or job agencies.⁵³ Literature research suggests that some of these ‘companies’ mostly aim at illegal persons. Some suggest to employers that they can work legally. Other principals knowingly permit these illegal workers to work in their companies.⁵⁴ In both situations, a strikingly high number of foreign citizens, many of whom work as recruiters, labour brokers or employers in their home country, appear to recruit migrants.⁵⁵ This leads to the last challenged assumption, the means used in the course of trafficking.

Lastly, whereas traffickers appear to generally use physical violence in sexual trafficking, it might be underestimated that trafficking for labour exploitation generally shows ‘softer’ means, such as debt bondage, removal of identity documents or intimidation and threats. Another, more intimidating and freedom-limiting situation, was found to be where victims lived with their traffickers.⁵⁶ This all leads to the following conclusion.

3.1. Conclusion

The abovementioned specific knowledge concerning the crime’s true nature substantiates that: (i) the crime does exist and in a significant portion of the labour market; (ii) it is not necessarily part of illegal migration, including (a) entry in a country through legal channels, (b) victims may work legally, or reside legally but work illegally, and (c) victims may also be nationals; (iii) women, men and boys can be victims (iv) perpetrators are individuals as well as criminal groups, and (v) generally more subtle means are deployed than in women trafficking for sexual exploitation. These findings provide a true appreciation of the crime and provoke, from this perspective, an examination of current national legislation and adjudication, as follows.

4. Human trafficking in three EU Member States

This section provides an impression⁵⁷ of how the Framework Decision has thus far – if at all – been implemented, as well as a case law synopsis indicating recent national judicial interpretation of the crime.

49 For a similar situation see the European Court on Human Rights (ECtHR) case *Siliadin v. France* (73316/01 [2005] ECHR 545) in Section 5.

50 B. Anderson & J. O’Connell Davidson, *Is trafficking in human beings demand driven?: a multi-country pilot study*, Geneva, International Organization for Migration, 2003.

51 *Ibid.*

52 Suggested in Skrivánková 2006, *supra* note 43.

53 Bureau of the National Rapporteur on Human Trafficking 2006, *supra* note 36.

54 A. van der Lugt, & R. Zoetekouw, ‘De strijd tegen georganiseerde illegale arbeid – het barrièremodel’, in *Jaarboek Fraudebestrijding*, 2003, pp. 5-6, referred to in *Aanwijzing aanpak mensenhandel en andere vormen van uitbuiting in de prostitutie* (2000A015).

55 Cyrus 2005, *supra* note 36.

56 Skrivánková 2006, *supra* note 43.

57 This sample cannot be generalised to all EU Member States, but did use a well chosen range of countries. Belgium has a long history of combating human trafficking also for labour exploitation from 1995 onwards. The Netherlands criminalised this only recently, but did already distinguish trafficking from legal prostitution work; Dutch legalised prostitution required to define when sex work has been forced. The UK with its distanced position within the EU and first cases on trafficking for sexual exploitation completes the spectrum.

4.1. Diverging definitions on human trafficking for labour exploitation

Current national definitions on trafficking for labour exploitation in Belgium, the Netherlands, and the United Kingdom (UK) differ from the Framework Decision and from each other. Crucially, other types of legislation were enacted: whereas Belgium⁵⁸ and the Netherlands⁵⁹ used criminal law, the UK⁶⁰ did not implement criminal law following the Framework Decision,⁶¹ but only used migration and employment law. Even in the two countries that do criminalise it, the substance of the crime is different. The Belgian definition ‘only’ requires actions and exploitation; the means are regarded as aggravating circumstances. The Dutch definition follows the Framework Decision in requiring an accumulation of all three to criminalise behaviour as trafficking for labour exploitation.

Additionally, Belgian law regards criminal law on human trafficking for labour exploitation to also encompass⁶² exploitation of begging⁶³ and coercion to commit a crime or offence.⁶⁴ It requires that persons are employed ‘in conditions incompatible with human dignity’; a general principle of law that is not further defined by the legislature.⁶⁵

The Dutch definition, although almost a literal translation of the Framework Decision’s, nonetheless also criminalises another type of behaviour: ‘The one who intentionally profits from this exploitation of another’. It is explained as ‘not only criminalise traffickers, but also those who gain from exploitation’.⁶⁶ It is unclear what the distinction is; at least, it does not follow from the Framework Decision. Furthermore, although the Belgian legislature appears to extend criminal legislation, it is questionable how willing the Dutch are in this regard. Dutch policy papers, nonetheless, do emphasise that excesses will predominantly occur in the sex industry.⁶⁷

Lastly, the UK evidently lacks an equivalent definition for trafficking for labour exploitation in domestic criminal law. Where it could be investigated under the applicable migration law, there exists a seemingly higher evidentiary threshold than in cases of trafficking for sexual offences; the perpetrator must have believed that the victim was brought to the UK to be exploited.⁶⁸

58 Art. 433quinquies Belgian Criminal Code (Act of 10 August 2005). The government of Belgium presented a Bill to Parliament on 14 January 2005 that was subsequently enacted on 10 August 2005, and published in the *Belgian Official Journal (Moniteur Belge)* on 2 September 2005. Now Arts. 443d-h.

59 Art. 273a – renumbered to 273f – Criminal Code, Act accepted by the First Chamber on 7 December 2004 (*Uitvoering van internationale regelgeving ter bestrijding van mensensmokkel en mensenhandel, Kamerstukken II 2003-2004, 29 291, no. 3*). Dutch criminal legislation was from 2000 onwards confined to trafficking prostitution, and implemented the Framework Decision whilst making labour exploitation a crime against the personal freedom by act of 1 January 2005.

60 Section 4 *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*, makes ‘arranging or facilitating arrival in the UK and departure from it when the ‘trafficker’ intends to exploit this person himself or believes that another is likely to exploit this victim in the UK or elsewhere’ a migration offence, and Section 145 Nationality, Immigration and Asylum Act 2002 for trafficking for prostitution. Sections 57-59 Sexual Offences Act 2003 criminalises wide-ranging offences of trafficking for the purpose of any sexual offence, which apply to trafficking of people into, within or from the UK. Equivalent Scottish provisions are contained in the Criminal Justice (Scotland) Act 2003 (Section 2). The labour law *Gangmasters (Licensing) Act 2004* established in April 2006 the Gangmasters Licensing Authority (Section 1), for a licensing scheme for labour providers in agriculture, shellfish gathering and associated processing and packaging sectors; the Act prohibits anyone from acting as a gangmaster in the specified area without a licence (Sections 6 and 12), and made it an offence to enter into an arrangement with an unlicensed one (Section 13).

61 No implementation following the UN Protocol or CoE Convention either.

62 Although the Framework Decision on child pornography is read in conjunction with this Framework Decision.

63 New Art. 433b.

64 Explanatory memorandum of Belgian Bill (*supra* note 58).

65 Further explained in Section 4.2.1.

66 *Uitvoering van internationale regelgeving ter bestrijding van mensensmokkel en mensenhandel, Kamerstukken II 2003-2004, 29 291, no. 3, p. 18*.

67 Government, *National Action Plan Human Trafficking, additional measures of the Cabinet to combat human trafficking in the Netherlands*, December 2004, p. 7. *Kamerstukken II 2003-2004, 29 291, no. 3, p. 12*. Also Board of Procurators-General, of Public Prosecution, *Indication Combat Human Trafficking*, 2004, (PaG/BJZ/3598). Determines national prosecution policy, the Dutch ‘magisterial’ prosecutor namely directs and checks police investigations.

68 House of Commons, *Asylum and Immigration: the 2003 Bill*, 17 December 2003, p. 87. Also quoting Government’s Explanatory Notes on the Bill (Bill 5-EN).

4.1.1. Conclusion

Hence, harmonised criminal law is not as self-evident as appears from the UK approach, and the different definitions that do not obviously follow the Framework Decision's definition, indicate divergent legislative approaches.

It follows from the diverse legislation that (1) different definitions of the crime exist, and (2) that these hamper harmonisation, as well as co-operation and sentencing. Co-operation in criminal matters is clearly hampered due to the UK's lack of domestic criminal law, but it may also be troubled between Belgium and the Netherlands. A clear problem is foreseeable as a result of the forthcoming European evidence warrant.⁶⁹ In this case, Belgian authorities might refrain from collecting evidence on means, and the Dutch may possibly require additional evidence on 'intentional profiting'. This indicates co-operation difficulties at the EU-level, in case of Eurojust support, but also if Europol obtains a mandate to investigate trafficking for labour exploitation, additional information on national interpretations will currently be crucial. Additionally, the diverging definitions prohibit uniform sentencing. A similar case in Belgium where proof of the means used in trafficking exists, will necessarily lead to a higher sentence than in the Netherlands and as follows from the Framework Decision. The UK's case is even more apparent, because it lacks minimum maximum penalties for trafficking for labour exploitation on the whole.

This compels an examination of judicial interpretation of the crime. For lack of case law, this sample⁷⁰ includes not only case law before the Framework Decision was implemented, but also a couple when the definition was introduced in Belgian and Dutch law.

4.2. Diverging adjudication in EU Member States

4.2.1. Belgian case law

The Belgian landmark case⁷¹ on human trafficking for labour exploitation deviates from the Framework Decision by requiring two elements of: (i) movement and (ii) exploitation, and also breaks almost wholly with case law traditions by requiring movement and constructing exploitation differently.

Firstly, the two requisites of movement and exploitation are explained with a twofold scheme, but without an explicit explanation of movement. Victims who entered the country on their own by various means – some of whom legally – were thought to be 'moved' to Belgium. That is, some were invited to visit castles, some were handed out visas and others were helped by requesting those.

The second element of exploitation required 'conditions incompatible with human dignity' and required two stipulations: (a) 'intended and actual exploitation'⁷² and (b) that one or more persons had to work in conditions that were incompliant with the norms as settled in the 'Act of 4 August 1996 concerning the well being of employee, and the payment of the minimum wages'.⁷³ With regards to (a), case law mirrors the legislation in requiring the perpetrator's intent

69 COM (2003) 648 final, 2003/0270 (CNS).

70 Only those cases for which the entire explanatory decisions were available in the original language are used. Only independent databases are consulted, although also these databases have the deficit of merely reported cases by the publishers (or courts recommend them to the database in the Netherlands). Search terms were 'human trafficking' and the applicable national legislation. For Belgium May 1999-May 2006, the Netherlands March 1999-March 2006, UK April 1999-April 2006.

71 District Court (*Correctionele rechtbank van Brugge, 14e Kamer*, 25 April 2006).

72 The Court refers to G. Vermeulen & F. Dhondt, 'België als voortrekker in de internationale strijd tegen mensenhandel en -smokkel. Een nadere analyse van de bestaande regelgeving en de vernieuwingen n.a.v. de wet van 10 augustus 2005 ter versterking van de strijd tegen mensenhandel en -smokkel', in: *XXXIIe Postuniversitaire cyclus Willy Delva, Strafrecht & strafprocesrecht*, 2006, p. 11.

73 *Ibid.*, pp. 12-14.

to be to gain from the activity and actual gain of profit. Intended gain was found proven on the basis of calculations indicating ‘labour costs savings’, the company accountancy namely showed that the lower ‘loan’ payment compensated for costs of stay, transport and visas. Actual gain was proved by grant profits as calculated by the court. The existence of the exceptional profit made, proved both trafficking and aggravating circumstances because it accumulated to means deployed in the course of this crime.⁷⁴ The second requirement, (b), was met due to the nature of the work, the working conditions, and even because of the living conditions. The first consisted of long working days for very low wages and with hardly any time off per week on construction work in ships and castles. Working conditions were neither healthy nor safe, and there was, *inter alia*, a lack of protection against welding fumes, fencing of dangerous holes, secure machines and rescue equipment. The living conditions were also incorporated in the judgment, whereas the victims stayed in a hangar that was clearly not suitable for living as also evidenced by the onlooker of the property.

Other important issues were also settled by the court. A criminal group was found, thereby also constituting aggravating circumstances, because of custom, association and connection between individuals, because both the size and duration of the ‘deliverance’ of the Lithuanians, their group working, and their clear and unambiguous ties. Liability of a legal person was also found; the corporation that hired the Lithuanians was held accountable. Thirdly, the court also concluded that means used constituted aggravating circumstances: the perpetrators gave false expectations to those in a vulnerable position. The vulnerable position was proven, because of factual circumstances of unemployment and low wages in Lithuania. Fourthly, the court deemed a person’s unwillingness as crucial: someone who himself opts to return whilst arguing that he earns three times more than in his home country and does not have to pay for food and residence, is not a victim. Lastly, a combination of, in this case, not being paid and violations of social legislation was required. Hence, labour exploitation entails a violation of working conditions – and possibly also living circumstances – as an infringement of social legislation. Such a position obviously undermines harmonisation as long as such social legislation is nationally organised.⁷⁵

Even though this approach is promising, except for the necessary difficulty with harmonisation with this nationally-oriented approach to social legislation, earlier Belgian case law, which came about before the Framework Decision was implemented, also provides interesting angles. Earlier Belgian case law did not require the element of movement. Besides, the assessment of ‘intended and actual gain’ as one of the requirements of exploitation is different from earlier appraisals of gain. In other words, the required violations of labour law and social security law appeared to exist always,⁷⁶ but in other manners and not always consistently. Two extremes are the explanation of exploitation by contrasting it to the earnings of an ‘irregular worker’ (*zwartwerker*)⁷⁷ versus exploitation as random payment⁷⁸. However, exploitation was regularly explained with ‘multiple dependencies’ on traffickers.

Next to no or little payment, generally ‘multiple dependencies’ on traffickers, for example, for living, food, and/or transport was required. The range of such dependencies is wide; the extreme being utter control of someone’s movements. This was found in cases in which the victims were made to do bar work, whilst being continuously guarded and not having the

⁷⁴ In this case, under Art. 77quater 6° and 77quater 7° of the Alien law.

⁷⁵ See Section 5.

⁷⁶ Supreme Court, 9 January 2002, No. P.01.0851.F (*Hof van Cassatie*). See also CEOOR, *Pleidooi voor een integrale benadering, analyse van de wetgeving en de rechtspraak*, 2003, pp. 68-70.

⁷⁷ Court of Appeal (*Hof van beroep van Luik, 4de kamer*, 28 February 2001).

⁷⁸ District Court (*Correctionele rechtbank Veurne, 8ste kamer*, 12 March 2002).

possibility to escape, also because they did not speak either of the official Belgian languages.⁷⁹ Similarly, a domestic worker that lived with the lady for whom she cleaned was under the constant guard of the lady's son.⁸⁰ Another extreme situation was that of three girls who were made to sell handicraft objects and do domestic work; one of them even came back after she had escaped because she was threatened that the others would be killed if she did not.⁸¹

Sometimes physical violence constituted this dependence. Severe beatings happened in a case in the fruit sector⁸², and in one case, sale of flowers, even rape was found.⁸³

However, also more 'loose' forms of dependency, such as deceit could suffice. One victim was made to believe that the trafficker knew a judge who could legalise her papers, and stayed with her son in 'provided' accommodation.⁸⁴ Also a case of debt bondage whilst being under threat of declaration to authorities added up.⁸⁵ The combination of transport and fake passports⁸⁶ or the situation of confiscated of passports could constitute the threshold required for exploitation.⁸⁷

Living circumstances have also always been evidence for exploitation. Not only in cases where accommodation was provided, as found in a case of illegal second-hand clothes trade,⁸⁸ but also where the conditions were inhumane or extremely unhygienic. The first was the case for victims that worked in and lived above the Chinese restaurant,⁸⁹ the second for victims that had to live in with the accused with too many people.⁹⁰ However, dependency on someone 'only' for residence seems insufficient,⁹¹ even though the court of first instance did convict because conditions were deplorable.⁹²

However, multiple dependency was not always required: terrible working circumstances in combination with low payment was sufficient,⁹³ and in one case a conviction (with suspension) even followed where a Polish worker worked illegally in agriculture, whilst, in his opinion, he was well-treated and enjoyed family life involvement in his place of residence.⁹⁴ Lastly, this Belgian case law indicates two more types of forced 'labour': compelled committing of crimes and forced begging. The first concerned girls who came under the pretence of becoming domestic workers but on arrival were forced to commit robberies.⁹⁵ Another case concerned the forced

79 District Court Brussel (*52ste kamer*, 20 December 2001).

80 District Court Veurne (*11de kamer*, 13 September 2002).

81 District Court Brussel (*51ste kamer*, 7 April 2004). Both aggravating circumstances, custom and performance in an organised group, were also concluded on the basis of means, coercion, present.

82 District Court Hasselt (*18de kamer*, 25 April 2003).

83 District Court Liège (*14ème chambre*, 1 December 2003) did not convict for rape, the Court of Appeal Liège did (unknown Chamber, 28 April 2004).

84 District Court Liège (*11ème chambre bis*, 18 January 2002).

85 District Court Brussel (*44ste kamer*, 28 June 2002).

86 Court of Appeal Gent (*8ste kamer*, 19 November 2002).

87 District Court Namen (*13de kamer*, 19 December 2002).

88 District Court Gent (*20ste kamer*, 20 December 2000).

89 District Court Nivelles (*6ème chambre*, 14 June 2001). A combination of working and living in inadmissible conditions also led to a conviction. District Court Liège (*chambre 11 bis*, 26 January 2001). Also a very heavy working schedule of different jobs and living in degrading circumstance. District Court Luik (*11de kamer bis*, 28 June 2002).

90 District Court Hasselt (*18de kamer*, 28 June 2002).

91 Court of Appeal Gent (*8ste kamer*, 19 November 2002).

92 District Court Gent (*Vak.k.*, 9 August 2002).

93 District Court Bruxelles (*44ème chambre*, 27 June 2003). Aggravating circumstance of custom was also found.

94 District Court Doornik (6de kamer, 9 November 1999); Court of Appeal Bergen (*3de kamer*, 8 November 2004) who settled that the girl came voluntarily and was not exploited; acquittal also followed in case of a football player, because he came on a tourist visum, whilst his first club tried everything to regularize his position and his second worked in good faith, also according to social inspection. District Court Bergen (*10de kamer*, 17 December 2002).

95 District Court Turnhout (details unknown).

selling of drugs.⁹⁶ This case involved a pregnant woman who was forced to beg, after having worked involuntarily as domestic in a forced marriage.⁹⁷

4.2.2. Dutch case law

Both Dutch cases on trafficking for labour exploitation led to acquittals. Especially the second case provides somewhat different types of requirements than those that follow from the Framework Decision and the above-mentioned Belgian case law.

The first case concerned Bulgarians, men, women and children, who worked as hemp ‘cutters’.⁹⁸ The Court set the requirements (1) coercion and (2) exploitation. The first was not met mainly because they came to the agreed place for transport voluntarily. The second required more than indecent treatment, which was found to be present because transport to and from work was dangerous, but also required (a) serious abuses in work and/or living conditions constituting violations of fundamental human rights, and (b) dependency on the traffickers for more than work. The fact that they had to work for wages approximately 25% under the minimum wage, had to do illegal work during the evening or the night, while seated on crates and in the stench of the plants, not knowing where they were, not allowed to communicate with others, and once transported there was no way back, did not constitute exploitation.

In the second case, the Court required that the traffickers (1) took the initiative and (2) were to blame for ‘actively doing’ on their part and, implicitly, (3) ‘multiple dependencies’ on the traffickers.⁹⁹ Even though the Court held that the Chinese restaurant holders abused the Chinese workers’ vulnerable position, it found it crucial that the victims approached those accused themselves. The court does mention that the Chinese workers had to work long hours, 11 to 13 per day, with five free days a month. It concluded that some slept and worked not for payment, but for residence and food. It, however, found it determining that the Chinese workers voluntarily came to the Netherlands and approached the restaurant themselves; some requested work in return for food and residence. Implicitly, the court required ‘multiple dependencies’ whereas it argued that the victims had no debts or other obligations; they were free to spend the money as they liked and could leave if they wanted.¹⁰⁰

The requirements summed up in these two cases, especially the case on initiative and ‘active doing’, but also perhaps the restrictive interpretation of exploitation as violations of fundamental human rights, do not appear to be wholly derivable from the Framework Decision. Moreover, compared with Belgian case law and legislation, the Dutch court appears not to weigh the criminal nature of the work in this case.¹⁰¹ Although drawing conclusions on the basis of this single case is difficult, it is nonetheless mentioned, especially because it might stem from the Dutch legalised prostitution policy that provided another interpretation on case law for sexual exploitation.¹⁰² In essence, the latter appears defined, to distinguish it from legal prostitution work, as (1) negatively, in the sense that the victim who has no control with regards personal

96 District Court Namur (*16ème chambre*, 16 December 2002).

97 District Court Charleroi (*8ste kamer*, 21 January 2004).

98 District Court ‘s-Gravenhage, LJN AZ2707. Appeal was dropped.

99 District Court ‘s-Hertogenbosch, LJN BA0145 and BA0141.

100 Interestingly, one of the accuseds was convicted for harbouring illegal persons for criminal gain constituting human smuggling because he housed persons in a room with multiple beds. Smuggling is defined as ‘every act of a person to recruit someone to come to work in the prostitution in another country, without proof of the fact that the manner of recruitment has limited the freedom of choice of the one recruited’. Supreme Court 18 April 2000, *NJ* 2000,443 on the basis of Art. 197a, Criminal Law, and District Court ‘s-Hertogenbosch, LJN BA0145. Another person still has to be tried.

101 Supreme Court, LJN AX9215. Also see Section 6 on the non-punishment clause of the CoE Convention (Art. 26).

102 Also M. Smit & M. Boot, ‘Het begrip mensenhandel in de Nederlandse context; achtergronden en reikwijdte’, 2007 *Justitiële verkenningen* 7, p. 10, and De Jonge van Ellemeet 2007, *supra* note 44.

freedom – one cannot wholly make his or her own choices freely – leaving some degree of freedom of choice, absolute lack of control is not required¹⁰³ – and (2) positively, in the sense that a situation of dependence stemming from dominance from the accused over the victim leaves the latter little choice. Both situations are those in which a ‘normal outspoken prostitute’ would not end up. The victim does not have to be exploited, intention suffices.¹⁰⁴

Compared with Belgian case law, if implied in the element of movement, cross-border movement is not a requirement in Dutch cases. It is certainly not required in cases with national victims. Such cases are deemed ‘loverboy’ cases in which young men usually seduce Dutch women whilst pretending to be searching for a loving relationship with them and force them into prostitution. Nonetheless there are also cases (although until now just one) with a Dutch victim who was not in a relationship.¹⁰⁵ Movement thus might also constitute transportation within the country. The Dutch court limited liability for that; there appears no duty to examine whether the women work willingly.¹⁰⁶ Someone who transports women to and from work and collected the money, but did not know the women worked unwillingly, was not convicted not even as an accessory accomplice. Importantly, actions such as transportation, but also possibly applicable to harbouring and paying, for instance, are deemed to be actions when every time in the context of the work and with the sole purpose of enabling this work.¹⁰⁷ Moreover, although not required as such, in cases of cross-border movement, recruitment in the source country was explained broadly.¹⁰⁸ Where cross-border movement exists, an important conclusion appears: former prostitution does not compromise a judgment of trafficking where persons are brought into the country.¹⁰⁹ Hence, some degree of willingness to come does not mean that trafficking cannot exist; the rationale is that victims do not consent to exploitation, not even when they come on their own initiative.

As follows from the above case law, multiple dependencies on traffickers are, like in Belgium, found convincing in the Netherlands. At the far end we find utter isolation of the victim.¹¹⁰ In one case a Dutch girl was accommodated by the accused and given means of sustenance. Concurrently, she was prohibited to leave the house, prevented from contacting others, and not allowed to quit. She even worked for four more years after the accused explicitly knew that she did not want to do it. She also underwent violence and threats thereto.¹¹¹ In another case, six Dutch victims were held in a comparable grasp. They were subjected to violence, had forced abortions and were made to have tattoos with the names of the accused on their bodies. They had to earn a set amount of money, whilst under constant control by telephone. Threats were made to relatives. One victim accrued imposed debts because the criminal group drew from

103 Supreme Court, LJN AX9215.

104 Advocate-General’s statement for the Supreme Court’s verdict LJN AX9215; not addressed by Supreme Court.

105 District Court Groningen, LJN AZ6818. Other Dutch case law concerns migrant victims.

106 Court of Appeal Arnhem, LJN AZ3369.

107 Advocate-General’s statement, *supra* note 104.

108 Crucial is the *mens rea* of the trafficker to intend exploitation after recruitment and transport (Court of Appeal Arnhem, LJN AX3969, AX5818, AX5818, and AX3978), taking someone cross border by car or plane is sufficient for recruitment (District Court Alkmaar, LJN AZ7515), deceit may accompany it (promising work as models or dancers) (District Court Zwolle, LJN AS2978), and also a case wherein the victims came themselves, but where later brought to their address and were provided with information about where to rent a room (District Court Amsterdam, LJN AU7087 and AU7093).

109 Advocate-General’s statement for the Supreme Court’s verdict LJN AX9215; not addressed by Supreme Court.

110 In cases of migrant victims: victims were moved to the Netherlands, housed, and multiply sexually abused with gross perversities, excessive violence, and the intention to make a snuff movie (a very lucrative movie involving the amputating of limbs and generally killing during the movie; not recorded because of escapes (Court of Appeal Arnhem, LJN AX3969, AX5818, AX5818, and AX3978); forced use of drugs, confiscated passports, induced indebtedness, and one victim sold (District Court Leeuwarden, LJN AZ5824); a victim who was kept prisoner in a club (the other was threatened that her friend would be hurt) (Court of Appeal Amsterdam, LJN AT7235); induced indebtedness combined with guarding (District Court Alkmaar, LJN AZ7515).

111 Court of Appeal Arnhem, LJN AZ7029.

an account on her name.¹¹² This also accounted for seven women, some of whom were in a loving relationship with one of the criminal group members of *Damco*, which was the name they constructed from the abbreviation of the Dutch words ladies (*dames*) and cocaine (*cocaine*). These women were subjected to excessive violence, such as the extinguishing of cigarettes on their bodies, forced abortions, and tattoos with the name of the accused; the court concluded that the latter ‘making of ‘property’ is a typical form of modern slavery’.¹¹³

Other ‘looser’ multiple dependencies were found where victims were emotionally dependent in the ‘loving relationship’ and gave all payments to the accused. In one case, the Dutch victim was under the pretence that the earned money she gave to him, a set amount per day, would be saved for their combined future.¹¹⁴ Whereas types of ‘looser dependency’ in cases of trafficking of migrant women indicate similar types of dependency as mentioned above, as also shown in the Belgian case law and under the Dutch ‘loverboy cases’,¹¹⁵ indicates the peculiarity of voodoo practice and female traffickers in two cases, we underline this existence.¹¹⁶

Lastly, it is important to acknowledge that courts do not always conclude ‘loverboy practices’ in cases wherein women are in a loving relationship and work as prostitutes. A causal relationship must exist between the means deployed and the exploitation. Hence, even though the woman was subjected to violent acts if this is not done to exploit her, trafficking does not exist. The severity of the violence in and of itself is not determinative, which it in this case was: multiple threats, intentionally taking someone’s freedom, keeping someone in that situation, attempts of severe abuse, and multiple bodily assaults.¹¹⁷

4.2.3. UK case law

Obviously no criminal case law¹¹⁸ exists on human trafficking for labour exploitation in the UK. However, there have been a few attempts to deal with trafficking for sexual exploitation, firstly without specific legislation¹¹⁹ and later under one type of anti-trafficking law for sexual exploitation, of which one shows that sometimes victims are sold and re-sold.¹²⁰

112 Court of Appeal Arnhem, LJN AZ3374.

113 District Court Almelo, LJN AU8378 and AU8380 (eight victims), LJN AU8381 (one victim), LJN AU8396 (four victims).

114 Court of Appeal Arnhem, LJN AZ3363, AZ3374, and AZ3362. The latter concerned one victim and cocaine trade.

115 Accommodation, induced indebtedness and false passports (Court of Appeal Amsterdam, LJN AT7235); arranged accommodation (Court of Appeal Arnhem, AX4214 and AX4208); threatening and intimidating situations from a distance so as to avoid risks (District Court Groningen, LJN AV1446).

116 Smuggling ending up in trafficking (District Court Zutphen, LJN AP18830); voodoo rituals and/or promises to the voodoo council in Nigeria accompanied by voodoo packets (District Court Arnhem, LJN AO4798).

117 District Court ‘s-Gravenhage, LJN AY5835 and 09/112721-04 (TUL).

118 Six cases were found through Westlaw UK with the search title ‘Nationality, Immigration and Asylum Act 2002’ and ‘human trafficking’. The POPPY project website indicated two more cases, and were thereupon found in Westlaw (not found: *R v. Merdinaj and Bregu*, Sheffield Crown Court December 2004, *R. v. Larcenko and others*, Southwark Crown Court, 16 September 2005, and *R. v. Likciani and Mungiovi-Cuka*, Cardiff Crown Court, 8 December 2005). It involves a selection bias, unpublished case law is unavailable.

119 Whereas trafficking had not been made a specific crime in UK law until 2002, the first two cases were prosecuted under existing offences such as assisting unlawful immigration, procuring a girl to have unlawful sexual intercourse, living on prostitution, incitement to rape, and kidnapping. The first case demonstrates an isolation-like situation for seven young girls. See also Immigration Law Practitioners’ Association (ILPA), Submission to the Joint Committee on Human Rights Inquiry into Human Trafficking, 2006. Attorney-General’s Reference No. 6 of 2004 under s.36 Criminal Justice Act 1988 in the case of *R. v. Plakici* [2004] EWCA 1275, and [2005] 1 Cr App R(S) 83. The second case involved more distance: an accused, who except for living of the operation of procuring women in prostitution, was not directly involved save as a driver. *R. v. Vethasalem Muruganathan*, Court of Appeal Criminal Division, [2004] EWCA Crim 2634. The Court of Appeal quashed the recommendation for deportation.

120 The first case concerned a 15-year-old Lithuanian girl who was sold and re-sold three times. *R. v. Shaban Maka* [2006] 2 Cr. App. R. (S.) 14 [2005] EWCA Crim 3365 CA (Crim Div) and 2005 WL 3719509 [2005] EWCA Crim 3365 CA (Crim Div). The second case concerned two victims who came voluntarily to work as prostitutes, but were exploited by having to work a lot, also while menstruating and for drunk clients, and having to hand over the bulk of their earnings. *R. v. Lorenc Roci, Vullnet Ismailaj* 2005 WL 3719510 [2005] EWCA Crim 3404 CA (Crim Div) and [2006] 2 Cr. App. R. (S.) 15 [2005] EWCA Crim 3404 CA (Crim Div). The third case concerned a 16 year-old Lithuanian girl who was under induced indebtedness and whose passport was confiscated. *R. v. Agron Demarku* 2006 WL 2629863 [2006] EWCA Crim 2049 CA (Crim Div). The ultimate case concerned a girl who ‘although she at least came willingly to ‘sell her body’, she was ‘an 18 year old, just out of school – naive, gullible and inexperienced in the ways of the world’. *R. v. Besmir Ramaj and Hasan Atesogullari* [2006] 2

Whereas one case indicates the need for domestic criminal law, because it concerns a national victim in a domestic trafficking case,¹²¹ this one is mentioned to emphasise what already followed from Dutch case law: national victims exist.

In this case, the court found that a man groomed a young English boy [B], then aged 13, and corrupted him for the sole purpose of exploiting him as a prostitute. He provided him, for instance, with alcohol, cigarettes and drugs in the form of cannabis and poppers, as well as special treats such as cooking and meals from McDonald's. After one instance of male prostitution wherein [B] 'served' a customer, the accused blackmailed him. Thereupon, [B] was coerced into having to perform anal and oral sex with clients. He described it as being treated 'like a rag doll'; he was made to have sex until bleeding from his anus, and was even anally raped upon which the accused had to pull off the customer. Later, the accused sold [B] to another, who put him into prostitution for his own purposes in a different part of the country. The first evening, [B] and a teenage girl named Martina, had to service a client who wanted them both. Over the course of the next seven days, [B] was used by the other 'employer' to service many clients in many parts of the UK. [B] was guarded all the time, and was only given the bare necessities to live. Multiple aggravating circumstances were concluded: ranging from grooming, selling and buying, and the acts the boy had to perform.

4.3. Conclusion

Not only do legislatures implement (if at all) the definition of the crime differently than the Framework Decision, but the courts also interpret the crime dissimilarly. It does, however, emerge that all five axioms of the crime found in Section 3 are confirmed: (i) labour exploitation occurs in many sectors and industries, and victims are even forced to beg, work in a marriage, and to commit crimes as hemp cutting, (ii) cross-border trafficking also (a) occurs through legal channels, the Belgian case law indicated visas and invitations to castles for that purpose, (b) victims may be legally and even 'work' legally in the country as follows from the forced marriage case, and (c) national victims are found in numerous Dutch 'loverboy cases', and in one UK case (iii) all genders can be victims and perpetrators, (iv) individuals and organized crime groups appear traffickers, wherein the latter is more prone to be found when the case is overall shocking, and (v) generally, although not exclusively, less explicit means than physical violence appear used.

Crucially different, the courts do not use any element of the Framework Decision's definition's non-exhaustive list of forced labour, slavery-like practices, servitude and slavery. Besides, in Belgium the element of movement has been introduced and the means are not part of the core crime.¹²² If implied, this element of movement cannot be restrained to cross-border movement, whereas both Dutch cases and a UK case indicate national victims. Additionally, use of 'multiple dependencies' of victims on their traffickers as arises in Belgian and Dutch case law does not explicitly stem from the Framework Decision's definition. Furthermore, the Belgian case's suggestion to introduce labour standards to distinguish labour exploitation from 'normal work' does not either. Lastly, the existence of selling and re-selling does not emerge from the definition.

Hence, both diverging legislation and adjudication once more indicate the need for uniform interpretation of the Framework Decision's definition, thus compelling comparative research to

Cr. App. R. (S.) 83 [2006] EWCA Crim 448 CA (Crim Div).
121 Attorney-General's Reference No. 122 and 123 of 2004 2005 WL 1333212 [2005] EWCA Crim 1059 CA (Crim Div).
122 Cases on sexual exploitation from 30.1.2007 until 15.1.2004.

(1) give a possible interpretation of exploitation by interpreting the non-exhaustive list of elements used to define it in the Framework Decision¹²³ and (2) include EU and/or international labour standards as supposed in Belgian case law.

5. A positive and negative definition of labour exploitation

A Framework Decision-consistent approach requires labour exploitation to be interpreted by the above-mentioned elements. It requires a distinction to be drawn between labour exploitation in human trafficking and voluntary work. This section suggests (1) a positive definition of what constitutes labour exploitation and (2) a negative definition of what labour exploitation is not. Both are explained below using sources that (a) directly mention human trafficking or construe forced labour, slavery-like situations which here includes servitude, and slavery, and (b) could be applicable to the EU Member States, although they require ratification,¹²⁴ might already be applicable because of being an EU Member State¹²⁵ or are supposed to be universally applicable¹²⁶.

5.1. A continuum of forced labour, the threshold for exploitation and aggravating circumstances

Generally, the inclusion of all elements, although not always explained comparably, appears uncontroversial, save for slavery. The use of all elements will therefore be explained, and the choice for slavery will be justified below.

The definition explains labour exploitation as a continuum, with forced labour as a minimum situation of exploitation, and slavery on the far end as the most aggravated circumstance. This approach appears valid and conclusive, although further interpretation and also added characteristics are required. The added value is that such interpretation and adjudication of trafficking for labour exploitation will be harmonised, because it necessitates judgments on all requirements of the elements, instead of invention of requirements by national courts.

5.1.1. Labour exploitation as at a minimum forced labour and services

There appears no reason not to use forced labour as the threshold for labour exploitation in the course of trafficking, defined as ‘all work or service which is exacted from any person (1) under the menace of any penalty and for which the said person has (2) not offered himself voluntarily’ (numbers added by author).¹²⁷ Especially, when these requirements are read as proposed by the authoritative body for the convention the definition stems from, the ILO, whilst following the two major exclusions, and reading it in compliance with other ILO conventions that make a distinction in perpetrators.

Firstly, this signifies that the above-mentioned requirements ask for interpretation in line with the ILO interpretation. The latter established that the penalty is not reserved to penal sanctions, but also includes loss of rights and privileges. The menace of a penalty ranges from physical violence or restraint, or even death threats addressed to the victim or relatives, to more

123 None of these are directly giving such an explanation – for example the ECtHR in *Siliadin* does not interpret the definition of human trafficking, but does give a positive obligation to CoE States Parties to effectuate the right not to be subjected to forced labour, possibly by means of criminal law on trafficking for labour exploitation.

124 ILO Conventions and CoE Conventions mentioned in this article.

125 All EU Member States are required to ratify the ECHR.

126 1998 ILO Declaration on Fundamental Principles and Rights at Work and 1926 Slavery Convention.

127 Art. 2(1) 1930 ILO Forced and Compulsory Labour Convention.

subtle forms, sometimes of a psychological nature. An example of the latter is threats to denounce victims to the police or immigration authorities. Penalties can also be of a financial nature, including economic penalties linked to debts, the non-payment of wages, or the loss of wages. The menace can thus also exist when employers require workers to hand over their identity papers, and/or use the threat of confiscation of these documents to exact forced labour.¹²⁸ Hence, the means as listed in the Framework Decision's definition suffice to conclude forced labour.¹²⁹

The European Commission on Human Rights's verdict that held that 'relative weight' has to be attached to prior-consent is supportive, because a service 'could not be treated as having been voluntarily accepted beforehand'.¹³⁰ Thus, (1) the consent of the person concerned does not necessarily rule out forced labour¹³¹ and therefore (2) the means as listed in the Framework Decision are crucial elements of the crime. Additionally, this definition of forced labour offers two major exclusions: it does not entail work or service exacted in the event of war that endangers the existence or the wellbeing of the whole or part of the population,¹³² or minor communal services that can be considered as normal civic obligations.¹³³

Lastly, for clarification on who can be a trafficker, the distinction between state-imposed forced labour¹³⁴ and that imposed by non-State actors as follows from separate ILO legal documents on these issues, elucidates. Hence, it is not State-imposed forced labour for ideological or political or other purposes, which, for instance, became particularly apparent during and after the Second World War.

Incidentally, this interpretation largely follows the first verdict of the European Court on Human Rights (ECtHR) in the case of *Siliadin* that required an interpretation of the terms in Article 4 ECHR, including forced labour.¹³⁵

This section only draws attention to the difference of approach, since this case will be discussed in more detail in the section dealing with slavery. That is, the ECtHR concluded that forced labour was present noting of the above-mentioned ILO criteria¹³⁶, but does not interpret the ILO-criteria 'penalty' as the ILO does, although with a similar and very promising effect for EU Member States. The ECtHR explains that a 'penalty' did *not* exist, because there was no penal sanction, but construed the criterion by saying that the victim, who was a minor, found herself being 'penalised' because of the perceived seriousness of the threat she was under. The ECtHR in its conclusion, referred to the nature of the work and lack of payment, save for possibly a one time exception. For example, *Siliadin* had to do household chores and office cleaning for about three years, seven days a week, without a day off. Her working day began at 7.30 am and ended at 10.30 pm, and she was only occasionally and exceptionally authorised to go out to collect the children and to attend mass on Sundays on her own.

A positive effect of such an appraisal of forced labour is that it has to be effectuated in the EU, because Member States to the European Convention on Human Rights have to prevent forced labour not only for their own citizens, but for all people 'within their jurisdiction'. The EU

128 ILO, *A global alliance against forced labour*, Report of the Director-General, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005, International Labour Conference, 93rd Session 2005, Report I (B) (ILO 2005).

129 Belgium needs to adjust its legislation to cover those as part of the core crime of trafficking.

130 *Van der Müsselle v. Belgium*, Judgment of 23 November 1983, *ECHR* (Ser. A), no. 70, Para. 37.

131 *Ibid.*, Para. 33.

132 *Ibid.*, Art. 2(2)(d).

133 *Ibid.*, Art. 2(2)(e) 1930 Forced and Compulsory Labour Convention. Also Art. 8 (c) i-iv ICCPR.

134 ILO Convention No. 105 of 1957.

135 The ECHR does not include conditions akin to slavery.

136 Use of *M.C. v. Bulgaria* and *Van der Mussele v. Belgium*, judgment of 23 November 1983, *ECHR* (Ser. A), no. 70, Para. 32, (39272/98) [2003] *ECHR* 646 (4 December 2003), Para. 32. The ILO Conventions, especially the 1930 Forced Labour Convention.

Member States are under a so-called positive obligation to do so, and what better way than to follow the Framework Decision in order to achieve that.¹³⁷ The same accounts for their duty to eliminate forced or compulsory labour under international obligations.¹³⁸

5.1.2. The first aggravated circumstances: practices similar to slavery and servitude

The first aggravated type of labour exploitation is formulated as practices similar to slavery. The acknowledgement that those practices are situations that can follow from forced labour and can develop into conditions analogous to slavery is acknowledged by the first treaty on slavery.¹³⁹ The follow-up Convention provides definitions for debt bondage,¹⁴⁰ serfdom,¹⁴¹ and servile marriage.¹⁴²

Debt bondage and servile marriage appear directly applicable, as also demonstrated by the intended effect of the Framework Decision as formulated in the introduction to Section 2. The first also explains the adoption and scope of the means of payment as laid down in the Framework Decision. Servile marriage is traditionally aimed at women, but there appears no reason why the latter cannot apply to men, although it is thus far not defined or explained as such. Also in this situation, the means of payment is particularly helpful to conclude such type of labour exploitation. Hence, this definition is also directly applicable.

Whereas the definition of servitude with use of serfdom could pose some problems because of parts of the definition referring to traditional feudal relations, the ECtHR¹⁴³ in the above-mentioned case explained it with a modern connotation. Determinative in both cases is the situation of forced labour in which the victim is not free to change his or her status. Payment of the victim is not decisive. In *Siliadin* this was factually substantiated by her being obliged to live on the other's property and being incapable of changing this status.¹⁴⁴ She hardly had any freedom of movement and she was entirely at mercy of her 'employers'. She could not improve her situation, because she remained illegally in the country, hardly spoke French, and did not attend school. Hence, this appears the last element of the first category of aggravated circumstances, which leads to the discussion of the most severe type of it: slavery.

137 See, *mutatis mutandis*, *M.C. v. Bulgaria*, (39272/98) [2003] ECHR 646 (4 December 2003), Para. 166.

138 Adopted in 1998, the ILO Declaration on Fundamental Principles and Rights at Work is an expression of commitment by ILO's governments, employers' and workers' constituents of central beliefs set out in the organization's Constitution. Available at www.ilo.org/dyn/declaris/DECLARATIONWEB

139 Art. 5 1926 Slavery Convention.

140 'the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined'. Art. 1 (a) 1956 Supplementary Convention.

141 'the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status', *ibid.* Art. 1 (b).

142 'any institution or practice whereby (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) a woman on the death of her husband is liable to be inherited by another person', *ibid.* Art. 1 (c).

143 Reference to *Seguin v. France* (42400/98 [2002] ECHR 420 (16 April 2002)), the European Commission of Human Rights's report in *Van Droogenbroeck v. Belgium*, 9 July 1980, Ser. B, Vol. 44, p. 30, Paras. 58 and 78-80 in which the Commission used the 1956 Convention on the Abolition of Slavery.

144 European Commission of Human Rights (No. 7906/77, D.R.17, p. 59) and Commission's report in *Van Droogenbroeck* case, Paras. 78 to 80.

5.1.3. *The worst type of aggravated circumstances: slavery*

Current international criminal law developments, some human rights legislation,¹⁴⁵ and work of expert groups, such as the UN Working Group on Contemporary Forms of Slavery,¹⁴⁶ and the European Expert group on Trafficking in Human Beings¹⁴⁷ lead to the conclusion that the worst type of labour exploitation a trafficking victim can be exposed to is slavery. This can only happen under very specific circumstances, in short, when the person is both (a) ‘brought into this situation’ (slave trade) and (b) ‘held in such a situation’ (enslavement).¹⁴⁸ Hence, for trafficking victims to suffer from labour exploitation that qualifies as slavery they have to be both ‘traded’ during the pre-exploitation and exploited as a modern-day slave during the exploitation phase. Such a division of phases, *a propos*, also follows from the terms ‘for the purpose of’ in the Framework Decision,¹⁴⁹ intended exploitation can suffice, a person does not need to have been exploited.

This is not uncontroversial,¹⁵⁰ because the definition of slavery that refers to ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’ is sometimes thought to require being permanent and/or based on descent,¹⁵¹ because it is explained as the traditional ‘right of legal ownership’ that could even be legally claimed and does not explain it as a present-day ‘reducing someone to an ‘object’.¹⁵²

Principally, however, the international community has indicated the need to hold human traffickers internationally accountable within the context of enslavement. That is, the drafters of the Statute for the International Criminal Court (ICC) have explicitly referred to human trafficking within the definition of the crime against humanity of enslavement.¹⁵³ Such an idea of modern-day relevance of slavery has also been reflected in the recent case law of the International Criminal Tribunal for the Former Yugoslavia,¹⁵⁴ even in two cases, and the Special Court for Sierra Leone (SCSL).¹⁵⁵ The first mentions human trafficking as a further indication of enslavement,¹⁵⁶ and the latter quotes it directly.¹⁵⁷ Although the attitude that human trafficking can be a crime that can meet even today’s criteria of the world’s gravest crimes, slavery appears

145 The UDHR, for instance, prohibits slavery, servitude and slave trade in Art. 4. The European Convention on Human Rights and Fundamental Freedoms (ECHR) does so, including also forced or compulsory labour in Art. 4 (1). However, the ECHR does not include slave trade. Moreover, the ICCPR prohibits all but slave trade (Art. 8, non-derogable Art. 4(2)). The ACHR prohibits slavery, involuntary servitude, slave trade, traffic in women and forced or compulsory labour in Art. 6 (1). Lastly, the African Charter on Human and Peoples’ Rights of 1981 (African Charter) criminalises slavery and slave trade (Art. 5). These provisions are shown to be very important. Art. 15(2) rules no derogation from it is permitted under any circumstances of 4 (1) ECHR. Art. 6 (1) and (2), with certain limited exceptions in (3) ACHR. Prohibition of suspension in Art. 27. Art. 5 of the African Charter.

146 Working Group on Contemporary Forms of Slavery, *Report of the 26th Session*, Geneva 11 to 15 June 2001.

147 European Commission, *Directorate-General Justice, Freedom and Security, Report of the Experts Group on Trafficking in Human Beings*, Brussels, 22 December 2004.

148 Art. 1 (1) 1926 Slavery Convention and Art. 7 (c) 1956 Supplementary Convention. Also C.K. Hall, ‘Enslavement’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, pp. 129-138 (Hall 1999).

149 Explanatory memorandum, p. 20. ‘The offence defined in article 3 of the Protocol is completed at a very early stage. No exploitation needs to take place.’ UNODC, *Legislative guide*, *supra* note 16, Para. 33.

150 J. Allain, *A legal consideration ‘Slavery’ in light of the Travaux préparatoires of the 1926 Convention*, (not published) presented during conference ‘Twenty-First Century Slavery: issues and responses’, Hull (UK), 23 November 2006.

151 ILO 2005, *supra* note 128.

152 *Siliadin v. France*, *supra* note 49. Please note that the Court emphasises that she was a minor at the time, but does not indicate how that differs for adults.

153 Art. 7 ICC Statute, Crimes against humanity, 1.(c) Enslavement ((g) (...) sexual slavery).

154 Trial Chamber and Appeals Chamber (IT-96-23 and 23/1).

155 *Prosecutor v. Brima, Kamara and Kanu* (SCSL-2004-16-PT).

156 Appeals Chamber Judgment (IT-96-23&23/1), Para. 116-124 and Trial judgment, Para 542.

157 SCSL judgment, note 745. Sexual slavery is no part of the ICTY Statute (as in ICC and SCSL Statute).

as a relevant last aggravated circumstance, under the above-sketches of trade and exploitation.¹⁵⁸

To provide some more content to the first, the ICTY, which explicitly explained why it would not limit slavery to a crime that lies only in the past,¹⁵⁹ affords four relevant criteria. (i) It must be realised that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor, but is insufficient. Such actions actually occurring could be a relevant factor.¹⁶⁰ (ii) Lack of consent is an element of the crime, since enslavement flows from claimed rights of ownership and therefore does not have to be proven.¹⁶¹ Moreover, the ICTY states that (iii) enslavement is defined by the relationship between the accused and the victim, duration is only one aspect thereof and is therefore not determinative for enslavement,¹⁶² and (iv) *mens rea* consists of the intentional exercise of a power attaching to the right of ownership.¹⁶³ This *mens rea* does not require proof that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them (here: for sexual acts).¹⁶⁴ The ICTY confirmed these aspects in *Krnjelav*.¹⁶⁵ Moreover, the SCSL has also done so in one of the three enslavement crimes, namely for abductions and forced labour.¹⁶⁶ It convicted for the use of civilians as domestic workers and as diamond miners, and for enslavement following from abductions for forced labour.¹⁶⁷

It is thought here that in the case of *Siliadin* the ECtHR has mistakenly not taken the ‘trading aspect’ into account. It might have had to conclude slavery where the girl was accompanied to France on a tourist visa at the age of fifteen years and seven months and she was also ‘lent’ to those who thereafter exploited her. Within the above-mentioned range of the ICTY, one can conclude that she was ‘traded’ into the country or at least ‘lent’, which reduced her to an ‘object’ (as is the case with buying, selling, trading or inheriting). This trading and lending combined with all the above-mentioned conditions added up to forced labour and servitude, and thus slavery within our modern definition¹⁶⁸ of it as shaped by leading international legislation and case law.

In the following section, this positive definition will be combined with knowledge of what human trafficking for labour exploitation most certainly does not entail.

158 Next to the specific jurisdiction of the ICTY, those are: (i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be widespread or systematic, and (v) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern. In *Tadic* Appeal Judgement (IT-94-1-T), Paras. 248 and 251. Art. 5 of the Statute expressly uses the expression ‘directed against any civilian population’. See also *Tadic* Trial Judgement, Paras. 635-644. *Mrksic* Rule 61 Decision (IT-95-13-R61), Para. 30.

159 Here referred to as ‘chattel slavery’ in ICTY (IT-96-23-T&23/1-T), footnote 145. It also quotes the *travaux préparatoires* of the ICCPR that were thought to imply the destruction of the juridical personality, a relatively limited and technical notion, whereas servitude was a more general idea covering all possible forms of man’s domination of man (M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p 148). Furthermore, *involuntariness* is the fundamental definition feature of ‘forced or compulsory labour’, whereas slavery and servitude are prohibited even in event of willingness.

160 Appeals Chamber Judgment, Para. 119.

161 *Ibid.*, Para. 120.

162 Trial Judgment, Para 542.

163 *Ibid.*, Para. 540. Appeals Chamber Judgment, Para. 121.

164 Appeals Chamber Judgment, Para. 122.

165 *Krnjelav* Trial Judgement, Para. 357.

166 The SCSL Trial Chamber, note 2095. The other two enslavement crimes are sexual slavery and conscription and use of children under the age of 15 for military purposes. Importantly on the first issue, sexual slavery was thought to possibly lead to enslavement. *Idem*, note 739. Justice Doherty, dissents on the matter of forced marriage, making it a crime of (non-sexual) slavery.

167 *Ibid.*, note 740.

168 See also General Assembly of the CoE, *Recommendation 1663 (2004), Domestic slavery: servitude, au pairs and ‘mail-order brides’*, 22 June 2004.

5.2. A negative definition: labour exploitation is work under conditions that violate international and European labour standards¹⁶⁹

Not only does the work have to be forced by a non-State actor, as explained above, but also the conditions, under which a victim has had to work, necessarily need to run counter labour rights, whether human rights or labour standards.

Although, the non-binding Charter of Fundamental Rights of the EU prohibits human trafficking,¹⁷⁰ EU labour laws are now exclusively applicable to legal workers. Hence, fair and just working conditions with regards health, safety and dignity are respected as well as a limitation of maximum working hours (including daily and weekly rest periods and an annual period of paid leave) do not apply to illegal workers. This is particularly worrisome, for instance, because a victim of trafficking for labour exploitation may also be subject to return and expulsion under migration law, which under EU-law, might happen if this victim does not co-operate with the judicial authorities.¹⁷¹

Protection of victims of human trafficking for labour exploitation can be served by an international treaty that thus far has not been ratified by all EU Member States: the 1990 UN Convention on the Protection of the Rights of all Migrant Workers and their Families.¹⁷² This Convention combines criminal law measures with conflicting labour and migration rights, and also effectuates several human rights provisions on labour rights that stem from all ratified international human rights treaties to the extent they did not make reservations to these.¹⁷³

It would require from EU Member States to counter unlawful migration by removing the incentive for employers to use irregular migrants by granting the latter some equal rights, and by obliging the State to promote sound, equitable and humane conditions in connection with international migration of workers and their family members. Irregular migrants are thus respected as human beings, and employers are discouraged to hire irregular labour by making it much less economically advantageous.

Important rights¹⁷⁴ for countering trafficking include the right not to be arbitrarily deprived of property,¹⁷⁵ the right not to have identity papers confiscated and/or destroyed,¹⁷⁶ the right not to be collectively expelled,¹⁷⁷ the right to equality in respect of social security,¹⁷⁸ and the right to transfer earnings and savings.¹⁷⁹ State duties lie in appropriate services dealing with questions

169 J.D.R. Craig & S.M. Lynk (eds.), *Globalization and the Future of Labour Law*, 2006.

170 Art. 5(3) of the Charter of Fundamental Rights of the European Union.

171 Council Directive 2004/81/EC, of 29 April 2004, on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. Earlier COM(2002) 71 Final, 2002/0043 (CNS), February 11, 2002. The CoE Convention provides better protection.

172 In 1985, the Economic and Social Council recognized the need for further efforts-national, bilateral, regional and international-to improve the social situation of migrant workers and their families (resolution 1985/24). Also ECOSOC (resolution 1988/6, Paras. 11-12) asked to pay special attention to the situation of migrant workers and their families. See: E. MacDonald & R. Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives*, 2007 available on <http://unesdoc.unesco.org/images/0015/001525/152537E.pdf>

173 Art. 23-25 UDHR and 6-8 International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200A (XXI) of 16 December 1966). These have to be read at least in combination with: the ICCPR; the Convention against Torture; the Convention against Discrimination against Women; the Convention on the Elimination of All Forms of Racial Discrimination (Art. 5 (e) (i) CERD); the Convention on the Rights of the Child; the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; The Supplementary Convention on the Abolition of, the Slave Trade and Institutions and Practices Similar to Slavery; The Vienna Declaration on Criminality and Justice and existing regional conventions and treaties against trafficking. CoE, European Social Charter, Turin, 18.X.1961. Art. 5(3) of the Charter of Fundamental Rights of the European Union.

174 Remark that some challenge these rights as already provided by the above-mentioned human rights instruments.

175 Art. 15 Migrant workers' Convention.

176 Art. 21.

177 Art. 20(2) and 22.

178 Art. 27.

179 Art. 32, other rights are: Arts. 23 and 16(7), Art. 26, Art. 28, Art. 30.

of international migration,¹⁸⁰ and close control of recruitment of migrant workers.¹⁸¹ Alongside these rights and duties, State Parties have a duty to prevent and eliminate illegal or clandestine movements and employment of migrant workers in irregular situations in their territory with all adequate and effective measures.¹⁸² It compels them to collaborate on this, and could possibly therefore also reach source and transit countries in trafficking. Moreover, it requires sanctions on employers of such migrant workers, without restricting their rights *vis-à-vis* their employer.¹⁸³

The above-mentioned rights will always have to be interpreted in accordance with the procedures laid down by Community law and national laws and practices. Therefore, even though these rights would be made dependent on national legislation, the labour standards may be unified in the EU and possibly even harmonised. The lack of protection of illegal migrant workers does not abide what should be aimed at in the EU.¹⁸⁴ Hence the following conclusion.

5.3. Conclusion

This section provides a positive definition of what labour exploitation entails as a continuum of the minimum situation of forced labour and the most aggravated type of slavery. It indicates that a negative definition cannot be provided without distinguishing between legal workers, possibly migrants, and illegal immigrants working and/or residing in the EU. This points to the current unfair situation, and suggests the provision of binding labour rights to all. This leads to the final conclusion on interpreting human trafficking for labour exploitation.

6. Conclusion: Interpretation of the definition

At the risk of over-simplification, the definition of human trafficking for labour exploitation is construed as: the process of (1) *bringing someone into* and/or (2) *maintaining someone in*, at least, a situation of forced labour imposed by a non-State actor.

On the basis of the Framework Decision's definition, we draw two conclusions:

1. A division exists in (a) a pre-exploitation phase in which generally the preliminary actions such as recruitment and/or transport take place, but also the other actions may occur, and (b) the exploitation phase in which generally the labour under exploitative conditions happens.
2. The non-exhaustive list offers a comprehensive minimum threshold for exploitation and a complete catalogue of aggravating circumstances.

180 Art. 65.

181 Art. 66 and also co-operation in the orderly return of migrant workers (Art. 67).

182 Art. 68.

183 C. Edelenbos, 'The International Convention on the Protection of the Rights of all Migrant workers and members of their families', Secretary, Committee on Migrant Workers, Office of the High Commissioner for Human Rights, 2005 *Refugee Survey Quarterly* 4.

184 *Mutatis mutandis* Art. 15 Charter.

Hence, schematically one can distinguish between the following:

-
- a. Pre-exploitation phase (*recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person – or even trading (which might indicate slavery, see 5.1.3)*)
 - i. At least intended criminal gain
 - b. Exploitation phase (*at a minimum, forced or compulsory labour or services, slavery or practices similar to slavery or servitude imposed by a non-State actor*)
 - i. Actual criminal gain
 - ii. Working conditions – violating labour laws and/or rights
-

Three general remarks before giving a detailed schematic overview, in the order of their presence in the above-presented scheme. The abovementioned trading of persons as an action of human trafficking may take place during the pre-exploitation phase (selling and buying), but also during the exploitation phase (for instance, when a victim is resold as found in UK case law). The trading in persons can involve the intention to subsequently exploit, and the actual exploitation of that person by appropriating that person's labour, possibly after trading someone. A person caught at the border, for instance, can only be found a trafficker when there is an indication of intention to exploit another person's labour (notwithstanding that it may constitute human smuggling, (see section 2). However, cross-border transport of the trafficked person is not required. Lastly, trading is an indicative of human trafficking, but a necessary requisite for the worst type of forced labour: slavery.

Secondly, we refer to criminal gain in human trafficking.¹⁸⁵ It appears to be underestimated in the Framework Decision and its Memorandum, but seems crucial. We understand the inclusion in Dutch legislation, and Belgian and Dutch case law requisites in that perspective. Although the adoption of another crime of 'intentional profiting' is not recommended, it is considered part and parcel of trafficking. Human traffickers aim to obtain, directly or indirectly, a financial or other material benefit and do so through exploitation.¹⁸⁶ This indicates the intended and actual gain in the separate phases of pre-exploitation and exploitation, as shown schematically below. Hence, labour exploitation does not need to have taken place for there to be trafficking; the intention may suffice.

Lastly, when in the exploitation phase, forced labour is defined as labour or services (even criminal acts)¹⁸⁷, which are undertaken (i) under the menace of a penalty and (ii) involuntarily. Interpretation follows the above-mentioned broad ILO definition, which also excludes work or service in war time or when the well-being of the whole or part of the population is at stake, and minor communal services that can be considered as normal civic obligations. The determination

185 UNODC, *Legislative guide*, as cited above. Proposal for a Council framework decision (COM (2000) 854 - C5-0042/2001 - 2001/0024(CNS)). Final Edition: 12/06/2001.

186 Article 2 UNCTOC. See also UNCTOC's substantive criminal legislation: Article 6 and 7 comply States in taking measures that concern criminalization of the laundering of proceeds of crime. The European Commission, a member of the Financial Action Task Force and fully participating in international bodies such as the OECD and the Council of Europe, has also negotiated on behalf of the EU in respect of these relevant money-laundering provisions, also following Article 8 and 9 UNCTOC on criminalization of and measures against corruption. The latter is also addressed in a comprehensive EU anti-corruption draft policy (<http://europa.eu/scadplus/leg/en/lvb/l33301.htm>).

187 This enables the CoE convention to function even better, because it would explicate that victims of trafficking can also be forced to commit crimes and therefore States cannot impose penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so (Art. 26 CoE Convention).

of element (ii) of doing the work involuntarily can only be done by establishing the means of the Framework Decision and this is therefore a crucial part for proving intended or actual labour exploitation, and thus forms an integral part of the crime's core definition. Consent is irrelevant when the means are deployed, because no one consents to being exploited, whether at present or in the foreseeable future.

Detailed schematic overview of human trafficking for labour exploitation

(different persons, who deploy different means, can be involved in different stages in the process):

Pre-exploitation phase

A person is recruited for work with the intention of subsequent exploitation [in the country of origin, the transit country or the exploitation country], and/or

Option 1: the person is transported into a country with the purpose of subsequent exploitation, and becomes illegal in the country, possibly while having to gain a 'new' identity [a false passport may have been provided], or

Option 2: the person is legally in the country, but lacks a work permit [entered through regular migration routes] or

Option 3: the person is legally in the country and is authorised to work [a national or a person who entered through regular migration routes and has a visa but is not aware of that]

[In all incidences: awareness-raising about when one resides legally or illegally and about work permits is needed (see UK research in section 3)]

Criminal gain is at least aimed at by traffickers [financial investigations are possible]

Actual exploitation does *not* have to take place, but if it does occur:

Exploitation phase

Labour exploitation is forced labour imposed by a non-State actor while using the means as listed in the Framework Decision. Required elements are actions, means and purpose, an exploitative relationship between trafficker and victim, and the objective to do so: gain.

1. Actions

Actions of recruitment, harbouring, transportation, transfer, and/or subsequent reception of a person, including exchange or transfer of control over that person, have to take place:

- (i) every time in the context of the work and
- (ii) with the sole purpose of enabling this work.

Some degree of willingness of the victim is allowed; one can come to a country to work, but be exploited in the course of trafficking anyway [e.g. *deceit into marriage, but than being forced into begging, section 4, or even coming to work but than being exploited in it anyway*]

2. Means and purpose

At a minimum, the person works

- (i) under the menace of a penalty [*the penalty does not have to be a criminal penalty, but also mentioned conditions under Article 1(a-d) Framework Decision*] and
- (ii) involuntarily [*the victim loses his free will to stop the work and/or go away*] and/or

This is a subjective condition; the victim must have felt working under both conditions (i) and (ii), those are not objective criteria. In other words, the trafficker appropriates the victim's labour power with the use of the means listed in the Framework Decision. For exploitation to exist, there has to be a causal relationship between the means deployed and the exploitation.

2a. Gain

Profit is laundered by traffickers [*financial investigations are possible*].

2b. Exploitative relationship

The trafficker establishes that the victim has hardly any autonomous control over his or her own life, he or she has no real prospect of stopping with the work, return home, or stop in any other way and/or the trafficker takes measures to prevent or deter escape. [*duration of the relationship is not determining, the nature and the conditions under which one works are*]

The victim may be multiply dependent on the trafficker(s), possibly in entering a country and 'getting an identity' [*provision of fake passports*] during the pre-exploitation phase, but certainly in working conditions [*this may include transport to and from work*] and/or living conditions. [*this may include the provision of food, accommodation that may be of bad shape, the confiscation of passports and sleep deprivation*]

[The EU standard of working conditions would be clearer if the Migrants workers' Convention would be ratified and/or the European Charter made binding]

A person may be held in an even more inclusive grasp, but this is thus not a necessary condition for human trafficking for labour exploitation:

Aggravating circumstances

The non-exhaustive list offers a comprehensive catalogue of aggravating circumstances. Those are slavery-like practices (here: servitude, debt bondage and servile marriage) and slavery. *Servitude* consists of forced labour where the victim is obliged to live on the other's property and is incapable of changing this status. *Debt bondage* where there is a repayment of induced indebtedness. *Servile marriage* exists where there is servitude in a (fake) marriage. *Slavery* exists when both the victim's labour is exploited *and* the victim is bought, sold, traded, inherited or 'lent' before coming in the situation of exploitation.

6.1. Justification

The suggested interpretation of the Framework Decision's definition allows for the crime of human trafficking for labour exploitation to also encompass forced work, also forced committing of crimes, in a wide range of sectors and industries, thereby also entailing the fact that perpetrators can be individuals or part of an organised crime group. It leaves room for the crime to be other than an immigration offence, for national victims to be acknowledged, and for more subtle means than generally used in women trafficking for sexual exploitation to be recognised.

This interpretation also leads to harmonisation. This is needed; surely we know that neither different types of legislation nor States' borders hamper traffickers. It also enables the required transnational co-operation in criminal matters, and uniform combat and sentencing. This is not at all obvious, as shown by the fact that the UK has not criminalised trafficking for labour exploitation, the divergence between the Belgian definition (in which the means are part of the aggravating circumstances) and that of the Netherlands (in which these are part of the core crime), and the existence of a variety of minimum and maximum penalties and sentences.

However, as also follows from the above, European countries can no longer downplay this crime as a result of political unwillingness to examine both legal and illegal labour markets. Abstaining from labour market regulation, whilst simultaneously restricting entry into labour markets through immigration laws, might just have driven labour migration into illegal channels, thus victimising illegal migrants, migrant workers or nationals. The EU has to encourage the inspection of both its labour market and that of its Member States, and allow for regulated labour migration whilst respecting those workers rights.

It is therefore hoped that the suggested interpretation will be used as a tool for both implementation and interpretation in all EU Member States, and that a successful combat of human trafficking for labour exploitation can thus be undertaken.