IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

Immigration and Criminal Law in the European Union

The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings

Edited by Elspeth Guild and Paul Minderhoud

Martinus Nijhoff Publishers

IMMIGRATION AND CRIMINAL LAW IN THE EUROPEAN UNION

IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

Volume 9

Editors

Elspeth Guild
Kingsley Napley Solicitors, London,
Centre for Migration Law, Radboud University Nijmegen

Jan Niessen
Migration Policy Group, Brussels

The series is a venue for books on European immigration and asylum law and policies where academics, policy makers, law practitioners and others look to find detailed analysis of this dynamic field. Works in the series will start from a European perspective. The incresed co-operation within the European Union and the Council of Europe on matters related to immigration and asylum requires the publication of theoretical and empirical research. The series will contribute to well-informed policy debates by analysing and interpreting the evolving European legislation and its effects on national law and policies. The series brings together the various stakeholders in these policy debates: the legal profession, researchers, employers, trade unions, human rights and other civil society organisations.

The titles published in this series are listed at the end of this volume.

Immigration and Criminal Law in the European Union:

The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings

Edited by

Elspeth Guild and Paul Minderhoud

Martinus Nijhoff Publishers
Leiden • Boston

A C.I.P. Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper.

ISBN 90 04 15064 1

Printed and bound in The Netherlands.

The publication of this book was made possible by the financial support of the European Commission Framework VI programme CHALLENGE.

TABLE OF CONTENTS

Elspeth Guild[*]

IMMIGRATION AND CRIMINAL LAW IN THE EUROPEAN UNION: THE LEGAL MEASURES AND SOCIAL CONSEQUENCES OF CRIMINAL LAW IN MEMBER STATES ON TRAFFICKING AND SMUGGLING IN HUMAN BEINGS

1. Introduction

By 2003 an explosion in political, legislative and academic interest in the field of trafficking and smuggling of human beings in Europe was well underway. It was in part a reflection of the international concern regarding smuggling and trafficking which was expressed in the United Nations Convention against Transnational Organised Crime and two draft protocols, one to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the other to combating smuggling of persons which supplement the convention adopted in 2000. However, it also coincides with the opening of the EU common border towards a number of countries, the new Member States, which in the recent past had been considered countries of emigration towards the EU and in respect of which concerns about organised crime and its involvement in people smuggling and trafficking had been an important issue. The association of people smuggling and trafficking with prostitution and 'slavery' in a number of EU Member States was particular strong, in fact existing legislation in a number of them addressed the issue only from this perspective.

While a substantial literature was beginning to develop in the early years of this century on the issue, much of it was instigated by a small number of international organisations with specific interest, in particular the International Organisation for Migration, academic studies into movement of persons and their use of smugglers and traffickers were only beginning. One of the areas where we noticed very little attention was the choice of fields of law into which to insert this policy concern. While most policy concerns regarding border controls are dealt with by way of administrative law, the UN measures recommend

* Professor of European Migration Law at the Radboud University, Nijmegen and partner at the London law firm Kingsley Napley.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *1-6.*
 ISBN 90 04 15064 1.

the use of criminal sanctions – an option increasingly adopted in this field by EU states.

This is a study of the legal framework on criminal measures on trafficking and/or smuggling and facilitating illegal entry in six Member States: France, Germany, Italy, the Netherlands, Spain and the UK, and the European Union. This issue is at the nexus of migration and criminal law. The system of criminal law in the Member States is a central part of a complex and important part of the balance of the powers of the authorities on the one side and the rights of the citizen on the other. The way in which civil liberties of the individual are weighed in comparison with public protection duties by the authorities is in essence a constitutional issue. The treatment of foreigners, in particular as regards their entry onto the territory and residence, is not part of the constitutional settlements but a field which is governed by state discretion and exceptionalism. The rules and administrative measures regarding entry, residence and expulsion of foreigners is not subject to the same civil liberties guarantees of due process as apply in criminal law.

In this comparative study we set out to examine, in each Member State, how the insertion of immigration into criminal law takes place. Do the rules of criminal law in respect of due process take precedence over the lower evidential and procedural requirements which are applied in the field of immigration? Is there a trade off? How does the criminal justice system deal with this new field where central constitutional issues are not present? There are two levels on which the insertion of immigration into criminal law takes place – the legal and the social. We recognised that it was necessary to examine both, on the one hand to look at the laws and the court decisions on criminal trials in respect of immigrants for immigration related offences,[1] on the other hand how the society (political actors, media, interest groups etc) discuss and develop this issue. Our main concern was to examine how the foreigner comes to be seen as a criminal and what is the role of law in this process.

In developing this project, the European Union level will also be considered. Article 29 Treaty on European Union is concerned with achievement of a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of policy and judicial cooperation in criminal matters specifically by preventing and combating crime, including trafficking in persons. Thus this is a policy field which has been pushed upwards in terms of level at which discussion and action is being pursued.

We contacted experts in law and social science in each of the countries under consideration and invited them to participate in the study. The result is two chapters per country, one chapter examining the legal framework of criminal law in respect of trafficking in human beings, illegal immigration as a criminal offence and the prosecutions which have taken place under this legislation;

1 We are focusing here on the meaning in national law.

the second a consideration of the political and social debate on trafficking in human beings and illegal immigration as a criminal offence specifically around the use of criminal law in this field. This comparative work is central to understanding how the new EU legislation in the field can interact with the existing framework of legislation. However, our starting place is the national level. Only by understanding the issue at play at the national level can we begin to understand the questions at the European level.

2. The National Law Issues

Among the difficulties in this area of criminal law is identifying who is the proper subject of criminal sanctions and who is a victim deserving of protection. The question of victims in criminal law is structured differently than in respect of immigration law and the discussion developing on this field. A victim is the person who suffers as a result of the action of another. In immigration, the victim is defined as the person who gets the benefit of the action – i.e. entry into the state. The same person who is one minute in immigration law constructed as a victim of a trafficker may the next minute find herself the object of criminal sanctions for irregular entry. As became clear in the debate in Greece on the 2003 law, if criminal law requires the immediate expulsion of persons irregularly on the territory then there is unlikely to be any chance of a successful prosecution of the perpetrators of trafficking as those able to give evidence against them will already be outside the jurisdiction of the tribunal. One of the many difficulties in the field is the degree of complicity between the trafficker and the victim. Culpability of one or other depends on the distinction which is made between their respective responsibilities. The willingness of the authorities to grant protection to victims depends to a substantial degree on the extent to which those authorities accept that the victims are indeed such and not accomplices of the traffickers. Little is known about the comparative situation as regards this critical aspect of law in different Member States.

The intertwining of the issue of organised crime with immigration follows much of the discussion at the political level. How is this reflected in national law and the pursuit of alleged criminals? What happens at the trial stage? Another field which has been traditionally joined with that of immigration in some Member States is prostitution. The overlap in discussion about forced prostitution and trafficking in women has become increasingly difficult to separate. What is the role of the prostitute in the discussion at the civil and legal level?

The difference between smuggling and trafficking is unclear in many countries and indeed such a difference may not exist in some. We asked our participants in each chapter to identify whether in law there is a difference in each country and whether in the social discussion a difference is perceived as important or relevant. Further after the attacks of 9 September 2001 in the USA and 11 March 2004 in Spain, the foreigner as a security threat has become part of the

political and social debate on immigration and asylum. The security issue has been very much dominated by the need to control people and their movement, thus persons who move irregularly are more likely to be considered suspect than others. However, persons who are in need of international protection, that is to say refugees, will often be unable to travel regularly out of their country or into a safe country where they apply for asylum. With the increasing use of mandatory visa requirements and sanctions on carriers for transporting persons without the necessary documents, refugees who may well not be able to get passports in their country of origin without putting their lives in danger, let alone obtain visas to travel to safe countries will mainly arrive irregularly. The limited provisions of the UN Convention relating to the status of refugees 1951 and its 1967 protocol which permit the exclusion of refugees who have committed particularly heinous crimes have become a source of vivid discussion both at the national level in EU states and at the EU level. The assumption is that there is some overlap between the categories of refugee and terrorist. We asked our participants to consider the impact of the anti terrorism debates in each of the countries and the legal measures adopted as regards foreigners and in particular refugees and to include this aspect of the discussion in their chapters.

3. The European Debate

All too often when measures are attacked either in the national courts or, more frequently, by public opinion as unfair or unjust, the national authorities point to external actors. It is all too common for the target of disapproval to blame the European institutions where there has been a co-ordination or harmonisation of law which has resulted in what public opinion considers an unjust outcome. When the European institutions are held out as responsible for the laws which are under criticism depending on the information and measure which is available to them, the criticisms can result in a loss of authority and legitimacy. It is very important in the application of European Union law measures that challenges to the legitimacy of the law do not result in a public reaction against the EU as imposing unjust criminal laws. This issue is becoming even more important at the EU level with the development of Europol, the creation of Eurojust and the anticipated European Public Prosecutor. To the extent that this is a field of trans-national crime within the scope foreseen for these bodies, their legitimacy in the field will be extremely important to establish. However, where they are acting in a highly contentious and complex field, they will be at risk of being undermined from many sources and competing interests. Thus an understanding of the sensitivities, the issues involved in some Member States (those most acutely involved are the legal measures surrounding trafficking and illegal entry) is timely.

4. The Main Research Questions

The two main issues which we have investigated are (a) the judicial and (b) political legitimacy of laws at national level on trafficking/smuggling in persons. As part of this study we have had regard to the judicial appreciation and social perception of complicity between perpetrator and victim. The research questions addressed the two fields as follows:

The issues from the legal perspective are:

1. What are the legal texts in force in the Member States under consideration as regards trafficking and smuggling in persons, illegal and clandestine entry;
2. The (main) criminal cases which have come before the courts under the legislation over the preceding 5 year period;
3. The results of those cases in legal terms – conviction/acquittal; sentence;
4. The critical elements of evidence to the result.

The issues from the political perspective are:

1. The focus of public discussion regarding the question of trafficking and smuggling in persons in the Member State over the past five years;
2. The main elements of the political debate on the passing of legislation on trafficking in persons both in favour and opposed to the legislation;
3. The reaction of the press in the Member States under consideration to the main criminal prosecutions for trafficking in persons over the past five years;
4. The positions taken by civil society actors towards the issue of trafficking: non-governmental organisations involved in immigration matters; lawyers' associations; transport industry trade associations; political parties.

4.1 Methodology

The research has been carried out by a team of researchers in each Member State under consideration. Each team consisted of two persons: a legal expert and a political/social scientist. In each state the researchers had extensive knowledge of the immigration law and policy of the Member State involved. The legal researchers addressed the specific research questions relating to law including a detailed review of the statutes/legal provisions and circulars relating to the area; a review of the main court cases over the past five years relating to the field; an analysis of the role of the victim both in the legislation and the court cases including the relationship of the perpetrator and the victim; the rights of victims prior or following court judgments, in particularly when they have assisted the police; an analysis of the legal texts to interpret the important elements; an overview of what measures needed to be taken at the national level to integrate the new EU acquis in the field.

The social science researcher addressing the questions relating to policy and legitimacy considered: the main press, both broadsheet and tabloid newspapers, radio and television (where available) in the Member State on this issue; the parliamentary debates on legislation, circulars or other measures relating to trafficking in human beings; the positions of non-governmental organisations including women's groups and victim support bodies, lawyers' associations, trade bodies and political parties about their positions on the legal provisions on trafficking; the perceptions of officials responsible for bringing charges or investigating potential or suspected offences of trafficking in human beings; the policy issues which were considered relevant to trafficking legislation in the Member State; the discussion regarding the engagement of "Europe" in the process and the calls for and against EU level activity. The two researchers liaised closely and worked together on their respective reports. The legal questions raised important issues for the social scientist to pursue in his or her research and interviews with actors. The chapter on the European Union considers the perspective of the legislation alone.

The result of this research is now before you. Our book seeks to provide a clear picture of the issues of legal and social legitimacy which surround criminal measures relating to trafficking in human beings in six Member States and the EU. It explains the legal nature of the types of measures which have been adopted and the presentation of criminal sanctions and the positions taken by key actors in civil society. In our opinion, we have at least begun to address the central issues of the intersection of administration law relating to foreigners and criminal law and placed this intersection in its political and social context.

*Johanne Vernier**

FRENCH CRIMINAL AND ADMINISTRATIVE LAW CONCERNING SMUGGLING OF MIGRANTS AND TRAFFICKING IN HUMAN BEINGS: PUNISHING TRAFFICKED PEOPLE FOR THEIR PROTECTION?

1. Introduction

While the punishment of acts covered by the definition of smuggling of migrants ("SM") started in the 1970's when the French frontiers were closed to labour immigration, only in March 2001 did members of the French Parliament start to deal with trafficking in human beings ("THB") with the aim of protecting human dignity. The French Act criminalising THB was thus drafted in 2003, at the same time that international texts, *i.e.*, UN and European texts, which are at present the main references in THB, were being negotiated and adopted. I will therefore analyse throughout this article the interactions between French and international texts at the origin of the standards governing SM and THB.

National and international texts introduce SM and THB as two separate offences, notably distinguished by the interests they protect and by the status granted to smuggled and trafficked persons: while SM seems to be penalised to protect the State's interests by preventing illegal immigration in which the smuggled person willingly takes part, punishing THB aims at protecting the trafficked person's human rights. This difference between SM and THB implies that only trafficked people can benefit from the status of victim. However, SM and THB are closely linked, in theory as well as in practice, which can result in trafficked persons who are aliens (third-country nationals) being treated as smuggled migrants, not as victims of THB, and therfore being criminally sanctioned and/or expelled from France instead of being protected. Under these circumstances,

* Doctoral candidate in Criminal Law at the Ecole doctorale de droit comparé, University of Panthéon-Sorbonne (Paris I), France, and a member of the association Gisti (association providing support and information to migrants). This chapter was translated by Christelle Nely.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *7-39.*
 ISBN 90 04 15064 1.

is it possible to consider that victims, and more specifically victims of THB, have rights as such?

2. How French Law Punishes Smuggling of Migrants and Trafficking in Human Beings

2.1 How Smuggling of Migrants is Punished

International Sources of French Law

The phrase "smuggling of migrants" was officially adopted in 2000 in the *Protocol against the Smuggling of Migrants by Land, Sea and Air* (SM Protocol), supplementing the United Nations *Convention against Transnational Organized Crime* (TOC Convention).[1] This Protocol gives the following definition for SM: "the procurement, in order to obtain, directly or indirectly, financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".[2] It also covers the production and provision of fraudulent travel or identity documents,[3] as well as the act of enabling this person to remain illegally in the State concerned.[4] This protocol also invites all Member States to increase the penalties for such offences when committed under "circumstances that endanger, or are likely to endanger, the lives or safety of migrants concerned" or "circumstances that entail inhuman or degrading treatment, including for exploitation, of such migrants".[5]

France signed and ratified the SM Protocol in 2002,[6] then passed the Act of 26 November 2003 on *migration management, residence of aliens in France and nationality,*[7] thus modifying the legislation concerning aliens. First, penalties were increased for carriers and, more generally, anyone who facilitates the unauthorised entry, transit across and residence in France of an alien. Second, the scope was increased: before this Act was passed, one could be punished for facilitating the unauthorised entry, transit across and residence in France while

1 The TOC Convention and the SM Protocol were adopted by the General Assembly of the United Nations on 15 November 2000 in Palermo. The TOC Convention entered into force on 29 September 2003, and the SM Protocol entered into force on 28 January 2004.

2 SM Protocol Article 3 (a).

3 SM Protocol Article 6.1 (b) i) and ii).

4 SM Protocol Article 6.1 (c).

5 SM Protocol Article 6.3.

6 France signed the TOC Convention and the SM Protocol on 12 December 2000, then ratified them on 29 October 2002 under the Acts No 2002-1039 and 2002-1040 of 6.08.02, published in the Official Journal (OJ) No 183, 7.08.02, p. 13521 – 13522.

7 Act No 2003-1119, OJ 274, 27.11.03.

acting from within another Member State of the 1990 Schengen Convention, or for facilitating the unauthorised entry, transit across and residence in another Schengen Convention Member State. Now, anyone who assists or tries to assist a person to enter, transit across or reside in the territory of a SM Protocol Member State, can also be punished.

The Reciprocal Influence of French Law and European Union Law

At the same time, France suggested – and obtained – that the EU Council adopt the 28 November 2002 Directive defining the facilitation of unauthorised entry, transit and residence[8] and the Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.[9] Only in exceptional circumstances may a State, rather than the Commission, take legislative initiative regarding Community matters. To respect the sovereignty of States in the field of immigration, the Treaty of Amsterdam included a mechanism that left an important role for decision-making to Member States for the first five years following 1 May 1999.[10] In addition, the EU Council was, during this time, the only decision-making body. This is why the Council could, without the support of the European Parliament[11] (the democratic representative body), adopt the text suggested by France rather than the Commission's note, which questioned the legal basis of the initiative.[12]

Originally,[13] the suggestion from France was based on the French legislation governing SM and ignored the criteria of economic benefit, although this criteria is required by Article 27 of the Schengen Convention. Consequently, even people assisting aliens for disinterested motives could be punished, while persons related to the assisted alien could not be punished.[14] The position of the French government was that it was too difficult to prove the existence of profit,

8 Council Directive 2002/90/CE, OJ L 328, 5/12/02, p. 0017 – 0018.

9 Council Framework Decision 2002/946/JHA, OJ L 328, 5.12.02, p. 0001 – 0003.

10 See Aboudahab, Zouhair (2002) "Cadre juridique de la politique migratoire de l'Union européenne: lecture critique", in *Le goût amer de nos fruits et légumes, l'exploitation des migrants dans l'agriculture intensive en Europe*, coll. Informations et commentaires, Le développement en questions, ed. Forum civique européen et Association pour un nouveau développement, numéro hors série, March, pp. 53- 61.

11 The European Parliament rejected this proposal in its Opinion PE 300.204 on 15.02.2001, OJ C276, 1.10.2001, p. 244.

12 Note 8845/01 of 16.05.01.

13 Communication 9892/00 of 30 June 2000 from France with a view to the adoption of a Framework Decision on the strengthening of the penal Framework to prevent the facilitation of authorised entry and residence.

14 See Article 21.III. – (1) and (2), Ordinance No 5-2658 of 2.11.45 modified by the Act of 26.11.03.

which was an obstacle to effectively punishing such acts.[15] But the UN High Commissioner for Refugees (UNHCR) recalled that it was necessary to protect from sanctions victims of exploitation by certain criminal groups, as well as persons (individuals or NGOs) assisting asylum seekers for disinterested motives.[16] This protection was all the more important to the UNHCR because the "States' increasingly restrictive immigration policies" often left only one viable option for genuine asylum seekers to reach the EU: smugglers. Finally, it was decided that assisting an alien to reside illegally would only be criminalized where a pursuit of gain exists, whereas the facilitation of unauthorised entry or transit would be criminalized without this motive. Nevertheless, in the case of facilitation of unauthorised transit and entry, all Member States must guarantee the right of asylum, and have the possibility not to punish persons assisting an alien with humanitarian motives. Here again, France modified its domestic law.

Strictly speaking, there is no offence called "smuggling of migrants" in French law. However, the conduct is incriminated in a series of other, related offences.

How the Facilitation of Unauthorised Entry, Transit or Residence, Is Punished

At present, the act of facilitating or attempting to facilitate, by assisting directly or indirectly, the unauthorised entry, transit or residence of an alien is punishable by 5 years' imprisonment and a fine of EUR30,000, to which can be added the following additional penalties:

1. a 5-year (3 years before 2003) restraining order;[17]
2. suspension of the driver's licence for a maximum period of 5 years (3 years before 2003);
3. temporary or definitive withdrawal of the administrative authorisation to operate international transportation services;
4. confiscation of that which was used to commit the offence or which is the product of it;
5. prohibition, for a maximum period of 5 years, to exercise any professional or social activity which facilitated commission of the offence;
6. deportation without right of re-entry for 10 years.[18]

15 See Council preparatory work of 28.07.2000.

16 See the Note 1235/00 of 16.10.00 from the UNHCR.

17 A restraining order prohibits the restrainee from being in a specific area determined by the judge.

18 Article 21.II, Ordinance No 45-2658 of 2.11.45, modified by the Act of 26.11.03. A banishment from the French territory involves a removal to the frontier without any other condition.

The maximum prison sentence is increased to 10 years and the maximum fine to EUR 750,000 where such acts are committed by an organised gang[19] or under circumstances involving an immediate risk of death or injuries which would cause mutilation or permanent disability. The same penalties are applied where the result of acts committed is to subject concerned aliens to living, transportation, working and harbouring conditions violating the dignity of persons, or to separate minor aliens from their family or usual environment.[20] In this case, it is possible to consider the confiscation of all or part of the smuggler's property, as well as the smuggler's definitive deportation from France.[21]

Nevertheless, some persons who merely help an alien reside illegally in France are exempt from prosecution: ascendants, descendants, siblings and their spouses, as well as the alien's spouse or concubine (in France, this is a legally recognized non-marital partner). In addition, under the Act of 26 November 2003, any individual or legal person providing assistance to an alien that is necessary to ensure the safety of the alien's life or physical safety, is also protected from prosecution.[22] To avoid prosecution however, the person assisting an alien with humanitarian motives must be confronted with a "present or imminent danger", where the means used are proportionate to the seriousness of the threat, and without any direct or indirect benefit. According to various associations assisting aliens, this restrictive definition of disinterested assistance does not sufficiently call into question the underlying principle and results in punishing an "offence of solidarity".[23] Indeed, this provision does not add anything new, con-

19 Under the law, an organised gang is any group formed or association established with a view to the preparation of one or more criminal offences, preparation marked by one or more material actions. The penalties imposed on organised gangs facilitating the unauthorised entry and residence in the Schengen area are generally not superior to 3 years of prison. Considering this lack of severity, it would appear that, contrary to the official national and international political opinion, "society" is moving towards the decriminalisation of SM.

20 Article 21 bis I, Ordinance n°45-2658 of 2.11.45 modified by the Act of 26.11.03.

21 Article 21 bis II and III, Ordinance No 45-2658 of 2.11.45 modified by the Act of 26.11.03.

22 Article 21.III. – (3), Ordinance No 5-2658 of 2.11.45 modified by the Act of 26.11.03.

23 See the analysis of the Act of 26 November 2003, *"Contrôler, surveiller et punir"*, 12/2003, 4th edition, by the GISTI (Groupe d'Information et de Soutien des Immigrés), available on the website <www.gisti.org>. The same site provides a petition that denounces the punishment of an "offence of solidarity" and information on the criminal proceedings against members of associations for having assisted undocumented people.

sidering that it is based on the standard defence to liability found in the French Penal Code: necessity.[24]

The Particular Case of Carriers

In 1992,[25] the Administration began to fine carriers who transport aliens who do not possess the documents necessary to enter the Schengen area, per Article 26 of the Schengen Convention.

In 2003, France implemented the Council Directive of 28 June 2001 supplementing Article 26 of the Schengen Convention:[26] the fine was increased from EUR 1,500 to EUR 5,000 for every alien disembarking or transiting in France. This fine is reduced to EUR 3,000 where the transportation company concerned systematically provides the passengers' travel documents and visas to the border control authorities. Where the alien transported is a minor travelling without a legal representative, the transportation company must immediately deposit EUR 5,000 or EUR 3,000, which will be partially or entirely returned, depending on the amount of the fine eventually assessed. Where no deposit is made, the fine is increased to EUR 10,000 or EUR 6,000. When the alien is authorised to enter France to lodge a request for asylum that is not "manifestly unfounded", the transportation company is not punished.[27] But the consequence of increasing the carriers' liability may be that the carriers will be less and less willing to take the risk of taking "bogus" asylum seekers on board – especially when they are minors – which would further reduce the opportunities for aliens to apply for asylum in France.[28]

The Particular Case of the Marriage of Convenience

The act of contracting or organising a marriage only for the purpose of gaining a residence permit for the alien is now[29] punishable by 5 years' imprisonment and a fine of EUR 15,000, or 10 years and EUR 750,000 where the acts were

24 See Article 122-7 of the French Penal Code: "a person is not criminally liable if confronted with a present or imminent danger to himself, another person or property, he performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat".

25 Act No 92-625 of 6.07.92, OJ 158, 9.07.92.

26 Directive 2001/51/CE of 28.06.01, OJ L 187, 10.07.01.

27 Article 20 bis II. – 2°, Ordinance No 45-2658 of 2.11.45 modified by the Act of 26.11.03.

28 See analysis of the Act of 26 November 2003, *"Contrôler, surveiller et punir"*, December 2003, 4th edition, by the GISTI (Groupe d'Information et de Soutien des Immigrés), available on the website <www.gisti.org>.

29 Under the Act of 26.11.03 mentioned above.

committed by an organised gang.[30] The additional penalties described above (see How the facilitation of unauthorised entry, transit or residence, is punished, numbers 1, 5 and 6), as well as the confiscation of all or part of the couple's property, may also be imposed. Incriminating this particular form of marriage of convenience as a separate offence appears to be redundant in the light of the existing offence of facilitating unauthorised residence, as well as disproportionate in comparison to other motives which are not penalised.[31]

How Forgery and the Use of Forgeries Are Punished

The list provided by the French Penal Code of offences undermining public trust includes forgery and the use of forgeries committed in a document delivered by a public body for the purpose of establishing a right, an identity or a capacity, or to grant an authorisation.[32] This includes, for instance, the forgery of a passport, an ID card or a residence permit. The maximum penalty of 5 years' imprisonment and fine of EUR 75,000 are increased to 7 years and EUR 100,000 where the offence is committed by a person holding public authority, or where it is committed habitually or with the intent to facilitate the commission of a felony.

Criminal and administrative law thus interact to punish offences relating to SM: although prison sentences cannot be imposed under administrative law, it can accelerate the repressive response to the acts concerned by avoiding a preliminary judgment.

How Migrants Who Benefit from the Assistance Are Punished

In the SM Protocol, migrants who benefit from assistance are presented as the "subjects" of smuggling, and cannot be punished as such. However, the Protocol specifies that a migrant's conduct can lead the State concerned to take measures against him,[33] including detention.[34]

Indeed, French law provides for the punishment of assisted migrants, although not on the grounds of smuggling, but for acts which are closely linked to smuggling:

– where the migrant illegally enters, transits across or resides in France, he/she can be criminally and administratively punished. On the one hand, the

30 New Article 21 quater, Ordinance No 45-2658 of 2.11.45 modified by the Act of 26.11.03.

31 See analysis of the Act of 26 November 2003, *"Contrôler, surveiller et punir"*, December 2003, 4th edition, by the GISTI (Groupe d'Information et de Soutien des Immigrés), available on the website <www.gisti.org>.

32 Article 441-2 of the French Penal Code.

33 See Article 6. 4 of the SM Protocol.

34 The hypothesis of detention is specified in Article 16. 5 entitled "*Protection and assistance measures*"!

criminal judge can impose a maximum prison sentence of 1 year, a maximum fine of EUR 3,750 and automatic deportation with no right of re-entry for 3 years.[35] On the other hand, the Prefect (the local State representative) can impose the administrative detention of the migrant during the period required to organise the migrant's departure (32 days maximum).

– where the migrant contracts marriage solely for the purpose of gaining a residence permit, he/she is subject to the same penalties as those applicable to the marriage of convenience;
– where the migrant possesses a forged document, he/she is punishable by 2 years' imprisonment and a fine of EUR 30,000, and up to 5 years and EUR 75,000 where he/she possesses several forged documents.[36]

In this context, can we say that an assisted migrant is the victim of the acts constituting smuggling of migrants?

In the SM Protocol, the word "victim" appears only once, as if by accident, in Article 15 on preventive measures. Nowhere else in the text does the assisted migrant benefit from the status of victim. Rather, he/she is considered an alien who voluntarily benefits from the SM by illegally entering and/or residing in the territory of a Member State.

The migrant thus appears in both the Protocol and French law as the main perpetrator of the SM, and the smuggler his or her accomplice. Indeed, French law defines an accomplice as a person who knowingly, by aiding and abetting, facilitates the preparation or commission of an offence. This clearly describes the conduct of the smuggler, though if the migrant is considered to provoke the SM, she or he becomes the smuggler's accomplice under another definition.[37] This conception of the migrant as perpetrator or provocateur may explain why the smuggled alien who is arrested along with the smugglers tends to be punished more severely than the smugglers.[38]

The true victim of the SM would in fact appear to be the State,[39] harmed in its sovereignty, in the integrity of its territory. Considering the offences addressed

35 Article 19, Ordinance No 45-2658 of 2.11.45 modified by the Act of 26.11.03.

36 Article 441-3 of the French Penal Code.

37 Article 121-7 of the French Penal Code also defines the accomplice as any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it.

38 For instance, the *Tribunal de grande instance de Paris* (Paris District Court), section 16/1, sentenced on 24.09.03 an alien who was helped to enter France illegally to 4 months' imprisonment and expulsion from France for 2 years, while the two smugglers were sentenced to 15 and 18 months' imprisonment, respectively, were expulsed from France for 3 years.

39 It is specified in the Preamble of the SM Protocol that organised criminal groups "bring great harm to the States concerned".

by French law, the punishment of SM aims, *a priori*, at fighting against illegal immigration and protecting public trust. Consequently, strictly speaking, the migrant is not a victim of SM, but only of the violations of his/her rights resulting from the SM (endangerment or exploitation).[40] The punishment of illegal immigration, considered to be criminogenic and progressively acquiring the status of transnational organised crime, is currently a priority for France as well as for EU.[41]

2.2 How Trafficking in Human Beings Is Punished

International Sources of French Law

The international definition of THB is provided by the Protocol *to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (TP Protocol),[42] supplementing the United Nations TOC Convention, as well as by the EU Council Framework Decision of 19 July 2002 *on combating trafficking in human beings.*[43] The acts constituting THB cannot be penalised in and of themselves; only the means used and the purpose of such acts make them punishable. The Framework Decision, which brought minor alterations to the TP Protocol,[44] provides a list of the acts concerned: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person. It also lists the means used for trafficking: coercion, force or threat, including abduction, deceit or fraud, 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 payments or benefits are given or received to achieve the consent of a person having control over another person. However, where the victim is a minor, such acts shall be considered trafficking in human beings, even if this does not involve any of the means mentioned above. Finally, the purpose of the perpetrator must be the exploitation of

40 The Preamble of the SM Protocol recalls the necessity to strengthen international cooperation "in order to address the root causes of migration". Migrations themselves therefore constitute a greater problem than their conditions, but the fact that these conditions can violate the migrants' rights helps to fight against migrations, in the name of the protection of such migrants.

41 According to the first recitals of the Directive and of the Framework Decision on the facilitation of unauthorised entry, transit and residence, one of the objectives of the European Union is to combat the aiding of illegal immigration to provide citizens with an area of freedom, security and justice.

42 The TP Protocol entered into force on 25 December 2003.

43 Framework Decision 2002/629/JHA, OJ L 203, 1.08.02, p. 0001 – 0004.

44 The European Commission wanted to be more exhaustive in completing the UN text, but France, *inter alia*, opposed this suggestion. The definitions provided by these texts are actually very close to each other.

the trafficked person. It can be either the "exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude", or the "exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography." Considering this definition, the trafficker is the one who facilitates the commission of the exploitation. The trafficker is therefore the exploiter's accomplice.

A specific offence of THB has recently been introduced in French law with the *Law on internal security* (*Loi sur la sécurité intérieure*, LSI) of 18 March 2003.[45] The idea to create this offence first came up in 2001 when a Parliament information mission, created on the initiative of field associations,[46] concluded that it was necessary.[47] The decision to incriminate "trafficking in human beings" was then mainly inspired by the TP Protocol. Soon afterwards, a parliamentary bill on the fight against contemporary slavery (*proposition de loi relative à la lutte contre l'esclavage aujourd'hui)* was introduced. But this bill was considered of minor interest and was not passed into law.[48] In 2003, however, the incrimination of human trafficking was finally adopted. But, where the 2002 parliamentary bill was mainly aimed at protecting trafficked persons' dignity, the objective of the 2003 law was to strengthen the fight against pimping and to guarantee French citizens' right to security, which became a fundamental right in 1995.[49] However, parliamentary debates resulted in a more generic definition of THB rather than restricting it to pimping.

How Trafficking in Human Beings Is Punished

Under the new Article 225-4-1 of the French Penal Code, THB is a violation of human dignity. It is defined as the recruitment, transport, transfer, accommodation, or reception of a person in exchange for remuneration or any other benefit or for the promise of remuneration or any other benefit, in order to put him/her at the disposal of a third party, whether identified or not, so as to permit

45 Act No 2003-239, OJ No 66, 19.03.03, p.4761, available on the Website <www.legifrance.gouv.fr>.

46 For instance, the CCEM (*Comité contre l'esclavage moderne* – Committee against modern slavery).

47 Information report entitled *L'esclavage, en France, aujourd'hui* (*Slavery in France, today*) No 3459, registered at the National Assembly on 12.12.01, available on the website www.assemblee-nationale.fr.

48 This text, which was approved by the lower chamber on 24 January 2002 but was never reviewed by the upper chamber, is available on the website <www.assemblee-nationale.fr>.

49 See Act of 21.01.95. This principle was then reaffirmed under the *Law on everyday security* of 15.11.01 (*Loi sur la sécurité quotidienne*, LSQ), the *Orientation and programming Law for internal security* (*loi d'orientation et de programmation pour la sécurité intérieure*) of 29.08.02 and under the *Law on internal security* of 18.03.03.

the commission against that person of offences of pimping, sexual assault or attack, exploitation of begging, or the imposition of living or working conditions inconsistent with human dignity, or to force this person to commit any felony or misdemeanour. THB is punishable by a prison sentence of up to 7 years and a fine of up to EUR 150,000. This sentence is increased to 10 years where, *inter alia*:

– the offence was committed in respect of a minor, of a particularly vulnerable person,[50] of several persons or of a person who was outside France, or upon arrival in France;
– the trafficked person was placed in circumstances involving an immediate risk of death or injuries which would cause mutilation or permanent disability;
– the offence was committed with the use of constraint, violence or fraudulent behaviour aimed at the trafficked person, a member of his/her family, or a person habitually in contact with the trafficked person;
– the perpetrator of the offence is an ascendant of the trafficked person or a person holding authority over him/her or who misuses the authority conferred by his functions.

The maximum prison sentence and fine are then increased to 20 years and EUR 3,000,000 where the offence was committed by an organised gang, and to life imprisonment and EUR 4,500,000 where torture or acts of barbarity are used. Where the victim is a minor, the statute of limitations for public prosecution runs from the date at which the victim ceases to be a minor, instead of the day of commission of the crime. Prosecution in felony cases (a crime carrying a prison sentence of at least 10 years) is time-barred by the passing of 10 years from the day of the commission of the crime (3 years for a misdemeanour).

Although the French definition seems quite similar to that of international texts, there are significant differences. The first concerns the acts incriminated: in the French law, the exchange or transfer of control over the trafficked person is a purpose, not a means. The second difference concerns the means: those described in the Framework Decision are not elements of the basic offence, but only constitute aggravating circumstances. Finally, concerning the purpose, in the French law the trafficker does not commit the offence with a view to the exploitation of the trafficked person, but with a view to handing this person over to a third party to obtain financial or other material benefit. The trafficker does not need to have knowledge of the possible exploitation of the trafficked person to be punished, but where this knowledge exists, the sentence will be similar to

50 The particular vulnerability of a person is due to age, sickness, to a disability, a psychic or physical deficiency or to a state of pregnancy, and must be apparent or known to the offender.

that of the exploiter.[51] Consequently, the French THB offence covers not only acts of complicity in the exploitation, as in the international definition, but also other autonomous acts that consist in handing the trafficked person over for financial or other material benefit, whether this person is willing or not.

It should be noted that, even where the trafficked person voluntarily takes part in the THB, this person remains a victim of the THB, and the trafficker remains guilty: firstly, the means used to achieve the consent are aggravating factors, not elements constituting the crime of THB, and secondly, the consent of the victim is not a defence to liability for the perpetrator. The victim's consent is therefore only taken into account to determine the severity of the punishment.

How Exploitation Is Punished

In 2003, the exploitation of trafficked persons falls within the definitions of a series of common-law crimes listed in Article 225-4-1 of the French Penal Code. On the basis of the EU definition of THB, these offences can be classified in two categories: sexual exploitation and exploitation of the labour or services.

Sexual exploitation

The French definition of pimping is extremely broad, since both constraint pimping (*proxénétisme de contrainte*) and support pimping (*proxénétisme de soutien*) are punished.

Constraint pimping consists in: hiring, leading a person into or corrupting a person in view of prostitution, or exercising pressure on such a person to make her/him practice prostitution or continue doing so, or making a profit out of the prostitution of someone, sharing the products or receiving habitually income from a prostituted person. The sentence to which the pimp is liable is increased under the following circumstances: where the victim is a minor or is particularly vulnerable, where an abuse of authority exists, where a weapon was used to threaten, where constraint, violence or fraudulent behaviour was used, where torture or acts of barbarity were used. The punishment of exploitation-prostitution thus visibly aims at protecting personal liberties, such as the right to respect of the will or physical integrity, in the name of respect of human dignity.

51 Article 225-4-5 of the French Penal Code. It should be noted that, in cases that occurred before 18 March 2003, aiding the exploitation of prostitution tended to be less severely punished than the exploitation itself, although both acts had the same legal qualification (pimping). For instance, in a sentence by the *Tribunal de grande instance de Paris* (Paris District Court), section 16/1, on 21.10.03, the person who had exploited the prostitution of young women was sentenced to 8 years of imprisonment, a fine of EUR50,000 and a definitive banishment from the French territory, while the person who had purchased, accommodated, dressed and handed the persons to prostitute over to the exploiter to obtain a payment, was sentenced to 5 years of imprisonment, a fine of EUR30,000 and a definitive banishment from the French territory.

Support pimping includes: helping, assisting or protecting the prostitution of others, being unable to account for an income compatible with one's lifestyle while living or entertaining habitual relationships with one or more prostituted persons, or providing premises (accommodation pimping) or a vehicle.[52] Support pimping covers concealed constraint pimping, but also the mere act of being in relation with a prostituted person.

What public interest are these "relationship offences" supposed to protect, when such offences do not violate the personal liberty of the prostituted persons? In reality, the purpose of this type of offence is more to protect public order than human dignity. Preventing the exercise of nuisance prostitution is not aimed at protecting the individual against forced prostitution but at protecting society. This explains why the law considers the driver, the bodyguard, the incomeless companion.[53] The landlord, the person who lends premises or a vehicle, etc., as pimps when they have knowledge of the prostituted person's activity. Thus, acts of solidarity between two prostituted persons, and even the activities of volunteer associations such as providing an address,[54] have been considered pimping.[55]

Considering the diversity of acts covered by the definition of pimping, the scope of the THB offence is not restricted to the mere act of complicity in the exploitation of the prostitution. The broad definition of THB also provides a way to strengthen the combat against prostitution.

In addition, the THB offence refers to sexual assaults. This includes rape,[56] as well as any sexual attack committed with violence, constraint, threat or surprise.[57] Moreover, sexual attacks committed without constraint on minors under

52 The *Law on internal security* added the act of providing a vehicle in Article 225-10 4° of the French Penal Code.

53 Providing that this person is unable to account for an income compatible with his/her lifestyle.

54 The Gasprom (Groupement accueil service promotion), member of the Fasti (Fédération des associations de solidarité avec les travailleurs immigrés), was accused by the prosecution service of the city of Nantes of complicity in pimping for providing an address to prostituted aliens as well as to any other migrant. See La Casinière, Nicolas, "A Nantes, domicilier, c'est jouer les proxénètes", in *Libération,* 20.05.04.

55 Figures related to the combat against pimping must therefore be considered carefully, since they do not distinguish constraint pimping from "relationship pimping".

56 Article 222-23 of the French Penal Code. Rape is punished by a maximum prison sentence of 15 years (20 years, 30 years or life imprisonment according to circumstances).

57 Article 222-22 of the French Penal Code. Punished by a maximum sentence of 5 years and EUR 75,000 (7 years and EUR 100,000 or 10 years and EUR 150,000 according to circumstances).

age 15 are punishable by 5 years' imprisonment and a fine of EUR 75,000,[58] whereas offences committed on minors over the age of 15 are punishable by a maximum penalty of 2 years' imprisonment and a fine of up to EUR30,000 under specific conditions.

Exploitation of Labour or Services

The exploitation of begging has been prohibited since 2003.[59] This offence covers the same type of acts as those concerning constraint pimping and leads to a maximum sentence of 3 years' imprisonment and a maximum fine of EUR 45,000. This maximum penalty is increased to 5 years and EUR 75,000 under the aggravating circumstances concerning THB listed above, and to 10 years and EUR 1,500,000 where the offence is committed by an organised gang. It should be noted that labour inspectors are authorised to establish the existence of this offence.[60]

In addition, penalties for subjecting a person to working or living conditions inconsistent with human dignity were increased in 2003. A maximum penalty of 5 years' imprisonment and a fine of up to EUR 150,000 (instead of 2 years and EUR 75,000) are now incurred for:

– obtaining the performance of unpaid services or of services for which the payment clearly bears no relation from a person whose vulnerability or state of dependence are visible or known by the perpetrator;[61]
– subjecting a person whose vulnerability or state of dependence is visible or known by the perpetrator to working or living conditions incompatible with human dignity.[62]

Though the existence of a state of vulnerability or dependence must be proved, it is nonetheless presumed for minors and for persons who become victims of this offence upon their arrival in France.[63] The existence of such offences can also be established by labour inspectors.

The maximum penalty increases with the existence of several victims (7 years and EUR 200,000), and even more where at least one of these victims is a

58 Article 227-25 of the French Penal Code.

59 Article 221-12-5 of the French Penal Code.

60 Article L 261-3 of the Labour Code.

61 Article 255-13 of the French Penal Code.

62 Article 225-14 of the French Penal Code.

63 Article 225-15-1 of the French Penal Code. Some authors believe that it would have been preferable that this presumption be also applied to legal aliens who do not possess a work permit and undocumented aliens. See S. Licari, "Des conditions de travail et d'hébergement incompatibles avec la dignité humaine résultant d'un abus de la situation de vulnérabilité ou de dépendance de la victime", *Revue de sciences criminelles et de droit pénal comparé*, No 2001-3, pp. 553-569.

minor (10 years and EUR 300,000). In this case, the limitation period for public prosecution also runs from the date at which the victim ceases to be a minor.

Finally, anyone who constrains another to commit a felony or a misdemeanour is guilty of complicity,[64] whereas duress is a defence to liability for the compelled person.[65] The accomplice is then liable to the same penalties as the perpetrator of the felony or misdemeanour.[66]

Is the Offence, as Currently Defined, Legally Necessary?

Although the French definition of THB, in spite of a different wording, seems to meet international expectations, France's choice to criminalize THB remains questionable in various aspects, not the least of which is its necessity. Indeed, as THB was defined in 2003, traffickers could already be punished pursuant to a variety of incriminations already found in the French Penal Code: those listed in Article 225-4-1 (discussed above); as intermediaries between prostituted persons and the persons exploiting them;[67] for abduction or illegal restraint;[68] or for facilitating the unauthorised entry, transit across or residence in France of an alien. Considering the case law concerning acts that are now covered by THB but that occurred before 18 March 2003, such acts were generally prosecuted as:

– pimping,[69] with or without facilitation of unauthorised entry or residence,
– imposition of living or working conditions inconsistent with human dignity, with or without facilitation of unauthorised entry or residence,[70] or
– facilitation of unauthorised entry or residence only.[71]

64 Article 121-7 of the French Penal Code.

65 Article 122-2 of the French Penal Code.

66 Article 121-6 of the French Penal Code.

67 Article 225-6, 1° of the French Penal Code.

68 Article 224-1 *et seq.* of the French Penal Code.

69 For instance, the Toulouse Appellate Court (Criminal Section), in its Decision of 17 May 2002, qualified as aggravated pimping the recruitment abroad of and transfer of control over young foreign women with a view to their prostitution.

70 For instance, the Rennes Appellate Court (3rd section) sentenced, on 3.04.95, a man who illegally employed 16 undocumented aliens to work in a workshop producing shoes 6 days a week from 8 a.m. to 10 p.m. for a monthly income of FF 3,000 to FF 4,000 that was sent directly to their family in China. The *Cour de cassation* (France's highest appellate court) did not quash on 6.05.97 (Request No95-82746).

71 For instance, the Bastia Appellate Court (Criminal Section), in its Decision of 24 April 2002, condemned the owner of a lorry for facilitating the unauthorised entry and residence of aliens, because he had organised "traffick concerning human beings" in order to obtain financial benefit. The aliens who had benefited from the assistance were compelled to work to reimburse the amount of their journey, which was disproportionate to the actual price of the service. The *Cour de cassation* (France's highest appellate court) did not quash on 4.12.02 (Request No02-83381).

Concerning cases that occurred after 18 Mars 2003, no one has as yet been prosecuted for THB, which tends to confirm its legal uselessness.

It is also relevant to question the motives and consequences of the criminalization of trafficking rather than exploitation, and more precisely, slavery. The notion of trafficking is indeed indissociable from the notion of slavery, since slavery is the purpose of trafficking. Then why were the acts of complicity – trafficking – criminalized instead of the primary result-reduction to slavery? According to the justification provided in the administrative circular[72] specifying how the Law of 18 March 2003 should be enforced, it was necessary that French law conform to international texts applicable in France. However, to observe its international commitments, France did not have to transpose the international terminology, it merely had to provide penalties for the conduct described. It could therefore have created an offence of reduction to slavery[73] rather than an offence of trafficking. This would have enabled the harmonization of offences concerning exploiters and the equal treatment of exploiters, as well as of exploited persons.[74] It is however obvious that the existing definition of reduction to slavery, recognized as a crime against humanity in the French Penal Code, is no longer applicable to the cases currently before the courts:

> Deportation, reduction to slavery or the massive and systematic practice of summary executions, of abduction of persons followed by their disappearance, of torture or inhuman acts, inspired by political, philosophical, racial or religious motives, and organised in pursuit of a concerted plan against a group of a civil population are punished by criminal imprisonment for life.[75]

This definition requires motives other than financial ones, an organisation in pursuit of a concerted plan – which excludes opportunism – and a group of a

72 Administrative Circular NoCRIM-03-7/E8-03.06.03, NOR: JUS-D-03-30082 C, published in the *Bulletin officiel du ministère de la Justice,* No 90, of 1.04.03 to 30.06.03.

73 At present, exploitation of the prostitution seems to be more and more punished in practice. Since 2003, and even before the Act of 18 March was passed, the penalties imposed have sometimes been very close to the maximum sentence, whereas previously, such penalties were hardly ever superior to a few years. Considering that the maximum sentence for other forms of exploitation is much lower, the harmonization of the punishment of the different forms of exploitation seems to be an illusion.

74 See Massias, Florence, "L'esclavage contemporain: les réponses du droit", in *Droit et Cultures*, No 39, 2000/1, p.101-124. Her conclusion underlines the necessity of specific criminal liabilities for slavery, debt bondage and forced labour, to enable the elaboration of appropriate penalties that would be proportionate to the seriousness of the crime.

75 Article 212-1 of the French Penal Code.

civil population – which excludes isolated cases. However, this definition could constitute the aggravated form of a basic offence of reduction to slavery, where trafficking would be punished as complicity.

Finally, the decision not to criminalize exploitation or reduction to slavery is a *de facto* denial of their existence, and thus of the existence of exploiters or enslavers and of their victims. Since judges do not have to face offenders qualified as exploiters or enslavers, it is unlikely that they will impose sentences as severe as would seem required by Article 4 of the European Convention on Human Rights, which prohibits slavery and servitude. Indeed, in cases of "domestic" slavery prior to 2003, even judges who acknowledged the existence of a situation of exploitation sentenced the perpetrators to suspended sentences of a few months' imprisonment, using "relay-offences"[76] that would have permitted more severe sentences.[77]

The explanation for the criminalization of THB could partially lie in the emergence of a crosscheck between SM and THB. The overlap, or even continuity, between SM and THB, may indeed be of considerable practical value.

3. Overlap and Continuity Between Smuggling of Migrants and Trafficking in Human Beings

At the International Level

At the international level, the considerations laid out for texts concerning SM and THB establish a link between them, and this link is reinforced by the definitions of the offences.

UN texts introduce SM and THB as two forms of TOC that must be combated because of their growing links with terrorism[78] and which, although they are distinct, lead to similar measures at borders.[79] Both offences have the same scope: transnational offences[80] perpetrated by organised criminal groups in

76 See the article by Florence Massias (mentioned in Note 30 above), who uses the expression "*incriminations relais de l'esclavage*" (offences used as a relay to punish slavery), referring to Articles 225-13 and 224-14 of the French Penal Code.

77 See, for instance, the sentence imposed by the Paris Appellate Court, section 12, on 21.05.01: the defendants were fined FF 15,000 and sentenced to 8 months' and 1 year's imprisonment, respectively, for having obtained the performance of work for which the payment clearly bore no relation to the importance of the work performed, and for subjecting persons to working and living conditions incompatible with human dignity.

78 Preamble of UN General Assembly Resolution of 8 January 2001 A/RES/55/25, Recital 8.

79 Article 11 of SM and TP Protocols.

80 The fact that the legitimacy of the UN is based on the transnational characteristic of the phenomena they are in charge of has certainly had some influence on the

order to obtain, directly or indirectly, financial or other material benefit. In the European text on THB, the acts concerned do not need to bear transnational characteristics to be qualified as THB. However, the European Union still tends to consider THB as a form of transnational organised crime.[81]

Concerning European texts on SM, the close link that existed with THB in the initial French version was blurred under the influence of certain delegations, particularly the Finnish[82] and Austrian delegations:[83] in the explanatory statement, the fight against THB was the main objective. However, both texts presently in force still aim at punishing "the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining *networks which exploit human beings*".[84]

Regarding the European definitions of SM and THB, various common points appear where the trafficked person is an alien from outside the European Community:

– the facilitation of unauthorised entry, transit and residence can consist in the transport, transfer, accommodation or reception of persons,
– exploitation of the person is a component of THB and a possible purpose of SM,
– the migrant, considered to voluntarily take part in the unauthorised entry, transit or residence, can nonetheless be deceived or abused concerning his/her exploitation.

At the National Level

Under these circumstances, it is not surprising to find such a link in French law. Indeed, the definitions of the facilitation of unauthorised entry, transit or residence, and that of THB can cover the same facts where the trafficked person is an alien (a third-country national) and is deceived. For instance, the facilitation of unauthorised entry, transit or residence, as well as THB, can consist in handing over a person against a payment or benefit, to a third person who subjects this person to living, working or harbouring conditions violating the dignity of persons. In this situation, the authorities could qualify the conduct as either SM or THB. Consequently, they could decide to qualify the trafficked person as a guilty migrant or as an alien-victim.

However, this partial overlap tends to become a continuity regarding not the definitions, but the sentences which may be imposed on the perpetrators of

---

choice of the term THB instead of slavery.

81 Action plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C 019, 23.01.1999, pp. 1-15.

82 Note 5186/01 of 11.01.01.

83 Note 6091/01 of 9.02.01.

84 See Recital (2) of the Preambles of the EU texts on SM (see Notes 8 and 9 above).

SM and THB. Indeed, it is possible to distinguish a coherent scale of sentencing between the two offences and the related aggravating circumstances:

- the smuggler is liable to 5 years' imprisonment and a fine of EUR 30,000 for facilitating the unauthorised entry, transit or residence of an alien;
- the smuggler is liable to 10 years' imprisonment and a fine of EUR 750,000 where the consequence of this facilitation was to subject the alien to living, working or harbouring conditions violating the dignity of persons, or where the offence was committed by an organised gang;
- the trafficker is liable to 10 years' imprisonment and a fine of EUR 1,500,000 for the transport, transfer, accommodation or reception of an alien where this person's consent was not forced, to hand the alien over to a third person, where the trafficker does not have knowledge of the future exploitation of this alien, against a payment or benefit;
- the trafficker is liable to 20 years' imprisonment and a fine of EUR 3,000,000 where such acts were committed by an organised gang.

Considering these elements, THB would be an aggravated form of the facilitation of unauthorised entry, transit or residence. Preoccupation with the fight against illegal immigration would thus explain the choice to criminalise THB and the broad definition of this offence.[85]

Since public authorities themselves admit that the vast majority of victims of THB are aliens, the overlap or continuity between SM and THB definitely has an effect in practice: alien victims of THB may be considered guilty illegal migrants and receive a criminal sanction and/or be expelled from France. This clearly calls into question the existence of universal rights for victims.

4. Are Victims' Rights Guaranteed?

4.1 Victims' Rights

At the International Level

On the international scale, the Council Framework Decision of 15 March 2001 on *the standing of victims in criminal proceedings* makes compulsory some victims' rights.[86] Right from its preamble, it asserts that victims must have access to justice and that their interests must be defended before, during and after crimi-

85 According to some actors in the fight against pimping, the offence of THB is more a tool for combating illegal immigration. See the interviews by Milena Jaksic in her *DEA* (French University diploma equivalent to a Master's degree) memorandum in ENS-EHESS, *Les constructions sociales de la victime de la traite des êtres humains, L'émergence d'une victime improbable*, supervised by Gérard Noiriel, September 2004.

86 Council Framework Decision 2001/220/JHA, OJ L 082, 22.03.01, pp. 0001-0004.

nal proceedings.[87] It then insists on their right to a suitable level of protection, particularly as regards their safety where there is a serious risk of reprisals, and includes adjusting the conditions in which they testify,[88] and the right to compensation for damages.[89] Moreover, this Council Framework Decision seems to differentiate between the victim, the witness and the party. 'Victim' refers to a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.[90] Victims can have the status of witnesses or parties to the proceedings.[91] Since the Council Framework Decision mainly refers to victims, it should be concluded that they have the stated rights as soon as the infraction causing them harm is committed, without having to testify or lodge a complaint. This could explain why the victims' right to recognition is mentioned as early as Article 2. Nonetheless, it is specified that no State is compelled to guarantee to victims the same treatment guaranteed to the parties to the proceedings.[92] As a consequence, victims seem to have more or fewer rights depending on their hierarchical classification as victim, victim-witness or victim-party.

At the National Level

In French law, 'victim' refers to a person who has suffered harm caused by an intentional or unintentional action which has the material characteristics of an offence. The preliminary article to the code of criminal procedure states that the judicial authority ensures that victims are informed and that their rights are respected throughout any criminal process. These rights are mainly the right to lodge a complaint, the right to be a party to proceedings and the right to ask compensation for the damages suffered.

Victims can ask for compensation in various ways: as victims-parties before the criminal court or the civil court; or, if they are French citizens or legal foreign residents, as mere victims, independently of any proceedings, before the CIVI (commission for the compensation of the victims of crime).[93] This latter possibility is however limited to acts which have brought about death, permanent incapacity or total incapacity for work for a month or more or to acts that

87 See preamble (3).

88 See article 8.

89 See article 9.

90 See the exact definition in article 1.a) of the Council Framework Decision.

91 See article 5.

92 See preamble, (9).

93 See articles 706-3 *et seq.* of the code of criminal procedure. In accordance with the Act of 3.01.77, the commissions for the compensation of the victims of crime can grant complete compensation, paid by a guarantee fund, to the victim having suffered serious harm, even when the author has not been identified.

can be qualified as a sexual assault or a sexual attack. This possibility will not be available to victims of THB before 1 January 2005.[94] It will be interesting to see if the commission for compensation will strictly apply this clause and reject the claims made by victims of forms of exploitation mentioned in the THB offence but not expressly stated.[95]

In addition, the INAVEM (French institute for help to victims and mediation) meets with victims and their family members and informs them of their rights, helps them throughout the procedure and gives them necessary psychological support. Moreover, criminal proceedings can be modified for the victim-witness. For instance, his/her address and identity can be kept secret.[96] However, French law makes no specific provision for organising the victim's physical protection. Nevertheless, the right to life, as guaranteed by the European Convention on Human Rights,[97] requires the State to take the necessary measures.

However, once a right is recognised, it must be guaranteed. To take effect, a right has first to be known by the persons entitled to it. It seems, however, that victims are only informed of their rights in the event of proceedings. For instance, systematically, a victim is informed of the possibility of receiving compensation without proceedings only when the criminal sentence has been pronounced. In addition, the persons entitled to the right in question must have the opportunity to claim its application before a court. The right to have access to justice is therefore fundamental: it is guaranteed under Article 13 of the European Convention on Human Rights.[98] Nevertheless, alien victims considered as

94 See Act No2004-204 of 9.03.04, published in OJ, 10.03.04.

95 In a case of 27.03.03, the *Cour de cassation*, 2nd civil section, made clear that the qualification chosen by the criminal court has to be retained by the commission for compensation, even if in this case, the offence qualified as pimping could have been qualified as sexual relation under duress. Thus, according to the *Cour de cassation*, the decision of the commission for compensation not to accept the claim of the victim was justified.

96 According to article 706-57 of the code of criminal procedure, the district prosecutor can authorise persons who are in a position to bring useful pieces of evidence to the proceedings to declare their registered address to be that of the police station or gendarmerie. According to article 706-58 of the code of criminal procedure, in proceedings brought in respect of a felony or a misdemeanour punished by at least 3 years' imprisonment, where the hearing of a person is liable to put his/her life or health or that of his/her family members or close relatives in serious danger, this person's statements can be recorded without his identity appearing in the case file for the proceedings.

97 Precisely the European Convention for the Protection of Human Rights and Fundamental Freedoms.

98 According to article 13, "Everyone [in France] whose rights and freedoms as set forth in this Convention [such as the right not to be subjected to torture or to inhuman or degrading treatment or punishment and the right not to be held in slavery]

offenders can be expelled from France to their native country or to another State. Under these circumstances, the effectiveness of such a victim's rights can be questioned.[99]

4.2 Victims Considered as Offenders

In this section, I will use the word 'victims' to refer to trafficked persons as well as migrants who have suffered harm during the SM. These people can both be victims and offenders, either because of offences related to their exploitation or because of immigration law.

Both Victim and Offender because One is Exploited

This hypothesis is perfectly illustrated by the recent change in the law on pimping.[100]

First, the Law of 18 March on *internal security* restores the sanction for passive public soliciting.[101] Since the definitions of the elements constituting this offence are vague, it is possible to prosecute anyone being prostituted on the public highway, including victims of constraint pimping. Punishing passive soliciting amounts to punishing not an action or an omission, but clearly a condition, that of prostitute. Oddly, the presumption of guilt which therefore weighs on the people who are prostituted is established in the name of a more efficient fight against pimping, and therefore a better protection of the human dignity of the prostituted persons.

The administrative circular specifying how the Law of 18 March 2003 should be enforced seems to justify the punishment of prostituted persons through the existence of a causal link between exploitation-prostitution and nuisance-prostitution: the same person can be considered both the victim of the former and the perpetrator of the latter. In this circular, the French Minister of Justice under-

---

are violated shall have an effective remedy before a national authority…", whatever the citizenship or administrative situation of this person, under the prohibition of discrimination stated in article 14.

99 In the cases studied, very few complaints are lodged and compensations asked for as far as exploitation is concerned. For instance, in a case presented before the *Tribunal de grande instance de Paris* (Paris District Court), section 16/1 on 21.10.03, only one out of 18 aliens victims of transnational pimping was a party in the proceedings and asked for compensation for the harm suffered.

100 See Vernier, Johanne, "La Loi pour la sécurité intérieure: punir les victimes du proxénétisme pour mieux les protéger?", to be published in January 2005, éditions La Martinière.

101 See Article 225-10-1 of the French Penal Code: "Publicly soliciting another person by any means, including passive conduct, with a view to inciting them to engage in sexual relations in exchange for remuneration or a promise of remuneration is punished by two months' imprisonment and by a fine of € 3,750".

lines that the different forms of exploitation concerned are all the more intolerable since, as a consequence, they often lead people who are victims of it to commit acts that disturb public order. He also specified that these acts then have to be punished, though such punishment must be adapted and proportionate.[102] The idea is to deprive pimping of its source of income by punishing prostituted persons in the hope that this will eventually lead to the disappearance of prostitution and therefore of pimping.

This new offence also offers new means of repression to the police. The obscure and vague definition of this offence gives the police great discretion, which has consequences mainly on aliens. Practically speaking, this law legitimates identity checks, during which the residency status of the prostituted person (or anyone who can be considered as such)[103] is verified. Identity checks therefore enable the administrative procedure to be launched to expel illegal aliens.[104] In the administrative circular of enforcement, the French Minister of Justice openly encourages this administrative option, which presents "only advantages", over the judicial option.[105]

The discretionary power left to the police is all the greater as the law of 18 March 2003 enlarges the category of aliens thus exposed to removal from France: aliens carrying a valid visa or who have been in France for less than 3 months, whose conduct constitutes a "threat to public order" can now be expelled,[106] as well as aliens carrying a temporary residence permit[107] who are "liable to prosecution" (in the case of public soliciting for instance). There is therefore no need for a judgment to establish public soliciting likely to disturb public order: the Administration alone both "judges" the perpetration of the offence (eventually confirmed by the administrative judge on appeal) and "punishes" the offence by expelling people from the territory.

---

102 Administrative Circular specifying the enforcement of the Law of 18.03.03, p. 3.

103 See Decision No 93-323 of 5.08.93 of the *Conseil constitutionnel* (French Constitutional Council) in which it asserts that the widespread and discretionary practice of identity checks would be incompatible with the respect of individual liberties.

104 There is therefore no statistical means to measure the exact number of prostituted aliens who have been expelled from France on the grounds of public soliciting.

105 Administrative Circular specifying the enforcement of the Law of 18.03.03, p. 10.

106 The removal is made possible by the withdrawal of the residence permit for these motives.

107 The temporary residence permit (*carte de séjour temporaire*) is issued for a maximum of one year, renewable, and granted discretionarily to visitors, students, wage earners, self-employed people, scientists, people working in the art and cultural industry, or for private or family reasons.

Arrest for public soliciting allows for placing victims of pimping in police custody, which was forbidden under the Act of 15 June 2000.[108] The threat of a sanction and/or removal from the territory because of public soliciting, and the promise of dropping the charges in exchange for the victim's collaboration,[109] should give the police, who wish to obtain information on the identity of possible pimps, significant coercive leverage. However the efficiency of this technique, which consists in obtaining testimony under threat, is doubtful: in Paris, between 1 April 2003 and May 2004, public authorities registered 3,192 arrests and only 158 testimonies of prostituted persons.[110] Either the great majority of prostituted persons are not victims of pimps, or the conditions under which they are enticed to denounce them are not favourable.

Victims of pimping can thus be arrested and expelled from the country on the grounds of public soliciting, but they should not be punished if they acted under duress which, as stated earlier, is a defence to liability. But distinction between victims and offenders has been minimized: when examining the Law of 18 March 2003,[111] the *Conseil constitutionnel* (9-member council that rules on the constitutionality of laws before their enactment) encouraged judges to take duress into account in sentencing. Thus the question is no longer whether or not to discharge victims, but whether or not to minimize the sentences, as if the victims were "repentant" offenders.[112]

Furthermore, victims of pimping are sometimes treated as pimps or as accomplices, which can result in their pre-trial detention, or even in a criminal sentence. For instance, in 2004, the pre-trial detention for more than 4 months of undocumented aliens, for aggravated pimping, was not quashed by the *Cour de cassation.*[113] The defendants were arrested while prostituting themselves at the side of a national road in disastrous living and hygiene conditions, according to their lawyer, and the liberty and custody judge had in fact ordered their pre-trial detention to protect them. Pre-trial detention can indeed be used to

108 Act No2000-516 of 15.06.00 *strengthening the presumption of innocence and the victims' rights*, published in OJ No 138 of 16.06.00 and OJ No 157 of 8.07.00 (corrigendum).

109 Administrative Circular specifying the enforcement of the Law of 18.03.03, p. 10.

110 Cornevin, Christophe, in *Le Figaro* dated 10.07.04.

111 See Decision No2003-467 DC of 13.03.03 of the *Conseil constitutionnel* (French Constitutional Council) on the Law on Internal Security, p.13.

112 The status of "repentant" was recently officialised by the Act No 2004-204 of 9.03.04, published in OJ of 10.03.04. It concerns persons who benefit from sentence exemptions or reductions for making it possible to avoid the perpetration of offences, to stop or reduce the harm caused by an offence, or to identify the perpetrators or accomplices of an offence.

113 *Cour de cassation*, criminal section, on 11.05.04, requests Nos 04-81153, 04-81160, 04-81165 and 04-81166.

preserve material evidence or clues or to prevent pressure on the witnesses or the victims,[114] but it must not become *de facto* imprisonment.

Concerning victims of pimping who receive criminal sentences, they are mainly prostituted persons known in French as "kapos",[115] a kind of relay person forced to collect money or to realise different tasks for pimps.[116] In 2003, an alien who was forced to prostitute herself, but also to take charge of new prostitutes, to collect the money and to deliver it to a "treasurer", and to send money orders for the pimp, was found guilty of aggravated pimping and condemned to a 2-year suspended sentence for having participated in the prostitution of a third person.[117] Despite the fact that this person had been bought to be prostituted, deprived of her passport, was under threats of reprisals against her son who had stayed in her country of origin, and had not received any remuneration or benefit for the tasks realised, the judges decided that the offence was not committed under duress. Instead, they considered her a repentant "*chef de secteur*" (sector chief) and rewarded her for her collaboration by suspending her sentence.[118]

Like prostitution, begging does not in itself constitute an offence[119] but can be punished where it disturbs public order, *inter alia,* by holding up traffic or disturbing passengers in public transportation.

---

114 Article 144 of the Code of Criminal Procedure.

115 This term is a reference to Nazi concentration camps during World War II; "kapo" stands for "Kameraden-Polizei",which designates a prisoner in charge of Kommando work or services. See Bettelheim, Bruno (1972) *Le cœur conscient*, Paris: Pluriel, p. 187, cited in the book by Plumelle-Uribe, Rosa Amelia (2001) *La férocité blanche*, Albin Michel, p.72, on the participation of victims: "it was almost impossible for prisoners not to cooperate with the SS efforts to reduce them to passivity in a depersonalised mass. The prisoner's interest went the same way as the pressure of the SS. Remaining independent implied dangers and many hardships. Accepting SS' orders seems to be in the prisoners' interest, for it automatically made their life much easier." (unofficial translation).

116 "Kapos" must *a priori* be distinguished from "*mamas*", former African prostitutes who became pimps.

117 See the decision of the *Tribunal de grande instance de Paris* (Paris District Court), section 16, on 21.10.03.

118 For more examples, see Guillemaut, Françoise (a member of French association Cabiria) (2004) "Trafics et migrations de femmes, une hypocrisie au service des pays riches", *Femmes contre violence*, in *Hommes et Migration*, No 1248, March-April.

119 See the decision of the *Cour de cassation*'s criminal section on 10.04.96, request No 95-50060: an undocumented alien begged drivers stopped at a red light.

Both Victim and Offender because One is an Alien

In France, the administrative situation of aliens, *i.e.*, non-nationals, is always precarious.[120] Because borders are closed to labour immigration,[121] being in France is considered a privilege (although temporary), not a right.[122] Ignoring this rule and entering, transiting across and residing in France without being authorised to do so, means "going underground" and becoming an offender. In order to be invisible to the law as an offender, many remain totally invisible to the law and, consequently, lose the means to have their rights respected. This situation of exclusion from the law is favourable to all forms of exploitation, since it prevents the guarantee of access to justice. In practice, where an undocumented alien shows up or is found as a victim, this person will most probably be punished criminally and/or expelled from France pursuant to immigration law, before having been able to ask for or obtain compensation for the harm suffered. Thus, the victim of an offence, who was arrested as the perpetrator of an offence linked with his/her exploitation and/or immigration law, can be expelled before, during, or after the proceedings. This is true for victims of pimping, sexual assault or attack, exploitation of begging, harbouring conditions violating the dignity of persons or offences committed during the SM.

The Particular Case of Undocumented Migrant Workers

As an exception to the constitutional principle that everyone has the duty to work and the right to obtain a job,[123] the management of labour immigration justifies the denial of this right to aliens who have not obtained authorisation to work.[124] Consequently, undocumented migrant workers as well as legal aliens working without a work permit are offenders according to the French Labour Code. Under administrative law, since the reform of 26 November 2003, aliens working without a work permit but carrying a temporary residence permit or a valid visa, or who have been in France for less than 3 months are subject to removal. Thus, undocumented migrant workers who are victims of working conditions violating the dignity of persons can be expelled as soon as they become visible to the law, before having the opportunity to ask for or obtain compensation for the harm suffered.

120 This rule includes some exceptions: aliens who are nationals of Community Member States have the right to freely transit across and reside on another Member State's territory; certain bilateral conventions can also grant to third countries' citizens a particular status.

121 This political turning point became official on 3.07.74. See special report "Immigration: trente ans de combat par le droit", *Plein Droit*, No 53-54, June 2002.

122 See Decision No93-325 DC of 13.08.93 of the *Conseil constitutionnel* (French Constitutional Council), published in OJ of 18.08.93, p. 11722.

123 See Preamble of the 4th French Republic Constitution of 27.10.46.

124 See Article L. 341-4 of the French Labour Code.

Consequently, even where the fear of being expelled or of a criminal sanction does not convince aliens-victims not to lodge a complaint, the status of offender constitutes an obstacle to their access to justice. This situation not only calls into question the very existence of victims' rights for certain categories of persons, it also impedes the effective repression of THB. Therefore, various measures were taken concerning victims of THB.

4.3 Specific Rights for Victims of THB

International Sources of French Law

At the international level, the definition of specific rights for victims of THB seems to be under way. The TP Protocol, having a universal vocation, mentions, *inter alia,* the following victims' rights:

- to obtain information on relevant judicial and administrative proceedings;
- to physical, psychological and social recovery (through the provision of appropriate housing; counselling and information as regards their legal rights in a language that they can understand; medical, psychological and material assistance; employment, educational and training opportunities);
- to have their physical safety guaranteed; and
- to obtain compensation for damage suffered.[125]

However, since the language used[126] leaves a wide margin of appreciation to the States Parties, it is not yet possible to say that this text has legally established victims' rights. Rather, it is an invitation to recognize such rights. For example, concerning aliens-victims' right to access to justice, the TP Protocol merely invites States Parties to "consider" permitting victims of THB to remain in their territory "in appropriate cases", giving consideration to "humanitarian and compassionate factors",[127] and specifies that repatriation shall preferably be voluntary.[128]

The EU Council Framework Decision *on combating trafficking in human beings* underlines that police investigations and prosecutions must not depend on reports or accusations made by victims.[129] More recently, the EU Council Directive of 29 April 2004 defined the conditions for granting residence permits

125 See Article 6 of THB Protocol.

126 The UN text states that the first two rights mentioned shall be ensured by the State Party, "in appropriate cases", or "shall be considered", while State Party "shall endeavour to provide" their physical security. Only the right to obtain compensation appears more compelling, for the State Party "shall ensure" that its domestic legal system contains measures that offer this "possibility".

127 TP Protocol, Article 7.

128 TP Protocol, Article 8.

129 See Article 7.

to victims of THB for the duration of the relevant proceedings, provided they cooperate with the competent authorities.[130] Does this really mean that aliens-victims of THB now have access to justice? Actually, foreign victims, instead of being entitled to rights, must earn them.[131] Moreover, the decision to grant such temporary residence permits to migrants who are victims of an offence during the SM is left to EU Member States' discretion.[132] These provisions seem to be in contradiction with the EU Council Framework Decision of 15 March 2001 *on the standing of victims in criminal proceedings*. Indeed, this text specifies that victims may not be subjected to "unnecessary pressure" or "secondary victimisation". First, they may not be required to testify or to supply evidence[133] except when necessary. The systematic interrogation of victims of THB could therefore be considered "unnecessary pressure". Second, the expulsion from France of a person, recognized as a victim, on the grounds that this person refuses to cooperate with the investigation, could well be considered a "secondary victimisation".[134]

However, the *Law on internal security* of 18 March 2003 comes within the framework of the Directive of 29 April 2004, since it gives the possibility to some victims, selected under restrictive conditions, to reside temporarily in France. The aim is to entice such victims into cooperating with public authorities by offering them administrative, physical and social protection.

The Administrative Protection of Alien Victims of Trafficking in Human Beings
Under Article 76 of the Act of 18 March 2003, victims of THB and/or of exploitation who lodge a complaint or testify against a possible trafficker and/or exploiter "can" be issued a temporary residence permit (APS)[135] with a work permit, except where their presence constitutes a menace to public order. Where

130 Council Directive 2004/81/EC of 29 April 2004 on *the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities*, OJ L 261, 06.08.04, p. 0019 - 0023.

131 The Commission explained that the broad notion of victim was selected rather than that of witness or party, because it would leave more discretionary power to the Member the States to identify or not the persons concerned. See preparatory works 11698/03 of 28.08.03.

132 France had insisted that the application of this Directive to migrants who have been the subject of an action to facilitate illegal immigration be optional. See preparatory works 11698/03 of 28.08.03.

133 See Article 3 of the Framework Decision.

134 See Article 15 of the Framework Decision.

135 The duration of the APS (*Autorisation Provisoire de Séjour*) varies, but hardly ever exceeds 6 months, renewable. In practically, the APS has more often been issued to asylum seekers and to aliens temporarily under medical treatment in France.

the perpetrator is eventually condemned, the alien victim "can" be granted a permanent residence permit (CR).[136]

Such administrative protection is far from being granted systematically; aliens who can benefit from this protection are selected under restrictive and discretionary conditions. The refusal to create a "right to" a residence permit for victims who testify was justified during parliamentary debates by the need to avoid a rush (*appel d'air*) of migrants claiming to be victims of THB.[137] This desire to distinguish "real" victims from "bogus" victims could explain why Article 76 seems to impose on anyone claiming to be a victim an obligation of results (i.e., conviction of the trafficker), while leaving the decision to grant a permit largely to the discretion of the administrative authorities.

On the one hand, the report made by the victim has to be useful, which means that the issuance of a temporary residence permit depends more on the needs of the investigation than on those of the victim and that the permanent residence permit is a reward for the conviction of the person denounced. The consequence is that, rather than distinguishing "real" from "bogus" victims, a classification is created of "good" and "bad" victims, depending on whether their help is effective in combating THB and exploitation or whether, on the contrary, they made useless or false statements. Several such "useless victims" who in fact wanted to leave France were thus denied protection as victims and summarily expelled, instead of being "repatriated" by specialised organisations,[138] as they would have been had they been granted victim status. Under such circumstances, the victim ceases to be a subject of law and is reduced to a mere piece of evidence.

On the other hand, the Prefect, who approves or denies requests for residence permits, does so, in this instance, on a purely discretionary basis. Even where an alien's testimony proves useful, no obligation results from it and the Prefect can decide to refuse to issue a temporary or permanent residence permit. In addition to the fact that the issuance of such a permit is only optional as provided under Article 76, the "menace to public order" provides a very convenient motive for refusal. Thus, several "useful" victims were denied temporary residence permits and were expelled before they could appear in court to honour their subpoenas to testify. Indeed, the victim's status as a witness or plaintiff does not in itself prevent expulsion.

136 The CR (*Carte de Résident*) is valid during 10 years, renewable.

137 This justification was given, *inter alia,* during the press conference for the publication, on 12.12.01, of the parliament information report: *"L'esclavage en France aujourd'hui"* (Slavery in France today), on the required participation of victims in the investigation for them to obtain a residence permit.

138 Like the International Organization for Migration (IOM), an intergovernmental organisation which takes charge of such procedures.

All in all, the administrative protection provided by the Act of 18 March 2003 is no more than the implementation of the Prefect's discretionary power to issue a residence permit. Article 76 was moreover considered in conformity with the Constitution by the French *Conseil constitutionnel*: it did not create any new right for the benefit of aliens, it did not subject them to any new obligation and it did not provide the administrative authority any new power. The *Conseil constitutionnel* considered that only the issuance of a work permit constituted a new right, which in itself could not be criticised.[139]

The Physical and Social Protection of Victims of Trafficking in Human Beings

Regarding the physical and social "protection" of victims, a *Conseil d'Etat* (France's highest administrative court) decree must specify how Article 76 should be enforced, and must also set out the conditions of protection, reception and accommodation of aliens who have been issued a temporary residence permit.

Following the example of international authorities, it was admitted that very few victims would be likely to make a report if they were not guaranteed physical and social protection. Such protection would enable the police to gain their trust, and would constitute fair compensation for the risk taken by making such a report. The Law of 18 March 2003 completes Article 76, stating that rooms available in centres for accommodation and social rehabilitation (*centres d'hébergement et de réinsertion sociale*) can be used for the reception of victims of THB in conditions of security.[140] Regarding, more specifically, victims of exploitation of their prostitution, the Law provides for a system of protection and assistance, which will be provided and supervised by the Administration, and in active collaboration with the various social action services.[141]

However, the *Conseil d'Etat* decree provided for in Article 76 has not yet been issued, and no instructions explaining how to coordinate the actions of the concerned organisations were given. Consequently, volunteer organisations do what they can, but the price of comprehensive care for victims (i.e., accommodation, food, clothes, medical care, psychological follow-up, teaching them to read and write or to speak French, professional training, legal and administrative assistance, aiding them to return voluntarily to their country of origin) is considerable, and this element is not always taken into account in the amount of public grants.[142] This could explain why some victims who have testified and have been issued a temporary residence permit but who are not fully assisted

139 Decision of the French *Conseil constitutionnel,* No2003-467 DC of 13.03.03, on the *Law on internal security.*

140 See Act of 18.03.03, Article 43.

141 See Act of 18.03.03, Article 42.

142 It is not impossible that the amount required to take completely charge of victims was evaluated while elaborating the Act of 18 March 2003, which in fact is more favourable to the removal of victims of THB and/or exploitation. Are we sure that,

continue to prostitute themselves. For example, on 3 July 2003 before the *Tribunal de grande instance de Paris* (Paris District Court), section 12, an alien who was issued a temporary residence permit as a victim of pimping and placed under the protection of an association was prosecuted for public soliciting while prostituting herself to survive.

Moreover, no physical protection is at present given beyond that provided by associations taking charge of victims they receive either directly or from the police force. Similarly, no physical protection is provided for their family members or close friends who may be subject to reprisals, in France as well as abroad. Numerous victims, afraid to make a useful report, refuse thus, for example, to mention names or other elements that could permit the identification of traffickers and/or exploiters.[143]

As a whole, French law thus appears to be in conformity with the provisions in the Directive of 29 April 2004. The only elements not provided under French law are a reflection period and appropriate protective treatment. However, these things exist in practice, when the police decide not to expel an alien who remains under the protection of an association until he or she cooperates with the police.

Nevertheless, the role of the Administration and the police force has been strengthened to the disadvantage of judges. And yet, the French Constitution itself states that the judicial authority is the guardian of personal liberties.[144] In order to allow some flexibility and avoid "bogus" victims, and in order to obtain increased efficiency and a more visible result as soon as possible, the discretionary power granted to the authorities to determine who is a "useful victim" is so considerable that it has resulted in contradictory practices which tend to make victims more vulnerable.

5. Conclusion

5.1 Managing Immigration rather than Protecting Human Rights

Migrants who are subjects of SM are assigned the status of offender, while trafficked persons are supposed to benefit from the status of victim. In fact, trafficked

in the long term, the solution of punishment (additional policemen, pre-removal detention, purchasing international tickets, etc.), is cheaper for the State?

143 Quite often, traffickers and/or pimps seize the passports of victims of exploitation of their prostitution. Therefore, victims who keep their original identity fear that they can find them or their family members for reprisals during the investigation, even during the exploiters/pimps' imprisonment or when they are released, where the police did not recover their passports. Voodoo could be included among the means of pressure.

144 See Article 66 of the 5th French Republic Constitution of 4.10.58.

aliens (persons not nationals of a Community Member State) are considered and treated by authorities as mere pieces of evidence or as "repentant" guilty persons when they are not simply expelled and/or punished for their immigration status. Moreover, the criminalization of THB does not clearly provide for the prohibition of exploitation or reduction to slavery. This tends to deny the very existence of such exploitation, and consequently, that of its victims, both symbolically (they are not recognised as victims) as well as practically (they are not protected as victims).

The case of victims of THB illustrates perfectly the necessity to create a universal status of victim which would, *inter alia,* establish the right to access to justice for everyone, without discrimination. At present, aliens are treated as less than human, because human beings have fundamental rights (such as the right to security and the respect for human dignity) guaranteed by the State, and aliens do not.

It should be noted that neither children's rights nor human rights prevail over immigration law. Indeed, this article has not distinguished between minor and adult victims of THB and/or exploitation or subjects of SM. Regarding THB, the fact that the victim is a minor is taken into account under criminal law: it is an aggravating circumstance, and carries a more severe penalty for the perpetrator; it means that the vulnerability or state of dependence is presumed; and it means that the statute of limitations for public prosecution runs from the date at which the victim ceases to be a minor. Nevertheless, where measures must be taken to protect a foreign minor, and particularly where such minor is isolated, the fact that this alien is a minor is most often denied in practice, because no document is available to prove it,[145] or because of the existence of a controversed expert medical report of his/her bones[146] which proves that the alien is not a minor.

In accordance with the international *Convention on the Rights of the Child* ratified by France, should not migrant minors, particularly when isolated, be

145 The Act of 26.11.03 on *immigration management* questions the principle of international private Law concerning the presumption of validity of records of civil status executed abroad as well as the principle of good faith of those who use it. See the critical analysis of the Act of 26 November 2003, "Contrôler, surveiller et punir", December 2003, 4th edition, by the GISTI (Groupe d'Information et de Soutien des Immigrés), available on the website <www.gisti.org>.

146 The medical expert analysis of bones has an error margin of 18 months. It consists in scanning determined bones (generally the hand bones and the wrist) compared to reference tables which go back to 1935 and are based on investigations concerning young white people belonging to a high socio-economical status and living in the USA. Back then, the objective was to diagnose early or late maturation in children whose age was known, that is to say to detect pathologies such as growth retardation. See special report "Mineurs étrangers isolés en danger", *Plein Droit*, No 52, March 2002.

considered by nature as in danger and protected as such like any French child? Here again, the fear of a "rush" is a hurdle to the guarantee of children's rights without discrimination. Isolated foreign minors in France are in permanent administrative limbo: they require no residence permit and it is impossible to expel them; moreover, when they cease to be minors, since no residence permit fits their particular case and since their access to French nationality was reduced in 2003,[147] they become illegals, and therefore offenders.

Thus, maintaining borders closed to labour immigration, which does not succeed in preventing aliens from entering France and remaining there without authorisation, boils down in reality to allowing their exploitation by keeping them away from the law. Would it be so easy for traffickers, exploiters and smugglers to victimize so many people if labour migration were possible? Would not aliens be less vulnerable if they had the right to be victims in law to cease being victims in practice, and if they did not fear criminal conviction and/or expulsion for asserting this right? Why was THB criminalized if not for the protection of people who are victims of THB, *i.e.*, a majority of aliens? Finally, does the punishment of THB only aim at legitimating increased repression of SM in the name of the respect of trafficked persons' dignity?

5.2 Conformity of French Law with International Obligations

Throughout this article, it has been established that French law, regarding SM and THB, is in compliance with international obligations, of the United Nations as well as of the European Union. Interactions between France,[148] the UN[149] and the EU[150] regarding the elaboration of French and international texts, as well as the flexibility in international texts could explain why standards governing SM and THB are so homogeneous.

However, in spite of this conformity, one cannot be satisfied with French law and its enforcement regarding SM and THB. The question, in fact, should not be whether French law is in conformity with EU law, but whether EU law is in conformity with human rights.

147 See the critical analysis of the Act of 26 November 2003, "Contrôler, surveiller et punir", December 2003, 4th edition, by the GISTI (Groupe d'Information et de Soutien des Immigrés), available on the website <www.gisti.org>.

148 The EU definition of SM was elaborated under the influence of France, and French Law had to be adapted to be in conformity with the European text that was finally adopted.

149 The French definition of THB is based on that of the TP Protocol.

150 The EU negotiated to obtain the respect of European standards for the elaboration of UN texts. It also took into account what had been developed by the UN to elaborate its own texts on SM and THB.

*Virginie Guiraudon**

TRAFFICKING AND SMUGGLING IN FRANCE: SOCIAL PROBLEMS AS TRANSNATIONAL SECURITY ISSUES

Introduction

Until the late 1990s, there was little public and political discussion about trafficking in human beings and human smuggling in France. These policy frames appeared in 2000-2002. In this period, the international agenda of the French – the French Presidency of the Union, the UK-French diplomatic row over Sangatte and the signature of the Palermo protocol in 2000 – had repercussions on the domestic electoral agenda, namely the municipal, presidential and legislative elections in 2001 and 2002. The new "trafficking" and "smuggling" policy frames were thus imported in the context of domestic electoral campaigns where law and order issues were very salient.

Reframing an issue as a question of transborder crime reduces the range of solutions to a problem: law and order measures and cross-border operational cooperation. The most obvious case is prostitution, which in 2001 was discussed as a social problem that the state needed to devote resources to so as to help NGOs on the ground. A year later, prostitution was redefined as a policing and immigration issue and social workers were marginalized in the process. Redefining a policy problem and its solution can expand or restrict the range of policy actors considered to be legitimate to participate in the policy field. In the case of trafficking and smuggling, the range of actors has been narrow: police and border guards headed by the ubiquitous Minister of Interior Sarkozy dominate the field. Reframing a problem can also expand or restrict the range of policy recipients or targets. In the 1990s, there was a debate on "modern slavery" that focused on personnel in embassies, chic neighbourhoods or exploitation of

* Marie Curie Chair Professor in Social and Political Sciences at the European University Institute in Florence, Italy.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *41-67.*
 ISBN 90 04 15064 1.

young women by co-ethnics. These cases fell by the wayside after the debate shifted attention to the trafficking of foreign prostitutes. Politicians and the media focused on specific small groups that were highly visible if only because of their spatial concentration: prostitutes in public space, beggars in Paris subways and streets, migrants in a warehouse turned Red Cross camp in a small Northern seaside village.

The chapter first seeks to contextualize the current period and its focus on trafficking in human beings and human smuggling. In section one, I examine the ways in which the French executive has resorted to irregular migration and regularizations as a means of managing migration flows in the post-war era yet has only recently focused on illegal entries and smuggling as well as trafficking. I then focus on the consequences of "importing" new terms via the UN and EU to address complex phenomena such as prostitution in the French context. The following three sections examine the main issues that have entered the French political debate: foreign prostitutes on French streets (section 2), Romanian minors (section 3) and migrants in the Calais region attempting to cross to the UK (section 4). In each section, I seek to outline the social phenomenon, determine the position of political parties, associations and state actors and study the dynamics of the policy debates. The chapter focuses on the period between 1999 and 2004 (see annexes for chronology of events).

1. Historical and Theoretical Premises

1.1 Irregular Migration in Historical Perspective: The French Management of Migration

"Irregular migration" is not a new phenomenon in post-war France, whereas the focus on illegal entry with the help of smugglers and/or as part of trafficking in human beings is. The term "*sans papiers*" (literally meaning "without papers") became known beyond French borders after March 1996 when three hundred undocumented Africans occupied a church in Paris and launched a new social movement calling for the regularization of undocumented aliens. Yet, as Johanna Siméant (1998) has shown, there have been instances of hunger strikes and other mobilizations of undocumented aliens in France for decades.

The legal and administrative term "irregular migrant," the political and media expression "clandestine" and the activists' *sans papiers* refer to a variety of situations. In brief, they include foreigners that entered legally and then lost their right of stay (eg tourist visa overstayers) or residence (eg rejected asylum-seekers or post-colonial migrants after changes in their legal status or in some cases family dependants) as well as legal residents that engage in activities that are not allowed by their status (eg work). There was also an amalgam for a long time between "irregular worker" and "irregular work," which seemed to imply that all the employees in the informal sector were foreigners without work per-

mits. The law of 11 March 1997 eliminated the word *travail clandestin* ("clandestine work") from the employment code to avoid the confusion with *immigrés clandestins* ("clandestine immigrants") and replaced it with the term *travail dissimulé* ("dissimulated work").

The reason why a number of foreigners do not have the right papers has varied over time reflecting the management of migration by the French state bureaucracy. At the height of the recruitment of foreign workers during the postwar reconstruction boom, the official procedure took too long for industries. The government was protective of business interests and this meant that migrants and sometimes their families came outside the regular procedure and their situation was "regularized" at the *préfecture*. The French executive also wanted to encourage the arrival of non-Algerian migrants: Italians that were attracted by other destinations such as Switzerland or Spaniards whose first destination was West Germany (Weil 2004). In 1956, as the economic situation improved, the government realized that bureaucratic hassle slowed down regular entries from other European countries. A simple circular, a ministerial guideline, sufficed to set up a regularization procedure to allow firms to hire foreign workers arriving spontaneously (Spire 2005).

When in 1972, the first attempts at stopping immigration led to the adoption of the so-called Marcellin-Fontanet circulars that re-established the strict implementation of immigration controls, it largely failed and mobilized labor and business groups, religious authorities and NGOs against the government plan while irregular workers went on a hunger strike in a Paris church. In the end, the government backed down and regularized 50000 workers in 1973 (Weil 2004). Employers preferred *post facto* regularization in order to choose whom to hire and when. The Portuguese case illustrates the attitude of the French executive towards "irregular migration" before 1974. Until then, the French government officially promised the Portuguese regime that it controlled its borders while in fact it gave instructions to customs and immigration officers to let Portuguese workers through, although most had no passports. Hundreds of thousands of young Portuguese looking for better labour market opportunities and wishing to avoid fighting in colonial wars thus entered illegally with the tacit approval of the French government (Weil 2004).

After the 1973-4 calls for ending foreign labor recruitment, there were attempts to force migrants to return in part by not renewing work and residence permits and expelling foreign workers. While President Giscard's drastic plan failed in the end in part because of the resistance of the highest administrative court, the Conseil d'Etat (Weil 1991), policy measures during the second part of the 1970s produced a number of "*étrangers en situation irrégulière*". Soon after François Mitterrand's election to the Presidency in 1981, there was a mass regularization of about 140000 foreign workers. Claude Valentin-Marie's detailed study of the characteristics of the persons regularized in 1981 has shown that 90 % had entered France legally (68,4 % with a tourist visa). 85 % worked in

four sectors in which foreign workers are still concentrated twenty years later: the building industry, services, agriculture, and the textile industry (Valentin-Marie 1988). Policies to address irregular migration have in fact focused on entry (through the Schengen visa and carrier sanctions policy) and on the work place, especially under Left-leaning governments that blamed employers for hiring irregular workers. Along with the 1981 campaign to regularize, the Socialists passed a law to punish the employer rather than the undocumented migrant or the legal migrant working in the informal economy. In 1991, a new law toughened the penalties against the employers of illegal workers and about 30 % of the undocumented foreigners who had entered French territory before 1989 were regularized. Thus there was a focus on the employment of undocumented workers with employers targeted in the laws.

The legislation has been difficult to implement in practice for a variety of reasons: labor inspectors feel that workers rather than employers unjustly pay the heaviest price: they may be deported while courts have found it hard to prove that employers intentionally hired undocumented workers; the penalties were found to be too harsh so that in fact the businesses would go bankrupt if the legislation was applied; and finally when there were structural or temporary shortages in certain sectors, authorities looked the other way. In brief, France had a tough legal arsenal that bureaucrats did not zealously enforce and penal judges had a difficult time implementing. Still, research has shown that, in the 1990s, there was a decline in the employment of illegal workers, which had been the policy focus of the preceding decade. In 1995, out of the eleven thousand companies prosecuted for employment infractions concerning 22000 employees, only 8,7 % were irregular migrants (*Rapport au Parlement sur la Sécurité Sociale*, 1999). From 1992 to 1997, the number of reported employment violations involving undocumented foreigners declined from 13 to 6 percent of the share of employees hired illegally (Marie 2000). Focusing on the Parisian garment industry, another study also pointed out a drop in citations related to the employment of undocumented immigrants between 1992 and 1999 (Iskander 2000). Quoting and commenting upon these figures, Michael Samers (2002) has argued that the reasons behind the drop are in part due to the increasing flexibility in work arrangements and the continued migration of legal unskilled workers, with Portuguese nationals representing about 80 % of the new hires in the construction industry and in agriculture.

Yet, in the 1990s, there was a drastic change in the focus and frame of policies targeted at irregular migration. First, there was a toughening of the laws on entry and stay (in particular in the so-called 1993 Pasqua laws) and starting in 1989 measures to restrict access to refugee status as the numbers of asylum-seekers rose in the late 1980s. There was also a continuing trend whereby rights (especially access to public services and social provisions) were restricted to legal migrants. Thus again French migration control policy created a sizable number

of *sans papiers*, at a time when the latter became all the more valuable. The large percentage of rejected asylum applications and the consequences of the Pasqua law led to a situation in which foreigners were allowed to remain for humanitarian reasons yet without official residence rights, leading to the coining of a new phrase "*inexpulsables-irrégularisables*" (those who cannot be expelled nor be regularized).

In brief, "irregular migration" is the product of a contradiction between the politics behind the laws on entry and stay that seek to regulate or restrict flows and other imperatives: economics until the 1970s and legal liberal norms thereafter (Guiraudon and Joppke 2001). These contradictions are temporarily resolved by recurring regularization campaigns. The last one took place in 1997. Since then, a permanent system of "case-by-case" regularization has been set up to "manage migration flows" (Lochak 2002) while avoiding the publicity of large-scale "exceptional" campaigns. In 2002, according to Patrick Weil (2004), 20000 persons were thus granted legal status for a variety of reasons (length of stay, family ties, illness, having French children).

By the 1990s, both nationally and in the intergovernmental forums that France belonged to (Schengen and the EU), there was a significant shift in the political framing of irregular migration. First, the "fight against illegal migration" became a broader call justifying a larger range of governmental initiatives. Second, this fight was explicitly linked to an equally large array of criminal activities defined as transnational. Third, there was a stigmatisation of the potential and actual migrant as cunning and deceitful. Schengen visa applicants from poor countries have been suspected of coming under false pretences and thus viewed in Schengen documents as "migration risks". Asylum-seekers have been deemed to be economic migrants in disguise. The 1993 Pasqua law reinforced the role of mayors in the fight against "bogus marriages" involving foreigners. While there was a shifting down of migration control to local actors, France also sought to shift responsibility for controlling migrants outwards, to non-state actors and before the border. This is the case of laws imposing sanctions on carriers to verify travel documents (Guiraudon 2002). In fact, France submitted a Council initiative during its presidency of the EU in 2000 on carrier sanctions along with proposals to deter irregular migration. Thus, the French executive laid the ground for the link between migration and crime with the migrant ambiguously portrayed as both a victim and perpetrator of crime.

1.2 Trafficking and smuggling: new policy frames for a complex and evolving situation

The current definitions of human smuggling and trafficking have only appeared recently in French legislation (see chapter by Johanne Vernier in this volume)

and their use outside of the legal sphere remains sparse.[1] They stem from international and European texts that France adheres to. These documents emphasize that these activities involve "transnational organized crime". In this way, they frame pre-existing "public problems" anew or, at the very least, compete with other public definitions of social problems. For instance, the 2001 parliamentary inquiry that led to the bill that introduced the notion of human trafficking into French law referred to "modern day slavery" and examined issues such as forced labor and prostitution. The legislative proposal itself was the 2002 "law to fight modern slavery".

Non-governmental organizations (NGOs), including the Committee against Modern Slavery, have been lobbying to denounce the exploitation and sequestration of people, regardless of their nationality, French or foreign, or that of the perpetrators. Using the term "modern slavery" underlines that it is a human rights issue and that the culprits are those who employ people in a way that deprives them of their liberty and human dignity. By speaking instead of human trafficking by transnational criminal networks, the focus shifts upwards to the border crossings of foreign criminals and their victims. The issue takes on an international dimension, which affects the type of policy solutions that governments put forward: most notably bilateral readmission agreements and the sending of liaison officers from the French police forces. This has been the main path trodden by the French government with respect to Romania.

There has been little reflection on the categories of victims and perpetrators that are excluded from the way the problem is now defined. Yet, the young women that the Committee against Modern Slavery has been helping since its creation in 1995 were often held in embassies or private apartments by employers that did not participate or resort to "transnational criminal networks". In the case of young Romanians involved in petty crime or prostitution, government statements always say that they are linked to international crime. The Minister of Justice when meeting with his Romanian counterpart in September 2004 spoke of "Romanian mafia networks". In fact, Parada, an association that takes care of Romanian street kids states that the youths that they take care of belong to "family networks" rather than "mafia networks". Their families tell them to go make a living in France to send money back home. In brief, the constant

1 Trafficking in human beings is translated into French as *traite des êtres humains*. In fact, the notion already existed to designate the actions of pimps in a context that did not presuppose any transnational activity. The expression is used in the 1949 UN Convention that considers prostitution incompatible with human dignity. France ratified the Convention and thus it is part of the "abolitionist" camp in Europe in relation to prostitution. Similarly, the police coordinating unit that has held with prostitution is called the "Central Office to Fight Trafficking in Human beings" (French acronym: OCRTEH) has been in existence for a long time yet its sixteen policemen have few resources to deal with the transnational networks that they now have to track.

reference to "transnational organized crime" does not always fit the complex situation on the ground.

In principle, the humans that are smuggled or trafficked should be considered to be the victims of smugglers and traffickers. In fact, they are first and foremost deemed to be foreigners that breach French immigration and labor laws and delinquents if they are involved in activities such as theft or prostitution. The means allocated to fight traffickers and smugglers are often derisory and there is little coordination between the various state agencies concerned. OCRTEH had only 14 staff members in 2001 to dismantle trafficking networks involved in prostitution (Loncle 2001). The number of work inspectors is ridiculously low and their role is to track informal employment not the employment of irregular migrants or modern slavery cases. In the end, it is easier to arrest and deport undocumented foreigners than to find smugglers or traffickers.

Whereas the terms used in policy debates do not seem to adequately reflect the evolution of what both NGOs and street-level bureaucrats refer to as "the reality on the ground" ("*les réalités du terrain*"), the latter has proven increasingly complex to handle. For example, NGOs that have been helping prostitutes for some years had an expertise in health and social issues. Some of them have had to find interpreters such as ALC in the South who hired a Russian-speaking mediator (Loncle 2001). NGOs are confronted with new situations as foreign prostitutes are threatened with deportation. The legal expertise required to aid the victims of traffickers that do not wish to return to their homeland has to be sought through partnerships with other types of associations (legal aid groups, NGOs specialized in human rights, refugee and immigration issues). Since 2000, the association "le bus des femmes" (the women's bus) that helps prostitutes has established a partnership with lawyers and magistrates from *Droits D'urgence*. The latter come to advise women with legal problems. In 2001, the files opened involved first immigration law (38 %) followed by penal law (35 %), family law and fiscal law. The NGO "le bus des femmes" states that the legal situations are complex and involve "a succession of denials of rights" (Bus des femmes 2002: 41). Conversely, migrant-aid groups have reorganized to handle the special problems faced by women that have been the victims of trafficking. For instance, in 2004, the migrant-aid organization la Cimade set up a "permanence femmes" ("receiving hours for women") for women victims of violence including "prostitution and modern slavery" to help them solve their administrative problems and direct them to other specialized associations (eg women's refuges). The FASTI (federation of solidarity associations with migrant workers) organized in spring 2005 a forum on "prostitution: the exploitation of foreign women".

NGOs have also been confronted with challenging criminal elements. In the case of foreign prostitutes, activists report violent threats against their actions. Migrant-aid organizations who worked in and around Calais have also witnessed gang violence and racketeering. They are also at a loss to aid migrants in situations of forced labour or sequestration.

Their relationship to governmental agencies and authorities is at best ambiguous. Groups that help prostitutes do not want to act as sheriff's deputies handing over foreign victims to be deported. Activists have also denounced instances when the laws against human smuggling and irregular migration are used to prosecute NGO workers. The most recent case received a lot of media attention in August 2004: two members of a local migrant-aid organization who had housed undocumented Afghans and helped them to receive money from their families were sentenced although the judge did not order them to pay a penalty or serve a jail term.[2] The two activists were part of a larger trial after a ring of smugglers had been dismantled.

2. Foreign Prostitutes and Trafficking in Human Beings

Most of the discussion on trafficking in human beings has focused on the increasing presence starting in the mid-to-late-1990s of young prostitutes on the streets of French cities designated as "foreign" and originating from East and Central Europe including the Balkans and the former Soviet Union. In 2000, the French police reported that 14 of the 23 prostitution rings that they had dismantled originated in former East Bloc countries (Loncle 2001). "Les filles de l'Est" ("girls from the East") are forced into prostitution by criminal networks that use violence, rape, drugs, sequestration and threats against the lives of the girls' families to keep them working on the street.[3]

There are also foreign prostitutes from Africa, in particular Sierra Leone and other war-torn countries such as Nigeria or Rwanda. Starting in 2000-2001, older prostitutes from Northern China appeared in certain Paris neighbourhoods. The few studies available suggest that the African girls and Chinese women are brought by smugglers whom they must reimburse. Although their stories seem less gruesome, they are also sometimes beaten and, in any case, there are threats on their relatives back home (Handman and Mossuz-Lavau 2004). The press uses the term "human trafficking" for the Eastern European

2 Alexandre Garcia, 'Dispense de peine pour les deux militants accusés d'avoir hébergé des sans papiers', *Le Monde* , 21 August 2004.

3 By now, the phenomenon has been turned into a film script: Coline Serreau's *Chaos*, which came out in October 2003, tells the story of a young woman forced into prostitution by a foreign mafia who escapes thanks to the help of a French bourgeois couple and enables the arrest of the head of the trafficking network. Stephen Frears' *Dirty Little Things* which addresses the trafficking of organs bought from illegal migrants that are also otherwise exploited was also a success in French cinemas the following year.

and African prostitutes. In the case of the Chinese, another term is also used: "*la servitude pour dette*" (debt bondage).[4]

In a relatively short time, the young foreign prostitutes on the streets re-ignited the French political debate on prostitution and its regulation at the local and national level and in the columns of newspapers (see chronology in Annex). There were specific initiatives on the part of associations and parliamentarians calling for the protection of victims of "modern slavery" and supporting global and European cooperation against "trafficking in human beings".[5]

Why did the issue rise so quickly on the political agenda? It should be underlined that prostitution had not been publicly debated for a very long time and social scientists working on the issue suggested that street prostitution was on the decline by the 1990s (Pryen 1999, Mathieu 2001). In a tautological fashion, politicians have focused on the most visible aspect of prostitution and the most conspicuous prostitutes – because they are "so blonde or so Black" (Fabre and Fassin 2003, p. 160). The debate has centered around street prostitution and soliciting in public space and ignored the few thousands of prostitutes in girlie bars or massage parlors. There has been an emphasis on foreign women on the streets, while, according to official statistics, between 40 % and 50 % of the prostitutes are French (Lazergues 2001) and almost 30 % of all prostitutes are men or transsexuals, including among the foreigners.[6] Thus the political construction of the issue of prostitution very much focuses on trafficking networks, "public order" and (illegal) immigration. One thus finds the link between security, transnational crime and migration that has emerged in the EU at least since the signing of the Schengen agreement.

The issue came to the fore during the campaign for the municipal elections in 2001 as prospective mayors on the Right but also on the Left of the political spectrum promised to side with the inhabitants that lived close to the prostitutes' spots. This explains the focus on the street prostitution and public order. The emphasis on immigration is not surprising either given that the issue has been salient in French politics since the early 1980s. According to Eric Fassin, a sociologist specialized in sexual and gender issues who took part in the debate on prostitution, "it is borders and migrations that matter to the state. The debate on prostitution thus was a way of addressing the immigration issue without really

4 'Le CES dresse un panorama de l'esclavage moderne', *L'Humanité*, 26 February 2003.

5 The social partners were more discreet yet the Economic and Social Committee where trade unions and employers sit issued a report on modern slavery in 2003.

6 The statistics that are quoted in parliamentary and in the press stem from the activity reports of the coordinating office of the national police in charge of prostitution (the OCRTEH). In 1999 and again in 2003, they estimate that there are 12000 street prostitutes and 3000 other in parlors and bars (15000 in all of France). The figure on men is quoted in Fabre and Fassin (2003).

dealing with it" (Fabre and Fassin 2003: 160-1). In the end, framing the issue as a law and order problem led to a repressive solution enacted by the Right-wing government with penalties against passive soliciting and the expulsion of foreign prostitutes that are not treated as victims but as clandestine migrants.

It is telling that the social scientists that have done research on prostitution and interviewed prostitutes all deplore the fact that the debate has ignored what they view as the key problem that needs to be addressed by public policies: the economic and social situation of prostitutes, regardless of their nationality and status. Lilian Mathieu entitles a press article during the controversy *La précarité, grande oubliée du débat* and emphasizes that prostitutes come from deprived backgrounds and suffer from social insecurity (Mathieu 2003). The two researchers who wrote the 2004 report on prostitution for the mayor of Paris, Marie-Elisabeth Handmann and Janine Mossuz-Lavau emphasize that whether the prostitutes are foreign or French, "poverty is the reason why they got to where they are and money is what keeps them there" and that they all "either need or want to make money […] in a relatively short time" (quoted in Zappi 2004b). Clearly, the policy problem was not constructed based on the assessment of its root causes by social scientists…

Social scientists do acknowledge that traffickers' victims that have no legal residence status are extremely vulnerable and act differently than the "natives". For instance, NGOs report that they do not use condoms and rarely are allowed by their pimps to test for HIV. The NGO le bus des femmes also reports that once granted residence papers, foreigners tend to stop prostituting themselves (Bus des Femmes 2002: 42). There have also been reports that they are more exposed to police abuse than natives. In the aforementioned survey of Paris prostitutes (Handmann and Mossuz-Lavau 2005), informants underline that African women in particular had been the target of police violence, rape, and humiliations.[7] Several cases in the news since the 2003 law on internal security have involved disciplinary sanctions against policemen that have extorted sexual favours and money from prostitutes. In brief, while the social and economic dimensions of prostitution have been neglected in French policy, the fact that the trafficked women are treated first and foremost as illegal migrants has made their situation worse than French prostitutes. They are under a number of physical threats. A related issue regards the fact that the new laws pit French and foreign prostitutes against one another: "there is a degradation of the relationship between French and foreign prostitutes as the latter are targeted in the latest legal dispositions" (Ngomsik 2004). As Gill Allwood has underlined, in the French parliamentary debate on prostitution, "prostitutes are divided into 'good' French prostitutes who do not disturb the peace and 'bad' foreign prosti-

7 Sylvia Zappi, 'Accusations répétées de violences policières', *Le Monde*, 14 January 2004.

tutes who undercut prices, offer unprotected sex, and work indiscreetly upsetting local residents" (Allwood 2004, p. 8).

The link between prostitution and trafficking in human beings was used by pro-abolitionist politicians and activists as an added proof of the horror of prostitution. For abolitionists, all prostitution is forced and is a violation of human dignity and prostitutes are victims that need to be saved and reintegrated in society (Mazur 2004). When the debate irrupted a propos foreign prostitutes, abolitionists were a strong lobby supported by all government coalition party leaders and with access to key Socialist policy-makers in the government headed by Lionel Jospin – his wife, the philosopher Sylviane Agacinski, was present at a conference organized by the abolitionist fondation Scelles in 2000. Non-abolitionist NGOs are made up of associations that were created in the early 1990s partly to fight the AIDS epidemic and includes also older associations of professional social workers that split from Catholic associations that seek to rehabilitate prostitutes (eg "Le mouvement du Nid"). The major ones Le bus des femmes, Aides and Act-Up Paris, Cabiria (in Lyon), PASTT (for transsexuals) do not seek to judge prostitutes and deny them subjecthood and agency. They focus on the health and social conditions of prostitutes and fight for their access to rights. Thus, while they were among the first to denounce modern slavery and trafficking, they do not confuse it as the other camp does with the sale of sexual services. While for abolitionists, the trafficking of women from Eastern Europe reinforced their arguments, for the other NGOs, it confused the issue in a way that undermined the welfare of sex workers but also the victims of trafficking and slavery not involved in prostitution (eg sequestered maids in embassies).

Following the 2002 presidential and legislative elections, the new Right-wing government and his ubiquitous Minister of Interior Sarkozy quickly turned to what had been the key issue in the campaign, "*insécurité*", through a number of law and order initiatives. In this process, prostitutes viewed predominantly by the former Left-wing majority as victims of violence were recast by the Right as one of the groups that threaten public safety – other groups included beggars and youths loitering in the hall of housing projects. Sarkozy made clear that his target were foreign prostitutes. In his view, treating them as criminals that must be charged and expelled from France was a charitable act. He presented the internal security bill before the Senate in November 2002 by stating: "It seems wise to escort girls who do not speak our language and who have just arrived in our country back to their country of origin in order to release them from the grasp of their pimps. It is a humanitarian duty!"[8]

During the legislative debate and as prostitutes mobilized against the law on internal security, the Left was split between "the moral left" and the "libertarian left" arguing in the editorials of newspapers for or against abolitionist posi-

8 Compte-rendu analytique officiel, séance du 14 novembre 2002, Paris, Sénat. <http// www.senat.fr>.

tions while in fact the Right-wing government had decided upon a securitarian treatment of prostitution based on the repression of foreigners (see Fabre and Fassin 2003 for details). Left-wing intellectuals were mistaken about the target and fighting the wrong battle in *Le Monde* and *Le nouvel observateur*. It should have been clear that the debate was not about "moral order" ("ordre moral") but "public order" ("ordre public") when the Socialists' proposal to criminalize clients was rejected by the government and only supported by Christian conservative passionaria Christine Boutin. In the end, there was no extension of the 2002 law on parental authority that criminalized clients of underage prostitutes.[9]

Non-governmental organizations have been alarmed by the consequences of the implementation of the Law on Internal Security for foreign prostitutes. In May 2003, a judge in Bordeaux issued for the first time a sentence calling for a prison term in application of the law on passive soliciting (the maximum penalty in fact of two months in jail).[10] The prostitute was an undocumented Kosovar woman condemned for soliciting and irregular stay. On June 26, 2003, several NGOs demonstrated in front of the Paris police headquarters denouncing the attitude of the authorities. The associations involved had a range of mandates: community health, AIDS prevention, aid to prostitutes, migrants' rights, women's rights, gay and lesbian rights, civil liberties protection and the fight against poverty. Their call for action mentioned that they had had to set up an operational monitoring system after the coming into force of the law to help the prostitutes.[11] Yet in spite of these emergency measures, they felt helpless as panicked prostitutes were harder to find while others were being arrested and presented to a judge the same day ("*en comparution immediate*") with access to a lawyer or interpreter often lacking.

9 One much publicized affair involves a 17-year-old foreign prostitute. In April 2004, she was found in the car of Prime Minister Raffarin's cabinet member and head of communication Dominique Ambiel. He had to resign after having been charged for having solicited sexual relations in exchange for money from an underage prostitute and for having insulted the police agents that had caught him red-handed on a boulevard in the middle of the night.

10 Other judges have publicly declared that the law on soliciting cannot be applied as long as prostitution is legal in France and few sentences have in fact been issued for soliciting (as opposed to irregular stay). This is part of a broader judges' revolt against the law on internal security. They also point to the banning of loitering in halls as an absurd and unnecessary means of overloading the courts.

11 The cross-NGO initiative included SAF, GISTI, PASTT, Cabiria, Femmes Publiques, l'association de défense des droits des étrangers, Act Up-Paris, ARCAT sida, le Syndicat de la magistrature and the local Green political party. These NGOs are not militant abolitionist NGOs but rather the neutral ones. See GISTI, 'Appel à Manifestation: La LSI s'attaque aux prostituées. Le "nettoyage" a commencé', 23 June 2003, Paris, GISTI.

In Paris, the state prosecutor Yves Bot decided that only foreigners would be tried immediately, that their residence permit would be taken away and that they would be judged for not respecting immigration laws otherwise. Only one month after the coming into force of the Law on Internal Security, the Paris *Préfet* was already publishing figures of what he labelled the "administrative and social handling" of the prostitution issue: 15 prostitutes expelled, 26 given an expulsion order and 31 a provisional temporary residence permit. No criteria for the difference in treatment were given.[12] The Ministry of Interior also is keen on issuing figures on expulsion. In January 2004, its first official evaluation of the law underlined that 126 foreign prostitutes arrested in Paris alone had been expelled from France since April 2003 (Zappi 2004a). Once again the key target were foreign prostitutes rather than all prostitutes. Data published in July 2004 revealed that 84 % of the 5600 prostitutes arrested since March 2003 are foreign, prompting a representative of a Lille-based NGO helping prostitutes to state that "the law had pitted ethnic communities against one another by hunting down mainly foreign prostitutes".[13]

In the end, there is a tacit consensus among NGOs that the laws on trafficking and soliciting have made prostitutes difficult to reach as they become less visible. Even the abolitionist NGOs acknowledge that there is no evidence that prostitution is diminishing. Instead there is a shift from the big cities to the suburbs and smaller towns such as Orleans and a greater use of Internet for soliciting. Some associations on the ground still witness a rise in the number of prostitutes on the Riviera in cities such as Nice (Ngomsik 2004).

None of the non-governmental actors were satisfied in the end with the legislative and bureaucratic handling of trafficking in human beings. For those who have focused on "modern slavery," the fact that prostitution has been in the limelight means that there is no attention paid to a larger phenomenon that includes domestic slaves, foreign or not. For activists that aid prostitutes, the political emphasis on immigration and foreign criminal networks has blurred the issue and the actual concerns and needs of prostitutes have been neglected. Instead, to avoid being arrested for soliciting, they are less visible and less accessible to the social workers that provide them with health care, condoms, and advice.

12 The Ministry of Interior figures are released as part of media events. In this case, a Paris municipal council meeting in which the *préfet* was invited (intervention de M. Jean-Paul Proust, séance du Conseil de Paris des 7 et 8 juillet 2003). For the full speech, see <http://ww.prefecture-police-paris.interieur.gouv.fr>.

13 Vincent Dubaele, Groupement de prévention et d'accueil lillois (GPAL), France3 Nord newscast of 10 December 2004 (online at <http://www.nord.france3.fr/dossiers/6408308-fr.php>).

3. Rom Beggars and Minors: Franco-Romanian Bilateral Cooperation on Trafficking

In the French public debate on trafficking and smuggling, some ethnic groups and nationalities have received more attention than others. This is the case of Roms and "Romanians". These same groups have been targeted by law and order operations and been the object of specific policies involving bilateral cooperation with their country of origin. A series of articles entitled "Ces Roumains qui trafiquent en France" in the leading Paris regional daily *Le parisien* in the summer 2002 illustrates the point:

> The Minister of Interior will travel to Romania on August 30-31 to sign an agreement against immigration networks to France and the exploitation of children and young prostitutes… Handicapped people forced to beg, minors thrown into crime, young girls subjected to prostitution… The networks of trafficking in human beings have turned Romania into the worse pupil among the candidate countries for accession into the European Union…[14]

First, it should be underlined that in public declarations and policy documents, the French government has always linked irregular migration and trafficking in human beings in such a way as to imply that (a) the two phenomena are concomitant and (b) Romanians are involved in both. In the summer 2002, the French Minister of Interior met his Romanian counterpart to discuss reinforced border controls, accelerated deportation procedures and the sending of French policemen specialized in human trafficking and immigration officers. He declared: "we have decided to initiate a very strong common action to act against clandestine immigration and mafia-like networks [...] France suffers from the criminality of some Romanian nationals" which he estimated to be "a few thousand persons" involved in "the prostitution of minors, aggressive begging and illegal migration". The Romanian Interior Minister Ioan Rus spoke of "a few hundred persons affecting the prestige and the image of over twenty million Romanians".[15] The discrepancy in the figures given by the ministers suggests that the French minister does not distinguish between the traffickers and those that work for them and between illegal migrants and Romanian nationals involved in criminal activities.

In January 2002, Romanian nationals no longer need to acquire a Schengen visa to enter EU member states and the French Minister of Interior also seemed to criticize the capacity of the Romanian government to control its borders. In fact, Romanians, including lone minors started arriving in France long before 2002 after the fall of Ceaucescu. The criminal activity associated with the

14 *Le Parisien*, 26 August 2002.

15 'Haro sur la délinquance roumaine', *Le nouvel observateur*, 30 July 2002.

Romanian youths at the time was the emptying of Paris parking meters known as the "*gang des horodateurs*" that led the Paris city hall to replace coin machines with cards.

Two of the subgroups coming from Romania require further attention. First, the *Roms* (also known as "tziganes" or gypsies in France) that are often the victims of ethnic and racial discrimination in Romania (where they represent 2 % of the population) have been the first to be targeted by law and order French policies. On 6 July 2002, as part of the many spectacular police raids that the Minister of Interior Sarkozy staged during the first months after his nomination, the French police encircled a *Rom* shantytown near Paris (Choisy-Le-Roi) focused on handicapped beggars, while arrests soon took place in Romania. 200 expulsion procedures were soon under way. The Romanian government promised to step up action to dismantle networks that exploited beggars on French streets. The Romanian press at the time multiplied anti-Rom statements and contributed to spreading rumors (1) on the re-establishment of visas for Romanians wishing to travel to France and (2) on the fact Rom traffickers mutilated people to then force them to beg.[16] In brief, the prime target of bilateral actions was the most vulnerable populations in the country of origin. The French authorities sought their expulsion in spite of the fact that, as a EU member state, France knew that the protection of minorities was one of the demands made on Romania during EU accession talks.

Another form of targeting of Rom populations has consisted in creating a new criminal offence in the 2003 law on Internal Security that corresponds to an activity practiced in Paris mostly by Rom beggars. The law of 18 March 2003 states that "keeping a child under 6 in public space to solicit the generosity of passers-by" is a criminal offence that can result in a seven-year prison sentence or a € 100,000 fine. The first case before the Paris appeals court in February 2005 involved three Rom women arrested for begging with their children on the Champs Elysées and the Paris subway. As with the lower court, the judges did not condemn the three women (one of them who did not come to the trial only received a small fine). Most NGOs were happy to see that the judges as in other cases mentioned above did not find Sarkozy's new crimes applicable as they consider that they "criminalize poverty". The main police union Alliance were furious however stating that "the mothers were forced to beg completely under the thumb of mafia networks". Alliance did state however that the law intended to punish human trafficking not their victims and that in practice the courts were asked to judge beggars and not those who exploited them.[17]

16 Pascale Egré, 'Enquête en Roumanie aux sources des trafics' and 'Dans la ville de trafiquants Videle', *Le Parisien*, 26 August 2002.

17 Bernard Delattre, 'Mendiantes mais pas mauvaises mères', *La libre belgique*, 16 February 2005.

The second group are Romanian minors involved in petty crime or prostitution. In the period covered in this study, it has been estimated that, in Paris and its suburbs, most of the unaccompanied foreign minors ("mineurs étrangers isolés"), minors without a fixed abode and without a parent on the territory were Romanian or Rom (others are from ex-Yugoslavia, China and North Africa. In 2001, 1100 of the 5200 minors arrested by the French and half of those presented before a judge were "unaccompanied foreign minors," a large majority being from Romania.[18] Yet the phenomenon remained difficult to assess and in 2001 Hervé Hamon the President of the Court for underage offenders asked for research to be conducted to understand whether the minors were sent by their families, sent through smugglers, and/or exploited by traffickers and also to understand the situation in Romania in case of return. The judge wanted to then organize a campaign to warn parents in Romania of the situation of their children in France. A 2002 report by ADRI, the parapublic agency conducting research on migrant communities, suggested that the families thought that the child sent abroad would send remittances after the smuggler had been paid back by the minor's wages. In many cases the smugglers handed the children over to criminals that would force the children into prostitution or theft. It is not always easy to find the families and the children did not always collaborate as their return from France would be a failure on their part to provide for their family.[19] It is not always clear that the minor will not be in danger once he/she has returned (ADRI 2002, Ficot 2002).

The magistrates that saw the children involved in petty crime such as theft (e.g. stealing from parking meters) were confronted with the problems linked to the foreign status of the minors: they could not be expelled by law because they were minors yet there were not enough structures to house them and they often ran away; should they serve a jail term, there was no possibility to be offered training or a perspective other than crime as other juvenile delinquents were because they were not allowed to work. A Senate report on juvenile crime published in 2002 highlighted these legal and practical problems (Carle and Shosteck 2002) yet, by then, the new Right-wing government had already decided to focus

18 That year, the *défenseure des enfants* (independent authority and mediator for the protection of children's rights) in her report estimated that there were twenty five thousand unaccompanied foreign minors in France (La défenseure des enfants, 2001, pp. 134-142) while the former judge of the Bobigny Jean-Pierre Rosenczweig *tribunal des enfants* (court for underage offenders) estimated that around 2,000 minors were living on Paris streets. See <http://www.rosenczveig.com>. On unaccompanied minors, including Romanians, see *Plein Droit* no. 52 (2002) and *Hommes et migrations* no. 1251 (2004) that are special issues on the topic.

19 In 2004, 868 Romanian minors were deemed to be illegal aliens. For 529, an identification procedure has been launched while French magistrates have asked the Romanian authorities to launch an investigation.

on returning Romanian minors through a bilateral agreement with the Romanian government.

Both before and after the bilateral talks between Romania and France however, the various actors involved in helping minors (judges and lawyers, social workers from the *SAMU social* ("social emergency service") and from the locally-funded hostels of *Aide sociale à l'enfance*, non-governmental organizations that offer help to Romanian children such as *Parada*, *Lazare* and *Aux captifs la liberation* and children rights' activists from NGOs such as the umbrella group "la Voix de l'enfant") disagreed as the best solution, one that would be in the interests of the children and could be implemented. The NGOs who knew the Romanian minors such as Parada but also magistrates felt that the minors should be given some kind of professional training and that their return should be voluntary. They argued that otherwise the minors would just come right back on Paris streets.

Some of the childrens' rights associations (e.g. la Voix de l'enfant") considered that professional training would create "a vacuum pump", an incentive for more minors to be sent. The understaffed and underfunded local institutions in charge of taking care of children in need of protection (Aide sociale à l'enfance or ASE) became overwhelmed with the arrival of many more Romanian minors that they could handle. While in 1998, the Paris ASE had housed fifty minors, they saw the arrival of over 400 in the first six months of 2002, some of which they found difficult to handle. In some cases, the minors were even placed in hotels which did not seem appropriate given their fragile psychological state and lack of French (Ficot 2002). The social workers also considered that bettering the conditions of the children would encourage the illegal migration networks and more children would come. They also did not want to be "instrumentalized" by families or traffickers that could profit from their facilities and felt that housing the children was changing their original mandate (ADRI 2002). In other words, they did not believe in focusing on developing help for the children in France but instead in Romania. On this last point, there was a lot of scepticism on the part of actors that knew the situation in Romania. They doubted that the families would welcome them back and that the Romanian government would invest in rehabilitating delinquent children and providing with the kind of psychological and educational help that French professionals considered necessary.

The reason is that there are already a lot of problems with the protection of children in Romania. The government was repeatedly warned by EU institutions that its chances of joining in 2007 were in jeopardy if it did not improve its record on childrens' rights. After the fall of Ceaucescu, images of the squalid conditions of Romanian orphanages were shown on TVs around the world. Yet the situation of children is still a matter of concern as the transition to the market

economy has meant poverty for some parents and the placement in children in orphanages. This means that public opinion in Romania may not understand why Rom children returned from France would be given "special treatment" while many other children are also in need of protection and care.

France and Romania signed a bilateral cooperation agreement in January 2005.[20] The stated objective is the following: "To intensify the fight against transnational crime and the protection of endangered unaccompanied Romanian minors on French territory and so as to insure the internal security of both countries and to develop the contribution of Franco-Romanian cooperation to the development of Romanian infrastructural capacities before its entry into the EU". In brief, the French are counting on the Romanian desire to join the EU as a tool to incite the Romanians to cooperate. While it is too early to study the implementation of the agreement, here are its two main features:

1. "Cooperating to secure the external borders of the European Union and fighting against illegal immigration networks";
2. "Fighting against trafficking in human beings and taking care of Romanian minors authors or victims of crime in France".

Regarding border control and irregular migration, the French and Romanian border police have a "contact point" in Oradea, a Romanian border police headquarters transformed into a "center for the coordination of border control" where joint Franco-Romanian patrols are organized.[21] The French had already sent liaison officers in Romania. There are now regular "assistance missions" with French policemen allowed along the Romanian border. Beyond this operational aspect, the French police are acting as experts in EU programs to train Romanians and help them apply the *acquis communautaire* in the area of Justice and Home Affairs. The cooperation protocol mentions the Schengen acquis, the training and professionalization of border guards, policemen, and *gendarmes* and the surveillance and control of the Black Sea.

As to the fight against human trafficking, the agreement states that the "bilateral operational liaison unit" set up by the 2002 agreement will be pursued and judicial cooperation accrued. The 2002 agreement[22] aimed at returning

20 *Protocole de coopération signé par le Ministre français de l'intérieur, de la sécurité intérieure et des libertés locales et le Ministre roumain de l'administration et de l'intérieur* (Bucarest, le 10 janvier 2005) On line in French at <http://www.ambafrance-ro.org/article-imprim.php3?id_article=1015>.

21 The patrols started before the agreement was signed. In his 2004 New Year's press conference, the Minister of Interior mentioned that 3000 joint patrols had been conducted in 2003. Press conference on line at: <http://www.defense.gouv.fr/portal_repository/1895479947_0001/fichier/getData>.

22 The agreement was published in the *Journal Officiel* n° 62 of 14 March 2003 page 4422. http://www.legifrance.gouv.fr

unaccompanied Romanian minors to Romania with the French financing and organizing returns and the Romanian authorities identifying families or structures that could house the minor (with the help of NGOs).

In the case of Romanians as in the case of prostitutes, irregular migration and trafficking in human beings are addressed as two sides of the same coin. What is more specific to that case is that the policy solution to a fairly localized problem in the Paris region involving criminal activities and juvenile delinquents has been international: a bilateral agreement legitimated within the larger framework of Romanian accession to the EU. The limits of this approach is that, while policemen and border guards cooperate, there is no way for France or the EU to meddle in Romanian affairs so as to improve the socio-economic "root causes" that drive children to arrive in France.

4. Foreign Labor and Human Smuggling

Public attention as reflected in the French printed media to human smugglers and trafficking in human beings is relatively recent and can be traced back to the beginning of this century. In June 2000, the suffocation of 58 Chinese migrants smuggled at the back of a truck in Dover had received wide coverage. It became part of the European collective memory on the issue along with images of boats landing on Italian or Spanish islands and coasts. Yet, France watched and passed judgement from afar on these developments. In February 2001, the "East Sea" freighter landed on the French Riviera carrying almost nine hundred Syrians and Kurds abandoned by their smugglers whom they had paid $ 2500. By 2001, there also was an increasing attention devoted to the Sangatte camp near the Northern French port of Calais opened in 1999, which housed foreigners on their way to the United Kingdom. Most resorted to smugglers to make their way to the South Coast of England and most had already had to pay to be brought from their home country to Calais. In fact, the attention mainly focused on the fury of British authorities, on the beefed-up high-tech controls that Eurotunnel had to set up as a response, and the deaths of some of the prospective migrants that still tried to make it across the tunnel. The coverage of issues related to the smugglers themselves was more important in the local papers that reported on their bloody brawls.

As Mark Thomson has shown in his analysis of politicians' and media statements on Sangatte in France and the UK (2003), political leaders and more specifically governmental actors started mentioning the role of smugglers when they decided in 2002 to portray Sangatte as a "security concern" rather than as a case of "asylum shopping" that required the tightening of UK asylum laws. Then UK Home Secretary Blunkett spoke of an "evil and barbaric trade" and Jacques Chirac in his traditional July 14 interview stated that smugglers were part of "monstruous mafia systems worse than slavery that go to get people, steal their last savings, making them believe in the El Dorado and then dumping

them miserably on our beaches and in our harbours".[23] Thomson has argued that the reason why politicians did not focus on the smugglers – that had been operating in broad daylight so to speak in the camp for a long time by 2002 – is that it contradicted the thesis that migrants freely choose their destination by comparing the legislation of various European countries, the basis of the "asylum shopping" argument. If the smugglers rather than the migrants decide where the latter will be delivered, it takes away from the argument that justified the signature of the Dublin Convention and that the French government put forth to UK authorities: UK legislation was too lax and attracted asylum-seekers and irregular migrants.

What do we know about the reasons that led migrants to arrive in Sangatte and seek to go to England? In the study commissioned by the Red Cross camp based on 284 questionnaires filled by camp inhabitants, Smain Laacher (2002) suggests that there is no single pattern regarding choice of destination and the hiring of smugglers. The narratives of the journey to Sangatte suggest that all migrants had to pay smugglers, whether or not they knew where they wanted to go ("Europe" or "England"). Yet, testimonies also make clear that smugglers were ready to abandon them anywhere at the first sign of danger to protect themselves. In other words, there was no guarantee that you would arrive at your chosen destination if you had one. A majority of prospective migrants, especially Iraqis stated that they had a final destination in mind, which correlated with the fact that they had a family member in the UK who often had paid for the trip. The others, especially young Afghanis who seemed at the mercy of the smugglers' routes, heard about Sangatte and England on the way, often in Paris.

The consensus among the migrants in Sangatte was the "professional cynicism" of the smugglers, the ways in which they were literally and figuratively kept in the dark as to their itinerary, treated as expendable objects. Still, the sums paid to the smugglers are considerable and this means that there is no turning back for most migrants. Most of the Afghanis and Iraqis had already paid $ 5000 to $ 10000 (Laacher 2002). The International Organization for Migration (IOM) issued a pamphlet that was distributed in Sangatte entitled "DIGNITY OR EXPLOITATION, the choice is in your hands". The organization sought to deter migrants form crossing over to England and instead return home through the voluntary return program aided by "a modest amount of money upon departure". One of the arguments used in the pamphlet is that the migrants will be exploited in England: "the people who exploit you are often the ones who arrange your travel. These traffickers are organised criminals with profit as their only motivation. They are prepared to use threats and violence –against you or your family" (IOM 2001). The migrants who had arrived in Sangatte only knew too well what the smugglers were capable of, yet this did not mean returning

23 Blunkett is quoted in the H.C. Hansard 387, col. 879, 26 July 2002. Chirac's interview on 14 July 2002 is at <http://discours-publics.ladocumentationfrancaise.fr>.

home with no money or only the IOM small financial assistance was a realistic option given the sacrifices they and their family had made to finance the trip.

In October 2002, a month before the camp in Sangatte stopped welcoming new arrivals and a few months before it was closed, the French police unit in charge of the fight against illegal migration (OCRIEST) declared having dismantled the smuggling organizations that organized the passage from Sangatte to the UK. Having paid around $500, the refugees were put on the back of trucks, unbeknownst to the drivers. The French police arrested 40 persons, all of them Iraqi Kurds after the 6-month "operation Babylonia".[24]

On 19 August 2004, two activists who belonged to a group that had helped the foreigners wandering in the Calais area called collectif C'Sur were on trial in Boulogne-sur-Mer for "direct and indirect aid to irregular entry and stay" at the same time as seven alleged Iraqi smugglers. The smugglers were accused of organizing the travel and transfer of irregular migrants. The activists were originally charged of being accomplices of the smugglers' ring. The charge was dropped yet they were still facing charges for having housed and helped financially irregular migrants. Many NGOs and trade unions came to support the activists and a petition that had been circulating was reactivated: "solidarity is not a crime". It is difficult to assess what made the non-governmental actors most irate: the fact that their aiding foreigners was deemed a crime, the ultimate governmental weapon to curtail their activities or that activists and smugglers were tried at the same time as if the actions had the same criminal significance.

The focus on Sangatte has obliterated many aspects of irregular migration in France, including their role as laborers. Yet, Sangatte has been a formative experience for activists and a symbol of the perverse effects of the dominant policies on asylum and immigration in the EU prompting some NGOs to launch a transnational initiative called "Migr'Europ'" mapping all the camps where foreigners are held in Europe. In the meantime and while the camp is closed, the area of Calais remains a place where smugglers take prospective migrants. The Minister of Interior in a circular sent to all French *préfets* in the fall of 2004 states that that year 12000 irregular migrants had been apprehended in the Calaisis and dozens of smugglers had been arrested for organizing "the transit or the stay through the French territory of hundreds of individuals" in the Calais area.[25]

---

24 Piotr Smolar, 'La police démantèle les réseaux de passeurs de Sangatte', *Le Monde*, 30 octobre 2002.

25 Circular of 17 septembre 2004 NOR/INT/C/04/00116/C. Le ministre de l'Intérieur, de la sécurité intérieure et des libertés locales à Mesdames et Messieurs les préfets, 'Développement de l'investigation par la police aux frontières contre les filières d'immigration, les réseaux d'aide au séjour irrégulier sur le territoire et le travail clandestin organisé', Paris, 2004.

There is no doubt that the migrants that arrived in the Calais region and that tried to cross to the UK paid smugglers. It should be underlined however that French and British authorities did not focus on the smugglers for a long time. Instead, there was an emphasis on delegating control to third parties, in particular private actors such as transporters (ferries, trains) and the Eurotunnel company that faced the threat of carrier sanctions while individual truck drivers were in some cases accused of smuggling and kept in British jails (Guiraudon 2002). The actual smugglers only appeared in the policy debate at a late stage to justify the need to close the camp for security reasons. The governments first wanted to argue that the migrants were solely responsible for "asylum shopping" and thus refused to take into account the fact that smugglers often did not keep prospective refugees informed of their destination.

5. Conclusion

"Irregular migration" has long been a feature of French immigration policy. In the post-war period, French authorities allowed the arrival of foreign workers outside official procedures to cater to the needs of business that required speedy and flexible recruitment. After the first oil shock, French immigration policy became restrictive and started to turn foreigners that beforehand had been legally residing into "irregular migrants". In the 1980s and 1990s, the issue of irregular migration came to the political fore as a phenomenon to be "fought". For the Left in the 1980s, the issue was mostly linked to the fight against undeclared work whereas the Right soon linked irregular migration to "*insécurité*". What is new in recent years and accentuated by the link between irregular migration and trafficking and smuggling is that irregular migrants are associated with criminal activities as victims and perpetrators. The disparagement of irregular migration takes place in a deleterious domestic context with the National Front durably affecting the policy agenda and the stances of mainstream parties. It also takes place within a larger European context where migration and security issues become increasingly linked.

In this article, we hope to have shown some of the effects of the policy linkage between irregular migration, trafficking and smuggling, and criminal activities. In the case of prostitution, foreign prostitutes that were the victims of traffickers were in the end the prime targets of a new law and order law that criminalized soliciting. As in the other cases discussed, a complex phenomenon was given a simplistic solution ie take the prostitutes off the main boulevards so that the phenomenon in fact endures but does not address the social aspects of the issue.

France closed the Sangatte camp under British pressure, yet there are still smugglers taking migrants to the Calais region. Similarly, we have seen that, while France signed an agreement with Romania to put an end to the presence of unaccompanied minors involved in petty crime in France, many of the socio-

economic factors that explain why children go to France will not be affected by the agreement. Not only are there multivariate causes behind voluntary and forced migration but also there is no easy return for migrants that have spent their family's savings or children that may not feel that they can face their parents or kin without money and "success" in the country where they migrated. The notion of trafficking and smuggling seems to provide a simple explanation to a complex phenomenon, yet the solutions are not as simple and cannot rely on law and order measures alone.

Still, it is fair to say that the reframing of the debate on "modern slavery" and "irregular migration" as an issue of trafficking and smuggling has not benefited the victims of trafficking or the clients of smugglers that remain straightforward targets for law and order authorities. Nor have the organizations that help irregular migrants or trafficked victims gained from the reframing of the debate. The exclusive law and order emphasis of the domestic debate has not made it easy for non-governmental actors that focus on health, social work, rights and other aspects. The fact that these issues were debated during local and national electoral campaigns where crime and security were highly salient explains in part why the post-2002 government privileged a law and order approach.

6. References

ADRI (2002) *Les mineurs étrangers isolés: Les réponses des professionnels sur Paris – Ile de France*, Paris, 1er novembre 2002.

Allwood, Gill (2004) "Prostitution Policy in France". Paper presented at the Political Studies Association, Lincoln, 6-8 April 2004.

Bus des femmes (2002) *Rapport d'activité 2001*. Paris: association Les amis du bus des femmes.

Carle, Jean-Claude and Jean-Pierre Schosteck (2002) *Délinquance des mineurs: La République en quête de respect*. Rapport d'information 340. Paris: Sénat.

Derycke, Dinah (2001) *Les politiques publiques et la prostitution. Rapport d'activité 2000*. Délégation du Sénat aux droits de la femme et à l'égalité des chances entre les hommes et les femmes. Paris: Sénat.

Fabre, Clarisse and Eric Fassin (2003) *Liberté, égalité, sexualités. Actualité politique des questions sexuelles*, Paris: Belfond.

Ficot, Elodie (2003) 'Les réponses des professionnels face aux mineurs étrangers isolés', *Hommes et migrations* 1241 (January-February).

Guiraudon, Virginie (2002) Before the EU Border: Remote Control of the "Huddled Masses", in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds), *In Search of Europe's Borders*. London: Kluwer Law International.

Handmann, Marie-Elisabeth and Janine Mossuz-Lavau (eds) (2005) *La prostitution à Paris*. Paris: Les éditions de la Martinière.

International Organization for Migration (2001) *DIGNITY OR EXPLOITATION, the choice is in your hands*. Geneva: IOM. August 2001.

Iskander, Natasha (2000) Immigrant workers in an irregular situation: the case of the garment industry in Paris and its suburbs, in OECD (ed.), *Combating the illegal employment of foreign workers*, OECD, Paris.

Koslowski, Rey (2000) 'Personal Security and State Sovereignty in a Uniting Europe', in Virginie Guiraudon and Christian Joppke (eds), *Controlling a New Migration World*, London: Routledge.

Laacher, Smaïn (2002) *Après Sangatte… nouvelles immigrations nouveaux enjeux*, Paris: La Dispute.

La défenseure des enfants (2001) *Rapport annuel*. Paris. http://www.defenseurdesenfants.fr/pdf/rapport2001.pdf

Lazergues, Christine (2001) *L'esclavage en France aujourd'hui*. National Assembly Report number 3459. Paris: Assemblée nationale.

Lochak, Danièle (2002) 'La politique d'immigration en France', in Emmanuelle Bribosia and Andrea Rea (eds) *Les nouvelles migrations, un enjeu européen*. Paris: Complexe.

Loncle, François (2001) 'Prostitution sans frontières. L'Europe de l'Ouest, proxénète des femmes de l'Est', *Le Monde Diplomatique*, November 2001, pp. 8-9.

Mathieu, Lilian (2001) *Mobilisations de prostituées*, Paris: Belin.

Mathieu, Lilian (2003) 'La précarité, grande oubliée du débat. On ne se prostitue pas par plaisir', *Le Monde diplomatique*, February 2003, p. 6.

Ngomsik, Diane (2004) 'La prostitution, un an après la loi sur la sécurité intérieure', *Infos Scelles* 25: 8-10. http://www.fondationscelles.org/dossier25.pdf

Pryen, Stéphanie (1999) *Stigmate et métier: une approche sociologique de la prostitution de rue*, Rennes: Presses universitaires de Rennes.

Samers, Michael (2002) "Invisible capitalism: political economy and the regulation of undocumented immigration in France". Paper presented at the UACES workshop "Theorising the Communitarisation of Migration," 17 May 2002, university of Liverpool.

Siméant, Johanna (1998) *La cause des sans papiers*. Paris: Presses de Sciences-Po.

Spire, Alexis (2005) *Etrangers à la carte*. Paris: Grasset.

Thomson, Mark (2003) *Images of Sangatte: Political representation of asylum-seeking in France and the UK*. Sussex Migration Working Paper 18. November 2003. University of Sussex.

Valentin-Marie, Claude. 1988. 'L'immigration clandestine et l'emploi des travailleurs étrangers en situation irrégulière', in Commissariat Général du Plan, *Le devoir d'insertion*, Paris, La Documentation française.

Viet, Vincent (1998) *La France immigrée. Construction d'une politique 1914-1997*. Paris: Fayard.

Weil, Patrick (1991) *La France et ses étrangers. L'Aventure d'une politique de l'immigration, 1938-1991*. Paris: Calmann-Lévy.

Weil, Patrick (2004) *La France et ses étrangers*. New and revised paperback edition. Paris: Folio.

Zappi, Sylvia (2004a) 'La Mairie de paris doute d'une baisse spectaculaire de la prostitution', *Le Monde*, 14 janvier 2004.

Zappi, Sylvia (2004b) 'La misère met les filles sur le trottoir, l'argent les empêche d'en sortir', *Le Monde*, 14 janvier 2004.

Other media:

Film: Chaos, director: Coline Serreau, came out on 3 October 2003.

Play: Le dernier caravansérail, director: Ariane Mouchkine, created in 2003.

Annex. Chronology of Events (1999-2004)

Human Trafficking: The Case of Foreign Prostitutes

Date	*Event*
November 1999	Death of Ginka, a Bulgarian prostitute in Paris. Local associations demonstrate to call attention to the violence against foreign prostitutes. The police reports that a third of the procedures against pimps involve Eastern European prostitutes.
2001	A NGO platform against trafficking in human beings is created calling for the implementation of the Palermo Convention.
March 2001	Municipal elections – the issue of foreign prostitutes is present in numerous debates
2001	Report by Socialist Dinah Dericke on policies related to prostitution.
January 2002	The National Assembly adopts a bill proposed by Socialist MPs on modern slavery aimed at protecting victims of trafficking. The Prime Minister does not follow up and law does *not* enter into force.
February 2002	The Law on parental authority adopted by Parliament includes penal sanctions against the *customers* of prostitutes under 18.
April and June 2002	President Chirac is re-elected and the Right wins an overwhelming majority of seats in the parliamentary elections.
October 2002	The government proposes a bill on internal security which contains measures against "*racolage passif*" and measures against trafficking in human beings. Prostitutes demonstrate against the bill.
March 2003	The law on internal security comes into force with new measures against "*racolage passif*" and trafficking is punished by prison terms ranging from 7 years to life and by fines of up to 4,5 million euros.
May 2003	A Kosovar prostitute is condemned to serve a two-month prison term.
January 2004	The Minister of Interior Sarkozy claims that prostitution in Paris has dropped by 40 % since the new law came into force and that 126 prostitutes have been deported.

Human Smuggling: The Calais Case (1999-2004)

Date	*Event*
24 September 1999	Opening of a Red Cross camp in Sangatte near Calais to house Kosovar refugees seeking to reach the UK.
2000-2001	Numbers in Sangatte rise and diversify. Camp planned for 700 becomes overcrowded (*c*. 1800 persons at a time). Conditions deteriorate.
13 September 2001	UK Home secretary and French Interior Minister Sangatte issue statement on Sangatte announcing new security measures to prevent illegal migration from France to the UK.
July-September 2001	Eurotunnel hires a retired UK army general to police tunnel and asks Lille administrative tribunal to close the Sangatte camp invoking millions in commercial losses and security investment
April-June 2002	Presidential and legislative electoral campaigns in France. Over 40 % of voters in Sangatte district cast a yellow vote to protest against camp. New right-wing Interior minister gets support from local left-wing politicians to close the camp.
26-28 September 2002	The Interior ministries of France and the UK meet in Sangatte and announce closing of camp. Two days later, UNHCR, France and Afghanistan sign an agreement on return of Afghani.
5 November 2002	No new admittances in the Sangatte camp.
10 November 2002	The *préfet* orders the police to evacuate 200 foreigners in a Calais Church.
19 August 2004	Trial of 7 Iraqi smugglers and 2 French activists in Boulogne-sur-Mer. The latter two are accused of having helped irregular migrants.
12 October 2004	Migr'Europ launches international petition against camps in Europe.
17 November 2004	An Interior ministry circular states that 12,000 irregular persons and dozens of smugglers were apprehended in the Calais area in 2004.

*Katja S. Ziegler**

THE LEGAL FRAMEWORK OF TRAFFICKING AND SMUGGLING IN GERMANY: VICTIM PROTECTION EMERGING FROM WITNESS PROTECTION?

1. Introduction: Legislative Context and Development

In Germany the criminal offences of smuggling and trafficking in human beings fit into a long tradition. In recent years, particularly since the 1980s,[1] there have been numerous attempts to reform these offences. However, whilst aimed at complying with international obligations, these amendments tended to involve fine-tuning and filling existing *lacunae* in the law rather than the creation of new offences. *Smuggling* relates to assisting with illegal entry or residence. Such assistance is, in principle, punishable as an inchoate offence to illegal entry or residence. A separate offence of "smuggling" (thus termed) covers the more serious forms of assistance. Whereas German immigration law has been significantly changed by the Immigration Act (*Zuwanderungsgesetz*) that entered into force on 1 January 2005,[2] the Act only led to a reshuffling of numbers of the provisions on smuggling in the new Residence Act (*Aufenthaltsgesetz* (AufenthG).[3] Whereas the offence of smuggling is contingent upon illegal entry or residence of a foreigner, trafficking is not.

Trafficking (thus called) used to criminalize only the exploitation of persons in a situation of vulnerability where they are influenced or induced to practice prostitution or to commit other acts of a sexual nature. Whereas the offence of

* Dr. iur., Lecturer in Law, DAAD Fellow and Deputy Director, Institute of European and Comparative Law, University of Oxford.

1 Schroeder, Irrwege aktionistischer Gesetzgebung – das 26. StÄG (Menschenhandel), 1995 *Juristenzeitung* (*JZ*), p. 231, 232 ff.

2 Statute of 30 July 2004, *Federal Law Gazette* (*Bundesgesetzblatt, BGBl.*), 2004 I, p. 1950 ff.

3 This article will refer to the numbers of the law in force. §§ 92a and 92b of the (old) Foreigners' Act (Ausländergesetz, AuslG) relate to 96 and 97 AufenthG (new).

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *69-111.*
 ISBN 90 04 15064 1.

smuggling is contingent on illegal entry or residence of a foreigner, trafficking is not. A recent overhaul of the legislation in this area has, however, broadened the scope of the terminology: a recent amendment[4] to the Criminal Code (*Strafgesetzbuch* (*StGB*))[5] that entered into force on 19 February 2005 unifies and extends the existing offences[6] in reaction to the Palermo Protocol[7] and the EU Framework Decision on Trafficking of July 2002[8] and includes new expanded provisions dealing not only with trafficking into sexual exploitation but also with trafficking for the purposes of exploitative employment, slavery, bondage and debt servitude which were in part previously codified outside the Criminal Code.[9] Trafficking for the purpose of organ transplantation still remains in a separate statute.[10]

1.1 Close Links between Smuggling and Trafficking

The factual situations of smuggling and trafficking are often entangled. This feeds into a confusion regarding their respective criminal offences. The confusion is compounded by the fact that cases of trafficking are often not discovered in their full gravity: a high number of potential trafficking cases remain unre-

4 Statute of 11 February 2005, *BGBl.* I 2005, p. 239.

5 §§ 180b, 181 (old), §§ 232, 233, 233a (new) StGB.

6 Recently, criticism was voiced because of the slow implementation of these international and European measures, see Schleusung: Richtlinien der EU erst spät umgesetzt, *FAZ*, 8 March 2005, p. 1, and Erfolge im Kampf gegen Menschenhändler?, *ibid.*, p. 4.

7 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. A/55/383, p. 53 (2000). Art. 7 of this instrument reflects the idea of a residence permit to victims of trafficking. The further Protocol against the Smuggling of Migrants by Land, Sea and Air, UN Doc. A/55/383, p. 62 (2000) does not contain any provision concerning residence rights.

8 Council Framework Decision on Combating Trafficking in Human Beings of 19 July 2002, *Official Journal of the European Union* (*OJ*), 2002 L 203/1. Tom Obokata, EU Council Framework Decision on Combating Trafficking in Human Beings: A Critical Appraisal, 2003 *Common Market Law Review* (*CMLRev*), p. 917; Ryszard Piotrowicz, European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers, 2002 *International Journal of Refugee Law* (*IJRL*), p. 263.

9 See Explanatory Memorandum in Deutscher Bundestag, *Drucksache* (*BT Drs.*) 15/3045, p. 6. Trafficking for the purpose of organ transplantation would remain in a separate statute: the Transplantation Act, *BGBl.* I 1997, p. 2631.

10 Transplantation Act, Statute of 5 November 1997, *BGBl.* I 1997, p. 2631.

corded or appear "only" as smuggling instead of trafficking.[11] Sometimes this focus on smuggling is due to the difficulty in proving trafficking. For example, illegal entry is often a factual element, but not a legal precondition of trafficking for sexual exploitation. The following factual elements constituting smuggling will often be present with trafficked women: They may cross the border illegally or with forged papers;[12] those who are in possession of short-stay visas may exceed their maximum permissible stay, or take up work (such as prostitution) against the residence status.[13] Whereas illegality of residence and trafficking often exist alongside each other, a conclusion that trafficking never occurs during *legal* stay would be precarious: the often *pro forma* legalisation of residence may serve to protect exploiters from investigation into their practices. In other words, where women who have been trafficked for prostitution obtain a work permit or acquire residence status, such as by marriage (of convenience), this may protect the traffickers from investigation.[14] Cases in which women are recruited by marriage brokers and in which the husbands (sometimes in cooperation with the broker) then traffic the women as prostitutes are reported frequently.[15]

In addition, smuggling may lead to exploitation (and thus resemble trafficking) as the smuggled person has incurred a debt vis-à-vis the smuggler that he or she may need to pay off[16] for example by working in a brothel owned by the smuggler or of those who paid the smuggler.[17] Intentional "illegalisation" of residence by the exploiters is also very common: for example, when women are

11 Hofmann, *Menschenhandel. Beziehungen zur Organisierten Kriminalität und Versuche der strafrechtlichen Bekämpfung*, 2002, p. 93.

12 Hofmann, p. 101.

13 Cf. Federal Court of Justice (Bundesgerichtshof, BGH), 2000 *Neue Juristische Wochenschrift* (*NJW*), p. 1732 ff. (women from the Ukraine coming on tourist visa and working as prostitutes); Hofmann, p. 102.

14 BGH, judgment of 17 March 2004, 2 *StR* 474/03, 2004 *Neue Zeitschrift für Strafrecht – Rechtsprechungs-Report* (*NStZ-RR*), p. 233 (also at <www.bundesgerichtshof.de>. Hofmann, p. 107, 241 ff.; Dreixler, *Der Mensch als Ware. Erscheinungsformen modernen Menschenhandels unter strafrechtlicher Sicht*, 1998, p. 208.

15 Landeskriminalamt Nordrhein-Westfalen (LKA NRW), *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 24 <http://www.lka.nrw.de/lagebilder/lagebild_menschenhandel_2002.pdf>.

16 Hofmann, p. 104.

17 As was the case, in BGH, 2004 *NStZ-RR,* p. 233. See also the Explanatory Memorandum to the Proposal for a Council Directive "on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities", COM (2002) 71 final, p. 2 (section 1.1.).

deprived of their passports (as is often the practice with trafficking),[18] they are in breach of the duty to carry a passport.[19]

1.2 Assistance to Illegal Entry and Smuggling Foreigners

Since the fall of the iron curtain, which sealed the Federal Republic of Germany's eastern border until 1989, the German legislature has amended the offence of people smuggling[20] and the related offence of enticing a foreigner to lodge an abusive asylum application[21] several times. Changes to the Foreigners' Act (*Ausländergesetz, AuslG*) successively introduced a highly differentiated system of criminal sanctions for smuggling with an overall trend of more and more severe sanctions. The most significant of these amendments[22] were motivated by the quest to crack down on the worst forms of smuggling (1992) and a generally enhanced effort to combat organised crime, illegal entry and organised or professional smuggling[23] (Combating Crime Act 1994[24]). There is a strong public interest rationale behind the amendments, which were presented as reactions to a series of xenophobic attacks against unwanted immigrants that occurred in the first half of the 1990s, and for which people smugglers were deemed at least partly responsible.[25] The latest amendment by the Immigration Act, passed on 30 July 2004 (*Zuwanderungsgesetz*)[26] introduces numerous changes to Germany's immigration policy. However, in the case of smuggling, except for a reshuffling of the provision numbers, there were no significant changes to the statute book by this latest amendment of immigration law. This chapter will refer to the new

18 See, for example the facts of BGH, 1997 *JZ*, p. 153.

19 According to § 3 (1) AufenthG (§ 4 (1) AuslG-old).

20 *"Einschleusen von Ausländern"*, §§ 96, 97 AufenthG.

21 *"Verleitung zur missbräuchlichen Asylantragstellung",* §§ 84, 84a Asylum Procedure Act (Asylverfahrensgesetz, AsylVfG).

22 See Stoppa, in: Huber, *Handbuch des Ausländerrechts*, Vorb § 92 AuslG 100 B, paras 6, p. 10-14.

23 Deutscher Bundestag, *Drucksache* (*BT Drs.*) 9/847, p. 11; 11/6321, p. 85; 12/5683, p. 8; 12/6853, p. 31 ff. Hofmann, p. 204 ff., 222 ff. for the context of trafficking.

24 "*Verbrechensbekämpfungsgesetz*", Statute of 28 October 1994, *Bundesgesetzblatt* (*BGBl.*) 1994 I, p. 3186. A further amendment was due to the Foreigners' and Asylum Procedure (Amendment) Act 1997, Statute of 29 October 1997, *BGBl.* 1997 I, p. 2584.

25 *BT-Drs.* 12/5683 of 18 June 1993, p. 11; Stoppa, in: Huber, *Vorb § 92 AuslG 100 B,* paras 6, 13.

26 *BGBl.* 2004 I, p. 1950 ff.

numbering of the re-named *Aufenthaltsgesetz*, which replaced the *Ausländergesetz* from 1 January 2005.[27]

1.3 Trafficking

Trafficking[28] is a separate offence under the German Criminal Code (*StGB*). This offence has a potential trans-border context, but does not necessarily require one, as it is not only aimed at protecting foreign nationals, but applicable to German victims as well.[29] The number of recorded investigations of trafficking cases reached a peak in 1995.[30] The offences relating to trafficking were extensively amended by statute in 1992 in reaction to the increased publicity of cases of trafficked women and children, and resultant pressure from public opinion.[31] The reform gave the provisions broader scope and increased the penalty levels. The legislator intended that the law should better reflect the vulnerability of the (foreign) victims to exploitation due to unfamiliarity with the country, language and legal system, as well as the organised nature of the offences.[32] The aim was to protect German and foreign women and girls alike from the dangers to their personal liberty flowing from prostitution.[33]

1.4 Recognition of Victims

Besides the enhanced criminalization of trafficking and smuggling, another trend is emerging: the recognition of trafficked or smuggled women and girls

27 This article will refer to the section/paragraph numbers of the law in force. §§ 92a and 92b of the (old) Foreigners' Act (Ausländergesetz, AuslG) relate to §§ 96 and 97 AufenthG (new).

28 *"Menschenhandel"*, §§ 180b, 181 StGB.

29 Hofmann, p. 90.

30 Federal Criminal Office (*Bundeskriminalamt (BKA)*, a federal police office), *Lagebild Menschenhandel 2002*, p. 3 <http://www.bka.de/lageberichte/mh/2002/mh2002.pdf>; LKA NRW, Lagebild Menschenhandel Nordrhein-Westfalen 2002, p. 27.

31 Hofmann, p. 349 ff.; Schroeder, 1995 *JZ,* p. 231 ff.

32 BT Drs. 638/91 p. 5; Tröndle/Fischer, *Strafgesetzbuch*, 51th ed. 2003, § 180b, para. 2; Hofmann, p. 350, 383, 398 ff., stresses the law-enforcement deficit with regard to organised crime, over deficits in the law itself; Schroeder, 1995 *JZ,* p. 231-233: "symbolic criminal law".

33 Bavarian Supreme Court (*Bayerisches Oberstes Landesgericht (BayObLG)*), 1995 *NJW,* p. 227; BGH, 33 *Sammlung in Strafsachen* (BGHSt), p. 353; BGH, 1983 *Neue Zeitschrift für Strafrecht* (*NStZ*), p. 262; Tröndle/Fischer, § 180b, para. 2; Lenckner, in: Schönke/Schröder, *Strafgesetzbuch*, § 180b, para. 1; Bundesrat, *Drucksache* (*BR-Drs.*) 567/90, p. 7; *BT-Drs.* 12/2046, p. 4 ff.; 12/2589; Schroeder, 1995 *JZ,* p. 231-232.

as victims in the perception of the public.[34] Media coverage of cases like the 35 Tamils who almost froze to death while being smuggled into Germany in 1996 in the back of a lorry seem to have played an instrumental role in this change of perception – at least in public discourse.[35] This trend in the public perception is, however, also counteracted by policy changes and the revelation of abuses of immigration rules: a politically high-profile criminal case at the Regional Court (*Landgericht, LG*) of Cologne[36] revealed the large-scale abuse of an administrative order given by the Ministry of Foreign Affairs in 2000,[37] which was intended to simplify and speed up the Schengen visa application process, and instructed civil servants to decide in favour of visa applications where there was discretion. In combination with a type of "travel insurance", this lead to an alleged practice which rendered the criteria for granting a visum largely devoid of meaning and open to abuse by people smugglers. The formal requirement of a financial guarantee, normally undertaken by the inviting host and meant to insure the financial viability of the stay, was no longer required if a guarantee by a third-party (in effect an insurance policy) was presented. At the same time and partly as a consequence of this, the factual check of the willingness to return was removed. This led not only to a state of near-siege of the German Embassy in Kiev and a soaring number of visa applications, but also to the flourish of faked invitations and the creation of companies set up by smugglers and their accomplices, selling

34 See the parliamentary debate on the amendment of the trafficking provisions, Deutscher Bundestag, *Plenarprotokoll* 15/109 of 7 May 2004, p. 9946 ff.; also the Question of Members of the German Parliament on trafficking of human beings in Germany to the Federal Government, Deutscher Bundestag, *Drucksache* 15/1938 of 5 November 2003, p. 2, and Answer of the Federal Government, *Drucksache* 15/2065 of 21 November 2003.

35 Cf. Sieveking, Staatliche Reaktionen auf Illegalität in Deutschland – europa-, ausländer- und arbeitsrechtliche Aspekte, in: Eichenhofer, *Migration und Illegalität*, 1999, p. 91 ff.

36 The court's judgment was followed by a parliamentary questioning of the Government, in which the government was accused of by-passing immigration law, see Deutscher Bundestag (BT), *Plenarprotokoll 15/99* of 24 March 2004, p. 8833 ff. and a debate in the opposition about instigating an inquiry commission, see Carstens, Andere Instrumente erforderlich, *Frankfurter Allgemeine Zeitung* (*FAZ*), 11 November 2004, p. 3; Union beantragt Visa-Untersuchungsausschuß, *FAZ*, 2 December 2004; Kusicke, Haltestelle "Deutsche Botschaft", *FAZ* 18 March 2005, p. 4; Kusicke, Der Richter sprach von einem "kalten Putsch", *FAZ*, 15 February 2005, p. 3.

37 So-called Volmer-Erlass of 3 March 2000, named after the then Secretary of State, who was a member of the Green Party in the coalition government. Wehner, Sorglos reisen mit Berliner Hilfe, *Frankfurter Allgemeine Sonntagszeitung*, 12 December 2004.

these guarantees like insurance policies.[38] The case caused a major political stir at the highest level, leading to criminal investigations against civil servants in the Foreign Office and triggering the creation of a select committee of the parliament to examine the political responsibilities and legal accountability for alleged breaches of German immigration law and obligations under the Schengen visa regime[39] in December 2004.[40]

The legal system currently does not reflect explicitly this growing recognition of victims. There are no specific legal provisions relating to victims of trafficking and smuggling, especially in the way residence permits are issued. However, existing provisions in the immigration law and rules of witness protection may *be applied* to give limited protection and might entail limited rights of residence. The possibilities for protection available under German law would in principle be the same for victims of trafficking and smuggling, because they derive from general provisions of immigration law and criminal procedure law. These means of protection will be discussed after an outline of the criminal offences of illegal entry/residence, smuggling and trafficking.

2. The Criminal Offence of Smuggling Foreigners

Besides the independent offences of trafficking and smuggling of persons technically so termed, incitement to or assistance with illegal entry or residence by third persons also amount to offences that could be called smuggling in a "non-technical" sense.[41] Hence, third persons inciting or assisting a migrant to illegally

38 In the case decided by the Regional Court (Landgericht (LG)) Köln, the defendant was convicted of having set up 39 companies and of having smuggled 550 persons from the Ukraine into Germany. He was sentenced to five years imprisonment, LG Köln, judgment of 9 February 2004, B. 109-32/02; see also Heinen, Schleuserkriminalität: Justiz kritisiert Auswärtiges Amt, *Die Welt*, 11 February 2004; Oertel, Schleusung ohne staatliche Billigung, *taz*, 14 February 2004, p. 7; *FAZ*, 26 February 2004, p. 4.

39 Also subject to examination by the EU Commission, EU prüft Verstöße gegen Schengen-Abkommen, *FAZ*, 21 February 2005, p. 4.

40 Bundestag setzt Ausschuß zum 'Volmer-Erlaß' ein, *FAZ*, 18 December 2004, p. 1-2; see also: *Wehner,* Sorglos reisen mit Berliner Hilfe, *Frankfurter Allgemeine Sonntagszeitung*, 12 December 2004; Beschuldigungen und Beweisanträge, *FAZ*, 21 January 2005, p. 4; Visa-Untersuchungsausschuß: 'Sex, Crime and Politics', *FAZ*, 20 January 2005, p. 4; Fischer wird vorerst nicht aussagen, *FAZ*, 11 March 2005, p. 2; Carstens, Die Montags-Prozedur, *FAZ*, 15 March 2005, p. 4; Verschleppt, verzögert, verschworen, *FAZ*, 17 March 2005, p. 2.

41 In conjunction with §§ 26, 27 StGB which may be read into all criminal offences. The punishments for incitement and assistance are oriented to the punishment of the immediate perpetrator, but are often lowered. For assistance, the sanction is compulsorily lowered according to the relevant criteria in § 49 StGB.

enter or reside may be held liable under two offences: first, for smuggling as independently codified and secondly as accessories to the offence of the migrant's illegal entry or residence. Therefore, if the aggravating elements of smuggling or trafficking (such as a financial gain, repeated commission of the offence, assisting several foreigners or acting professionally, etc.) are not met, the criminal sanctions for assistance to illegal entry or residence remain as a fallback position. Given that the offence of smuggling is also conditional on actions breaching the immigration rules,[42] a brief consideration of the grounds of the criminal offence of illegal entry or residence is also necessary.

2.1 The Criminal Offence of Illegal Entry or Residence

The Residence Act (AufenthG) proscribes[43] illegal entry and residence[44] in its basic, i.e. least severe form, as punishable by imprisonment of up to one year, or a fine, in addition to the possibility of expulsion.[45] The elements of the offences are:[46] entry or residence without a necessary permit or visa[47] or, where no prior

42 Mentioned in § 95 AufenthG.

43 § 95 AufenthG. Less severe breaches of immigration law are only offences under administrative law (e.g. negligent stay without permit, §§ 98 AufenthG, § 10 EU Free Movement Act (Freizügigkeitsgesetz/EU 2004). These are outside the ambit of this chapter. See Aurnhammer, *Spezielles Ausländerstrafrecht. Die Straftatbestände des Ausländergesetzes und des Asylverfahrensgesetzes. Eine vergleichende Untersuchung*, 1996. p. 91. The obligation on carriers not to transport persons into Germany who lack the necessary passport or visa can be enforced by fines (§ 63 AufenthG).

44 Illegality of residence under German law may occur in relation to a highly sophisticated system of permits. This necessitates the differentiated list of offences in § 95 AufenthG. The consequence of a violation of these provisions is, however, uniform.

45 §§ 53-55 AufenthG.

46 Survey by Westphal/Stoppa, Straftaten bei unerlaubter Einreise und unerlaubtem Aufenthalt von Ausländern, 1999 *NJW*, p. 2137 ff. and Welte, Illegaler Aufenthalt in Deutschland, 2002 *Zeitschrift für Ausländerrecht* (*ZAR*), p. 54 ff.; Steiner, Schleusungskriminalität aus der Sicht des Revisionsgerichts, in: Minthe (ed.), *Illegale Migration und Schleusungskriminalität*, 2002, p. 141, 151 ff.

47 § 96 (1) no. 1 and 3 AufenthG. The offence is considered to be accessory to the administrative decision of granting a permit or visa. The question whether on the substance there is an entitlement for such a permit or visa, therefore, is irrelevant for liability (but may be considered as mitigating the *culpa* and punishment). See Court of Appeal (Oberlandesgericht, OLG) Frankfurt, 1 Ws 106/00, judgment of 18 August 2000, 2001 *NStZ-RR*, p. 57 ff.; also Court of Appeal (Kammergericht (KG) Berlin, 1 Ss 198/01, judgment of 28 September 2001.

permission is necessary, residence or entry without the obligatory possession of a passport.[48]

There is an aggravated offence[49] for repeated illegal entry or residence following a previous expulsion order. This offence is punishable by up to three years imprisonment, or a fine, or even deportation, which entails a prohibition on re-entering and residing.[50] Repeated breach, therefore, is considered to be especially harmful.[51]

It also amounts to an aggravated offence to give or use false information to obtain a permit (such as a visa) for oneself *or another* to enter or reside.[52] Hence, in this case acts of third parties are independently proscribed. The feigning of a regular marriage by both parties is subsumed under the provision of false information, so that marriages of convenience come under the scope of the prohibition.[53] A further example of giving false information is entry under the pretext of a tourist visit, when the intended purpose of the stay is to take up work (for

48 § 96 (1) no. 1 and 3 AufenthG. Further acts come under the broadly defined concept of illegal entry and residence in § 95 AufenthG (breach of a prohibition to take up employment). See OLG Karlsruhe, 1998 *NStZ-RR*, p. 61 ff. for a case where illegality of residence was founded on transgressing the scope of a residence permit because of taking up gainful activity (prostitution in that case); OLG Düsseldorf, 1994 *NJW*, p. 2558 ff. for a distinction of employment and favours rendered to members of the family. Other forms of illegal stay may result from engaging in prohibited political activity (No. 4), active resistance to fingerprinting and photographing (No. 5), or membership in a secret association of foreigners (No. 7), See Von Pollern, Das spezielle Strafrecht für Ausländer, Asylbewerber und EU-Ausländer im Ausländergesetz, Asylverfahrensgesetz und EWG-Aufenthaltsgesetz, 1996 *ZAR*, p. 175, 176 ff.

49 It is a systematic feature of German criminal law to differentiate "normal", aggravated and less severe offences of the same basic offence by adding additional elements to it (A "qualification" or aggravation under German law is a more severe *offence* modelled on a basic form of offence which is expressly provided for in criminal law statutes, e.g. simple theft or theft while carrying a weapon). Aggravation or – its opposite – privileging have to be distinguished from a differentiation of gravity depending upon the level of guilt. When sentencing, aggravating and mitigating "circumstances" will be assessed.

50 § 95 (2) AufenthG.

51 For a typology of illegal residents in Germany, see Lederer, Typologie und Statistik illegaler Zuwanderung nach Deutschland, in: Eichenhofer, *Migration und Illegalität*, 1999, p. 53, 57 ff.

52 § 95 (2) AufenthG.

53 OLG Düsseldorf, 2000 *NJW* 1280; Renner, *Ausländerrecht. Kommentar*, 7th ed. 1999, § 92 AuslG para. 18. Cases discussed by Aurnhammer, p. 67 ff.; Von Pollern, 1996 *ZAR*, p. 175, 177; Dreixler, p. 224 ff.

example, as a prostitute).[54] It should be noted that there is an (albeit limited) exception to the offence for the provision of false or incomplete information in asylum procedures. The Residence Act[55] does not seek to punish asylum seekers who make false statements in order to gain entry into Germany and initiate asylum status proceedings. However, a third person who induces or assists an asylum seeker could be held liable.[56] Whereas the initial bill from the *Bundesrat* (Council of Federal States) provided for a parallel mechanism in asylum and immigration procedures[57] with severe sanctions for the asylum applicant himself or herself, the current provisions[58] of the Asylum Procedure Code (*Asylverfahrensgesetz, AsylVfG*) are more lenient.[59] This exception serves to adhere to the intention of the Asylum Procedure Act and the constitutional importance attributed to the right of asylum in Art. 16a of the Constitution (*Grundgesetz, GG*).[60] From a practical perspective, if the provision of false information by an asylum seeker were proscribed, in order to convict, the judge would have to assess whether the accused *in fact* has a right to asylum because in that case, the sanctioning of illegal entry would be incompatible with this right. The criminal court, however, may not be the ideal forum for this assessment.[61] The prosecution of smugglers was a motivation for making *only* the accessory act of third persons punishable in the asylum context.[62] This is because, if asylum seekers

54 BGH, 2000 *NJW* 1732, para. 19 ff. If providing false information leads to the creation of a document, the offence of indirect forgery ("constructive false certification") of § 271 StGB may be committed as well, BGH, *NJW* 1996, 2170.

55 § 95 (2) No. 2 AufenthG.

56 See § 84 AsylVfG.

57 § 84 Asylum Procedure Act and § 96 AufenthG.

58 §§ 84 – 86 AsylVfG.

59 See Renner, § 84 AsylVfG, para. 3; Aurnhammer, p. 73 ff. with further references.

60 BGH, 1997 *NJW* 333; Hailbronner, *Ausländerrecht. Kommentar*, Heidelberg, up-to date 31st supplement, August 2002, A 1, § 92 AuslG, para. 55.

61 See Recommendation of the Judicial Committee (Rechtsausschuss), *BT Drs*. 9/875, p. 26. This argument does not seem to be valid after the decision of the German Bundesverfassungsgericht (BVerfG), 2 *BvR* 397/02 of 6 March 2003, para. 34 ff., in which it was held that the factual circumstances giving rise to a right of "tolerance" have to be included when determining whether someone has committed the offence of illegal entry under § 95 AufenthG. It is not sufficient to examine whether permission to stay actually has been granted, but it is necessary to determine whether permission *may* be granted. See also Pfaff, Prüfungsumfang der Strafgerichte bei unerlaubtem Aufenthalt, 2003 *ZAR*, p. 148 ff. For previous attempts to construe a justification for reasons of necessity, see Abramenko, Unerlaubter Aufenthalt und rechtfertigender Notstand – Zur Anwendung von § 34 StGB auf ausländerrechtliche Strafvorschriften, 2001 *NStZ*, p. 71 ff.

62 Because of the right to refuse to give self-incriminatory evidence (§ 55 StPO (Criminal Procedure Code, *Strafprozessordnung*), the prosecution of the smugglers would

were potentially liable for the provision of false information, the prosecution of smugglers and traffickers could be impaired due to the right of asylum seekers not to incriminate themselves.[63] It should be noted that assistance without economic motives rendered by friends and relatives was meant to be kept outside the scope of criminal sanctions.[64]

The *attempt* of (illegal) entry without the necessary permit or passport, and illegal re-entry after prior expulsion or deportation were proscribed by statutory amendment in 1997.[65] Thus, a perceived legal loophole was closed, allegedly to allow for punishment of (assisting) third persons as demonstrated by the following case: before 1997 the driver of a car who was discovered attempting to smuggle a person into Germany could not to be punished.[66] The other forms of illegal entry[67] are not punishable if only attempted,[68] but most cases will come under the purview of attempted illegal entry lacking a necessary permit or passport.

In order to meet Germany's obligations under Art. 31 of the 1951 Geneva Convention Relating to the Status of Refugees,[69] the Residence Act[70] provides that punishment for entry or residence without the appropriate permit or visa is waived if the immigrant applies for refugee status without undue delay.[71] Similarly, for reasons of hierarchy of norms, the constitutional right to asylum under Art. 16a (1) GG may be a defence for the breach of the provisions of immigration law.[72] Therefore, refugees and asylum seekers must not be punished for illegal entry on the basis of a (lower-level) statute. The statute has to be

---

have been hampered as the illegal immigrant potentially is the main source of evidence. A second motive was that the criminal sanction for using false information or documents would depend on the non-existence of a right to asylum, something the criminal law procedure should not have to deal with, see Recommendation of the Judicial Committee (Rechtsausschuss), *BT Drs*. 9/875, p. 26; Aurnhammer, p. 41, 34; Von Pollern, 1996 *ZAR*, p. 175, 180.

63 Aurnhammer, p. 73 ff.

64 Aurnhammer, p. 41.

65 § 95 (3) AufenthG.

66 BayObLG, 1996 *NStZ*, p. 287.

67 Listed in § 95 AufenthG, *supra,* text to fn. 46.

68 Hailbronner, A 1, § 92 AuslG, para. 61.

69 Implemented by § 13 (3) AsylVfG.

70 § 95 (5) AufenthG.

71 BGH, 1999 *NStZ*, p. 408, 409 ff.; Amtsgericht (AG, local court) Landsberg, 2 Cs 103 Js 112199/00j, judgment of 21 August 2001, 2002 *Informationsbrief Ausländerrecht* (*InfAuslR*), p. 198 ff. In this case, contact with the authorities after six days was not "without undue delay" (the applicant had waited in vain for the arrival of his children which was promised by the smuggler to occur 2 to 3 days after his own arrival in Germany).

72 Aurnhammer, p. 163 ff.

interpreted and applied restrictively in line with the constitution. However, the scope of this constitutional exception has become limited to rare situations of direct entry from a persecuting state, which means *de facto* by air travel. When an asylum applicant enters Germany by crossing a land-border, the safe-country concepts,[73] introduced by constitutional amendment in 1993 to implement the Dublin Convention, prevent the claim of asylum.[74] The grant of asylum depends, therefore, on a binding decision of the Federal Office for the Recognition of Foreign Refugees that the safe-third-country rules are not applicable to the case. Thus, in practice safe-country concepts prevent many applications of the right protected in Art. 31 of the Refugee Convention.[75]

This is demonstrated by one case of Turkish Kurds who used smugglers in order to reach Germany and then claimed asylum.[76] The asylum seekers were stopped by German border guards while still in Belgium and convicted for attempted illegal entry. In line with several court rulings, the constitutional right to asylum under German law was precluded as a defence because, following the 1993 amendment, the right to asylum is curtailed where transit through a safe third-country has occurred.[77] The Court of Appeal (*Oberlandesgericht*) of Cologne has also ruled out an exclusion of punishment by Art. 31 of the Refugee Convention.[78] The court's argument was that Art. 31 of the Refugee Convention could only justify illegal entry where there were good reasons for entering illegally, such as a threat to life connected to legal entry, for example, if a visa could not be obtained in the state of origin. By using smugglers, the defendants had circumvented the mechanism of Art. 31 of the Refugee Convention, which required contact with the immigration authorities and an application for asylum

73 Art. 16a (2) GG, §§ 26a, 31 (1) 2, 34a (1) AsylVfG, § 60 AufenthG. Held to be constitutional by the German Bundesverfassungsgericht, 94 *BverfGE,* p. 49 ff. and 115 ff. See however, European Court of Human Rights, App. No. 43844/98, *T.I. v. UK*; "Procedures Directive", Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM (2002)326 final, Explanatory Memorandum to Art. 28 on the point of a non-rebuttable presumption of safety.

74 Explicitly Bavarian Administrative Court of Appeal (*Bayerischer Verwaltungsgerichtshof (BayVGH)*), 1998 *Bayerische Verwaltungsblätter* (*BayVBl.*), p. 119 ff., quoting Bundesverwaltungsgericht, 89 *BverwGE*, p. 231, 234; *Westphal/Stoppa*, 1999 NJW 2137, 2138.

75 See OLG Dresden, 1999 *Strafverteidiger* (*StV*), p. 259 ff.

76 OLG Köln, 2004 *NStZ-RR*, p. 24, 25.

77 See also OLG Dresden, 1999 *StV*, p. 259 ff.; Renner, § 13 AsylVfG, Rn. 20. Previously, mere transit was not considered as ending the flight of a refugee, see 78 *BverwGE*, p. 332 and 79 *BverwGE*, p. 347.

78 In this respect BGH, 1999 *StV*, p. 382.

at the border.[79] As an aside, when punishment is waived for the asylum seeker, it is at best uncertain whether Art. 31 of the Refugee Convention will also rule out punishment for the third person assisting with the illegal entry.[80]

2.2 Inchoate Offences of Incitement or Assistance to Illegal Entry or Residence

Third persons may be liable under the general rules of criminal law for inciting or assisting illegal migrants[81] as well as under the smuggling provisions. The inchoate offence of assistance to illegal entry or residence is of most practical relevance to the present context as the specialised separate provisions on smuggling are built on elements of the inchoate offence. Such an identical element is, for example, what amounts to assistance. *Assistance* to illegal entry or residence is interpreted widely and includes any form of enabling, promotion, facilitation, intensification, securing or reinforcement of illegal entry or residence.[82] This wide interpretation opens up a broad number of potential perpetrators from the classical smuggler to the employer of illegal immigrants. The act of assistance need not relate directly to crossing the border as such. Any encouragement, facilitation, or enabling of the entry or residence is sufficient. Recruitment for illegal labour, providing information about travel routes to enter illegally, providing means of transport or accommodation, transferring financial means abroad,[83] arrangement and conclusion of marriages of convenience with illegal foreigners,[84] provision of translation services and even assistance to the transgression of an entry permit's territorial restriction[85] come under the purview of the prohibition.[86] Advising migrants to destroy their passports after entry could

79 OLG Köln, 2004 *NStZ-RR*, p. 24, 25; no criminal offence held by OLG Düsseldorf, 1998 *StV*, p. 139 ff.

80 To the negative: Aurnhammer, p. 159; Westphal/Stoppa, 1999 *NJW* 2137, 2144; however, LG Offenburg, order of 7 July 1994 – Qs 85/94 granted the waiver.

81 § 95 AufenthG in conjunction with §§ 26 or 27 StGB. See, for example, BayObLG, 2002 *NJW* 1663, 1664; KG Berlin, judgment of 4 July 2001, 1Ss 263/00; OLG Frankfurt, 1993, *NStZ* 393; OLG Zweibrücken, 1992 *Monatsschrift des deutschen Rechts* (*MDR*), p. 894; Aurnhammer, p. 152 ff.

82 BGH, 1989 *NJW* 1435 – *Philippine women (recruitment of women to be married in Germany)*. Aurnhammer, p. 75; BayObLG, 2002 *NJW* 1663, 1664.

83 LG Braunschweig, 36 KLs 806 Js 41519/98, judgment of 26 March 2002 (money transfer to Iraq for immigrant who had no permission to enter).

84 BGH, 2004 *NStZ-RR*, p. 233; OLG Düsseldorf, 2000 *NJW* 1280; LG Darmstadt, 1998 *NStZ-RR*, p. 30 ff.; OLG Frankfurt, 1993 *NStZ*, p. 394.

85 BayObLG, 2000 *NStZ-RR*, p. 226 f.

86 Renner, § 92a AuslG, para. 5; Von Pollern, *ZAR* 1996, p. 175.

qualify as criminal incitement or assistance to residence without the required passport.[87]

In relation to the provision of accommodation, a critical distinction is drawn between a mere humanitarian act of "saving" persons from otherwise "inhumane conditions" and situations where providing accommodation encourages or facilitates illegal residence. In one case it was held that selecting "suitable" brothels and driving illegally resident Thai women there to work was covered because these acts provided for the conditions in which the women could pursue prostitution.[88] By contrast, the provision of accommodation or employment to someone who is determined to stay under any circumstance, no matter what (*omnimodo facturus)*, has been ruled not to amount to providing assistance to illegal entry or residence because the act of assistance has no causal effect on the offence of the migrant.[89] This being said, recently the Court of Appeal of Cologne adopted a more restrictive approach, ruling out the intention of the immigrant as a potential defence.[90]

The wide scope of the concept of assistance was referred to in a Federal Court of Justice (*Bundesgerichtshof*, BGH) judgment in 1989. The defendant was accused of recruiting Philippino women, helping them to organise and finance their trip, and arranging marriages with interested German men. The Court held that this was covered by the prohibition although the defendant was not the archetypical smuggler in the context of organised crime. It was held that the facilitation of *taking up illegal employment* was not a necessary motive behind smuggling and thus, not a constitutive element of the offence. This was compatible with the wording of the statute but went beyond the legislators' expressed intention. The Court referred to the over-all intention to combat smuggling because of its seriousness in selfishly and gainfully exploiting the lack of knowledge and economic need or distress of foreigners who, for these reasons may easily fall victim of the smuggler.[91] This reasoning is interesting in that it reveals

87 § 95 (1) no. 2, 3 AufenthG.

88 BGH, 1990 *NJW* 2207, 2208. See also OVG Lüneburg, 1997 *Neue Zeitschrift für Verwaltungsrecht* (*NVwZ*), p. 622 ff. – smuggling by letting rooms with the purpose of enabling prostitution.

89 BGH 1990 *NJW* 2207, 2208; OLG Düsseldorf, 2002 *StV*, p. 312 ff.; BayObLG, 2002 *NJW* 1663, 1664; 2000 *StV*, p. 366 ff.; KG Berlin, 1 Ss 263/00 (195/00), order of 4 July 2001: the provision of one night's accommodation held not enough to facilitate, intensify or secure the determination of an illegal immigrant.

90 OLG Köln, 2003 *NStZ-RR*, p. 184, 185. See also criticism of the previous jurisprudence by König, Kann einem omnimodo facturus Beihilfe geleistet werden?, 2002 *NJW* 1623, 1624 f.

91 BGH, 1989 *NJW* 1435, referring to *BT Drs*. 9/800, p. 11 and 9/847 p. 12; see also examples mentioned by Walter, Schlepper, Schleuser, Menschenhändler. Der grenzpolizeilichen Alltag an den deutschen Ostgrenzen, 1998 *Kriminalistik*, p. 471, 474 ff.

the individual protective thrust inherent in the law against smuggling.[92] Assistance by providing so-called "church asylum" may fall into the scope of the prohibition.[93] The mere omission to intervene where illegal immigrants are known to be present (for example, prostitutes in a bar), however, does not amount to assistance. Publicans are not entrusted with and should not be required to exercise the public function of controlling the residence status of foreigners who frequent their establishment.[94]

It is not necessary that the migrant is actually punishable in order for third parties to be liable for an inchoate offence. For example, he or she may not be criminally responsible – as a child or because of mental insufficiencies. However, liability of the third person requires at least an intentional and illegal act of the migrant; in other words: an unlawful act not justified by a defence.[95]

2.3 The Criminal Offence of Smuggling Foreigners

In addition to the basic inchoate offence of assisting illegal entry or residence outlined above, §§ 96, 97 AufenthG single out more severe forms of providing assistance for illegal entry or residence, both by adding additional elements to the offence and by "upgrading" the offence to the special, independent, aggravated offence of "smuggling" in its own right.[96] These aggravated offences allow for more differentiated and more severe punishment than does the basic offence of providing assistance for illegal entry.[97] By way of example, an accessory to another's illegal entry or residence can at most be punished in the same way as the principal offender (up to one year imprisonment).[98] By comparison, smuggling is punishable by imprisonment of up to five years. This is accessory to and contingent on any intentional and illegal act of entry or residence[99] committed

92 See also Aurnhammer, p. 75; Geisler, Bekämpfung der Schleuserkriminalität, 2001 *Zeitschrift für Rechtspolitik* (*ZRP*), p. 171 f.

93 Aurnhammer, p. 181 ff.

94 OLG Oldenburg, 2004 *NJW* 1748 f.; see also VGH Mannheim, 1995 *Verwaltungsblätter Baden-Württemberg* (*VBlBW*), p. 404; critical annotation by Zeitler, "Passkontrolle" durch den Bordellwirt?, 1996 *VBlBW*, p. 44 ff.

95 See, e.g. OLG Köln, 2003 *NStZ-RR*, p. 184.

96 E.g. BGH, 2004 *NStZ*, p. 45; OLG Köln, 2003 *NStZ-RR*, p. 184; *Renner,* § 92a AuslG, para. 4. Description of the mechanisms of smuggling, for example, Hofmann, p. 234 ff.

97 Geisler, 2001 *ZRP*, p. 171, 172.

98 With a mandatory reduction of the punishment for "mere" assistance according to § 27 (2) StGB. This reduction does not apply to the smuggling offences which are independently codified forms of assistance to illegal entry, BGH, 2004 *NStZ*, p. 45.

99 Under § 95 AufenthG.

by the illegal immigrant himself. However, as previously indicated, it is not necessary that the smuggled person is in fact subject to punishment.[100]

The aggravating elements "upgrading" the assistance to the independent offence of smuggling are:

– pecuniary advantage received by the smuggler;
– repeat offending;[101]
– acting for several foreigners;
– smuggling professionally; or
– gang-based repeat smuggling.

Pecuniary advantage is interpreted widely. The money need not be received from the smuggled person but can come from a third party, such as the potential husband of a smuggled woman.[102] Thus, the Federal Court of Justice has included payment received for the brokering of marriages with German men. The organisation of illegal entry and the later marriage brokering was considered to be one inseparable economic unit, as smuggling was seen as a means to achieve a financial benefit (through marriage brokering).[103] Even the reimbursement of travel and other expenses incurred by the defendant was considered a financial benefit, as the defendant had borne the risk of non-recovery.[104]

The aggravated offence of smuggling *several* foreigners was the result of an amendment in 1997.[105] It has now been ruled that "several" means at least two smuggled persons.[106] The previous wording referred to more than five foreigners. It was originally formulated against the backdrop that that the smuggling provisions should not catch-up assistance to illegal entry coming from the milieu of family and friends or offered for reasons of humanity. The change will shift

100 *Geisler,* 2001 *ZRP*, p. 171, 172 for the case of smuggling of an infant under the age of criminal responsibility. However, Geisler sees a *lacuna* of the law in the wording of § 92a AuslG (now § 96 AufenthG). BayObLG, 2003 *NStZ-RR*, p. 275 ff. convicted a smuggler of an infant who was not criminally responsible but capable to act; BayObLG, 2000 *StV*, p. 366 (formula only) held to the contrary that smuggling could not be committed where the smuggled person was not committing a criminal offence. See also Westphal/Stoppa, 1999 *NJW* 2137, 2143.

101 Repeated smuggling is already assumed where the first case is a mere assistance under § 95 (1) no. 1, 2 AufenthG (§§ 92 (1) No. 1, 2 or 6 AuslG). It is not necessary that the smuggler had already acted with gainful intent or other aggravating elements required by § 96 (1) AufenthG, BGH, 1999 *NJW* 2829.

102 BGH, 1989 *NJW* 1435, 1436; BayObLG, 1989 *NJW* 1437 (formula of the judgment reprinted only).

103 BGH, 1989 *NJW* 1989, 1435, 1436; 34 *BGHSt*, p. 299, 303 = 1987 NJW 1987.

104 BGH, 1989 *NJW* 1435, 1436.

105 Statute of 29 October 1997, *BGBl*. I, p. 2584.

106 BGH, 2004 *NStZ*, p. 45.

cases that were previously punishable only as assistance to illegal entry or residence into the ambit of the more serious provisions on smuggling.[107]

A further aggravation[108] provides for a compulsory prison sentence of a minimum of six months (maximum ten years) if smuggling is committed *individually as a profession* (in other words, repeated acts generating a more than transitory source of income)[109] *or* as a member of a *gang* intending to commit the offence *repeatedly*.[110] In both cases mere attempt is punishable. Both of these aggravations place the offence in the context of organised crime. The aggravated offences may also result in "economic" sanctions[111] provided by the Criminal Code to recoup gains made from offences in a context of organised crime. These include "extended confiscation" of assets or profits which are presumed to have been obtained from the offence[112] (without having to prove this link).

Finally, the combination of receiving or being promised a pecuniary advantage, or repeated or multi-person smuggling with the professional activity of gang offences is classified as a "*crime*"[113] (rather than an offence).[114] This is the most severe case, punishable by a minimum of one-year imprisonment (maximum ten years). The special economic sanctions mentioned above are applicable in addition to imprisonment. As a "crime", even the mere agreement to commit offences becomes punishable.[115] Classifying some forms of smuggling as "crimes" has far-reaching effects on the exercise of German jurisdiction. German criminal law is generally only applicable to acts committed in Germany, except for cases where jurisdiction is specifically provided on other grounds, like the protective or universality principles.[116] Smuggling – other than trafficking of persons – does not fall into the latter category of jurisdiction. Accordingly, there is generally no German criminal jurisdiction where untruthful statements are made to a German Embassy abroad and there is no later territorial link for

107 Also critical comment by Stoppa, in: Huber, § 92a AuslG 100 B, para. 6.

108 § 96 (2) AufenthG.

109 BGH 1998 *NStZ*, p. 305.

110 The predecessor of this provision was inserted in the context of the Asylum Amendment Act in 1992, implicitly punishing actions that are perceived to be especially exploitative, cf. Aurnhammer, p. 24.

111 The regular sanction of the German Criminal Code is either a fine or imprisonment. For certain categories of offences, additional sanctions apply, such as revocation of driver's license (§ 44 StGB) or or extended forfeit/confiscation (§ 73d StGB).

112 § 73 d StGB.

113 § 97 AufenthG.

114 German criminal law is built on the distinction between offences and crimes (§ 12 (1) StGB), the latter entailing a minimum of one year imprisonment and automatic liability for attempt (§ 23 (1) StGB).

115 § 30 (2) StGB.

116 §§ 3, 5-7 StGB.

that person.[117] However, when at least parts of the actions (of gang members) amounting to an offence are committed within Germany, the whole activity is brought into the ambit of German criminal law.[118] By criminalizing mere preparatory acts, like the agreement and association to smuggle,[119] these are caught by German criminal law, even if entirely committed abroad.[120] Thus by classifying serious organised forms of smuggling as "crime", they come under German jurisdiction at a much earlier stage in the smuggling process. This expansion of German criminal jurisdiction to the activities of smuggler gangs who are mainly active abroad does not seem to have been deliberated by the drafters of the bill.[121]

Not only smuggling into Germany is covered by the statute, but also cases where Germany is a *transit* country, for example for Kurds waiting to be eventually smuggled into Denmark or Sweden.[122] The decisive factor is the temporary illegal entry or residence in Germany, as opposed to breach of the immigration laws of a third country.[123] It should be noted that the breach of immigration laws of third states is only criminalized with regard to the area covered by the Schengen agreement.[124] The Federal Court of Justice has invoked the parliament's rationale such that the aim to combat the "dreadful [act of] smuggling" is independent of whether smuggling occurs into or through Germany. This is said to be motivated by two factors. First, smuggling is perceived as the driving force for illegal entry; and second, acknowledging the victim status of the smuggled person, smuggling is perceived as a highly reprehensible offence due to its exploitative nature.[125]

---

117 BayObLG, 2000 *NStZ-RR*, p. 433, 345; OLG Köln, 2000 *NStZ*, p. 39, 40.

118 § 9 StGB. For example, when the offence is committed by several persons jointly in a way that each person's individual action is attributable to the others, § 25 (2) StGB.

119 Punishable under § 30 (2) StGB.

120 39 BGHSt 88, 89; Lorenz, Die "Schreibtisch-Schleusung" – eine Einführung in das Ausländerstrafrecht, 2002 *NStZ*, p. 640, 643.

121 *BT Drs*. 12/5683, p. 8 (explanatory memorandum to the bill of the Bundesrat).

122 45 *BGHSt*, p. 103-108 (= 1999 *NJW* 2827 ff.); BGH, 2002 *NStZ-RR*, p. 23; also OLG Zweibrücken, 1 Ss 22/95, judgment of 25 March 1995; LG Flensburg, 2000 *NStZ-RR*, p. 124. In this case the state of destination was not a Schengen state and illegal entry into Germany could not be proven, so § 92a (4) AuslG (now § 96 (4) AufenthG) did not apply, BGH, 2002 *NStZ-RR*, p. 23.

123 Cf. BGH, 2002 *NStZ-RR*, p. 23, where the Federal Court of Justice held that where it could not be established that there was assistance to illegal stay in Germany, the "smuggling" out of Germany and into another country did not amount to an offence. Contradictorily, the ending of the judgment was considered to be a contribution to restore the law by ending an illegal residence (para. 3)!

124 See *infra,* text to fn. 126. BGH, 2001 *NStZ*, p. 157 ff.; 2002 *NJW* 3642 ff.

125 45 *BGHSt*, p. 103 ff., para. 8.

§ 96 (4) AufenthG implements obligations under the Schengen Agreement, extending the jurisdiction of Germany for the offence of smuggling *into other Member States of the Schengen area*, provided that these States maintain equivalent criminal sanctions for illegal entry and residence.[126] That means that smuggling into the territory of other Schengen States can be punished in Germany – a special case of extraterritorial jurisdiction. The Federal Court of Justice has held that this applies even when the smuggled person is lawfully staying in Germany, hence smuggling someone out of the country alone can be a criminal offence.[127]

It has already been mentioned that the provision of false or incomplete information in order to obtain residence status for *another* is punishable under the provisions criminalizing illegal entry.[128] Combined with the extra elements of smuggling like financial gain, this too will fulfil the more severe offence of smuggling.[129] The Asylum Procedure Act which exempts asylum seekers from criminal responsibility contains a parallel offence of inducing, encouraging or supporting a foreigner to make false or incomplete statements[130] in an asylum procedure (which is systematically not called "smuggling" but *enticing to lodge an abusive asylum application)*. Thus, §§ 84 (2), 84a AsylVfG mirror the pattern of the smuggling provisions and include similar aggravated offences (financial gain, repeatedly, for several foreigners, professionalism, gang for repeated commission, etc.).

2.4 The Dual Role of the Foreigner or Asylum Seeker as a Victim of the Smuggler: No Punishment for Inciting or Assisting the Smuggler

Unlike trafficking, smuggling is not normally committed against the will of the smuggled person[131] and therefore resembles a "crime without a victim": the border between victim and criminal is blurred.[132] It has therefore been debated whether a foreigner or asylum seeker could be convicted of incitement or assistance of the smuggler's offence where he or she is doing more than being the object of the smuggler (more than so-called "necessary participation"). A smuggled person may not only "suffer" smuggling and follow unsolicited advice given

126 Hailbronner, A 1, § 92a AuslG, para. 24 ff.

127 BGH, 2001 *NStZ*, p. 157 ff. For the temporal scope see BGH, 2002 *NJW* 3642 ff.

128 Under § 95 (2) AufenthG.

129 §§ 96, 97 AufenthG.

130 Marriages of convenience would be subsumed under this variant.

131 See also Dreixler, p. 256 ff.

132 See Schur, *Crimes Without Victims. Deviant Behaviour and Public Policy*, 1965, p. 169 ff.; Albrecht, Eine kriminologische Einführung zu Menschenschmuggel und Schleuserkriminalität, in: Minthe (ed.), *Illegale Migration und Schleusungskriminalität*, 2002, p. 29, 48 ff.

by the smuggler, but may actively seek out the smuggler, ask to be smuggled across the border, pay him or her and inquire into what kind of false information he or she would have to provide immigration authorities or in an asylum procedure, etc.[133] In a technical sense, this would amount to incitement to smuggling.[134]

A restrictive interpretation that would prevent such liability for smuggled persons is more easily justifiable with respect to asylum seekers (under the Asylum Procedure Act). As discussed above, asylum seekers may not be punished for providing false information. The policy behind this law, and the rationale of Art. 31 of the Refugee Convention would both be circumvented if asylum seekers could be punished for incitement of the smuggler. Furthermore, as mentioned earlier, potential punishment of asylum seekers for inchoate offences would endanger the prosecution of the smuggler because of the right of the asylum seeker not to incriminate him- or herself.[135] With regard to foreigners, an argument also can be made in favour of a restrictive interpretation: the punishment of foreigners for illegal entry or residence is less severe than the offences of the smuggler (up to one year for the former whereas the smuggler faces up to five years imprisonment[136]). Incitement to smuggling is punishable in the same way as smuggling itself (assistance is subject to a diminished punishment); if foreigners were punishable for inciting the smuggler, this would amount to a greater offence than their actual illegal entry or residence.

The underlying rationale of greater leniency towards asylum seekers and foreigners respects the fact that the actions of smugglers are more reprehensible, and sees the migrant also as a victim of the smuggler. However, as the individual protection of the victim is not the only purpose of criminalizing smuggling, this argument alone is not sufficient to plausibly justify the exception that common sense seems to demand. Criminalization is motivated by the strong public interest considerations in seeing the procedural rules of immigration law enforced[137] and in preventing illegal immigration. The overall context of combating organized crime reveals this even more flagrantly. However, it is possible to justify the restrictive application of the provisions on incitement and assistance out of consideration for proportionality, which all criminal law has to observe

133 Aurnhammer, p. 160; Hailbronner, A 1, § 92a AuslG, para. 33.

134 § 96 (1) AufenthG or § 84 AsylVfG, in connection with §§ 26, 27 StGB; Aurnhammer, p. 160; *Roxin,* Leipziger Kommentar, 11 ed., Vor § 26 StGB, para. 35 assumes that the courts would come to the conclusion that the act is punishable; in the affirmative Hailbronner, A 1, § 92a AuslG, para. 33.

135 In the same vein Aurnhammer, p. 161.

136 Under §§ 96, 97 AufenthG.

137 Von Pollern, 1996 *ZAR*, p. 175; Geisler, 2001 *ZRP*, p. 171, 175; Lorenz, 2002 *NStZ*, p. 640, 641; Hailbronner, A 1, § 92a AuslG, para. 33.

(ultima ratio).[138] People smuggling is criminalized because of the threat to the public interest resulting from organised smuggling; peripheral punishment of the smuggled person seems beside the point.[139] This restrictive application can also be founded upon the principle of equality: if punishment of the smuggled person depended upon whether the smuggler approached the smuggled person first or vice versa, this could lead to arbitrary results.[140]

3. The Criminal Offence of Trafficking

3.1 Terminology: Trafficking of Human Beings as Trafficking for Sexual Exploitation

Although the German legal system has been combating exploitative structures generally (most notably through labour regulation) under separate provisions of criminal law (for example: Robbing of Persons,[141] Stealing of Minors and Children,[142] Trafficking of Children,[143] Children Trafficking for Adoption,[144] Organ

138 90 *BVerfGE*, p. 145, 146, 173.

139 Aurnhammer, p. 162; Gropp, Deliktstypen mit Sonderbeteiligung. Untersuchungen zur Lehre der "nnotwendigen Teilnahme", 1992, p. 207 ff., 222 ff., 235, 238, 300.

140 Convincingly: Aurnhammer, p. 162.

141 § 234 StGB. Seizure of a person by certain means (force, threat of appreciable harm or trickery), so that he is not free in his decisions; the intention of the perpetrator must be to abandon the victim in a helpless situation, place him in slavery or bondage or introduce him to service in a military or paramilitary institution abroad. Slavery or bondage refers to a situation where these institutions are still recognised in a legal order, 39 *BGHSt*, p. 214; Tröndle/Fischer, § 234, para. 2.

142 § 235 StGB. Removal or withholding children or minors from their parents or legal guardians, Tröndle/Fischer, § 235, para. 10.

143 § 236 StGB. To leave children under 14 years of age to a third person with the intent to enrich oneself or another in circumstances where the obligations of a parent or guardian to ensure the well-being of the child are neglected. Further, the provision of placement services for the adoption of minors or to the aim to take in a minor is criminal (up to five years or a fine), where there is an economic motive.

144 Adoption Placement Act (Adoptionsvermittlungsgesetz), supplementary to § 236 StGB above. A number of prohibitions result in both administrative and criminal sanctions. For example, placement services can only be rendered by authorised state institutions (children's welfare authorities (*Jugendamt, Landesjugendamt*) via adoption offices or churches and welfare organisations), with the exception of relatives or where there is an individual case with no economic motive; administrative fines are also given for arranging "baby lifts" for later adoption outside the scope of the German law, while there is a criminal sanction for finding surrogate mothers. Acts on the demand side are not criminalized. Schur, p. 174; Dreixler, p. 50, 66, 278 ff.

Trafficking,[145] Illegal Employment – "Trafficking" of Illegal Workers[146]), the primary offence of trafficking in human beings up to February 2005 remained in the context of sexual offences. The recent amendment of the Criminal Code brought the Code in line with the meaning which trafficking of human beings has acquired under the Palermo Protocol.[147]

Trafficking women is not a particular offence under German law, only trafficking human beings,[148] which was included under the highly complex[149] provisions of §§ 180b, 181[150] (previous version, now § 232) StGB in its section on offences against sexual self-determination, grouped in the vicinity of sexual exploitation of children and minors, rape, prostitution, pimping and the dissemination of pornographic materials. The amendment in § 232 StGB in February 2005 gives trafficking a broader context by systematically placing it into the section on offences against personal liberty. This move can be welcomed from a systematic point of view. From a practical perspective it may be assumed that the impact with regard to offences outside the context of sexual exploitation will be not very far-reaching, as by substance these offences already existed, albeit

145 Transplantation Act. Prohibits the gainful trade in organs. This Act protects the donor and the recipient from inducing someone or being induced to give organs. It also prohibits the removal and transferral of organs when the prohibition of trade would apply. The prohibition applies to donors, doctors who know about the trade, traders and recipients alike. The court has the discretion to reduce or waive punishment in case of the donor and the recipient. Dreixler, p. 95.

146 § 233 StGB (previously § 406, 407 SGB III, before that *Arbeitsförderungsgesetz*). In extreme situations, the combination of illegal employment and exploitative working conditions may be termed trafficking of workers. A situation of dependency on the employer coupled with an illegal residency is similar to and closely linked to that of trafficked or smuggled persons. The illegality can be twofold, the stay of a foreigner may not entitle her to take up employment, or the stay itself may be illegal. According to § 227a AFG, employers who exploit foreign employees who have not been granted work permits, are punishable if there is a "striking disparity" between the working conditions of the illegally employed persons and German employees exercising a similar activity. Dreixler, p. 132 ff., 254. Illegal "lending" of foreign workers without necessary authorization is an offence which is in principle regulated in the same way as the illegal employment in order to ensure social protection of the employee against his employer. The particularly sensitive lending of workers in the construction business has been banned completely.; Kawelovski, Kriminelle Bausanierungen. Eine besonders brutale Art des Wirtschaftsgebarens, 2001 *Kriminalistik*, p. 663, describes some practices in this context.

147 *Supra* note 7.

148 See also Schroeder, 1995 *JZ*, p. 231, 236 who refers to abduction to be placed in brothels abroad as the "archetypical" case of trafficking in women.

149 This has widely been criticized, Schroeder, 1995 *JZ*, p. 231; Hofmann, p. 381.

150 "*Menschenhandel*".

in a dispersed manner. Trafficking into sexual exploitation may well remain the most relevant of the trafficking provisions in practical terms, especially, since the amendment deals with some remaining problems and loopholes. Therefore, the following will largely deal with § 232 StGB. Although trafficking in human beings is formulated as gender-neutral ("whoever influences another person…"), the context of sexual offences and prostitution suggests that the victims will still mostly be women and more precisely, foreign women,[151] although men are not excluded from the scope of protection.

3.2 Elements of Trafficking

3.2.1 Background

The aim of the offences of trafficking is to protect the sexual and more general self-determination of persons who are *especially vulnerable*, either because of their young age[152] or because of a special situation of vulnerability.[153] The gravity of the offence is reflected in the scope of jurisdiction asserted by the German Criminal Code. Trafficking is enumerated among the offences, which are prosecuted under the universality principle, regardless of their place of commission or the nationality of the perpetrator.[154] The offence is a so-called "control offence", which means that it is normally brought to light by controls or informants in the milieu of prostitution and only rarely by reports made to the police.[155]

3.2.2 Vulnerability for Exploitation

The basic offence of trafficking[156] addresses two situations that make the victims more susceptible to potential trafficking: one is a situation of predicament; the other is vulnerability resulting from being in a foreign country. A *situation of predicament* can be assumed even when the victim's perception of her situation is erroneous.[157] It is irrelevant whether the victim has contributed to this situation,[158] be it economic need, or personal emergency situations like, lack

151 In 2002, 21 out of 203 trafficked women in the Land of Northrhine-Westphalia were German nationals, LKA NRW, *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 13.

152 Under 21 years of age, § 232 (1), 2nd sentence.

153 Lenckner/Perron, in: Schönke/Schröder, § 180b, para. 2; Tröndle/Fischer, § 180b, para. 2.

154 § 6 No. 4 StGB.

155 LKA NRW, *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 3, 14.

156 § 180b (1) StGB.

157 Unless it is an over-exaggerated fear of general risk of life, Lenckner/Perron, in: Schönke/ Schröder, § 180b, para. 6.

158 For example by drug addiction or as a consequence of fleeing from supervised living conditions, Tröndle/Fischer, § 180b, para. 5.

of accommodation, illness, unemployment or divorce, all of which lower the victim's resistance to attacks against sexual self-determination.[159] It is debated whether generally bad social or economic conditions in the country of origin are sufficient to amount to a situation of predicament.[160] Even if this is not the case, these situations will generally be covered by vulnerability resulting from being in a foreign country. Fear of expulsion and deportation of persons illegally in Germany is included in this category, as is fear of being shunned or ostracised if returned to the home country.[161]

Vulnerability resulting from being in a foreign country is interpreted narrowly and according to the concrete situation and capabilities of the victim. A situation of helplessness must result from being abroad, but need not already exist at the time when the perpetrator influences the victim in her home country. The potential for such a situation to arise in the new country is sufficient.[162] The victim's helplessness must reduce her resistance to pressures to engage in sexual activity because of the difficulties connected with being in a foreign country.[163] Lack of knowledge of the language can,[164] but need not be a sufficient factor. Dependency on the perpetrator for financial support, accommodation and subsistence will normally qualify, as will a lack of travel documents or passport.[165] However, it has been held that helplessness cannot be assumed when the woman has worked as a prostitute outside Germany or when she has worked outside prostitution within Germany, even though she was in 'dire straits' financially.[166]

3.2.3 Punishable Acts of the Trafficker

The perpetrator must *influence*[167] the victim in a way that incites her to take up a more intensive form of prostitution,[168] or to continue prostitution where

159 42 BGHSt 399; Lenckner/Perron, in: Schönke/Schröder, § 180b, para. 12

160 Tröndle/Fischer, § 180b, para. 5; answering in the positive: Lenckner/Perron, in: Schönke/ Schröder, § 180b, para. 6; BT-Drs. 12/2046, p. 4.

161 Tröndle/Fischer, § 180b, para. 5.

162 BGH, 1997 *JZ*, p. 153, 154 (= 42 *BGHSt*, p. 179 ff.); Tröndle/Fischer, § 180b, para. 11; Hofmann, p. 363; BGH, judgment of 18 October 2001, 3 *StR* 247/01.

163 *BT Drs*. 7/514, p. 10; BGH, 1999 *NJW* 3276; 1999 *NStZ*, p. 349.

164 BGH, 2004 *NStZ-RR*, p. 233.

165 BGH, 1999 *NStZ*, p. 349; Tröndle/Fischer, § 180b, para. 10.

166 BGH, 2004 *NStZ-RR*, p. 233.

167 The new § 232 StGB lowers the threshold with regard to the intensity of the influence of the trafficker (from "bestimmen" in § 180b (old) to "dazu bringen", see *BT Drs*. 15/3045, p. 8.

168 BGH, judgment of 27 May 2004, 3 *StR* 500/02; judgment of 20 June 2002, 3 *StR* 135/01, p. 8 ff.

she – even only potentially – wants to give it up,[169] or to perform sexual acts by which the victim is exploited.[170] The influence must be of certain intensity; mere advice, offers or questions would not be sufficient.[171] However, an indirect influence by creating certain living conditions that make the victim susceptible to the influence may be sufficient.[172] The victim's resistance against influence is not necessary.[173]

The *aim* of the perpetrator must be to cause the victim to *take up or continue prostitution*.[174] The influence need not result in the actual taking up or continuing of prostitution.[175] By including continuing prostitution, the law aims to protect both women who have decided to quit prostitution, and those who are induced to engage in a more intensive form of prostitution.[176] The law also protects those who do not want to engage in prostitution at a given point in time or who do not want to do so anymore.[177] Influencing *to perform sexual acts* that remain below the level of prostitution is now in itself sufficient where these acts are exploitative in nature.[178] This is primarily intended to cover economic exploitation, such as in the production of pornography, peepshows and "marriage trade".[179]

From the case law it appears that these crucial two elements of the offence are difficult to prove.[180] Often it cannot be proven with sufficient probability that the victim did not voluntarily pursue prostitution, especially when the woman

169 BGH, 2004 *NStZ-RR*, p. 233; 45 *BGHSt*, p. 158, 161 ff.

170 § 232 (1) now puts these on an equal par with prostitution, see *BT Drs*. 15/3045, p. 8.

171 BGH, 1999 *NJW* 1044.

172 Tröndle/Fischer, § 180b, para. 6.

173 45 *BGHSt*, p. 158, 163; Tröndle/Fischer, § 180b, para. 17.

174 Tröndle/Fischer, § 180b, para. 7.

175 BGH, 2000 *NStZ*, p. 86 ff.

176 33 *BGHSt*, p. 353; BGH, 1997 *JZ*, p. 153, 155 (= 42 BGHSt 179 ff.); BGH, 3 *StR* 135/01, 20 June 2001; *BT-Drs*. 12/2589, p. 8; Bottke, Zur Einordnung einer fremdbestimmten Intensivierung einer Prostitutionsausübung unter die Tatbestände des StGB, 1997 *Juristische Rundschau* (*JR*) , p. 250 ff.; Dencker, Prostituierte als Opfer von Menschenhandel, 1989 *NStZ*, p. 249 ff.; see also Dreixler, p. 215 ff.

177 Dencker, 1989 *NStZ*, p. 249.

178 See *BT Drs*. 15/3045, p. 8

179 *BT Drs*. 15/4048, p. 12.

180 This is especially problematic where statement stands against statement without any further evidence. It is exacerbated when there are inconsistencies in the witness statements, cf. BGH, judgment of 30 May 2000, 4 *StR* 24/00; *Thoma,* Rechtliche Problemstellungen, in: Koelges/ Thoma/Welter-Kaschub, *Probleme der Strafverfolgung und des Zeuginnenschutzes in Menschenhandelsprozessen*, 2002, p. 18, 24 ff.

was already a prostitute.[181] The same difficulty applies with regard to continuing prostitution, as criminal convictions are largely dependent upon the state of mind of the prostitute. It would have to be proven that the prostitute was planning to abandon or reduce her activities.[182] Nevertheless, these cases may still be caught by laws against pimping, exploitation of prostitutes,[183] or smuggling, which regularly are committed alongside trafficking or trafficking-like situations.[184] Where it cannot be proven that the customer paid for the performance of sexual acts, the definition of prostitution is not satisfied. This is often the case for rape committed by traffickers or their accomplices, which might have been punished only as rape rather than trafficking.[185] In that respect, § 232 StGB is now broader, as it is not limited to sexual acts with third persons (prostitution) but includes sexual acts with the trafficker himself, reflecting the reformulated provision's thrust to protect from exploitation in a more general sense.[186] Also, influencing one to practice *a more intensive form* of prostitution, which in theory is sufficient to bring a greater number of actions under the provisions on trafficking, is difficult to prove. The boundaries between different forms of prostitution are not clear-cut. Does forcing a prostitute to perform sexual intercourse with overweight customers or to perform unprotected sexual intercourse amount to a more intensive form? What if the clients suffer from sexually transmitted diseases?[187]

The basic offence is now independent of the perpetrator acting in pursuit of some *financial gain.* This criterion was explicitly dropped by § 232 StGB, making the basic offence, in principle, stricter.[188] However, the acts to which the victim is

181 BGH, 2004 *NStZ-RR*, p. 233; judgment of 20 June 2002, 3 *StR* 135/01. According to the statistics of trafficking victims in the Land of Northrhine-Westphalia in the year 2002, 22 women out of 203 victims in total already practiced prostitution in their home countries, see LKA NRW, *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 13, 18.

182 BGH, 2004 *NStZ-RR*, p. 233.

183 §§ 181a, 180a StGB.

184 Thoma*,* in: Koelges/Thoma/Welter-Kaschub, p. 18, 21; see Koelges/Welter-Kaschub*,* Auswertung der Prozessunterlagen, in: Koelges/Thoma/Welter-Kaschub, p. 66, 93 ff. for examples of convictions for these "subsidiary" offences.

185 As in BGH, judgment of 20 June 2002, 3 *StR* 135/01.

186 *BT Drs*. 15/3045, p. 8.

187 Discussion in BGH, judgment of 27 May 2004, 3 *StR* 500/03, but left open (tendency to answer in the negative as these acts were not considered to be sufficiently separate forms of prostitution to amount to more intensive forms, except in the case of sexually transmitted diseases).

188 This is also reflected by the fact that the formerly separate aggravating circumstances (e.g. person under the age of 21) under § 180b (2) StGB have been dropped, following the 2005 amendment, as these circumstances now are covered by the

induced are only caught by the provision if they are economically exploitative.[189] A financial benefit in any case was understood widely even under the previous state of the law: Neither did the origin of such gain matter, nor and did it have to result from professional activity.[190] For example, it could be the direct earnings of the prostitute or a commission or brokering fees.

Whereas the perpetrator previously had to act *knowingly* with regard to the facts from which the vulnerability results or with regard to the victim's subjective predisposition,[191] it is now sufficient that he objectively exploits a situation of predicament or vulnerability, thus broadening the scope of the trafficking provision. In this basic form, trafficking is punishable by imprisonment of a minimum of six months (mandatory prison sentence) up to ten years,[192] bringing its minimum sanction in line with pimping.[193] The basic offence on the one hand is still less severe than other offences against personal liberty, for example, robbing persons,[194] or kidnapping or hostage taking entailing an element of extortion, which carries a minimum sentence of five years imprisonment.[195] On the other hand, the abduction of minors, or trafficking children are subject to lesser maximum sanctions.[196]

3.2.4 The Crime of Trafficking of Persons[197]

Especially serious forms of trafficking are classified as "crimes" subjected to a minimum of one year imprisonment (maximum ten years), for example that of children into sexual exploitation, where the victim suffers severe physical abuse

basic offence, with an increased sanction (now mandatory minimum sentence of six months up to 10 years, formerly imprisonment up to five years with no mandatory minimum sentence) under § 232 StGB already. Formerly, only certain aggravated offences listed in § 180b (2) StGB did not require the pursuit of a gainful interest and where subject to a mandatory minimum sentence of six months.

189 *BT Drs*. 15/4048, p. 12.

190 Hofmann, p. 357 ff; Lenckner/Perron, in: Schönke/Schröder, § 180b, para. 10.

191 A direct exploitative intent was not required, Tröndle/Fischer, § 180b, para. 8.

192 This means an increase in the sanction (previously up to five years or fine) which was at least influenced by the requirements of the EU Framework Decision to provide – under certain circumstances – for a maxium sanction of at least eight years imprisonment, see *BT Drs*. 15/4048, p. 12. As a consequence, there was no need anymore to separately codify aggravating circumstances which were previously contained in § 180b (2) StGB (old).

193 Six months imprisonment minimum up to five years, § 181a StGB.

194 § 234 StGB, crime, minimum of one year imprisonment (maximum ten years).

195 §§ 239a, 239b StGB.

196 §§ 235, 236 StGB, respectively. Note that trafficking of children into sexual exploitation is a crime subject to more severe sanctions under § 232 (3) no. 1 StGB.

197 § 232 (3) StGB, formerly § 181 StGB.

or where her life is endangered[198] or where the perpetrators act professionally (gainful activity) and as a gang.[199] It is also a crime where the effort to influence one to commit exploitative sexual acts results from *physical violence, threat or trickery*.[200] Studies have shown that 54.9 % (2001) and 53.5 % (2002) of victims have been deceived about the real purpose of their entry into Germany.[201] A link to the crime of "robbing of persons" (§ 234 StGB) is made by making it a crime when a victim is "seized" (i.e placed under physical control) with physical violence, threat or trickery in order to bring the victim to commit exploitative sexual acts. Abduction[202] could amount to a preparatory act of seizure that is punishable as an attempted crime.[203]

However, a *lacuna* opens up when the perpetrators make money by recruiting women for commission, but are indifferent to their destiny. For example, when agents professionally recruit and provide brothel-keepers with women for the payment of a commission fee, their intent is to get the commission. They may be indifferent as to whether the women work as prostitutes or waitresses. In this circumstance, they lack the intent "to induce or bring" the women *to commit exploitative sexual acts*, which is a required condition of the offence because negligence is not made an offence in this context.[204] Because of this division of labour between traffickers and final exploiters, often only the offences of pimping or exploitation of prostitutes will be fulfilled[205] (or indeed smuggling, as mentioned above).

The special economic sanction of "extended confiscation" is applicable to offences of trafficking when committed by a member of a gang and when the perpetrator acts professionally.[206] The application of this sanction is limited when the realization of claims for damages by the victim may be put in jeopardy.

3.2.5 Promotion of Trafficking in Human Beings

The new § 233a StGB inserted by the 2005 amendment of the Criminal Code further creates an independent offence of what amounts to promotion of and

198 Results from the EU Framework Decision, see *BT Drs*. 15/3045, p. 9.

199 § 232 (3) StGB. See also Dreixler, p. 218 ff.

200 § 232 (4) StGB, § 181 (1) no. 1 & 2 (old).

201 Data according to Federal Criminal Office (*Bundeskriminalamt (BKA)*, *Lagebild Menschenhandel 2001 and 2002*, respectively <http://www.bka.de/lageberichte/mh/2002/mh2002.pdf>.

202 A a change to a location where the victim is at the mercy of the perpetrator, BGH, 1992 *NStZ*, p. 43.

203 §§ 232 (2), 23 (1) StGB.

204 See § 15 StGB. Hofmann, p. 380.

205 §§ 180a, 181a StGB. Hofmann, p. 380 ff.

206 § 233b (2) StGB (formerly, § 181c StGB).

assistance to trafficking (recruitment, transportation, passing on, providing accommodation or taking in of trafficked persons) to close the gaps of the criminal law of mere preparatory acts of trafficking (not even an attempted offence) and attempted assistance.[207] Both were not punishable *per se* under German law before.[208] This provision is technically analogous to §§ 96, 97 AufenthG in the smuggling context. In order to implement the EU Framework Decision, aggravated cases[209] were created, raising the sanction from three month (maximum five years) in the basic offence to the required maximum of ten years.

4. Criminal Victims – Ways of Protection in the Light of the Dual Role of the Migrants

As described above, the liability of smugglers is often accessory to an offence of the victim. This is not the case with traffickers, even though frequently the trafficked person will also be an illegal resident. A discussion of how to protect victims of trafficking and how to alleviate their position with regard to immigration law is not in the same way mirrored with respect to victims of smuggling. The reason for this disparity may be that in contrast to trafficked persons, smuggled persons are not always perceived as victims,[210] especially if they chose to be smuggled, notwithstanding additional circumstances and calamities. The view therefore persists that victims of smuggling voluntarily expose themselves to the risk of exploitation, hence cutting off the line of causation to the smug-

207 Punishability of attempted offence in § 233a (3) StGB.

208 Only under the limited conditions of § 30 StGB (requiring a crime). Under the previous legislation, only the attempt of certain limited aggravated cases was punishable (§181b (2)-old StGB), not the attempt of the basic offence. As this meant punishability of attempted influencing, there were already certain cases with far-reaching punishability extending into the pre-delictual phase. This has been criticized as beyond the legislator's intention, Tröndle/Fischer, § 180b, para. 22.

209 § 233a (2) StGB: victim a child, serious physical abuse/danger of death, violence/threat or professional or gang action.

210 See, for example, the differentiation between victims of trafficking and smuggling (including the added element of having suffered harm) in the Explanatory Memorandum to the proposal of the short-term residence permit directive, COM (2002) 71 final, p. 6 f. (section 2.2.2). "Although the notion of victim of trafficking in human beings does not present any difficulties (…), the concept of 'victim of action to facilitate illegal immigration' has a very specific meaning, in that it does not cover all those who seek assistance in illegal immigration, only those who might be reasonably regarded as victims, who have suffered harm (…). The concept, as mentioned in Article 1, covers persons who have suffered harm, for example having their lives endangered or physical injury." N.B. the adopted Article 1 of the Directive merely focuses on the possible assistance in criminal proceedings, and does not mention the term "victim" anymore.

gler by a more direct ground of attribution to the smuggled person. Smuggling as such does not occur against the smuggled person's but in line with his or her will. However, this does not completely remove smuggled persons from the protection of the law.[211] In most cases lack of knowledge of the risks undertaken in the process of smuggling or some situation of predicament or the superior knowledge of the smuggler will be sufficient to rule out any responsibility of the smuggled person.[212] The protection of the smuggled person is likely to be dependent on considerations of public interest, for example, his or her usefulness in combating the organised smuggling of people.

From the point of view of the trafficked and smuggled person, the need for protection is threefold: First, protection from criminal prosecution for illegal entry or residence; second, protection by residence status, contingent on their importance as a witness or not; third, witness protection if they are assisting in the prosecution of their traffickers and smugglers.

4.1 Protection of Victims from Criminal Prosecution

4.1.1 Protection by Refugee Status

The Residence Act[213] proscribes illegal entry and residence notwithstanding Art. 31 (1) Geneva Refugee Convention. In the same way the higher normative rank of the constitutional right to asylum must be preserved. The severe limitations of these rights by safe third country concepts have already been discussed.[214]

4.1.2 Protection by Discretion not to Prosecute

4.1.2.1 Expulsion in Lieu of Prosecution

There is discretion under the Criminal Procedure Code (*Strafprozessordnung*, *StPO*)[215] not to prosecute if the foreigner breaching immigration rules is to be expelled, deported or extradited. The blameworthiness in these cases is considered negligible. However, this is not the case for repeated breaches or longer illegal

211 In the sense of an unsanctioned act of self-endangerment, as Geisler, 2001 *ZRP*, p. 171, 174 ff. has shown convincingly; see Dreixler, p. 257 ff., criticising an underlying over-individualist conception of injustice. See also the unanimous agreement with the argument of Van Essen, MdB, in the parliamentary debate on the amendment of the trafficking provisions, Deutscher Bundestag, *Plenarprotokoll* 15/109 of 7 May 2004, p. 9949.

212 Geisler, 2001 *ZRP*, p. 171, 175; Dreixler, p. 264 ff.

213 § 95 (5) AufenthG.

214 *Supra,* text to fn. 71 ff.

215 § 154b (3) StPO.

stays.[216] An exemplary study[217] examining the practice of the Office of the Public Prosecutor in Görlitz at the German-Polish border revealed gradually increasing enforcement by the prosecution authorities. It concluded that first-time offenders are normally expelled directly after recording the attempted illegal entry and are not prosecuted.[218] 85 % of the cases belonged to this category. Second-time offenders are usually expelled but prosecuted under the abridged procedure of a penal order,[219] which is generally used for minor criminal offences. Although these orders are not enforceable abroad, and therefore the fines imposed are unlikely to be paid, they may serve as a deterrent to re-entry. After the third illegal entry, the prosecution tends to issue an arrest warrant and to bring charges. These cases normally result in short prison sentences, which are an exception in the criminal sanction system, but are deemed to be in the public interest in these cases.[220] When several instances of illegal entry occur in a short time, the staggered system might not work, as central recording takes some time, and each entry may be treated as a first-time offence.[221] However, with respect to the smugglers, as a rule prison sentences are handed down and enforced (not suspended) even for first time offenders. This is deemed necessary for reasons of general deterrence from committing the offence.[222]

4.1.2.2 Victims of Offences

A further protection from criminal prosecution is not tied to the residence status but to the fact that someone may be a victim of another's offence (for example, smuggling or trafficking). The Criminal Procedure Code used to allow only for discretion not to prosecute migrants who are also victims of somebody else's offence, when the victim has been threatened or blackmailed about potential

---

216 Hailbronner, A 1, § 92 AuslG, para. 21.

217 Aurnhammer, p. 57 f.

218 VG Hamburg, 8 *VG* 3964/99, judgment of 11 January 2001, 2001 *InfAuslR*, p. 218 ff.: breach of § 92 (1) No. 1 and 6 AuslG (now § 95 (1) no. 1, 3 AufenthG) justifies expulsion unless lack of blameworthiness is positively confirmed. When a criminal procedure is not initiated (and hence no finding of lack of blame occurs), there are heightened requirements of proportionality if the expulsion occurs for reasons of public interest (preventative deterrence).

219 *Strafbefehl*, § 407 StPO.

220 § 47 (1) StGB provides that short prison sentences of less than six months are the exception and need to be justified by special circumstances. The underlying rationale is that the harmful effect of being exposed to a prison environment outweighs any corrective effect of short sentences.

221 Aurnhammer, p. 58.

222 Minthe, Illegale Migration und Schleusungskriminalität, in: Minthe (ed.), *Illegale Migration und Schleusungskriminalität*, 2002, p. 17, 23 ff.; Nowotny, Schleusungskriminalität aus staatsanwaltlicher Sicht, in: *ibid*., p. 93, 102.

disclosure of their illegal entry or residence by the smuggler or trafficker.[223] The amending statute of 11 February 2005 now extends this discretion to victims who report being smuggled or trafficked to the prosecutor, thereby disclosing their own offence of illegal entry or residence without the further requirement of threat or blackmail.[224] There is, however, no automatism regarding the granting of a residence permit.

4.2 Protection by Residence Status

Much of the plight of victims of trafficking and smuggling derives from their illegal residence status. To some extent, rather temporary permission to stay may be obtained under existing provisions of immigration or criminal procedure. Generally speaking, this is only the case where strong factors outweigh the interest of the state to end illegal residency. These factors may be based on individual humanitarian grounds or interests of the state that are prioritised over ending illegal residence (such as prosecution of the traffickers and smugglers).

4.2.1 Independent Residence Status of the Spouse: Duration of Marriages Rule
In the context of marriage brokering, there is not only enormous pressure on the women to find a husband within the three month term of their tourist visa,[225] but exploitation and vulnerability of these women persists after marriage.[226] Immigration law requires a minimum of two years marriage to a German partner before independent residence status is acquired.[227] The required duration was only recently (2000) reduced from four years.[228] There is a discretionary exception for circumstances in which this rule would lead to extraordinary hardship. In 2000, these grounds of hardship were expanded to include the fact that an exploitative marriage *would have to be continued* (in order to gain residence rights).[229] Abuse or exploitation by husbands has not been prevented but perhaps has been alleviated to some extent by relaxing the requirements for independent residency.

223 §154c StPO.

224 See the new § 154 c (2) StPO.

225 Dreixler, p. 201.

226 Dreixler, p. 200 ff.

227 § 31 AufenthG.

228 *BGBl*. 2000 I, p. 742.

229 § 31 (2), 2nd sentence AufenthG.

4.2.2 Discretionary Subsidiary Protection Status

4.2.2.1 Protection of the Victims by Delay of Expulsion

The effectiveness of criminal sanctions for people trafficking has been questioned. The "demand" side can hardly be discouraged by the current legal regime and is even promoted by restrictive immigration policies. Two antagonistic explanations may account for this law enforcement deficit: the incentive of very high profits, leading to organised criminal structures,[230] and the difficulties in long and complex investigations – the victims are therefore at the edge of society.[231] Moreover, the single-minded approach of the criminal law is problematic as the victim is caught between Scylla and Charybdis – dependency on the exploiter and potential expulsion by the state.[232] A general administrative guideline (2000) expresses a rule that when a person is subject to trafficking, she should be granted at least four weeks to leave Germany voluntarily. This grace period should enable the victim to seek advice from special institutions and to sort out her personal affairs.[233] The public prosecutor is invited to give an opinion on whether the woman is needed as a witness. Whereas this is already seen as an improvement, the frequency of the actual application of this provision in practice is still doubtful.[234]

4.2.2.2 "Tolerance" Permits[235]

When important personal, humanitarian or public interest reasons counter the deportation of a foreigner, the (weak) residence status[236] of a tolerance permit may be issued to stay the expulsion. The fact that the foreigner is required in a criminal investigation amounts to such a public interest reason only if a permission to enter temporarily from abroad[237] to give evidence in the proceedings is inadequate.[238] If the public prosecutor deems the presence of a witness necessary as a means of evidence against a trafficker or smuggler, the public interest is confirmed and the immigration authorities are required to grant the tolerance

230 Renzikowski, Frauenhandel – Freiheit für die Täter, Abschiebung für die Opfer?, 1999 *ZRP*, p. 53, 54.

231 Hofmann, p. 350, 383, 398 ff. stresses the law-enforcement deficit; Schroeder, 1995 *JZ*, p. 231, 233: "symbolic criminal law".

232 Dreixler, p. 231; Hofmann, p. 399.

233 No. 42.3.2 of the Guidelines (Allgemeine Verwaltungsvorschriften zum Ausländerrecht), Bundesanzeiger, Beilage Nr. 188a of 6 October 2000.

234 BKA, *Lagebild Menschenhandel 2001*, p. 21.

235 "*Duldung*" under § 60a AufenthG.

236 Only a waiver of expulsion.

237 § 11 (2) AufenthG.

238 Masuch, in: Huber, B 100 § 55, para. 75; Renner (1998), § 43, para. 719; § 20, para. 80; Renzikowski, 1999 *ZRP*, p. 53, 55, FN 31 lists the Guidelines issued by the Länder.

permit.[239] The immigration authorities may not replace the evaluation of the value of the witnesses' evidence by their own and may be criminally liable for attempting to obstruct punishment[240] by deporting a foreigner whose presence is deemed necessary by the public prosecutor.[241] Due to the conflicting public interests (repressive criminal prosecution versus preventive enforcement of immigration law), a shift in decision-making authority occurs: public prosecutors and to some extent criminal courts acquire authority to decide who may stay and who must leave. This may imply a prioritisation of criminal law over immigration law.[242] The duration of a tolerance permit is normally limited to one year, being renewable when the public interest persists.[243] As a rule, the public interest ceases with the termination of criminal proceedings against the traffickers. In 2002, 16.3 % of the trafficked persons received permission to stay under a tolerance permit.[244] However, this does not reveal how long the victims stayed, or whether they were expelled later, left Germany voluntarily or received a different residence status. There is a new practice, following an order of the Federal Ministry of Labour and Social Affairs, to issue work permits to victims of trafficking who have been granted a tolerance permit, waiving the normal waiting period of one year, which may serve to alleviate the harsh conditions of the permits.[245]

The Federal Criminal Office[246] stresses the need for a temporary permission to stay to enable police investigations, whose success is contingent on the evidence of the victims.[247] This in turn depends largely upon establishing a relationship of trust with the victims, who are often traumatised. The positive effects of a short-term stay in Germany until the termination of the criminal proceedings against the traffickers are limited and there is often a considerable danger for the women returning to their country of origin, especially if organised criminal networks are in operation.[248] The case of a victim who gives evidence in crimi-

239 Under § 60a (2) AufenthG (§ 55 (3) AuslG-old). The discretion under this norm is said to be reduced to zero, Renzikowski, 1999 *ZRP*, p. 53, 55, 58; Hofmann, p. 401; Thoma, in: Koelges/ Thoma/Welter-Kaschub, p. 18, 26 ff.

240 § 258 StGB.

241 Renzikowski, 1999 *ZRP*, p. 53, 58.

242 *Renzikowski,* 1999 *ZRP*, p. 53, 58. Incidentally, it would make an interesting empirical study to find out how far the prosecution makes use of these special responsibilities.

243 § 60a (3) AufenthG.

244 § 60a (2) AufenthG. Bundeskriminalamt, *Lagebild Menschenhandel 2002*, p. 16.

245 See also Bundesamt für Arbeit, Erlass of 29 May 2001, Az. IIa7-51/45.

246 *Bundeskriminalamt*, BKA, a federal police force.

247 See also LKA NRW, *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 27.

248 BKA, *Lagebild Menschenhandel 2001*, p. 21 ff. The example is quoted of a woman who returned to Germany to give evidence who was seriously threatened and attacked.

nal proceedings against her traffickers, who is then expelled and "welcomed" home by the defendants in the very same proceedings, resulting in abuse and subsequent further trafficking, is not completely uncommon.[249] One possibility in these cases is to rely on humanitarian grounds for continued presence in Germany. The Guidelines to the Foreigners' (now Residence) Act allow for a tolerance permit to be issued where there is a concrete and individual danger following the giving of evidence in a German criminal procedure.[250] Also, the prosecuting authorities on the *Länder* (federal states) and federal levels have entered into cooperation agreements based on recommendations of a Federal Working Group "Trafficking in Women",[251] providing for various forms of protection, assistance and counselling of victim-witnesses, including help with the contact with immigration and social welfare authorities.[252] Problems arise as to the different levels of administration and local responsibilities to finance the stay under these witness arrangements. Local communities are generally responsible for the payment of social assistance, which is granted either as general social benefit or as an asylum applicant support benefit.[253] Apparently, the police encounter difficulties in finding communities who will accept their responsibility for social welfare benefits in these cases, as well as divergent practices in different states. It has been suggested that the costs be detached from the regional decision-making authorities under the Foreigners' (Residence) Act and that a general fund out of which these costs could be covered in full be introduced.[254]

Another possibility to gain permission to stay may be to enter formal witness protection programmes by which a new identity is given to the witness and

249 It may be added that she was prepared to act as witness in new criminal proceedings in spite of the likelihood of being expelled again afterwards, LKA NRW, *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 24, 29.

250 No. 53.6.1 of the Guidelines (Allgemeine Verwaltungsvorschriften zum Ausländerrecht), *Bundesanzeiger*, Beilage Nr. 188a of 6 October 2000.

251 An interdepartmental working group which united representatives of several government departments, the Federal Criminal Office, the respective Länder departments and counselling organisations. It was founded in 1997 and convenes several times a year. See also Alt/Fodor, *Rechtlos? Menschen ohne Papiere*, 2001, p. 101 ff.; see also Koelges, in: Koelges/Thoma/Welter-Kaschub, p. 36.

252 Cf. Answer to a Parliamentary Question "Menschenhandel in Deutschland", *BT-Drs.* 15/2065, p. 4.

253 See § 1 Asylbewerberleistungsgesetz (Asylum Applicants' Benefits Act), *BGBl*. 1997 I, p. 2022, providing that asylum applicants, foreigners under a tolerance permit, foreigners whose deportation has to be stayed for humanitarian reasons, spouses and minor children have a right to benefits, provided they to not have a right to stay longer than six months.

254 BKA, *Lagebild Menschenhandel 2001*, p. 22; 2002, pp. 19 f., 20; Hofmann, p. 402; see already in this respect Heine-Wiedemann, Konstruktion und Management von Menschenhandels-Fällen, 1992 *MschrKrim*, p. 121, 129.

she is moved to an assigned protected place, etc.[255] These measures have to be formally processed by public prosecutors and the courts. Not many women enter these formalised programmes.[256] This may partly be due to the resultant interference with private life and the removal from the social contacts these women may have built up.

4.2.2.3 Independent Residence Status on Humanitarian Grounds[257]

The tolerance permit is the weakest residence status available under German law and is often only used to provide a temporarily waiver of expulsion,[258] but not a fully legalised stay, for the duration of criminal proceedings. This may not be sufficient incentive for victims to come forward to initiate prosecution of their exploiters, as they will at the same time have to reveal their illegal residency and give up longer-term prospects to stay.[259] This decision is often only taken when the women have made up their minds to return to their home country anyway. The criminal law, therefore, remains to a large extent unenforceable due to the lack of complainants, evidence and witnesses.[260] One possible solution would be to grant a residence permit on humanitarian grounds.[261] Another, albeit weak possibility is the mere staying of expulsion.[262] The provision of a residence permit on humanitarian grounds is currently favoured by counselling agencies that attend to the women as a solution to threatened expulsion.[263] However, from a legal perspective it is subject to the criticism that the fact of having become a victim should not *per se* lead to an unlimited and undifferentiated right of residence for reasons of general deterrence of breaches of immigration law.[264] A

255 See Statute of 11 December 2001, *BGBl.* I 2001, p. 3510; Thoma, in: Koelges/Thoma/Welter-Kaschub, p. 18, 29.

256 In the Land of Northrhine-Westphalia, eight women were placed in witness protection programmes in 2002, LKA NRW, *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 25.

257 §§ 23a, 24 (4), 25, 60 AufenthG (the old *Aufenthaltsbefugnis* under § 30 AuslG).

258 The duty to leave the country, in principle, persists.

259 Renzikowski, 1999 *ZRP*, p. 53, 54; Heine-Wiedemann, 1992 *MschrKrim*, p. 121 ff.

260 Schur, p. 171.

261 §§ 23a, 24 (4), 25, 60 AufenthG.

262 § 60 (5) AufenthG (§ 53 (4) AuslG-old).

263 Also Dreixler, p. 234 ff.

264 Pointing to the conflict of interest Renzikowski, 1999 *ZRP*, p. 53, 56, 59; Schmidt-Jortzig, Bekämpfung von Sexualdelikten in Deutschland und auf internationaler Ebene, 1998 *NStZ*, p. 441, 443; Hofmann, p. 414.

tolerance permit[265] is seen as balancing the conflicting interests of prosecuting the trafficker and enforcing immigration law sufficiently.[266]

4.3 Victim and Witness Protection and its Limitations in Criminal Proceedings against Traffickers and Smugglers

4.3.1 Protection

The presence of victims of trafficking and smuggling can be relevant at various stages of the criminal procedure. The fact that a main witness has already been deported could in the extreme lead to a court's refusal to open criminal proceedings in the first place due to lack of sufficient evidence supporting the suspicion of having committed an offence.[267] The value of recorded evidence is considered weaker than evidence given in person. Decisions on the basis of recorded evidence, therefore, risk challenge by the defendant. Besides various ways of protecting witnesses in criminal proceedings, a right of stay during the proceedings may be achieved via the described tolerance permits or through formal witness protection programmes.[268]

4.3.2 Legal (Procedural) and Factual Limitations

4.3.2.1 Opportunity Principle and Non-Prosecution

In principle, criminal prosecution is governed by the principle of legality that mandates the investigation of potential offences when sufficient cause – initial suspicion of an offence – exists.[269] Further, if following the investigation there is sufficient probability of proving the commission of an offence, the public prosecutor is obliged to prosecute the perpetrator by submitting a formal accusation to the court.[270] There are, however, exceptions to this rule, which are especially relevant for offences linked to foreign countries for which it is not considered opportune to prosecute in Germany. In these cases, there is discretion to terminate the investigations without prosecuting.[271] Of particular relevance is the possibility of dropping the charges if the suspect is expelled or deported from Germany.[272] As mentioned, this practice seems to be common for first-time ille-

265 According to § 60a (2) AufenthG (§ 55 (3) AuslG-old).

266 Renzikowski, 1999 ZRP, p. 53, 56 ff.

267 § 203 StPO; Renzikowski, 1999 *ZRP*, p. 53, 55.

268 *Zeugenschutz*.

269 § 152 (2) StPO.

270 § 170 (2) StPO. Roxin, *Strafverfahrensrecht*, 25th ed. 1998, § 14 B II.; Beulke, *Strafprozessrecht*, 2nd ed. 1996, para. 333 ff.

271 §§ 153c, 154b StPO.

272 § 154b (3) StPO.

gal immigration. This can amount to an obstacle in the prosecution of smugglers or traffickers.

4.3.2.2 Practice of Reading out Recorded Witness Statements

In principle, criminal procedure requires the witness to give statements in person.[273] Where the statement of a smuggled or trafficked person is crucial for the conviction of a smuggler or trafficker, the prosecutor's office, the police and the immigration authorities can ensure that the witness stays in Germany until after the procedure with a tolerance permit and witness protection.[274] However, it has been noted that in spite of the importance of their evidence, victims are often not allowed to stay in Germany until the end of the criminal proceedings.[275] In 2002, 16.3 % of trafficked persons[276] received permission to stay under a tolerance permit.[277] As mentioned, this is not indicative of the length of stay or whether they were allowed to stay until the end of the criminal proceedings against the traffickers. When there is a large number of witnesses, the prosecution may adopt a selective approach and only keep some in the country, allowing others to be expelled.

While written transcripts or witness statements can only exceptionally replace a direct statement, resort may be taken to this weaker form of evidence in order to follow through with an expulsion. Witness statements *made in front of and recorded by a judge* in the investigation phase may be read out in the criminal procedure under certain circumstances even *against or without the consent* of the accused and his defence:[278]

- if the witness has died or his whereabouts are not known;
- if there are long or uncertain impediments, like prolonged illness of the witness; or
- if requiring the witness' presence imposes an unreasonable burden on her (for example, when she must travel a distance which is out of proportion to the importance of the statement).

273 Principle of immediacy, § 250 StPO.

274 *Supra,* text to fn. 236 ff.

275 Renzikowski, 1999 *ZRP*, p. 53. For recent data, see BKA, *Lagebild Menschenhandel 2002*, p. 16, available online. Out of a total number of 811 victims of trafficking, 17 % where deported, 27.5 % were expelled, 16.3 % received a tolerance permit, 23.9 % returned voluntarily, and 5.5 % entered a witness protection programme. The whereabouts of 21.1 % was unknown; see also Thoma, in: Koelges/Thoma/Welter-Kaschub, p. 18, 27 ff.

276 §§ 180b, 181 StGB.

277 § 55 AuslG (now § 60a (2) AufenthG); BKA, *Lagebild Menschenhandel 2002*, p. 16.

278 § 251 (1) StPO; Thoma, in: Koelges/Thoma/Welter-Kaschub, p. 18, 27 ff.

This feature of the German Criminal Procedural Code might further the early expulsion of trafficked persons.

Statements not made in front of a judge can only be read out when the witness has died or is unavailable for an indefinite period.[279] This practice is especially problematic in trafficking cases: partly because evidence in person carries greater weight – the victim plays an important role in the criminal proceedings against the trafficker or smuggler and is needed to clarify issues arising in the course of the proceeding; partly because of the decreasing likelihood of witness cooperation and willingness to give evidence once victims have returned home. On the one hand, risking the absence of key witnesses might endanger the punishment of a trafficker and therefore, for the main prosecution witnesses, it is unlikely that travel to the court would be considered too burdensome in relation to the importance of the statement in order to justify the absence. On the other hand, summoning from abroad entails much effort. Victims are often not prepared to appear in court and give evidence, or cannot be found anymore, or have been subject to threats in connection with their giving evidence.[280] The dilemma is obvious: deportation of witnesses may lead to impunity of perpetrators, at least when no other evidence supports the recorded evidence.[281] The case-law regarding appeals on the ground that a conviction was based on inadmissible evidence (absent witnesses, read-out witness statements), however, suggests that criminal courts manage to get around the problem of absent witnesses when they can rely on other evidence, supporting the witness statements that were recorded.[282]

The decision about expelling a witness is taken early in the investigative phase by the public prosecutor. It has been suggested that the court tactically should make greater use of the possibility to refuse requests for taking evidence[283]

279 § 251 (2) StPO.

280 Walter, *Kriminalistik* 1998, p. 471, 476; Hofmann, p. 410 ff.

281 BGH, 2004 *NStZ-RR*, p. 233 dismissed an appeal on points of law. The appeal challenged a conviction on the grounds that absent witnesses, the whereabouts of whom were not known, were not heard. The court held that this did not vilify the conviction as the read-out statements were only used in so far as supported by other evidence. See also BGH, judgment of 2 July 2002, 1 *StR* 135/02; and judgment of 30 July 2002, 1 *StR* 82/02 in which a witness could not be found in Poland and a conviction for rape could not be obtained, especially since the original statement was not recorded and could only be introduced into the proceedings by summoning the original interviewer.

282 BGH, 2004 *NStZ-RR*, p. 233 (*supra* fn. 281); BGH, judgment of 2 July 2002, 1 *StR* 135/02. See, however, in this context the case-law of the Eur. Ct. H.R., *Lüdi v. Switzerland,* judgment of 15 June 1992, Series A, No. 238, p. 21, para. 49; *Birutis and others v. Lithuania,* judgment of 28 March 2002, 2002 ECHR 350 in the context of the rights of defence under Art. 6 (1) ECHR.

283 § 244 (5) 2nd sentence StPO.

when the witness has to be summoned from abroad, to indirectly increase the likelihood of witnesses' staying in Germany in the first place. Incidentally, this may also be an adequate tool to prevent the delay of procedures through abusive requests by defendants for taking evidence of witnesses abroad.[284]

The Witness Protection Act 1998[285] created the further possibility to question a witness at a different location from which the statement would be filmed and transmitted real-time into the court room.

4.3.2.3 Witness Evidence taken by a Commissioned or Requested Judge[286]

In the context of international judicial assistance, it would be possible to take witnesses' evidence abroad. In one recent case, the Federal Court of Justice considered evidence given by Swiss investigation judges who interviewed Paraguayan victims because other evidence supported it, and the court could gain a first-hand impression of the Swiss judges who had taken the witness statements.[287] However, if the witness' evidence is crucial, this will not be sufficient for a conviction.

4.4 Right to Join as a Private Accessory Plaintiff and to Link Related Tort Action

According to the Criminal Procedure Code,[288] victims of trafficking[289] have the right to actively participate in criminal proceedings as private plaintiffs. This was only included in 1998 by the Witness Protection Act.[290] This improves the procedural position of victims: as a consequence, they can apply early for legal assistance[291] and legal aid. The victim can also join a private law action for damages to the criminal proceedings and does not have to initiate a separate civil lawsuit.[292] In practice, this option is not often taken. The criminal courts still can refuse applications if they are not the most appropriate forum or if it delays

284 Hofmann, p. 411.

285 § 247a StPO, Statute of 30 April 1998, *BGBl.* 1998 I, p. 820. Cf. BGH, judgment of 18 May 2000, *StR* 647/99, 46 *BGHSt*, p. 73 = 53 *NJW* 2517 (2000); judgment of 23 March 2000, 1 *StR* 657/99, 2000 *NStZ*, p. 385.

286 § 66b StPO.

287 BGH, 2004 *NStZ-RR*, p. 233.

288 § 395 StPO.

289 §§ 180b, 181 StGB.

290 *BGBl.* 1998 I, p. 820.

291 § 406g StPO.

292 §§ 403 ff. StPO, so-called adhesion procedure.

criminal proceedings.[293] However, the basis for the claim may still be certified with only the exact amount of damages left to decide by the civil courts.[294] In any case, criminal conviction is prejudicial to the finding of a tort in a civil case.

4.5 Victim Compensation

It should be noted that the Federal Ministry of Labour and Social Affairs included victims of trafficking in the scope of the Victims' Compensation Act, via a Guideline of 5 March 2001.[295]

4.6 Protection of Prostitutes

Although prostitution itself is not criminalized under German law, it is still considered to be immoral.[296] This is reflected by the fact that until recently, claims by prostitutes against their clients used to be both void and, consequently, unenforceable.[297] The general legal and social situation of prostitutes is characterised by discrimination (social security law, health insurance), and the surrounding circumstances of prostitution are often criminalized,[298] resulting in a state of semi-illegality and exploitative dependence on brothel owners and pimps.[299] The Prostitution Act of 2001 has improved this situation to some degree. The Act recognises the *enforceability* of claims by prostitutes against their clients as an (unsystematic) exception to the general rule that such claims are invalid for reasons of breach of morality.[300] It is, however, unlikely that the (mostly foreign)

293 A statute (Second Victim Protection Act, *BT-Drs.* 15/814 of 8 April 2003) passed by the Bundesrat on 14 May 2004 is intended to make the compensation of victims in criminal proceedings easier by restricting the possibilities to refuse such applications.

294 See for example BGH, 2004 *NStZ-RR*, p. 233.

295 Statute of 7 January 1985 as amended on 6 December 2000, *BGBl.* 1985 I, p. 1, 2000 I, p. 1676.

296 § 138 BGB; Dreixler, p. 239 f.

297 BGH, 1992 *NJW* 2557; now departing from this in 2002 *NJW* 1885, referring to a change in morality; Armbrüster, Zivilrechtliche Folgen des Gesetzes zur Regelung der Rechtsverhältnisse der Prostituierten, 2002 *NJW* 2763.

298 §§ 180a, 181a StGB; Schroeder, JZ 1995, p. 231, 234 ff.; Cf. Rautenberg, Prostitution: Das Ende der Heuchelei ist gekommen!, 2002 *NJW* 650, 651 ff.

299 See, for example, Kelker, Die Situation von Prostituierten im Strafrecht und ein freiheitliches Rechtsverständnis, 1993 *Kritische Vierteljahresschrift für Rechtswissenschaft* (*KritVJ*) , p. 289 ff.

300 Heinrichs, in: Palandt, § 138, Anh., para. 2; Armbrüster, 2002 *NJW* 2763, 2764, 2765; cf. BGH, 2002 *NJW* 1885; see also Dreixler, p. 238 ff.

victims of trafficking will benefit from this situation, as their illegal residence status still serves as a lever for extortion and exploitation.

5. Conclusions

Contrary to the European, and to some degree the international level, German immigration law does not explicitly lay down one single rule resolving the conflict of breaches of immigration law by victims of smuggling or trafficking specifically. It has been shown that at the intersection of German criminal and immigration law, there is a limited scope for the recognition of victim status. There are no special statutory provisions tailored for this intersection but more general provisions may be applicable. The combined use of criminal law and immigration law is largely governed by discretionary rules; hence the scope of protection of trafficking and smuggling victims (who are also law breakers) may vary in practice. The EU Directive on Short-Term Residence Permits may raise greater factual awareness about the options available under German law[301] – up to a degree where non-consideration of this option could be considered a lack of exercise of discretionary powers and hence a reviewable procedural deficiency.

The victim role in criminal and procedure law may affect the application of immigration rules. However, this is controlled by a balancing act and not by according automatic preference to the victims' interests. Generally, victims are only protected in so far as there is public interest in their stay, for example to prosecute perpetrators who are linked to organised crime, outweighing the public interest in prosecuting immigration offences or ending illegal residence.[302] Victim protection therefore comes under the cloak of witness protection. This protection does not normally lead to a long-term residence permit, and therefore, does not seem to be a sufficient incentive for women to cooperate with the police and public prosecutors.[303] This causes severe problems for the prosecution, as the Federal and Länder Criminal Offices point out, because the evidence of witnesses is invaluable in these cases. The unusual case of a woman who was willing to act as a prime witness a second time after being expelled and then re-trafficked, in spite of the prospect of being expelled again must certainly be regarded as an exception.[304]

A more altruistic form of victim protection based on a more holistic analysis of the public interest in allowing victims of trafficking to escape from the milieu of organised crime does exist, mainly in civil society with some administrative cooperation. A holistic approach which would recognise and restore

301 Directive 2004/81/EC of 29 April 2004, *OJ* 2004 L 261/19. See also Obokata, in this volume.

302 Similar Alt/Fodor, p. 101 ff.

303 LKA NRW, *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 29.

304 LKA NRW, *Lagebild Menschenhandel Nordrhein-Westfalen 2002*, p. 24.

the agency and personhood of the women as an end in itself, and which would reduce victim/perpetrator dependency in the relevant milieu is, however, not currently systematically reflected in the law.[305]

305 For recent legislation in this direction, see the chapters on Italy in this volume.

*Norbert Cyrus and Dita Vogel**

SOCIAL WORKING OF CRIMINAL LAW ON TRAFFICKING AND SMUGGLING IN HUMAN BEINGS IN GERMANY

1. Introduction

German immigration policy is characterised by a tough rhetoric against (unwanted) immigration and less restrictive and more pragmatic dealing with factual immigration (Bade & Bommes 2000). As far as trafficking and smuggling in human being is concerned Germany simultaneously works on the development of civil instruments in order to protect victims of human smugglers and traffickers and the erection of the fortress Europe. Compared to other EU-member states Germany has developed a sophisticated and far-reaching legal and institutional framework to deal with unwanted immigration: Measures such as carrier sanctions, strict safe-third-countries and safe-countries-of-origin rules, or the trafficking victim-witness protection scheme were introduced in Germany already since the early nineties. Germany stands at the forefront of European immigration policy (Weller-Monteiro Ferreira 2004; Brinkmann 2004). Many instruments developed in Germany have become standard elements of European migration policy. This particular role within the European policy arena gives the German case a particular relevance.

Debates on and the activities against human smuggling and trafficking in human beings are framed by particular national historical experiences. This contribution therefore starts with a short historical review on immigration history with a particular reference to illegal migration (2). The following paragraph presents and discusses relevant current statistical data from the field of illegal immigration, human smuggling and trafficking in human beings (3). The public

* Norbert Cyrus is research fellow and Dita Vogel is international coordinator of a European research project on active civic participation of immigrants at the Interdisciplinary Centre for Education and Communication in Migration Processes (IBKM) of the University of Oldenburg

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *113-139.*
 ISBN 90 04 15064 1.

perception of these phenomena is reviewed in the next paragraph and reveals a dominant narrative that over-emphasizes the role of human smugglers and traffickers (4). The following paragraph reviews the implementation of the victim-witness-protection scheme (5). We end with the conclusion that the focus on the plight of trafficking victims in public debates does not result in a consequent and unconditioned protection of victims but serves as legitimization for tighter crime control (6). Most background information and data for this contribution have been gathered in connection with a study on forced labour and trafficking for the International Labour Organisation (ILO) (Cyrus 2004) and a research project on the implementation of migration control (Cyrus & Vogel 2000 and 2002), while the review of public perception has been prepared specifically for this contribution.

2. Historical Review of the Perception of Human Smuggling and Trafficking in Human Beings

In October 2004 the "expert council on immigration and integration" presented an account with cautiously formulated recommendations for a more liberal immigration management (Sachverständigenrat Zuwanderung und Integration 2004). The expert council had been appointed by the Federal Minister of the Interior and includes high ranking actors from politics, labour market interest groups and scientists with diverse political background. Nonetheless, political actors did not accept this council as a means to reach a more liberal consensus. All leading political parties – with the exception of the Green party – rejected the recommendations. This reflects the current situation of German immigration politics. After a short period of progressive concepts in all political parties around the turn of the millenium (Vogel 2003b), politics returned to a strict anti-immigration line after September 11th. A considerable share of the German electorate is worried about security and criminality issues linked to immigration. They think that there is too much immigration in the country and too 'many immigrants who do not use but abuse us'. Political parties successfully apply to anti-immigrant sentiments in order to win elections (Thränhardt 2001; Meier-Braun 2002). In spite of a traditional anti-immigration focus in politics, policies have been more pragmatic. Today, an estimated 30 percent of the population residing in Germany is born abroad or offspring of recent immigrants (after 1945) (Bade & Münz 2002: 11). Thus, debates on illegal migration, trafficking and smuggling in human beings take place in a policy arena that is characterised by high de facto immigration and strong anti-immigration sentiments, spurred by security concerns. All governments, regardless of the belonging to political camps, adhere to the conviction that the prevention of unwanted immigration is necessary in order to protect the order of the German labour markets and as a prerequisite for the integration of the already residing immigrants.

Officially unwanted immigration is obviously a 'response' to a demand for immigration that is not accepted by immigration policy and thus takes on patterns characterised as illegal (Sciortino 2004; Bade & Bommes 2004). This general statement is also true for the German context (Alt 2003; Cyrus 2004). It occurred already in the times of the German empire when Polish seasonal workers became illegal as soon as they paid no due respect to the rigid and discriminating rules governing their legal presence (Bade 2000: 222). During the Weimar Republic labour market regulations stipulated the priority of native workers. As a side effect the labour migration of seasonal workers from Poland proceeded illegally (Kahrs 1993) and was only stopped when the Nazi-regime imposed totalitarian control on spatial mobility (Herbert 1986). After 1945 the issue of illegal immigration did not gain much relevance at first.

The post-war situation in the Federal Republic of Germany until 1961 was dominated by the influx of refugees from the former German territories and from the GDR. As a rule, the Federal Republic of Germany accepted not only citizens from GDR but used to grant permission to stay to citizens of other socialist states which had managed to leave unauthorised. In the country of origin these migrants were perceived to be illegal emigrants while in West-Germany they were perceived to be legitimate refugees from the communist domination. The general precondition that foreign citizens need a permission to enter or a visa was not deployed in their cases. Moreover, the support of such unauthorised border crossing was positively characterised as "support to escape". Even the commercially motivated support of illegal border crossing of GDR-Refugees was accepted. The Federal Supreme Court underlined in a judgement from 20.09.1977 that a refugee from GDR is obliged to pay the agreed fee for the agreed service of human smuggling (Neske, Heckmann et al. 2004: 10). This stance towards human smuggling of refugees from socialist states proceeded until the collapse of the socialist system at the end of the eighties.

The program for the recruitment of temporary employed migrant workers from the Mediterranean basin started already in 1955 and worked until 1973. Bilateral agreements between the sending states and Germany stipulated admission procedures via recruitment offices in the country of origin. Nonetheless, admission was de facto much more liberal. Migrant workers could bypass official procedures. After a tourist or unauthorized entry, they could regularize as workers as soon as they were able to present a company willing to employ them. Unauthorised entry and stay did not gain much attention.

After the declaration of the recruitment stop 1973, German authorities selectively introduced visa requirements vis-à-vis states that turned out to be the origin of unwanted immigration in order to reduce unauthorised entries. Immigrants from non-socialist countries were classified as merely economic refugees who intended to raid the social systems. The role of professional smugglers of human beings became an important issue during mid-eighties. But all in all the

numbers seemed to remain below a critical point, due to the barriers against free movement effectively erected by the system of socialist states (Dowty 1987).

At the end of the eighties the situation dramatically changed. For a short period a situation close to "open borders" became real. As a consequence, the influx of foreign citizens increased tremendously. With the collapse of the socialist system, East European governments no longer restricted their citizens' travel and emigration effectively, but at the same time Western governments had no ideological reason to accept emigrants from these states any more. In the transitory period, it was easy to enter Germany without the help of smugglers or traffickers and to legalize (temporarily) once in the country. Several options where available: Those who could prove German ancestry made use of the "ethnic German" programme and settled with full rights. East Europeans with Jewish background followed this movement as the German state did not enforce expulsion against Jews. Asylum was an option for refugees and immigrants from all over the world, as application numbers increased faster than the administrations' capacities to deal with them, ensuring a legal residence for quite some time independent of the chances of the claim. And additionally, hundreds of thousands of 'tourist-traders' came to German cities for a few days in order to sell imported small items or smuggled cigarettes and alcohol. As a result of the sharp and visible increase of presence of foreigners a 'moral panic' against migration occurred. The dominant opinion of that time is illustrated by two slogans that 'in Russia twenty million people sit on packed suitcases' and intend to come to Germany – but 'the boat is full' (Ronge 1992).

In the following decade the judicial framework concerning immigration changed considerably (see Ziegler in this volume). While border control was intensified, legal immigration and legalisation options were channelled and restricted, namely by stopping the practice to tolerate East European emigrants (since 1989), introducing quota and restrictions for ethnic Germans (1990, 1993, 1996), introducing a regulated, restricted programme for Jewish refugees (1990, 1991, (see Dietz 2003), and severely restricting access to the asylum procedure (1993) (Marshall 2000).[1] Agreements with Poland and the Czech Republic granted visa-free entrance for their citizens while securing their cooperation in border control, migration and asylum issues (since 1991). Due to these changes, it became much more difficult to enter the country unauthorised without smuggling services.

At the same time, the government intensified the fight against human smuggling. The German government initiated a sequence of international governmental conferences dealing with multi-lateral cooperation for combating human

1 Two complete revisions of the foreigners'/immigration law fell in this period: the foreigners' law of 1990 and the immigration restriction law of 2004. Notwithstanding their importance for integration issues, they are of minor importance for the topic of this contribution.

smuggling. Re-admission agreements and cooperation of enforcement were the main results of these endeavours. In the interior, new criminal provisions were introduced into foreigners' law, raising maximum sanctions (see Ziegler in this volume). Public authorities started to frame illegal immigration as a problem predominantly caused by human traffickers and smugglers. The basic rationale is clearly expressed by an expert council, announced in connection with the new immigration law: "Human smuggling undermines the management of immigration, threatens the life of immigrants, fosters the emergence of criminal networks and has also an effect on the respective country's capacities to receive and to integrate immigration" (Sachverständigenrat Zuwanderung und Integration 2004: 361). With respect to trafficking in sexual exploitation, the role of human traffickers who lure young women under false pretences into forced prostitution was emphasised. With respect to asylum applications, German authorities suspected that applicants were brought into Germany by human smugglers who had instructed their customers about the basic requirement in order to avoid the expulsion to a safe third-country of a safe country of origin. And with respect to illegal labour, immigration authorities and trade unions suspected that foreign workers were recruited and exploited by unscrupulous employers or labour agents who belong to organised crime (Cyrus 2003). Thus, within a few years the framing of illegal immigration had changed from the image of a matter of individuals crossing the borders unauthorised in order to find shelter or income to a phenomenon closely related to and mainly instigated by human smugglers and traffickers.

The development towards tighter control and stricter law evoked some reactions from NGO actors. As a general rule, humanitarian organisations defended the right of asylum. In this context the role of illegal entry was debated. With respect to the introduced principles of the safe-country-rule and the safe-third-country-rule it was argued that refugees are dependent on illegal entry in order to apply for asylum (EKD 1996). Accordingly, the services of human smugglers were implicitly viewed rather ambiguous as the precondition for refugees to get access to asylum – as a necessary evil. According to the opinion of pro-refugee-groups the refugees were driven to make use of the service of human smugglers in order to get access to asylum. Accordingly human smugglers were perceived to enable refugees to get to a safe haven against persecution. Left wing groups spoke of 'escape helpers' – with allusion to the discourse of the refugees from former socialist states (FFM 1998).

However, this discourse was partly challenged by feminist groups who began to deal with the issue of international trafficking since the early eighties. Until the mid-nineties most victims of traffickers came from Asia (Ban-Ying 1994; Berliner Fachkommission Frauenhandel 1997; Niesner 2001). Within a relatively short period local NGOs established in several Federal states. Already in 1983 the action group "agisra" was founded and established three years later a Federal network. The network started campaigns and public relation work

and reached that policy started to deal with these issues. The Federal ministry of women commissioned a study on international trafficking in women for the purpose of sexual exploitation in Germany (Heine-Wiedenmann 1992).

With the situation of quasi-open borders the source countries shifted to CEE and the awareness of the plight of trafficked women rose. A number of NGOs began to deal with "trafficking in women" and established particular organisations and specialised advice-centres. In 1989 agisra demanded the introduction of a round table of all relevant institutions and actors concerned with the combat of trafficking (agisra 2001). The public efforts to combat trafficking in women were intensified. The legislation was tightened in 1992 after NGOs were heard. The Federal Criminal Office and state police established particular task forces to combat trafficking in human beings. Already in 1994 the Federal state North Rhine-Westphalia issued an administrative decree that allowed that foreign victims of forced prostitution may be exempted from expulsion for four weeks in order to consider the question whether the person will serve as witness in a court proceeding against traffickers (delayed expulsion scheme). Since 1996 the increased awareness of the dangers of trafficking and the supposed close linking with organized crime on national and international level pushed further initiatives: In 1997 the Federal Criminal Office started to integrate the issue of trafficking in human being into its professional training of police officers. In the same year the cooperation of NGOs and law enforcement began: The Federal Ministry of Women introduced a "Federal Working Group Trafficking in Human Beings" consisting of representatives from law enforcement, NGOs and administration and began to finance altogether six jobs for the social work with trafficking victims. In 1998 advice-centres and law enforcement reached an officially accepted cooperation agreement (agisra 2001). In 1999 the advice-centres founded a joint coordination with meanwhile (2004) forty member organizations (see: <www.kok-potsdam.de>).

Since 1999 the Federal Criminal Office publishes an annual situational report on trafficking in human beings (Bundeskriminalamt 2004). An examination of the figures and trend in investigations by the BKA revealed that the treatment of victims differ considerably from one Federal state to the other. The financial situation of victims allowed to stay in order to serve as witness in a court proceeding was insecure in many Federal states. In response, the Federal working group elaborated a manual concerning the financing of the stay and care of victims of trafficking addressed towards social benefit authorities. One year later, the umbrella association of the social benefit authorities accepted the manual. But the implementation remained poor due to financial bottle-necks and unclear responsibilities. In 2000 Germany signed the UN-protocol on trafficking (Albrecht & Fijnaut 2002). In 2001 the Federal Government decreed that also foreign victims of trafficking are included in the victim compensation act. In 2001 Berlin was the place of the OSCE conference "Europe against trafficking". The Federal Criminal Office conducted a workshop for Lithuanian police officers in Vilnius.

In 2003 a research project commissioned by the BKA began in order to evaluate why the number of investigations decreased (Bundeskriminalamt 2004).

The rough overview shows that NGOs and public authorities launched several activities against trafficking in human beings during the last years and established with the "Federal working group" even a joint network that serves as platform for the coordination of practical cooperation. The networking of main actors influenced the contemporary debate on human smuggling and trafficking in human beings. But the attention focused exclusively on the trafficking of women into sexual exploitation although some NGOs indicated that trafficking is not restricted to forced prostitution but is also taking place in other workplaces like households and is also connected with marriage migration (Mentz 2000; agisra 2001). A recent ILO-study confirmed that trafficking into labour exploitation is taking place in Germany in considerable numbers. The examined patterns of illegal employment of foreign migrant workers that fit into the definition of trafficking in labour exploitation are widespread and take place in several industries, predominantly in construction, transport, meat processing, domestic services and of course also in the sex industry. But since such offences – due to the lack of juridical definition – are neither statistically counted nor accounted for, the phenomenon is widely neglected. The narrow national legal concept of trafficking prevented that the exploitation of labour was considered in Germany as a manifestation of trafficking. Accordingly, victims of trafficking into the exploitation of labour were officially not perceived as trafficking victims but only as offenders against the Foreigners' Act and the work permit law (Cyrus 2004). In the meanwhile a law amendment that defined trafficking for the purpose of labour exploitation a severe criminal offence passed the German parliament.

To summarise: border control was intensified and legalisation options were restricted in the 1990s. At the same time, the issue of human smuggling and trafficking gained importance in the public debate – with some differences. While human smuggling was predominantly perceived as an immigration crime that criminal smuggling networks committed jointly *with* illegal immigrants against the state immigration laws, trafficking was mainly perceived as a sexual crime that was committed *against* women and state immigration laws, enabling pragmatic coalition building between NGOs and control agencies.

3. Statistical Overview

Several German authorities provide administrative statistical data concerning illegal entry and stay, human smuggling and trafficking in human beings. However, all experts point out that the figures need to be interpreted carefully for various, mutually influencing reasons. The offences are classical "control offences". The number of undetected cases is supposed to be high. The development of figures moreover mirrors to a particular extent increased resources and extended competencies in law enforcement. Furthermore, law enforcement activities incite

reactions on the other side: Human smugglers may choose more remote and dangerous places for an illegal border crossing or begin to organise illegal entry on the basis of visa obtained by trickery. Another example: If brothels are controlled more intensively, human traffickers may retreat to hotels or private flats. Available data thus inform in the first instance on the activities of law enforcement and allow only tentative insights on the subject of human smuggling and trafficking.

3.1 Police Data on Human Smuggling

We will review first the border related data. They are based on statistics kept by the Federal Border Patrol.

Table 1: Illegal entry, unauthorised stays and cases of human smuggling

	Apprehension of illegally entered persons at the German Border	Apprehensions of smuggled persons	Smuggled persons as percentage of apprehended illegal entrants	Apprehended smugglers	Smuggled persons per apprehended smuggler
2002	22 638	5 713	25 %	1 844	3,1
2001	28 560	9 194	32 %	2 463	3,7
2000	31 485	10 320	33 %	2 740	3,8
1999	37 789	11 101	29 %	3 410	3,3
1998	49 201	12 533	25 %	3 162	4,0
1997	35 205	8 288	24 %	2 023	4,1
1996	27 024	6 656	24 %	2 215	3,0
1995	29 604	5 848	20 %	2 323	2,5
1994	31 065	5 279	17 %	1 788	3,0
1993	54 298	8 799	16 %	2 427	3,6
1992	44 949	3 823	9 %	1 040	3,7
1991	23 587	1 802	8 %	619	2,9
1990	7 152	1 794	25 %	847	2,1

Source: Police Criminal Statistics and Federal Border Patrol, ongoing volumes, and own calculations.

The data generally show two peaks around 1993 and around 1998. Since 1998, there is a continuous decline in the number of border apprehensions of illegal entrants as well as those illegal entrants that are registered as suspected of smuggling or having been smuggled. The percentage of smuggled persons in all apprehended illegal entrants rose continuously from 8 percent in 1991 to 33 percent in 2000. In 2002, it had dropped back to a quarter in comparison with 1990 before the border opened. Police found on average 2 to 4 persons per smuggler.

Spectacular smuggling cases with tens of illegal entrants in a bus or lorry seem to be the exception.

Table 1 is taken from the police criminal statistics. It includes data from the separate police units of all 16 federal states and the federal border police. Table 2 presents the development of suspected offences against the Foreigners' Act. The available data provided by authorities show some inconsistencies that have caused the call for a reform of statistical account (Sachverständigenrat Zuwanderung und Integration 2004: 362). For the purpose of this contribution we will not tackle inconsistencies.

Table 2: Suspected offences against the Foreigners' Act (FA)

	Suspected foreign nationals with illegal residence	Illegal entry – Sect. 92 FA	Support of illegal entry (human smuggling – Sect. 92 a FA)	Professional human smuggling – Sect. 92 b FA	Marriage of Convenience
2002	112 573	44 362	6 187	741	4 360
2001	122 583	53 576	6 493	743	4 457
2000	124 262	50 635	5 457	652	5 269
1999	128 320	58 504	6 518	615	5 574
1998	140 779	60 360	5 145	462	5 077
1997	138 146	48 793	3 448	448	4 102
1996	137 232	51 769	3 271	366	2 486
1995	97 007	54 532	2 292	-/-	2 030
1994	90 380	57 616	1 733	-/-	1 384
1993	88 148	62 986	1 322	-/-	955

Source: Vogel 2003a; Neske, Heckmann et al., 2004, p. 33.

Police statistics show a declining trend of persons suspected of illegal residence or entry since 1998. The investigations in smuggling cases are not declining accordingly, but they are relatively unimportant compared to the total number of investigations in connection with illegal residence (5 %). Declining numbers of apprehended foreigners without legal residence status do not necessarily mean that there is less illegal immigration in Germany. Nonetheless, there are strong indications that this is the case. Considering that law enforcement efforts increased, the stagnation or reduction of figures indicates that illegal immigration does not increase. Several factors contribute to this development: In 2001, some countries with a high share of illegal entrants were granted visa-free entrance, namely Romania. Romanians can now cross the border regularly. Furthermore, the economic and political situation in some important areas of origin of illegal and smuggled immigrants improved, namely in the former Yugoslavia and Turkey. An additional important factor could be the shrinking need for

illegal immigrants due to the economic recession on Germany and the pressure on unemployed to accept bad job offers. Against this political and economic background the enlargement and intensification of crime control does not seem to be the decisive factor for shrinking figures on foreigners apprehended when trying to cross the border illegally. Figures of apprehended illegal entrants could increase again with the economic revival or the break out of violent conflicts in areas connected with Germany in a migration system (Kritz, Lim et al. 1992).

3.2 Police Data on Trafficking in Human Beings

In contrast to the previous statistics on illegal immigration, the available figures on trafficking in human beings show overall a rising tendency, but on a comparatively low level (see table 3). This trend has to be attributed to the increased awareness and the subsequently intensified efforts of crime prevention. The figures on trafficking in human beings until 2002 concerned exclusively *foreign* victims of forced prostitution. Only since 2003 victims with German citizenship are covered too. The data provided by the Federal Criminal Office show some inconsistencies too since interviewed victims did not answer every question. Accordingly for some areas of interest the share of unknown cases is relatively higher.

Table 3: Figures on trafficking in human beings

	Total of investigations	Victims of human trafficking (foreign citizenship)	Suspected traffickers (of foreign victims)	Share of trafficking victims with legal entry
2003	346	1 108	990	59.9 %
2002	289	811	821	60.0 %
2001	273	987	747	47.7 %
2000	321	926	837	47.3 %
1999	257	811	805	41.8 %

Source: BKA, ongoing volumes. (Authorities do not possess information for all victims equally. Therefore the basic unit differs and the data is inconsistent.)

The annual situational report on trafficking in sexual exploitation, prepared by the Federal Criminal Office, delivers some basic information on manifestations and trends. According to the 2003 report altogether 346 investigations were reported to the competent Federal Criminal Office in 2003 with altogether 1 108 foreign victims, 36.6 % more compared to 2002. The victims were nearly exclusively women (only in nine cases gender was not mentioned while in eight cases the victims were male). Eighty percent of the foreign victims stemmed from Eastern Europe. The Federal Criminal Office observes a trend of increasing numbers of victims from Russia, Rumania and also Latvia. In 306 investi-

gations only one victim was registered while in nine investigations more than twenty victims were affected.

For 827 victims the Federal Criminal Office obtained information on the pattern of recruitment: 437 women (52.8 %) were forced to take up or to proceed with prostitution by physical or psychical violence. With respect to the country of origin, violence mainly took place in the case of women from Russia (67. %), Ukraine (66.7 %), Lithuania (57.1 %), Rumania (46.7 %), Bulgaria (46.7 %) and Poland (39.7 %). 420 victims (45.0 %) were deceived about the real purpose of the entrance, while 301 women (32.3 %) accepted to work in prostitution.

The legal status of border crossing is not known in all cases. In 2003, from 993 trafficking victims that indicated the circumstances of entry 580 (59.9 %) had crossed the border legally. The available data show that the share of victims of trafficking that entered the country legally ranges between forty and sixty percent. The Federal Criminal Offices underlines: "The greater part of the victims of traffickers entered the country legally. Therefore, border focussed controls as a rule does not have much effect. In particular the victims from the countries that recently accessed the European Union and from countries associated with the European Union predominantly enter to the greater part legally" (Bundeskriminalamt 2004: 11). Illegal entry is neither the prerequisite nor the equivalent of forced labour or prostitution.

In 2003 altogether 1,110 suspects were registered of having committed trafficking in human beings. With respect to investigations of cases with exclusively foreign victims the respective number is 990 suspects. German citizens are the main group among suspects (39.4 %). Out of the registered 437 suspects with German citizenship, 87 (19.9 %) are foreign born, mainly in Russia, Turkey, Kazakhstan and Poland. Nearly one third of all suspects are citizens from CEE-countries (30.6 %). In 213 investigations only one suspect was reported while only in 13 investigations ten or more suspects were reported.

According to experts, there is much more forced prostitution than the police investigations expose. Law enforcement cannot cover every location of forced prostitution. Hidden prostitution in private flats and service in hotels is difficult to control. Also manifestations of trafficking in sexual exploitation, taking place behind a legal façade of marriage migration or au pair, are hardly covered. Thus, the figure of 1 108 victims constitutes the minimum number of victims of trafficking into sexual exploitation. Crime control representatives are convinced that the number of investigations could be increased by increasing police resources for this task. A further increase of trafficking offences will definitely take place as a result of the introduction of the new offence trafficking in labour exploitation that passed the German parliament on 28 October 2004. At the moment statistical data concerning the offence "trafficking in labour exploitation" is not available.

3.3 Convictions for Human Smuggling and Trafficking Offences

It is extremely difficult to prove the offence of trafficking in human beings in court proceedings. The first periodical security report noted that the efforts of Police on Federal and state level led to a temporary increase of investigated cases (Bundesministerium des Innern and Bundesministerium der Justiz 2001). Accordingly, the number of sentences because of trafficking in human beings (sect. 180 b and 181 Penal Code) nearly tripled from 1993 to 1998. Prison sentences dominated these convictions. However, the experts observed a discrepancy between the number of investigated cases and the final conviction. In 1998 only 164 out of 993 accused were sentenced (17 %) – mainly with prison. The experts argued that the low rate of convictions stems from difficulties to prove the offence, not from a high percentage of persons that are innocently accused of the crime. As it is difficult to provide sufficient proof for a conviction of trafficking in human beings, investigators rather switch to offences easier to handle (Bundeskriminalamt 2001a: 4). This leads to a suspension of the proceeding or to a conviction for an offence that is less significant but easier to prove. "Therefore the only offence that remains for conviction in a court trial initially opened because of section 181 Penal Code [i.e. trafficking in persons for the purpose of sexual exploitation; NC] is the penalising because of exploitation of prostitutes (sect. 180 a Penal Code), Pimping (sect. 181 a Penal Code) or because of an offence against section 92 Foreigners' Act (illegal entry)" (Bundesministerium des Innern and Bundesministerium der Justiz 2001: 108; Bell & Haneke 2004: 51).

A recently conducted study reviewed the application of judicial provisions in the context of altogether 2,666 court decisions regarding smuggling in human beings (sect. 92 a and b, Foreigners' Act) in 1999. It turned out, that the most important offence combined with smuggling in human beings was document fraud (section 267, penal code) with 79 applications (3 %), followed by illegal employment of foreign workers with 73 applications (2.8 %), driving without license (44 applications, 1.6 %), pimping (33 applications, 1.2 %), promotion of prostitution (24 applications, 0.9 %), fraud (23 applications, 0.9 %), serious trafficking in persons (18 applications, 0.7 %), providing with false documents (17 applications, 0.6 %), trafficking in persons (15 applications, 0.6 %) (Steinbrenner 2002: 130).

It seems that law investigation uses the suspicion of organised crime or trafficking-in-sexual-exploitation in order to initiate an investigation but drop the provision finally and switch to offences easier to prove like smuggling in human beings. The data rather reflect the practice and the difficulties of court decisions and does not allow safe conclusions on the empirical connection of human smuggling and trafficking in human beings. The Federal criminal office underlines that investigations in the field of trafficking in sexual exploitation are intricate, and trafficking in sexual exploitation is difficult to substantiate. Proof is difficult because in the final instance in court proceedings against traffickers the

testimony of the victim is decisive for a perpetrator to be found guilty and sentenced. However, this offence is a typical 'control offence' and is characterised by the fact that victims do not report to the police and do not act as witness.

3.4 The Role of the Victims

Public authorities and NGOs concurringly trace back the difficulties to detect and punish trafficking in sexual exploitation to the unfavourable treatment of (putative) victims. Most apprehended women that are supposed to be victims of traffickers have to leave the country soon or are even expulsed (table 4).

According to the Federal Criminal Office, about forty percent of the women perceived to be victims of traffickers are even deported or expulsed (table 4). Only a small number received victim protection. The admission to a classical witness protection scheme concerned only 2.8 per cent.

Table 4: Remain of victims

	Total	Remain unknown	Deportation	Expulsion	Tolerated Status	Voluntary Return	Witness protection scheme
2003	1,108	255 (23 %)	149 (13.5 %)	247 (22.3 %)	130 (11.7 %)	192 (17.3 %)	31 (2.8 %)
2002	811	171 (21.1 %)	109 (17.0 %)	175 (27.3 %)	104 (16.3 %)	153 (23.9 %)	35 (5.5 %)
2001	987	383 (38.8 %)	177 (29.3 %)	64 (10.6 %)	124 (20.5 %)	128 (21.2 %)	21 (3.5 %)
2000	926	25 (27 %)	216 (32.4 %)	101 (15.1 %)	112 (16.8 %)	138 (20.7 %)	33 (4.9 %)
1999	801	154 (19.2 %)	206 (31.8 %)	112 (17.3 %)	109 (16.9 %)	136 (21.0 %)	27 (4.2 %)
1998	840	215 (25.6 %)	192 (307 %)	153 (24.5 %)	97 (15.5 %)	119 (19.0 %)	14 (2.2 %)
1997	1,201	268 (22.3 %)	524 (56.2 %)		53 (5.7 %)	216 (23.2 %)	20 (2.1 %)
1996	1,581	472 (29.9 %)	584 (52.7 %)		51 (4.6 %)	253 (22.8 %)	29 (2.6 %)
1995	1,753	465 (26.5 %)	784 (60.9 %)		69 (5.4 %)	212 (16.5 %)	34 (2.6 %)

Source: (Bundeskriminalamt 2004: 16)

Most of the cases with tolerated status are related to the victim-witness-protection scheme that includes the delay of expulsion mainly on basis of a tolerated status. In 2003 altogether 229 women participated in a victim-witness protection scheme. The police task force of the Federal state North Rhine-Westphalia summarises:

> Many victims [of trafficking in sexual exploitation] are afraid to contact investigation authorities and do not show up to the agencies. The main reason lies in the role of the respective girls who are at the same time victims, witnesses but also suspects. Out of this constellation quite different judicial consequences may arise, in particular consequences from foreigners' law. They last from receiving a tolerated status over a residence allowance or permission, to the deportation with the immediate taking into custody. This strengthens the dependency between pimps and the person running a brothel on the one side,

> and the women or girls on the other side. It is prevented that women reveal themselves to authorities (LKA NRW 2002: 36).

The readiness to cooperate with justice is impaired on the one hand by the fact that offenders scare the victims and threaten with violence against the victims or their family back home. On the other hand the victims hesitate to cooperate with authorities because of bad experiences with authorities in the home country. It is, moreover, problematic that the affected women are not only treated as victims of trafficking but also as offenders against the foreigners' law. The latter suggests that the state is the real victim of traffickers (Kootstra 1996).

4. Media Perception of Human Trafficking and Smuggling

The previous overview showed that authorities deal with human smuggling and trafficking in human beings. The following section tries to recapitulate the public perception of these phenomena.

Public discussion concerning illegal entrance and stay began already in the mid-eighties and received more public attention against the background of the emerging collapse of the socialist system. Unfortunately there is no study on media coverage of these issues available. We were not able to conduct a systematic evaluation of media discourse for the purpose of this contribution. But at least, we consulted internet-archives of the quality newspapers *Der Tagesspiegel* (liberal-conservative) and the *Frankfurter Allgemeine* (conservative) for the period 1999 – 2003. Additionally, we made use of the archive of a yellow-press organ, the *BZ – Berliner Zeitung*, offering information unfortunately merely since 1 May 2002. We searched in the available archives for the words "Menschenhandel" (trafficking in human beings) and "Menschenschmuggel" (human smuggling). The evaluation reveals that the terms were used by all reviewed newspaper (see table 5).

Table 5: Headwords "Menschenhandel" (trafficking in human beings) and "Menschenschmuggel" (human smuggling) in selected newspapers 1999-2003

	Tagesspiegel		Frankfurter Allgemeine		BZ (Berliner Zeitung)	
	Trafficking in human beings	Human smuggling	Trafficking in human beings	Human smuggling	Trafficking in human beings	Human smuggling
2003	23	6	45	11	9	2
2002	9	7	22	18	4	0
2001	27	12	4	29	- / -	- / -
2000	24	7	11	20	- / -	- / -
1999	8	4	9	7	- / -	- / -

Source: Own compilation; the archive of the BZ – Berliner Zeitung starts from 1 May 2002.

The table shows that German newspapers make use of the terms 'trafficking in human beings' as well as 'human smuggling'. On first sight there is neither a common general trend of media coverage nor a clear distinction between the reviewed newspapers visible. It is somehow surprising that the yellow press organ *BZ* shows only eleven indications in 2004. One explanation is that the paper prefers less judicial and more emotionally loaded terms like 'illegal' or 'slave trade'. As a rule, this yellow press product relates trafficking in human beings to organised crime and violence (*BZ*, 24.8.04; 23.10.03) or reports when celebrities are involved (*BZ,* 22.05.03).

On the other hand, the quality newspapers *Frankfurter Allgemeine Zeitung* and *Tagesspiegel* more frequently reproduced the official vocabulary in the coverage on the main political debate or events abroad. As a rule, the *Frankfurter Allgemeine Zeitung* informed the readership about the political and legal development in this field of concern on national and international level and made use of press releases of police or justice. Two reports immediately dealt with the investigation and court trial against a prominent conservative politician, and further coverage was initiated by this case. Also blatant events in other countries were reported, for example the death of the 58 Chinese in Dover or the situation in the Mediterranean Sea. In the *Frankfurter Allgemeine* the information on trafficking increased while in the same period the information on human smuggling decreased. The usage of the term "trafficking in human beings" has a peak in the *Frankfurter Allgemeine Zeitung* in 2003, while in the *Tagesspiegel* in 2001. The main reason for the earlier peak in the *Tagesspiegel* in 2001 was the 40th anniversary of the erection of the "Berlin wall" which was designed by the GDR-politicians – in their terms quoted in the *Tagesspiegel* six times – as an instrument to combat the "Bonner Menschenhandel" (Bonn trafficking in human beings). The remaining 21 indications in 2001– like the 24 indications in 2000 – are caused by different events. This shows that the chosen terms are only weak indicators. The context of the usage needs to be considered. As a rule, the dealing with these issues is caused by events that can be grouped into five categories:

1) reporting on dead or maltreated illegal immigrants: media continuously report on the detection of dead bodies at the borders or the liberation of maltreated women. Newspapers informed also about spectacular cases abroad. Most attention gained the death of 58 Chinese illegal immigrants in Dover (*Tsp*, 20.06.2000) and the death of refugees in the Mediterranean Sea (*Tsp*, 22.08.2003; 16.11.99; *FAZ*, 30.10.2003).
2) reporting on human smuggling: the detection of smuggled illegal immigrants announced by the Federal Border Patrol is another important cause to inform the readership. As a rule, mainly cases with a local reference or a kind of particularity were reported (*FAZ*, 01.10.03, 1.10.02; *Tsp*, 11.0.03; *BZ* 22.05.03).
3) court hearings: court proceedings against human smugglers as well as human traffickers give a further cause for reporting and seem to be of continuous

interest (*FAZ*, 07.02.03). Particular interest raise court proceedings against traffickers when sex and violent crime is involved (*Tsp*, 12.10.00). Therefore, the court trial against a former police investigator raised much interest (*Tsp*, 08.03.03). The renewed increase in 2003 is caused mainly by the public attention in an investigation and court proceeding with a prominent conservative politician involved (*Tsp*, 08.03.03; *BZ*, 28.11.03). The *Tagesspiegel* devoted at least ten articles to this court trial taking place in Berlin and some more articles are indirectly inspired by this investigation and court trial, and the other two reviewed newspapers also cover this issue at length. Another investigation and court trial that evoked a general public interest concerned a popular TV-reporter who had illegally employed East-European women for the care of his parents in need of care. He was suspected of illegal employment and human smuggling. The investigation directed attention to the particular problems related to the private care sector.

4) a fourth cause for reporting are press releases by authorities or NGOs that accompany political events like international conferences (*Tsp*, 27.02.03, 16.05.01, 21.08.01; *BZ*, 24.07.03) or the elaboration of new concepts or legislations (*FAZ*, 18.07.02; *Tsp*, 02.09.03, 08. 08.01).
5) background coverage: the last category may be summarised as coverage incited by actual interest in the issue. In the period under investigation, for instance, media dealt with two cinema films that deal with human smuggling at the German-Polish border (i.e. "Lichter") or trafficking (i.e. "Lilja 4-ever"). The information on TV-programmes contained also the term 'trafficking in human beings' when indicating documentary TV-coverage on trafficking in women. Longer features depend on investigations carried out by individual journalists. However, the investigations are mostly follow-ups to events that had provoked public interest. The subjects encompass coverage of the "difficult work" of the border patrol, but also portrayals of victims of trafficking and the information on the work of advice-centres. Against the background of increased public interest, reporters investigated on their own in order to portray illegal immigrants or trafficking victims. These background essays show often sympathy for the portrayed persons and advertise for humanitarian solutions of their pitiful predicament (*FAZ*, 23.10.03; *Tsp*, 06.05.01, 08.03.04).

The rough review indicates that newspapers usually report on events at the national and international level related to human smuggling and trafficking. It seems that media coverage follows the increased public relation activities of public authorities and NGOs. The statistical account of illegal entry and stay, human smuggling and trafficking in human beings do not substantiate that the phenomena has increased. A more exact investigation and interpretation is necessary but cannot be realised in the context of this contribution.

Newspaper coverage often seems to follow a hidden agenda: background features start with a portrayal of an individual victim. The miserable situation in the country of origin is initially depicted. Then traffickers are introduced as the main agents that lured victims into illegal immigration with the prospect of a job in Europe. The illegal passage into Germany and the subsequent process of enslavement with the final liberation from slavery by law enforcement is described in detail. A description of the intensive efforts of public authorities to punish the perpetrators completes the report (*Tsp*, 26.11.03).

Official declarations and media coverage implicitly suggest that illegal immigration is closely connected with trafficking and illegal immigrants end up in slavery. Statements usually start with an account of illegal border crossings and then turn to trafficking in sexual or labour exploitation (Severin 1997). Some scientific studies that heavily rely on interviews with public officials display the same type of linking (Chabake & Armando 2000; Müller-Schneider 2000; see also IOM 2003). The sequential linking of illegal entry and trafficking is rather a narrative than a factual account. A narrative can be conceived as the telling of a series of temporal events so that a meaningful sequence is portrayed – the story or plot of the narrative. A narrative involves a sequence of two or more units of information such that if the order of the sequence were changed, the meaning of the account would alter (Rapport & Overing 2000: 283). The use of a narrative is a rhetorical device that blurs the distinction between illegal entry, human smuggling and trafficking in persons and generates the impression that illegal entry inevitably ends up in captivity.

NGOs complain that media use to present trafficking in women in form of pathetic and pitiful stories of individual fates. The media presentation includes a particular distribution of roles: The women as a rule play a passive role while the traffickers and later law enforcement agents play the active role. By this particular narrative the problem of human smuggling and trafficking is transformed into a struggle of the active parties, i.e. the criminals against public authorities. A recent statement by the Federal Minister of Justice shows that public authorities use to reproduce this particular feature (Bundesministerium der Justiz 2004).

However, public authorities' insights in illegal immigration are not consistent with such a narrative. German authorities do not document every entry. The estimated annual figure of entries and departures across the border with non-Schengen countries ranges between 450 and 500 million (Bundesministerium des Innern 2002: 26). As a rule, only random checks are conducted for feasibility reasons. The focus of control is on persons belonging to groups that are screened out for tighter surveillance like Colombian citizens who are more intensively checked due to a generalised suspicion of drug smuggling (Alscher et al. 2001).

German authorities identify four patterns of smuggling in human beings: abuse of visa free entrance, entrance with fraudulent or manipulated documents, entrance with visa obtained by trickery, and entry without documents (Bundesministerium des Innern and Bundesministerium der Justiz 2001: 333 ff). Also

the official entrance with a falsely declared purpose of stay is considered to be illegal entry and stay. The organisation or support of a falsely declared entry is accordingly smuggling in human beings. Persons or agencies providing a visa with false information or using the visa-free entrance for the recruitment of illegally employed workers are perceived to be smugglers, even if they operate only in the country of origin and never entered the German territory. By this very framing the offence smuggling in human beings is broad and cannot be equated with trafficking in persons. Findings from qualitative-empirical studies (Alt 2003; Anderson 2003; Cyrus and Vogel 2002; Erzbischöfliches Ordinariat 1999) indicate that the share of traffickers is overestimated. Interviews with illegal immigrants revealed that criminal and mafia-like groups exist. But they took on a kind of life of their own and the points of contacts with usual illegal immigrants were rare. According to estimations by Jörg Alt about 10-20 percent of all smuggled persons are trafficked. The share of trafficked persons from CEE countries is lower while the share from Non-European countries is higher. Law enforcement officers informally estimate that the share is about 30 percent (Alt 2003: 331, 333). This estimation coincides with international research suggesting that the share of trafficked and smuggled persons of illegal immigration is often overemphasized (Kyle & Koslowski 2001). In the USA, for instance, the competent immigration authority estimates that 60 % of all illegal immigrants are visa-overstayers (Fraser 2000: 101). The majority of people smuggled across a national border are not hold in captivity by the organisation that supported or organised the illegal border crossing (Cyrus 2004; Neske, Heckmann et al. 2004). Provided that the agreements are kept, the illegal immigrants use to perceive the services of human smugglers as a fair deal (Alt 2003: 331). The maintained automatic connection of illegal entry and trafficking is not given. The majority of illegal immigrants is not trafficked or smuggled in the strict sense of the word.

NGOs complain that the current debate fails to acknowledge that migration of women has far more complex and global features. Moreover, the term "trafficking in women" is rather problematic because "trafficked women are no longer perceived as actors managing their life under particular difficult circumstances. The sexual or domestic work they perform is made invisible. There is the danger that women are reduced on a mere status of a passive object of commodity characteristic. By this the attention is reduced exclusively to the individual level of the object-made woman. The global and complex feature of migration of women is lost. This becomes obvious in the media coverage that uses to deal with this phenomenon only in the kind of pitiful stories and individual fates. But the whole reality of women in the migratory process needs to be considered and presented" (agisra 2001: 171).

5. Main Elements of the Political Debate

The previous examination revealed a particular narrative that starts with a consideration of the plight of trafficking victims and then turns to efforts to punish perpetrators. Behind this feature stand the two allegedly competing approaches of crime control and human rights concerns. Up to now crime control dominates although in the last decade a slight convergence of crime control and victim protection strategies can be observed. The formation of the Federal working group trafficking in human beings signal that authorities and law enforcement began to realise (at least partly) that human rights protection is not detrimental to crime control efforts but supportive.

The recent debate concentrated on the question how to transfer international conventions into national law on the one hand and how shortcomings of the practical implementation related to the victim-witness protection scheme can be solved. The main issue of the recent political debate on human smuggling and trafficking was the legal procedure on the implementation of the extended understanding of the concept of trafficking in human beings agreed in the "UN-Convention against Transnational Organized Crime" (UNTOC) (Albrecht & Fijnaut 2002). Some NGOs were rather sceptical against an extension of the trafficking offence. They supposed that the extension will serve only as a means to tighten crime control to diminish the protection of victims and will finally lead to a criminalization of humanitarianly motivated help for refugees:

> The German state and the other European countries take trafficking in human beings as a legitimization for the European policy of closed borders. Combating trafficking human beings aims to close the European borders and to prevent illegal immigration. Moreover, trafficking legitimizes a repressive national and European security policy. Repressive approaches flourish with the combating of trafficking and go hand in hand with an extension and strengthening of the whole crime control apparatus (Niesner 2001).

But these arguments did not show any effect. On 28 October 2004 the amendment of penal law that encompass trafficking for the purpose of labour exploitation passed the German parliament.

The meanwhile completed implementation of the relevant transnational conventions went on surprisingly silently and without much public attention. The new understanding creates a changed situation in the area of combating trafficking since labour exploitation is now covered. Against this background the practical experiences with the implementation of the victim-witness-protection scheme are highly relevant.

The German example of the victim-witness-protection scheme (Niesner & Jones-Pauly 2001) highlights that the introduction of appropriate legal norms is a necessary but by no means sufficient condition for effective combating of traf-

ficking in human beings. It is not the letter of the law but the implementation level that is decisive for success or failure of legal norms. With this regard NGOs and law enforcement concurringly see the need to improve the victim-protection scheme. On the one hand, some representatives of public authorities show considerable scepticism. From their point of view the victim-witness scheme offers opportunities for abuse. Apprehended women who did work illegally in prostitution may take it merely as a ticket to prolong their stay. The experience that women who were cared for by advice-centres finally did not serve as witness in a court proceeding seems to substantiate such a view. But according to the insight of advice-centres, victims of trafficking have a lot of reasons to make such a decision: they do not want their "profession" to be known in the country of origin where they finally have to return. They fear that they or their families in the home country will be subject to revenge by the perpetrators. Accordingly, advice-centres make the imperfect victim-witness protection scheme responsible for the reluctance of consulted victims to serve as a witness. Representatives from police task force and NGOs thus concurringly explain that the victim-witness protection scheme still does not work properly (Schaab 2001). Several problems arose and wait to be solved: the rule that trafficking victims should be granted a delay from expulsion and be accommodated and cared by a specialised NGO advice agency was only partly realized since such institutions did not exist in all Federal states and the regulations were not sufficiently known among the police officers. Another problem that undermined the efficacy of the victim-witness protection scheme was the unsolved question of who has to finance the costs. As a rule, the local social benefit agencies should cover the costs of accommodation and care. But due to ignorance and lack of resources some local benefit agencies refused to bear the costs. The Federal decree that assigns financial responsibility does not work well without allocating the necessary financial means. In order to solve this problem the introduction of a fund on Federal state level is recommended. A probable source for augmenting funds is fines and confiscated profits from sentenced traffickers. At least the Federal state Rhineland-Palatinate introduced a fund consisting of € 100 000 (Bundeskriminalamt 2004). Based on practical experiences most actors that deal with these issues have developed proposals for the improvement of the victim-witness-protection scheme (agisra e.V., Kok e.V. et al. 2003; Bundeskriminalamt 2004; Merk 2004; Stange, Robert et al. 2004; Diakonie 2001).

But besides these tackled organisational problems a more basic problem is still unsolved. The current path to more comprehensive legal definitions and higher sanctions is based on an instrumentalist approach. It does not take the social working of legal norms into account. The 'social working' of law approach consequently looks at the way legal rules influence social behaviour.

> People will not use rules unless they have a good reason for doing so and no pressing reasons *not* to do so, conditions that often are not met. When rules are

> effective, this is often more likely to be due to enforcement by informal social control than enforcement by legal officials, so the conditions under which informal social control will take over the enforcement of a legal rule are of great importance (Griffiths 1999: 329).

If at all, and to what extent the objectives of legislation are reached, depends on the perception of norms by the addressees. Rules are used in concrete social situations. Local fields have and enforce their own behavioural expectations and these may be quite different from those contained in legal rules. And it is the social surrounding, not the legislator, to whom an actor looks for guidance and proper interpretation of an experience.

With regard to this basic understanding of the "social working of law" it is questionable whether the reform will reach the victim. The recent law amendment states that trafficking victims *may* be exempted from removal from the territory. However, this is still a discretionary regulation and leaves the victim in a situation of legal insecurity since – if s/he is aware of the new opportunity at all – s/he cannot know in advance how law enforcement will make use of the discretionary space. Trafficking victims thus remain in a situation of legal uncertainty (djb 2004).

The predominant humanitarian reasoning in policy when issues of illegal immigration and trafficking in human beings are tackled stands in contrast to the reality how victims of traffickers are treated. The target of the contemporary victim-witness protection scheme is the conviction of perpetrators. Accordingly, the admission to a victim-witness-protection scheme does not depend on the plight of a victim but only on the value that a testimony of the particular person has for a court hearing. This means that women are only admitted to the victim-witness protection when they possess a particular knowledge on offences and perpetrators that cannot be proven otherwise. If investigation agencies gained knowledge through other channels (including the confession of a perpetrator or testimony of other witnesses), the victim will be removed from the territory regardless of the individual plight. They are treated as accomplice in an investigation and court proceeding.

Although policy legitimates crime control with reference to the particular harmful plight of trafficking victims the practice is purely instrumental. The evaluation-report prepared by NGOs summarises that the currently performed public crime-control strategy "does not only lead to the exploitation and secondary victimization of the affected women but also to a distorted perception of reality of trafficking in women and prevents by this the development of effective preventive strategies" (agisra e.V., KOK. e.V. et al. 2003: 10). With regard to the 'second victimisation' experts consequently claim for non-harmful treatment of victims (Albrecht 2002).

6. Conclusion

Illegal immigration has a long history in Germany, but it has not always been perceived as a substantial problem. This perspective gained importance since the 80s of the 20th century. Human smuggling historically even had a positive connotation of helping people to escape from the GDR, while today negative connotations in connection with illegal residence and trafficking in human beings dominate public perception. Official statements and media coverage are uniformly characterized by a linking of the topic of illegal residence, human smuggling and trafficking. Empirical information does confirm that there are such patterns, but do not support the view that they are of major importance. The – in quantitative terms – most important patterns of illegal immigration are neither linked to human smuggling nor to trafficking, and the latter offences occur often after a legal (or seemingly legal) entrance.

In public debates, strict sanctions are often justified with reference to two objectives: protecting the state from a breach of migration laws and protecting the migrants from abuse of criminal networks. Migrants are characterized as victims of human smuggling and trafficking. Nonetheless, when it comes down to legal norms and their implementation, the protection of victims is only poorly secured, and only in connection with women trafficked into sexual exploitation (see Ziegler, in this volume). In connection with trafficking into sexual exploitation, NGOs succeeded to organise some support and build coalitions with law enforcement agencies, arguing that victim protection simultaneously serves crime protection purposes, but in connection with human smuggling even this does not exist.

The protection of persons that are simultaneously committing offences (illegal residence) and suffering from more severe offences (dangerous smuggling practices, trafficking) is a prerequisite for effective crime control (see ILO 2004). But there is a trade-off between crime control and immigration control: if authorities want to minimise illegal migration, they may not give residence rights to illegal immigrants, even if they have suffered from severe crimes. If authorities want to fight serious crimes against illegal immigrants more effectively, they need their cooperation. Securing their cooperation necessarily involves some ways into – at least temporary – legality. This view has been successfully pushed in connection with trafficking into sexual exploitation and inspired victim-witness-protection schemes. But legal realisation of this schemes and its implementation shows that the immigration control objective is still dominating the aim of crime control and victim protection.

References

agisra (ed.) (2001) *Migration von Frauen. Ausbeutung, Illegalisierung und Menschenhandel. Die Dokumentation der agisra-Vernetzungstreffen von 1996 bis 2000*, Frankfurt am Main: agisra.

agisra e.V., KOK. e.V., et al. (eds) (2003), *Schattenbericht zum 5. Staatenbericht der Bundesregierung Deutschland, 2003, zum Übereinkommen der Vereinten Nationen zur Beseitigung jeder Form der Diskriminierung der Frau (CEDAW)*, Frankfurt, Potsdam und Tübingen.

Albrecht, H.-J. (2002) 'Eine kriminologische Einführung zu Menschenschmuggel und Schleuserkriminalität. Illegale Migration und Schleusungskriminalität', in: E. Minthe, Wiesbaden: Kriminologische Zentralstelle, pp. 29-53.

Albrecht, H.-J. & C. Fijnaut (eds) (2002), *The Containment of Transnational Organized Crime. Comments on the UN Convention of December 2002*, Freiburg i.Br.: edition iuscrim.

Alscher, S., R. Münz, et al. (2001), *Illegal anwesende und illegal beschäftigte Ausländerinnen und Ausländer in Berlin. Lebensverhältnisse, Problemlagen, Empfehlungen. Demographie aktuell*, Berlin: Humboldt-Universität.

Alt, J. (2003), *Leben in der Schattenwelt. Problemkomplex illegale Migration*, Karlsruhe: von Loeper Literaturverlag.

Anderson, P. (2003), *"… dass Sie uns nicht vergessen." Menschen in der Illegalität in München. Eine Studie im Auftrag des Münchner Stadtrats*, unter Mitarbeit von Pater Dr. Jörg Alt, Christian Streit und Katherine Krebbold, München: Wohnungs- und Flüchtlingsamt München, Stelle für interkulturelle Zusammenarbeit.

Bade, K. J. (2000), *Europa in Bewegung. Migration vom späten 18. Jahrhundert bis zur Gegenwart*, München: C. H. Beck.

Bade, K.J. & M. Bommes (2000), Migration und Politische Kultur im 'Nichteinwanderungsland', in: K.J. Bade & R. Münz (eds), *Migrationsreport 2000*, Frankfurt am Main und New York: Campus, pp. 163-204 (also available in english: Immigration and Poitical Culture in a Non-Immigration Country. The 'German' Model revisited, in: Hollifield, James F.; Thränhardt, Dietrich (eds), Magnet Societies 2001).

Bade, K. J. & M. Bommes (2004), Illegalität: Formen – Wege – Ursachen – Folgen. Migration, in: J. Sikora, H. Uihlein & H. Nietsche (eds), *Menschen in der Illegalität Sozialarbeit in Grenzsituationen*, Bad Honnef.

Bade, K.J. & R. Münz (2002), Einführung: Migration und Migrationspolitik – säkulare Entscheidungen für Deutschland, in: K.J. Bade & R. Münz (eds), *Migrationsreport 2002. Fakten – Analysen – Perspektiven*, Frankfurt am Main und New York, pp. 11-30.

Ban-Ying (1994), *Handel mit ausländischen Frauen*, Berlin: Ban-Ying.

Bell, I. & B. Haneke (2004), Gegen den teuflischen Mechanismus – Aktiv gegen Frauenhandel, *Politische Studien* 55 (Mai/Juni), pp. 44-52.

Berliner Fachkommission Frauenhandel (1997*), Bericht der Berliner Fachkommission Frauenhandel – Berlin 1997*, Berlin: Senat für Arbeit, berufliche Bildung und Frauen.

Brinkmann, G. (2004), Die europäische Migrationspolitik: Überblick und aktuelle Fragen, in: N. Cyrus (ed.), *Zwischen dosierter Öffnung und verschärfter Kontrolle. Arbeitsmöglichkeiten für Migrantinnen und Migranten in Deutschland*, Berlin: Friedrich-Ebert-Stiftung, pp. 37-44.

Bundeskriminalamt (2001), *Lagebild Menschenhandel 2000 – Offene Version*, Wiesbaden: Bundeskriminalamt.

Bundeskriminalamt (2004), *Lagebild Menschenhandel 2003 – Offene Version*, Wiesbaden: Bundeskriminalamt.

Bundesministerium der Justiz (2004), *Bundesministerin Zypries: Menschen sind keine Ware – die Politik der Bundesregierung gegen den Menschenhandel*, press-release from 05.03.2004 (www.bmj.bund.de).

Bundesministerium des Innern and Bundesministerium der Justiz (2001), *Erster Periodischer Sicherheitsbericht*, Berlin: Bundesministerium des Innern, Bundesministerium der Justiz.

Chabake, A. & Armando, T. (2000), Irregulare Migration und Schleusertum: Im Wechselspiel von Legalität und Illegalität, in: K. Husa et al. (eds.), *Internationale Migration: die globale Herausforderung des 21. Jahrhunderts?*, Frankfurt am Main: Brandes & Apsel Südwind, pp. 123-143.

Cyrus, N. (2003), Changing rhetoric and narratives: German trade union and Polish migrant workers, in: W. Spohn & A. Triandafyllidou (eds), *Europeanisation, National Identities and Migration. Changes in Boundary Constructions between Western and Eastern Europe*, London: Routledge, pp. 192-222.

Cyrus, N. (2004), *Aufenthaltsrechtliche Illegalität in Deutschland. Sozialstrukturbildungen – Wechselwirkungen – Politische Optionen. Expertise für den Sachverständigenrat Zuwanderung und Integration Nürnberg*, Berlin (www.bamf.de/ template/ zuwanderungsrat/expertisen/expertise_cyrus.pdf).

Cyrus, N. (2005), *Menschenhandel und Arbeitsausbeutung in Deutschland*, Geneva: ILO (http://www.ilo.org/public/german/region/eurpro/bonn/download/ menschenhandelendfassung.pdf).

Cyrus, N. & D. Vogel (2000), Immigration as a side effect of other policies – principles and consequences of German non-immigration policy, in: A. Triandafyllidou, *Migration Pathways. A historic, demographic and policy review of four countries of the European Union*, Brussels: European Commission-Community Research, pp. 9-37.

Cyrus, N. & D. Vogel (2002), *Managing access to the German labour market – how Polish (im)migrants relate to German opportunities and restrictions*, Oldenburg: University of Oldenburg.

Cyrus, N. & D. Vogel (2002), Work-permit decisons in the German labour administration: an exploration of the implementation process', *Journal of Ethnic and Migration Studies,* Vol. 29, No. 2, pp. 225-255.

Diakonie (ed.) (2001), *Prostitution und Menschenhandel. Was hilft? Neue Bündnisse und Wege in der Arbeit. Dokumentation der Fachtagung des Diakonischen Werkes der EKD vom 14. bis 16. März 201 in Berlin*, Berlin: Diakonie.

Dietz, B. (2003), Jewish Immigrants from the Former Soviet Union in Germany: History, Politics and Social Integration, *East European Jewish Affairs* 33(2), pp. 7-19.

djb, (Deutscher Juristinnenbund) (2004), *Stellungnahme (2) zum Entwurf eines Strafrechtsänderungsgesetzes – §§ 180b, 181 StGB*, Berlin (www.djb.de).

Dowty, A. (1987), *Closed Borders. The contemporary assault on freedom of movement*, New Haven/London.

EKD (1996), *Asylsuchende und Flüchtlinge. Zur Praxis des Asylverfahrens und des Schutzes vor Abschiebung*, herausgegeben vom Kirchenamt der Evangelischen Kirche Deutschlands (EKD), Hannover: EKD-Texte 51.

Erzbischöfliches Ordinariat Berlin (ed.) (1999), Illegal in Berlin. Momentaufnahmen aus der Bundeshauptstadt, betrifft: *Migration* Nr. 4, Dezember 1999, Berlin: Erzbischöfliches Ordinariat.

FFM (Forschungsgesellschaft Flucht und Migration (1998), Die Grenze. Flüchtingsjagd in Schengenland,*Flüchtlingsrat. Zeitschrift für Flüchtlingspolitik in Niedersachsen* 55 (5) p. 98.

Fraser, J.R. (2000), Preventing and Combating the Employment of Foreigners in an Irregular Situation in the United States, in: Organization for Economic Co-operation and Development (ed.), *Combatting the Employment of Foreign Workers*, Paris: OECD, pp. 101-105.

Griffiths, J. (1999), The Social Working of Anti-Discrimination Law, in: T. Loenen & P.R. Rodrigues, *Non-discrimination law: comparative perspectives*, The Hague: Kluwer Law International, pp. 313-330.

Heine-Wiedenmann, D. (1992), *Umfeld und Ausmaß des Mädchenhandels mit ausländischen Mädchen und Frauen*, Stuttgart: Kohlhammer.

Herbert, U. (1986), *Geschichte der Ausländerbeschäftigung in Deutschland 1880 bis 1980. Saisonarbeiter -Zwangsarbeiter – Gastarbeiter*, Bonn: Dietz.

ILO (International Labour Organization) (2004), *Human Trafficking and Labour Exploitation. ILO-Guidelines for Legislators and Law enforcement*, Geneva: ILO, (forthc.).

IOM, (International Organization for Migration) (2003), *World Migration 2003. Managing Migration – Challenges and Responses for People on the move*, Geneva: IOM.

Kahrs, H. (1993), Die Verstaatlichung der polnischen Arbeitsmigration nach Deutschland in der Zwischenkriegszeit, in: Jungfer, E. et al. (eds), *Arbeitsmigration und Flucht. Vertreibung und Arbeitskräfteregulierung im Zwischenkriegseuropa*, Berlin und Göttingen: Schwarze Risse und Rote Erde, pp. 130-194.

Kootstra, T. (1996), *Hintergrundstudie über die Grundprinzipien für einen Verhaltenskodex innerhalb der Mitgliedsstaatend er Europäischen Union zur Verhinderung und Bekämpfung des Frauenhandels*, Utrecht: Dutch Foundation against Trafficking in Women (STV).

Kritz, M.M., Lim, L.L. et al. (eds.) (1992), *International Migration Systems. A Global Approach*, Oxford.

Kyle, D. & R. Koslowski (2001), Introduction, in: D. Kyle & R. Koslowski, *Global Human Smuggling: Comparative Perspectives*, Baltimore/London: John Hopkins University Press, pp. 1-25.

Kyle, D. & Koslowski, R. (eds.) (2001) *Global Human Smuggling. Comparative Perspectives*, Baltimore: John Hopkins University Press.

LKA NRW, (Landeskriminalamt Nordrhein-Westfalen) (2002), *Lagebild Menschenhandel Nordrhein-Westfalen 2001*, Neuss <www.lka.nrw.de/lagebilder/lagebild_mh_2001.pdf>.

Marshall, B. (2000), *The New Germany and Migration in Europe*, Manchester and New York: Manchester University Press.

Meier-Braun, K.-H. (2002), *Deutschland. Einwanderungsland*, Frankfurt am Main: Suhrkamp.

Mentz, U. (2000), *Frauenhandel als migrationsrechtliches Problem*, Frankfurt am Main u.a.: Peter Lang.

Merk, B. (2004), Bekämpfung des Frauenhandels aus Sicht der Justiz, *Politische Studien* 55 (395), pp. 19-25.

Müller-Schneider, T. (2000), *Zuwanderung in westliche Gesellschaften. Analyse und Steuerungsoptionen*, Opladen: Leske & Budrich.

Müller-Schneider, T. (2001), Einschleusung von Migranten nach Deutschland. Ein neues Massenphänomen im migrationssoziologischen Überblick, in: E. Currle & T. Wunderlich, *Deutschland - ein Einwanderungsland? Rückblick, Bilanz und neue Fragen*, Stuttgart: Lucius & Lucius, 223-248.

Neske, M., Heckmann, F. et al. (2004), *Menschenschmuggel. Expertise im Auftrag des Sachverständigenrats für Zuwanderung und Integration*, Bamberg: Europäisches Zentrum für Migrationsstudien (efms). (www.zuwanderungsrat.de).

Niesner, E. (2001), Zur veränderten Rolle von NGOs im Kontext von Frauenhandel, in: agisra (ed.), *Migration von Frauen. Ausbeutung, Illegalisierung und Frauenhandel. Die Dokumentation der agisra Vernetzungstreffen von 1996 bis 2000*, Frankfurt am Main: agisra, pp. 113-124.

Niesner, E. & C. Jones-Pauly (2001), *Frauenhandel in Europa: Strafverfolgung und Opferschutz im europäischen Vergleich* (Trafficking in women in Europe: prosectution and victim protection in a European context), Bielefeld: Kleine.

Rapport, N. & J. Overing (2000), *Social and Cultural Anthropology. The Key Concepts*, London: Routledge.

Ronge, V. (1992), Migrationsdruck aus Osteuropa, *Ästhetik und Kommunikation* 21(78), pp. 63-72.

Sachverständigenrat Zuwanderung und Integration (2004), *Migration und Integration – Erfahrungen nutzen, Neues wagen. Jahresgutachten 2004 des Sachverständigenrates für Zuwanderung und Integration*, Nürnberg: Bundesamt für die Anerkennung ausländischer Flüchtlinge (BAFL) (www.zuwanderungsrat.de)

Schaab, E. (2001), Zeuginnenbetreuung und Prozeßbegleitung in Menschenhandelsverfahren. Migration von Frauen, agisra (ed.), *Ausbeutung, Illegalisierung und Menschenhandel. Die Dokumentation der agisra Vernetzungstreffen von 1996-2000*, Frankfurt am Main: agisra, pp. 95-99.

Sciortino, G. (2004), Between Phantoms and Necessary Evils. Some Critical Points in the Study of Irregular Migrations to Western Europe, *IMIS-Beiträge* (24), pp. 17-44.

Severin, K. (1997), Illegale Einreise und internationale Schleuserkriminalität. Hintergründe, Beispiele und Maßnahmen, *Aus Politik und Zeitgeschichte. Beilage zur Wochenzeitung Das Parlament* (B46/97), pp. 11-19.

Stange, D., Robert, G. et al. (2004), *Externe Evaluation: Kobra-Net – Fachberatungsstelle für Opfer von Menschenhandel. Endbericht Januar 2004*, Dresden: Evangelische Fachhochschule für Soziale Arbeit.

Steinbrenner, C. (2002), Die Verurteilungspraxis deutscher Gerichte auf dem Gebiet der Schleuserkriminalität, in: E. Minthe, *Illegale Migration und Schleusungskriminalität*, Wiesbaden: Kriminologische Zentralstelle.

Thränhardt, D. (2001), Einwanderungsland Deutschland – von der Tabuisierung zur Realität, in U. Mehrländer & G. Schultze (eds.), *Einwanderungsland Deutschland. Neue Wege nachhaltiger Integration*, Bonn: Dietz, pp. 41-63.

Vogel, D. (2003a), Illegaler Aufenthalt. Konzepte, Forschungszugänge, Realitäten, Optionen, in: D. Thränhardt &U. Hunger (eds.), *Migration im Spannungsfeld von Globalisierung und Nationalstaat*, Wiesbaden: Westdeutscher Verlag, pp. 161-179.

Vogel, D. (2003b), Paradigmenwechsel ohne Instrumentenwechsel?, in: A. Gohr & Seeleib-Kaiser (eds.), *Kontinuität und Wandel im Politikfeld Migration. Sozial- und Wirtschaftspolitik unter Rot-Grün*, Opladen: Westdeutscher Verlag, pp. 265-286.

Weller-Monteiro Ferreira, S. (2004), Die Vergemeinschaftung europäischer Einwanderungspolitik und ihre Auswirkungen auf die Soziale Arbeit, in: A. Treichler & N. Cyrus (eds.), *Handbuch Soziale Arbeit in der Einwanderungsgesellschaft*, Frankfurt am Main: Brandes und Apsel, pp. 99-122.

*Matilde Ventrella McCreight**

CRIMES OF ASSISTING ILLEGAL IMMIGRATION AND TRAFFICKING IN HUMAN BEINGS IN ITALIAN LAW: ILLEGAL IMMIGRATION BETWEEN ADMINISTRATIVE INFRINGEMENT AND CRIMINAL OFFENCE

1. Introduction

This chapter will outline the Italian law on smuggling of migrants, trafficking in human beings and irregular migration. It will point out that in 1998 only Italy commenced to develop legislation on the three phenomena.

In 1998 a new law was implemented where co-operation with other Member States of the European Union (EU) and other States not belonging to the EU, was reinforced. In particular, Act no. 40/1998 indirectly referred to international agreements such as the Schengen *Acquis*,[1] because, in Act no. 40/1998, the Schengen Acquis never had been expressly mentioned leaving the reader in doubt, where, Article 27 (1) of the Schengen Convention required to all Member States

> … to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.[2]

Italy acceded to the Schengen Convention in 1990 and it ratified the Schengen *Acquis* by Act 388/1993, thus a more precise legislation on illegal immigration

* Doctoral candidate in European Union law at the School of Law, University of Birmingham.

1 See Council Decision 1999/435/EC of 20 May 1999 in OJ D 176, 10 July 1999, and in OJ L 239/1, 22.9.2000.

2 See Article 27(1) of Schengen Convention in OJ 176/19 of the Council Decision, cit. note 1.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *141-168.*
 ISBN 90 04 15064 1.

and smuggling of migrants was essential especially when the Schengen *Acquis*, in 1997, became part of the Treaty on European Union (TEU).[3]

Trafficking in persons was even less developed, the Italian criminal code punished the reduction of a person to slavery and the slave trade only.[4] Italian criminal law did not have any provision that clearly defined the phenomenon of trafficking in persons.[5]

The next sections examine legislation introduced in 1998. It is pointed out that the legislator of 1998 did not emphasise the importance of police and judicial co-operation at European Union (EU) level. Secondly, it is highlighted that the legislator of 1998 rightly penalized the phenomena of smuggling of migrants and considered the phenomenon of irregular immigration as an administrative infringement and not as a crime.

The next sections also outline modifications introduced by the legislator in 2002. It is emphasised that these changes particularly were made on the phenomenon of irregular migration. The legislator of 2002 continues to consider this phenomenon as an administrative infringement, although it establishes limitation of personal freedom without giving to the immigrants the opportunity of organising a defence. This is the reason why the Italian Constitutional Court declared this part of the new legislation unconstitutional. However, before examining Italian Constitutional Court jurisprudence on the new Acts of 2002, the chapter examines who are the immigrants that can be expelled and it emphasises how the legislator of 1998 and the legislator of 2002 neglected to specify which category of asylum seekers cannot be expelled. Furthermore, legislation on trafficking in human beings is also analysed and it is pointed out that proper measures on trafficking in human beings have entered into force in 2003 only.

The aim of this chapter is to show that Italian legislation on smuggling of migrants and irregular immigration is restrictive, although not excessively if the EU reality is taken into account. In the chapter one provision of the Schengen Implementing Agreement is analysed to demonstrate that the European law considers irregular migration a crime. Italy is bound to Schengen and it is not respecting this Agreement as it does not criminalize irregular migration. However, in this chapter it is explained why the Schengen Implementing Agreement is not respected in the part related to the penalisation of irregular migration.

---

3 See Protocols added by the Treaty of Amsterdam in OJ 1997 C340/92-114.

4 See Article 600 *et seq* of the Italian criminal code in Regio Decreto 19 October 1930, no. 1398. In *Gazzetta Ufficiale* no. 251, 26/10/1930.

5 However, Italy is not the only Member State of the EU that did not focus on the crime of trafficking in human beings before 2003. In the UK also, for example, the crime of trafficking in human beings had been ruled in 2002. See section 145 of the *Nationality, Immigration and Asylum Act 2002.* For a more detailed analysis of trafficking in human beings in the UK see the chapter on the UK in this book.

The purpose of this chapter is also to emphasise that rightly Italian legislation specifies that irregular immigration is an administrative infringement. If Italian law had criminalized this conduct, the legality of the centres of assistance where irregular migrants have their personal freedom limited, could have been recognised. Some have complained, that these centres should better respect human rights, but the legality of these centres of assistance must be justified by the fact that being irregular migrants, persons are thereby also criminals, this limitation of freedoms is not against the law. On the contrary, the author of this chapter thinks that the centres of assistance where illegal migrants wait for expulsion, should be banned as they are in fact a form of concentration camp. An Italian policeman has recently emphasised that these centres of assistance in Italy called *centri di prima accoglienza* are comparable with lagers.[6] The policeman said that this work is not in the line of duty of an officer and that other policemen did not know that they were being recruited as guards for a concentration camp. He also reported that the first time he entered the camp, called *Borgo Mezzanone,* he was shocked and he recounted an incident which happened on 31 August 1999. He said that a police car caused an accident in the centre of assistance and two adults and one minor were involved. A man died but the Red Cross denied this death. The police union confirmed this death and gave the name of the dead person: Kamber Dourmishi who was born in Pristina in 1960.

Finally, the aim of this chapter is also to show that in Italy asylum seekers are neglected and that the crime of trafficking in human beings is seriously dealt in 2003 only.

2. The Legislation on Immigration before 1998

The first attempt to legislate on immigration had been made in 1931 where there were provisions that classified the phenomenon of immigration as a problem of public order.[7] Moreover, the Italian criminal code established expulsion for foreigners who committed crimes punishable with imprisonment not less than ten years and for foreigners guilty of crimes against the Italian State.[8] In 1948 also, when another important act came into force, the phenomenon of immigration

6 See Polchi, V., 'Io poliziotto vi racconto l'inferno dei Cpt'. On ilPassaporto.it-ilgiornale dell'Italia multietnica. <http://www.ilpassaporto.kataweb.it/dettaglio.jsp?id=24165&s=0>. Accessed on 2.4.2005.

7 For a study in depth on immigration law in force before 1998 see Musso, M., ' Immigrazione', in *Digesto delle Discipline Penalistiche* (UTET, 1992) p. 161. See also Regio Decreto 18 June 1931, no. 773 in *Gazzetta Ufficiale* no. 146, 26/6/1931.

8 See Article 235(1) and Article 312 of the Italian Criminal Code, *op. cit.* note 4.

continued to be consider as an issue related to the public order.[9] Furthermore, in 1975 Act no. 152/1975 provided for the expulsion of migrants who could not demonstrate their ability to maintain themselves with sufficient means of subsistence and in respect of law.[10]

Successively, other acts entered into force. Precisely, in 1986 Law 943/1986 was approved entitled 'Norme in materia di collocamento e di trattamento dei lavoratori extracomunitari immigrati e contro le immigrazioni clandestine'.[11]

In 1989 only, the Italian government approved legislation on the *status* of refugees.[12] Indeed, Act 39/1990 recognised the *status* of refugees and the criteria that a person shall meet to claim this *status*.

However, in 1995, the new legislation approved did not modify the concept immigration/public order because it stated that expulsion could follow when a court was satisfied of the effective danger of a foreigner, although the fact that the migrant was not capable of maintaining himself/herself was no longer necessary.[13] Therefore, in 1995 the social aspects of immigration still prevailed over the punitive aspects.

The privileging of the punitive aspects as a priority began in 1998 when a new Legislative Decree entered into force.[14] The *Corte di Cassazione*,[15] Italian Court of last resort, asserted that Legislative Decree 286/1998 was repressive compared

9 In 1948 Article 2 of the Legislative Decree no. 50/1948 punished with imprisonment, persons whom knowingly did not communicate the identity of foreigners and *apolidi* (stateless) into Italian territory to the authority of public security within twenty-four hours. See Article 2 of Legislative Decree no. 50/1948 'Sanzioni per Omessa Denuncia di Stranieri e Apolidi', in *Gazzetta Ufficiale* no. 44, 21/2/1948.

10 See Article 25 of Law no. 152/1975 'Disposizioni a Tutela dell'Ordine Pubblico', in *Gazzetta Ufficiale* no. 136, 24/5/1975.

11 See Act 943/1986 in *Gazzetta Ufficiale* no. 8, 12/1/1987. Translation from Italian into English, except where noted, are my own. Translation of this title is: Norms related to employment and treatment of immigrants coming form countries nor belonging to the European Community and against illegal immigration.

12 See Law Decree 416/89 in *Gazzetta Ufficiale* no. 303, 30/12/1989. The Law Decree was converted in Law no. 39/1990 in 1990. See Act 39/90 in *Gazzetta Ufficiale* no. 49, 28/2/1990.

13 See Article 7 of Law Decree 489/1995 on <http://www.stranieriitalia.com/briguglio/immigrazione-e-asilo/1996/gennaio/emendamenti-commissione.html>. Accessed on 4/12/2004.

14 Legislative Decree no. 286/1998, 'Testo Unico delle Disposizioni concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero', in *Gazzetta Ufficiale* no. 191, 18.8.1998.

15 In Italy the trial consists of three grades. There is the Court of first grade, the Court of appeal and the Court of Cassation which is the Court of last resort.

to previous laws on the subject.[16] Precisely, the *Corte di Cassazione* had to rule on a person accused of facilitating the entry of an illegal immigrant for the purpose of sexual exploitation. The defendant claimed that the Court of Appeal's motivation was illogic because it did not take into consideration the contradictory evidence presented by the victim. Furthermore, the defendant pointed out that the Court of Appeal did not take into account the fact that he did not commit the crime of assisting illegal immigration ex Article 12(1 and 3) of Legislative Decree 286/1998 because the victim and him, were both illegal immigrants whose entry onto Italian territory was facilitated by the carriers. The *Corte di Cassazione* rejected the issue because the Court of Appeal motivation was *ictu oculi* logical. The contradictory evidence presented by the victim was caused by the violence she had suffered. Furthermore, the *Corte di Cassazione* analysed Article 12 of Legislative Decree 286/1998 and successive modifications introduced by Act 189/2002 that, according to the *Corte di Cassazione*, highlighted the repressive aspects of Legislative Decree 286/1998 and neglected the solidarity aspects introduced by Legislative Decree 286/1998. The *Corte di Cassazione* pointed out that Act 40/1998 as incorporated in Legislative Decree 286/1998, privileged aspects of public order already part of Act 943/1986 where, in any case, the principles of non-discrimination between Italian citizens and foreigners takes priority. If in 1986, the *Corte di Cassazione* emphasised in their judgement, the fact that the phenomenon of illegal immigration was considered as a consequence of poverty, in 1998 illegal immigration was seen as a fact to repress. The repressive tendency was even more highlighted in 2002 and thus, the defendant was punished because although he also entered Italian territory illegally, he took steps to facilitate the entry of another illegal immigrant into Italian territory. Consequently, the *Corte di Cassazione* asserted that Article 12 of Legislative Decree 286/1998 must be interpreted extensively so as to include illegal immigrants who facilitate the entry of other illegal immigrants into Italian territory.

3. The Legislation of 1998 on Immigration and Successive Modifications

3.1 Assisting Illegal Immigrants

Legislative Decree no. 286/1998 consolidated all provisions in force[17] that dealt with immigration issues and with legal status of third-country nationals.[18]

16 See Judgement of the Italian Supreme Court of Cassation, Corte di Cassazione, judgement no. 3162, 31/01/2003.

17 See provisions of section 2 of this chapter. However, the main laws part of Legislative Decree 286/1998 are: Legge 6 marzo 1998 no. 40 in *Gazzetta Ufficiale* no.59, 12/03/1998. Legge no. 943, 30.12.1986 in *Gazzetta Ufficiale* no. 8, 12/01/1987.

18 See Nascimbeni, B., 'Italy', in Higgins, I. & Hailbronner, K., *Migration and Asylum Law and Policy in the European Union*, p. 205 (Cambridge University Press, 2004).

Decree 286/1998 specified that Decree 286/1998 applies to citizens of states not belonging to the EU and stateless persons "*apolidi*".[19]

Article 12(1 and 3)[20] are analysed because they criminalize attempting and assisting illegal immigration. Article 12(1) Decree 286/1998 states that persons who commit acts directed to facilitate third-country nationals to enter Italian territory, can be punished with imprisonment for up to three years and with a fine not exceeding thirty million lire; Article 12(3) Legislative Decree 286/1998 specifies that if the crime of paragraph 1 was committed by three or more persons or with the aim of gaining an economic advantage "*fine di lucro*" and it involves the entry of five or more persons into Italian territory, imprisonment between four years and twelve years and a fine of thirty millions lire for each smuggled person applies.

Article 12(1) of Legislative Decree 286/1998 was quite restrictive because it punished those who attempted to facilitate the entry of illegal immigrants into the Italian territory no matter whether the illegal entry took place.[21] It is thought that Legislative Decree 286/1998, as Act no. 40/1998, responded to the requirements of Article 27 of the Schengen Implementing Agreement which requires states parties to the Convention not only to criminalize those who assist illegal immigrants, but also those who attempt to assist illegal immigrants to enter the territory of a Schengen state, although Legislative Decree 286/1998 did not expressly refer to the Schengen Acquis.[22]

It is thought that Legislative Decree 286/1998 has been partially modified by Act 189/2002[23] for different reasons. Firstly, Legislative Decree 286/1998 did not take into account co-operation with other States in order to prevent illegal immigration. Indeed, Article 3(2)[24] of Legislative Decree 286/1998 emphasised that international agreements and co-operation with other Member States of

---

19 See Article 1(1) Legislative Decree no. 286/1998, ' Testo Unico delle Disposizioni concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero', in *Gazzetta Ufficiale* no. 191, 18.8.1998.

20 See Article 12(1, 3) Legislative Decree no. 286/1998, cit. note 19.

21 This crime can be classified as *delitto tentato* punished by Article 56(1) of the Italian criminal code, cit. note 4.

> *Chi compie atti idonei, diretti in modo non equivoco a commettere un delitto, risponde di delitto tentato, se l'azione non si compie o l'evento non si verifica.*
>
> Any one who does suited acts directed unequivocally to commit a crime, can be punished for attempt if the action is not done and the event does not take place.

22 See section 2 of this chapter.

23 See Act no. 106, in *Gazzetta Ufficiale* no 133, 8.06.2002. See Act no 189, 30/07/2002 in *Gazzetta Ufficiale* no.199 26/08/2002.

24 See Article 3(2) Legislative Decree 286/1998, cit. note 19. The programme indicates actions and intervention that Italian State, in co-operation with other Member States of the European Union also, with international organisations, with Com-

the EU on immigration need to be agreed. Although it might be assumed that the agreements the Legislative Decree referred to were the readmission agreements, Article 3(2) was too generic and it could have created confusion. For instance, it did not expressly state that these agreements included police and judicial co-operation in criminal matters at EU level, although this lack was justified by the fact that, in 1998 the issue of police and judicial co-operation in the EU was not developed.[25]

Furthermore, Article 11(4) of Legislative Decree 286/1998 stated that the Minister of Foreign Affairs and the Minister of Internal Affairs promote the necessary initiatives, in agreement with countries involved in border controls, with the purpose of accelerating checks of essential documents to improve the effectiveness of this text.[26] Article 11(4) did not clarify that Italy promoted and reinforced criminal co-operation in order to prevent illegal immigration, thus Article 11(4) was too wide and it is thought that excluded the possibility of criminal co-operation in order to prevent illegal immigration. In this case also, it is thought that this lack is because the developments in the EU on police and judicial co-operation were only introduced in 2002. In any case a reform of Legislative Decree 286/1998 was necessary *in primis* because the European Union was reinforcing and requiring police and judicial co-operation between Member States of the EU to combat cross-border crimes.

Act 189/2002 met these requirements and it stated that in elaborating and reviewing bilateral programmes of cooperation and support of non-humanitarian nature with states not belonging to the EU, the government takes also into account co-operation of these states in order to prevent illegal immigration flows and criminal activities involved in illegal immigration.[27]

---

munity institutions and non-governmental organisations, will stipulate on immigration, also by conclusion of agreements with countries of origin.

25 The Treaty of Nice, in 2002, introduced new norms on police and judicial co-operation in the Treaty on European Union. See Title VI of the Treaty on European Union as amended by the Treaty of Nice in OJ C 2002 C325/1-184.

26 See Article 11(4) Legislative Decree 286/1998, cit. note 19.

4. *Il Ministero degli affari esteri e il Ministero dell'interno promuovono le iniziative occorrenti, d'intesa con i Paesi interessati, al fine di accelerare l'espletamento degli accertamenti e il rilascio dei documenti eventualmente necessari per migliorare l'efficacia dei provvedimenti previsti dal presente testo unico*.

27 See Article 1(2) of Act no.189/2002, cit. note 23.

Nella elaborazione e nella eventuale revisione dei programmi bilaterali di cooperazione e di aiuto non a scopo umanitario nei confronti dei paesi non appartenenti all'Unione europea, … il Governo tiene conto anche della collaborazione prestata dai Paesi interessati alla prevenzione dei flussi migratori illegali e al contrasto delle organizzazioni criminali operanti nell'immigrazione clandestina.

Firstly, Act 189/2002 seems clearer as it reinforces co-operation with states not belonging to the EU to prevent illegal immigration and to combat criminal organisations which are behind illegal immigration.

Secondly, Act 189/2002 stresses more specifically the conclusion of readmission agreements and after Act 189/2002, twenty-nine readmission agreements have been concluded with third-national countries.[28] Therefore, Act 189/2002 anticipated the European Commission initiatives on readmission agreements.[29] It can be argued as Peers did, that EU policies on immigration, including readmission agreements, are '… unbalanced, inhumane, and internally contradictory'.[30] As Peers rightly points out, the more EU immigration policy excessively concentrates on control, the more the EU becomes unilateralist.[31] Nevertheless, Italy belongs to the EU, it could seek to adapt EU law to the specific case of the Italian territory within the framework of the general principles.

Thirdly, Act 189/2002 reinforces co-operation with other Member States of the EU also, because it expressly quotes the Schengen Acquis.[32]

Further, Act 189/2002 does not modify Article 12(1) of Legislative Decree 286/1998 where it punishes the attempt to assist entry of illegal immigrants. Precisely, assisting illegal immigration does not have the characteristics of Article 3 of the Protocol of the United Nations Convention against Trans-national Organized Crime (UNTOC) on Smuggling of Migrants[33] signed by Italy on 12 December 2000 and not yet ratified,[34] because whilst according to Article 3 of the Protocol on Smuggling of Migrants:

---

28 See Ministero degli Interni, 'Lo Stato della Sicurezza in Italia', 15/8/2004, p.119, in <www. interno.it/assets/files/6/20040816172018_10-113-232-21.pdf>, accessed on 10/04/2005.

29 See Communication from the Commission to the Council and the European Parliament. Report on the Priorities for the Successful Development of a Common Readmission Policy, p.1 *et seq.* SEC (2004) 946 final, 19/7/2004. See also Commission Staff Working Paper. Annual Report on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders, and the Return of Illegal Residents, p. 11. SEC (2004) 1349, 25/10/2004.

30 See Peers, S., Readmission Agreements and EC External Migration Law, in *Statewatch* no. 17. On <http://www.statewatch.org/news/2003/may/readmission.pdf>. Accessed on 18/3/2005.

31 *Ibid.*

32 See Article 10(1-*bis*) of Act no. 189/2002, *op. cit.* note 23. The Schengen Acquis introduces provisions on police and judicial co-operation in criminal matters. See Article 39 *et seq.* of the Schengen Convention, cit. note 1.

33 See Article 3 of Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. A/RES/55/25, 8.1.2001.

34 See <http://www.unodc.org/unodc/en/crime_cicp_signatures_migrants.html>, accessed 8.11.2004.

> (a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial gain or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident …[35]

Act 189/2002[36] continues to punish the simple attempt and not only the procurement of illegal entry as Article 3 of the Smuggling of Migrants Protocol does. Thus, it is thought that Legislative Decree 286/1998 and Act 189/2002 are more restrictive than the UNTOC requirements. Furthermore, it is important to add that Act 189/2002 does not distinguish the two different crimes in the imposition of sanctions as both crimes, attempt to facilitate illegal immigration and the procurement of illegal entry, are punished with imprisonment from four to twelve years.

Act 189/2002 then has introduced the crime of attempting to facilitate illegal emigration to another state and procuring illegal emigration to another state where illegal emigrants do not have citizenship or the right of permanent residence.[37] It is essential to point out that all these crimes concerning illegal immigration and illegal emigration require European police and judicial co-operation and co-operation with states not belonging to the EU because they have all the characteristics listed in Article 3(2) of the UNTOC:

> … an offence is transnational [*sic* trans-national] in nature if:
> (a) It is committed in more than one State;
> (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
> (c) It is committed in one State but involves an organized [*sic*: organised] criminal group that engages in criminal activities in more than one State; or
> (d) It is committed in one State but has substantial effects in another State.[38]

35 *Ibid*.

36 See Article 11(1, 3 and 3*bis*) Act no. 189/2002, cit. note 23. Article 12(1, 3) has been modified by Article 11(1, 3) Act no. 189/2002 which has also introduced the new paragraph 3*bis* to the Legislative Decree 286/1998, *op. cit.* note 19.

37 See Article 11(1 and 3) of Act no. 189/2002, note 23. See also Nascimbene, B., 'Nuove norme in materia di immigrazione. La legge Bossi-Fini: perplessità e critiche', *Corriere giuridico*, 2003, (4) p. 536. Nascimbene defines the illegal entry from Italy in another State as illegal emigration.

38 See Article 3(2) of the United Nations Convention against Transnational Organized Crime, cit. note 33.

If immigrants are smuggled from Turkey into Italy and successively they are transferred to the UK by the support of criminal organisations, two problems arise. Firstly, police investigations on instigators and perpetrators would be rather difficult without active co-ordination between the different police of Italy and the UK in this case. Secondly, which state has to take over the case? Italy would claim jurisdiction because assisting illegal immigration was committed on their territory, the UK could claim jurisdiction because it is the state of final destination of migrants and thus the state that suffers negative effects of the crime of assisting illegal immigrants. However, Act 189/2002, which reinforces coordination between Italian authorities responsible for border controls and European authorities responsible for borders controls under the Schengen Implementing Agreement, might resolve these potential conflicts and it makes feasible European police and judicial co-operation in preventing persons who seek to facilitate the entry of illegal immigrants into Italy and the entry of illegal emigrants to another state of which illegal emigrants do not have citizenship. In this respect Act 189/2002 is very advantaged as by referring to the Schengen Acquis, it opens the construction of a European criminal law to combat the trans-national crime of assisting illegal immigration that the UNTOC calls smuggling of migrants.

Finally, another difference between Legislative Decree 286/1998 and Act 189/2002 concerns the definition given by the latter on assisting illegal immigration which, appears much more generic than the definition of Legislative Decree 286/1998, as it does not require an organised activity with at least three persons being involved.[39] Offenders could be anyone (*chiunque* as Article 11 (3) Act 189/2002 specifies) with the consequence that the new act is rightly much more restrictive towards smugglers of migrants compared to Article 12 (3) Legislative Decree 286/1998.

In conclusion, it is thought that Act 189/2002 has fairly added provisions on police and judicial co-operation in preventing and combating assisting illegal immigration at EU level that Legislative Decree 286/1998 had neglected. Furthermore, Act 189/2002 is more restrictive on the crime of assisting illegal immigration and this severity is justified because of the gravity of this crime.

The next section examines the crime of trafficking in human beings in Italian legislation by analysing Legislative Decree 286/1998, Act 189/2002 and Act 228/ 2003.

3.2 Trafficking in Human Beings

Trafficking in human beings is superficially dealt with by Legislative Decree 286/1998 and Act 189/2002 because only two provisions relate to this crime. The crime of trafficking in human beings was only considered an aggravating cir-

39 Compare Article 12(3) of Legislative Decree no. 286/1998, cit. note 19 and Article 11(3) Act no. 189/2002, cit. note 23.

cumstance of the crime of assisting illegal immigration by Legislative Decree 286/1998.[40] Moreover, Legislative Decree 286/1998 mostly concentrated on traffic in prostitution. Act 189/2002 also considers trafficking in human beings an aggravating circumstance, albeit it modifies this provision as it not only punishes traffic in relation to prostitution, but also a more generic crime of trafficking in persons concerning women and children.[41] Nevertheless, it is thought that the crime of trafficking in human beings cannot be classified as an aggravating circumstance only, but as a different criminal offence itself. Another provision included by Legislative Decree 286/1998 is Article 18 which, stated that victims of the crime of trafficking in persons may obtain a *permesso di soggiorno* (permit to stay in Italy) for a period of no longer than one year.[42] Article 18 of Legislative Decree 286/1998 has not been modified by Act 189/2002, although it is thought that this Article is incomplete and ambiguous. Certainly, it is a form of protection for victims of trafficking in human beings. However, it is incomplete because it does not protect victims of smuggling of migrants. These people also need protection because criminal organisations take advantage of their poor state and oblige them to pay a high price to come to Italy. Article 18 then is ambiguous as it seems to guarantee protection to persons who accept to cooperate with Italian police in order to arrest and detain traffickers in human beings only. Thus, when there is no need of this form of cooperation, victims of trafficking in human beings might be considered 'useless' and sent back to their countries of origin. These are the reasons why Act 189/2002 should have amended Article 18 of Legislative Decree 286/1998.

Therefore, because of these ambiguities and omissions, the new Act 228/2003 on trafficking in human beings,[43] which modifies Articles 600 *et seq* of the Italian criminal code, is welcome.[44] The new provisions are similar to the provisions inserted in the Protocol on Trafficking in Persons of UNTOC[45] that Italy has signed on 12 December 2000 but not ratified yet.[46] Article 3 of the Protocol on Trafficking in Persons of UNTOC states

---

40 See Article 12(3) of Legislative Decree 286/1998, cit. note 19.

41 See Article 12(3*ter)* of Legislative Decree 286/1998 … cit. note 19 as substituted by Article 11(1(c)) of Act no. 189/2002, cit. note 23.

42 See Article 18 of Legislative Decree 286/1998, cit. note 19.

43 See Act no.228/2003 'Misure contro la Tratta di Persone', in *Gazzetta Ufficiale* no. 195, 23/8/2003.

44 See section 2 of this chapter.

45 See Article 3 *et seq* of Annex II entitled Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. A/RES/55/25, 8.1.2001.

46 See <http://www.unodc.org/unodc/en/crime_cicp_signatures_migrants.html> last accessed on 8.11.2004.

> (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[47]

Indeed, the new Article 600 of Italian criminal code as modified by law no. 228/2003 punishes the crime of reduction of an individual to slavery.[48]

Act no. 228/2003 reforms the Italian criminal code by defining and criminalizing trafficking in persons called *tratta di persone.* A person who commits traffic in persons reduced to slavery, can be punished by imprisonment from eight to twenty years. Constraints under which persons must be coerced to be trafficked are the same as in Article 3 of the Protocol on Trafficking in Persons of the UNTOC.[49]

In conclusion, in Italy there were no provisions on trafficking in human beings until 2003. Before this date, Legislative Decree 286/1998 and Act 189/2002 were incomplete, ambiguous and lacking as regards the crime of trafficking in human beings.

The next section deals with illegal immigration which in the Italian context is a very controversial phenomenon.

3.3 Irregular Migration

The most important modifications introduced by Act 189/2002 concern provisions on irregular migration. The new law is more restrictive than Legislative Decree 286/1998 and also very ambiguous because in some cases it considers illegal immigration an administrative offence, in others a crime. It is thought that the ambiguity is caused by different factors. On one side, there are political parties and the Catholic Church that are reluctant to consider illegal immigration, in the meaning of unauthorised entry, a crime.[50] On the other side, there are other political parties in favour of considering illegal entry a crime. Further, there is the Schengen Implementing Agreement. It is important to emphasise that Article 9 of the Schegen Agreement states:

47 See Article 3(1) letter (a) of Protocol on Trafficking in Persons, cit. note 47.

48 See Article 1(1 and 2) of Act no. 228/2003, *op. cit.* note 43.

49 *Ibid.*

50 See for example 'Gli immigrati vanno accolti, ma non in un carcere. Il parere di un gruppo di giovani sulla realizzazione di un Centro di permanenza temporanea nell'ex caserma "Polonio" a Gradisca', in *Il Piccolo*, 5/4/2005. See also 'Cpt, "sanzioni no global"', *Il Manifesto*, 2/4/2005.

> The Parties shall reinforce cooperation between their customs and police authorities notably in combating crime, particularly … the unauthorised entry and residence of persons …[51]

Therefore, according to Article 9 of the Schengen Agreement, irregular migration in the meaning of unauthorised entry is a crime. Although Italy acceded to the Schengen Implementing Agreement in 1993, it is not in conformity because it does not always consider unauthorised entry a criminal offence. It is thought that Article 9 of the Schengen Implementing Agreement is not respected because it would create too many polemics between Catholic associations, political parties and other social groups that deeply reject the idea of criminalizing irregular migrants. It is also thought that Italian law should not be modified in order to respect this provision of the Schengen Implementing Agreement.

In any case, it is important to analyse the Italian provisions on irregular migration. Legislative Decree 286/1998 established that irregular migrants who may be expelled are foreigners who either enter the state territory by avoiding frontier checks when they have not been rejected, or stay in the state territory without having requested a residence permit within their limited permission, apart from the case of *force major*.[52]

Nevertheless, Legislative Decree 286/1998 did not impose imprisonment on irregular migrants because it never considered irregular migration a crime but an administrative infringement, punishable by expulsion. Furthermore, Article 13(1) created extra-territoriality because the expulsion would apply even when the foreigner is not resident in Italy any more. Moreover, Article 13(2) above stated that a foreigner (apart from European citizens) who entered Italian territory without applying for a residence permit or by avoiding checks foreseen by the Legislative Decree no. 286/1998 would be expelled. Article 19(1) of Legislative Decree 286/1998 (not modified by Act 189/2002) stated that expulsion could not be applied towards a state where the foreigner risks of being persecuted for reasons of race, sex, language, citizenship, religion, political opinions, personal and social conditions.[53] Moreover, Article 19(2) listed categories of persons who cannot be expelled in any case. They are persons under eighteen years old, unless following their expelled parents; foreigners who are in possession of the *carta di soggiorno* (permit to stay in Italy); foreigners who live with their parents; women during pregnancy and in the six months after the birth, including their spouses. Article 19 presents elements of perplexity because it is not precise enough. Are the persons considered in Article 19(1) asylum seekers? It is thought that Leg-

51 See Article 9 of the Schengen Agreement in OJ 176/13 in Council Decision, cit. note 1.

52 See Article 13(2) Legislative Decree 286/1998, cit. note 19.

53 See Article 19(1) of Legislative Decree 286/1998, cit. note 19.

islative Decree 286/1998 should have given more attention to this category of persons. On the contrary, Article 19(1) only refers to unprotected persons and it excludes asylum seekers, because persons who risk to be persecuted in another state (Article 19(1)), are refugees and not asylum seekers because asylum seekers apply in order to obtain the status of refugees, so they are in the stage of demonstrating their risk of being persecuted in another state and in the meantime, according to Italian law, they can be expelled like other irregular migrants who are not in possession of a residence permit.

Furthermore, Article 13 (4 and 5) Legislative Decree 286/1998 (now modified) indicated the procedure to follow after expulsion. It stated that the expulsion order was carried out by the head of police administration (*questore*) and did not fix a limit within which, the expulsion order had to be followed. The provision also stated that the police authority (*prefetto*), on the basis of objective circumstances and taking into account the social, working and family life of the foreigner, had to establish the need for expulsion in case the foreigner did not have valid identity documents. Consequently, the expulsion was rightly not automatic.

Modifications have been introduced by Article 12(1(c and d)) L. 189/2002, which introduced changes to Article 13(4 and 5) of Legislative Decree 286/1998. Furthermore, Article 2(1) L. 106/2002 has added paragraph 5 *bis* to Article 13 Legislative Decree 286/1998. These new provisions did not modify the administrative nature of irregular migration, facilitated measures on expulsion and rendered Article 13 more restrictive. The Constitutional Court asserted that legislator imposed more severe measures to prevent uncontrolled entry of immigrants who could endanger order and security.[54]

The new Article 13 states that expulsion is always carried out by the head of police administration by accompanying the foreigner to the frontier by public force, with the exception of the foreigner who over-stayed in the Italian territory after his residence permit expired by more than 60 days and the renewal has not been requested. In this latter case the new Article 13 imposes more severity because the expulsion includes the order to leave the state territory within fifteen days. Further, the head of police administration is to carry out the immediate accompanying of the foreigner to the frontier, if the police authorities consider that there is a concrete danger that the foreigner might avoid the deportation order.

In all these cases the head of police administration immediately communicates and, in any case, within forty-eight hours from the adoption of the measures, to the tribunal territorially competent the provision by which the accompanying to the frontier is carried out. The provision has immediate effect.

54 This point is better explained in section 4.2.

The tribunal verifies the supporting requisites, and authorises the deportation within the next forty-eight hours. [55]

It might be argued that the new law has transformed the administrative infringement of illegal entry into Italian territory into a crime in cases where the police authority (*prefetto*) orders the head of police administration (*questore*) to carry out the expulsion immediately on the basis that there is a danger that the illegal immigrant could escape and thus avoid deportation. In this case of danger of escape, the expulsion must follow in forty-eight hours with the consequence that in this period of time the illegal immigrant loses his/her personal freedom without the opportunity of organising a defence because of the short time within which the expulsion order has to be followed.[56] The expulsion order does not follow immediately if the immigrant possesses a residence permit that has been expired for more than sixty days and has not been renewed.[57] Exceptions on expulsion concern foreigners who need help and assistance. It seems that the assistance and help to which Act 189/2002 refers is medical. Consequently, asylum seekers are neglected. Precisely, Article 14(1) of Legislative Decree 286/1998 states that when expulsion by accompanying the foreigner to the frontier or the alien rejection cannot immediately follow because it is necessary to give medical assistance (*soccorso*) to the foreigner, it is for the head of police administration to decide to keep the foreigner at the nearer centre of temporary assistance.[58]

Foreigners under Article 14(1) cannot be expelled, thus they can be kept in centres of assistance, although temporarily only and with limitation of personal freedom (among others) as Article 14(2) of Legislative Decree 286/1998 states that a foreigner may be kept in the centre only in accordance with the guarantee of assistance and respect of dignity (although no personal freedom) including

---

55 See Article 13(4, 5 and 5*bis*) Legislative Decree 286/1998, cit. note 19 as modified by Article 12(1(c and d)) of Act no. 189/2002, cit. note 23, and Article 2(1) of Act no. 106/2002, cit. note 23.

56 See Article 12(1 c and d) of Act no.189/2002, cit. note 23, which replaced the previous Article 13(5 and 6) Legislative Decree 286/1998, cit. note 19. See also Article 2(1) L.106/2002, cit. note 23, which inserted paragraph 5*bis* into Article 13 Legislative Decree 286/1998, cit. note 19.

57 See Article 13(5) Legislative Decree 286/98, cit. note 19 as modified by Article 12(1) of Act no. 189/2002, cit. note 23.

58 See Article 14(1) of Legislative Decree 286/1998, cit. note 19.

Quando non e' possibile eseguire con immediatezza l'espulsione mediante accompagnamento alla frontiera ovvero il respingimento, perché occorre procedere al soccorso dello straniero, … il questore dispone che lo straniero sia trattenuto per il tempo strettamente necessario presso il centro di permanenza temporanea e assistenza più vicino …

freedom of correspondence and freedom to telephone to foreign countries.[59] However, what is the difference between a person who has committed a crime and a person who, because he/she cannot be expelled from Italian territory, is kept in a centre of assistance? Both persons see their personal freedom limited, thus both persons are criminals, despite the fact that Italian law considers irregular migration an administrative infringement only. Thus, *de facto* Italian law treats irregular migrants as criminals.

Finally, Article 14(5bis, 5ter and 5*quater*) of Legislative Decree 286/1998 as modified by Article 13(1 letter b) of Law 189/2002 states that when it has not been possible to keep the foreigner in a centre of temporary detention, or the period of detention has passed without the deportation or removal of the foreigner, the head of police administration may order the foreigner to leave Italian territory within five days. The order follows with a written procedure in which criminal consequences are applicable in cases where the foreigner is in breach of the order. Indeed, the foreigner who without just reason remains on Italian territory in breach of the head of police administration's order, is punished by arrest and a conviction from six months to one year. Further, the foreigner who is expelled according to paragraph 5*ter* who is found on Italian territory is punished with imprisonment from one year to four years.[60]

These new provisions apply the penalty of imprisonment for foreigners who do not leave Italian territory following a deportation order. Legislative Decree 286/1998 did not foresee a similar consequence, thus even in this case the new Law 189/2002 privileged the protection of public order and security[61] on Italian territory by criminalizing irregular migration in specific circumstances.

The next sections examine the Constitutional Court jurisprudence on Act 189/2002, which declared certain provisions of Act 189/2002 unconstitutional.

---

59 See Article 14(2) of Legislative Decree 286/1998, cit. note 19.

1.*Lo straniero e' trattenuto nel centro con modalità tali da assicurare la necessaria assistenza e il pieno rispetto della sua dignità … e' assicurata in ogni caso la libertà di corrispondenza anche telefonica con l'estero*.

60 See Article 14(5*ter* and *quarter*) of Legislative Decree 286/1998, cit. note 19 as modified by Article 13(1 Letter b) of Law 189/2002, *op. cit.,* note 23.

5.bis Quando non sia stato possibile trattenere lo straniero presso un centro di permanenza temporanea, ovvero siano trascorsi i termini di permanenza senza aver eseguito l'espulsione o il respingimento, il questore ordina allo straniero di lasciare il territorio entro il termine di cinque giorni. L'ordine e' dato con provvedimento scritto, recante l'indicazione delle conseguenze penali della sua trasgressione.
5ter. Lo straniero che senza giustificato motivo si trattiene nel territorio dello Stato in violazione dell'ordine impartito dal questore ai sensi del comma 5bis e' punito con l'arresto dai sei mesi ad un anno …
5quater. Lo straniero espulso ai sensi del comma 5ter che viene trovato,… nel territorio dello Stato e' punito con la reclusione da uno a quattro anni.

61 Point better explained in section 4.2.

4. Italian Jurisprudence

4.1 Expulsion Order under Specific Conditions

In 2004 an Italian Constitutional Court ruling declared unconstitutional Article 13 (5 *bis*) Legislative Decree 286/1998 as modified by Article 2 (1) L.106/2002.[62] The Italian Constitutional Court ruling followed after the *Tribunale di Roma* asserted that Article 13(4 and 5) of Legislative Decree 286/1998 as modified by Article 12 (1 letters c and d) of Act 189/2002 established a physical constraint without indicating any deadline within which the alien's personal freedom had to be limited.[63] The *Tribunale di Roma* also pointed out that paragraph 5*bis* inserted by Article 2(1) of Act 106/2002 that imposes a limit of forty-eight hours within which deportation had to follow, did not resolve the problem because paragraphs 4, 5 and 5*bis* of Article 13 are contrary to Articles 13, 24 and 111 of the Italian Constitution. Indeed, Article 13(3) of the Italian Constitution states that in exceptional circumstances expressly specified by the law, the authority of public security (*questore, prefetto*) can adopt temporary measures that must be communicated to the judicial authority within forty-eight hours. If the judicial authority does not ratify these temporary measures within forty-eight hours, the measures lose their effect.[64]

Article 24(1 and 2) of the Italian Constitution states that any one can proceed to defend their rights. Defence is an inviolable right.[65]

Article 111 of the Italian Constitution also creates guarantees of defence for persons accused of committing crimes or other infringements. The *Tribunale di Roma* emphasises as the procedure of Article 13(4, 5 and 5*bis*) does not permit to the foreigner to defend himself/herself because the Article does not foresee that the foreigner must be heard before a judge to give his/her reasons.[66]

---

62 The Italian Constitutional Court ensures that all Italian acts respect the Italian Constitution. See judgement of the Italian Constitutional Court, Corte Costituzionale no. 222, 8-15/7/2004 in *Gazzetta Ufficiale* no. 28, 21/7/2004.

63 See judgement of the Italian Constitutional Court, cit. note 62 section 1.

64 See Article 13(3) of the Italian Constitution *Costituzione della Repubblica Italiana,* in *Gazzetta Ufficiale* no. 298 27/12/1947.

In casi eccezionali di necessità ed urgenza, indicati tassativamente dalla legge, l'autorità di pubblica sicurezza può adottare provvedimenti provvisori, che devono essere comunicati entro quarantotto ore all'autorità giudiziaria e, se questa non li convalida nelle successive quarantotto ore, si intendono revocati e restano privi di ogni effetto.

65 See Article 24(1 and 2) of the Italian Constitution, *op. cit.* note 64.

Tutti possono agire in giudizio per la tutela dei propri diritti…La difesa e' diritto inviolabile …

66 *Ibid.*

Furthermore, the *Tribunale di Roma* argues that the foreigner does not have the opportunity of appeal against the expulsion procedure carried out by the head of police administration *questore.* The *Tribunale di Padova* also required the declaration of unconstitutionality[67] of Article 13(5*bis*) of Legislative Decree 286/1998 as modified by Article 2 (1) of Act 106/2002 because it is in breach of Articles 3, 13, 24 and 111 of the Italian Constitution for the same reasons indicated by the *Tribunale di Roma.*

Furthermore, the *Tribunale di Padova* highlighted that Article 13(5*bis*) constituted discrimination between foreigners for whom, according to Article 14(1) of Legislative Decree 286/1998, expulsion cannot follow for different reasons such as assistance after arrival[68] and foreigners for whom expulsion must follow.

The *Tribunale di Padova* added that Article 14(4) foresees that foreigners must be heard and must have the opportunity of defending himself/herself in cross-examination, while in Article 13(5*bis*) there is not a similar guarantee. Therefore, the *Tribunale di Padova* asserted that the confirmation procedure of Article 13(5*bis*) is merely a formality and *de facto* does not protect the foreigner's personal freedom. The *Tribunale di Padova* also pointed out that Article 13(3) of the Italian Constitution would be violated by Article 13(5*bis*) because while the former specifies that in cases of necessity and urgency the authority of public security can adopt temporary measures restrictive of personal freedom, the latter states that deportation can follow not only in cases of extraordinary urgency but also when foreigners are in breach of an expulsion procedure establishing a term of fifteen days to leave Italian territory.[69] The Advocate General intervened to defend the President of the Council of Ministers[70] and asserted that the *Tribunale di Roma* and *Tribunale di Padova* required a Constitutional Court ruling even if the foreigners, against whom a procedure of expulsion has been decided, fulfilled all the requirements to be deported and did not oppose the deportation order. Furthermore, the Advocate General pointed out that a right to cross-examination does not require that foreigners must be on Italian territory. In other words they can defend themselves without necessarily being in Italy. The Advocate General then quoted the Constitutional Court judgement no. 13 of 1972 that declared constitutional Article 15(2) of r.d. 773/1931 in the part where it stated that because the concommittent detention temporarily limits personal freedom, this measure does not require the judicial authority to carry out a confirmation procedure. The Advocate General also highlighted that by declaring unconstitutional Article 13(4, 5 and 5*bis*) many expulsion orders

67 See judgement of the Italian Constitutional Court, cit. note 62 section 2.

68 See Article 14 of Legislative Decree 286/1998, cit. note 19. See also section 2.3 of this chapter.

69 *Ibid.*

70 See judgement of the Italian Constitutional Court, cit. note 62 section 4.

would have been suspended with the consequence that aliens should be allocated in centres of assistance listed by Article 14 of Legislative Decree 286/1998 beyond the cases expressly foreseen by Article 14. This would be in breach of the right of the state to protect its borders and public security through measures of delimitation of illegal immigration. The Advocate General added that the same Constitutional Court asserted, by judgement no. 353/1997 and ordinance no. 146/2002, that measures that foresee automatic expulsion cannot be prohibited because they guarantee regular migration flows.

4.2 The Constitutional Court Ruling on Expulsion Orders under Specific Conditions

The Italian Constitutional Court joined the questions raised by the *Tribunale di Roma* and *Tribunale di Padova* because they are related.[71] The Italian Constitutional Court then rejected questions related to Article 13(4 and 5) of Legislative Decree 286/1998 as modified by Article 12(1 letters c and d) of Law 189/2002 because the *Tribunale di Roma* did not give reasons. Indeed, the Constitutional Court observed, the *Tribunale di Roma* grounded their reasons on provisions related to methods of deportation established by Article 13(4 and 5) as modified by Article 12(1 letters c and d) (*diritto sostanziale*), rather than on the procedure of confirmation itself. Furthermore, the Italian Constitutional Court rejected the Advocate General points related to the fact that questions were raised despite the fact that foreigners fulfilled all the requirements to be deported and they did not oppose the deportation itself. Indeed, the Italian Constitutional Court highlighted that the question to be resolved was if it is admissible to impose on a judge a merely formal confirmation grounded on a communication sent by the head of police administration and in the absence of the foreigner.[72] Thus, the Italian Constitutional Court asserted that according to Article 13(5 *bis*) of Legislative Decree 286/1998 as modified by Article 2(1) Act 106/2002 the irregular migrant is coercively deported where this takes place before the tribunal can decide on a procedure which limits his/her personal freedom. Furthermore, the Constitutional Court continues, even if subsequently the tribunal rejected the procedure that confirmed the expulsion, it would not have any positive effect on the migrant because he/she would have already been expelled from Italian territory without the opportunity of defending himself/herself, due to the short time (forty-eight hours) during which the expulsion has to be carried out.[73]

71 See judgement of the Italian Constitutional Court, *op. cit.* note 62 section 1 of Court ruling.

72 See judgement of the Italian Constitutional Court, *op. cit.* note 62 section 3 of the Court ruling.

73 See judgement of the Italian Constitutional Court, *op. cit.* note 62 section 6 of the Court ruling.

The Italian Constitutional Court also pointed out that Article 13(5*bis*) is in breach of Article 13(3) of the Italian Constitution, which provides that a procedure that has not been confirmed by the judicial authority within 48 hours by the tribunal is null and void.[74]

The Italian Constitutional Court added that the right of having a defence is infringed together with the right of personal freedom because Article 13(5*bis*) Legislative Decree no. 286/1998 does not provide that the foreign person must be heard by the judicial authority with the assistance of a defence.[75]

Finally, the Italian Constitutional Court held that the government, by approving Article 2(1) Act 106/2002, intended to accelerate expulsion procedures to guarantee public order and security that might be compromised by uncontrolled migratory flows. However, the government omitted to consider the basic principles related to jurisdictional protection of individuals.[76]

The afore-mentioned reasons led the Italian Constitutional Court to conclude that Article 13(5*bis*) Legislative Decree 286/1998 as modified by Article 2(1) Act 106/2002 was unconstitutional.[77] Consequently, the government in September 2004 approved the new Legislative Decree 241/2004.[78] Article 1(1) states that in the cases foreseen in paragraphs 4 and 5 the head of police administration immediately communicate and, in all cases, within forty-eight hours from its adoption, to the territorially competent magistrate the measure by which the order of accompanying to the frontier is disposed. Execution of the order by the

---

Lo straniero viene allontanato coattivamente dal territorio nazionale senza che il giudice abbia potuto pronunciarsi sul provvedimento restrittivo della sua libertà personale.

74 *Ibid*.

E' quindi vanificata la garanzia contenuta nel terzo comma dell'art. 13 Cost., e cioè la perdita di effetti nel caso di diniego o di mancata convalida ad opera dell'autorità giudiziaria nelle successive quarantotto ore.

75 *Ibid*. note 73.

E insieme alla libertà personale è violato il diritto di difesa dello straniero nel suo nucleo incomprimibile. La disposizione censurata non prevede, infatti, che questi debba essere ascoltato dal giiudice [sic:giudice], con l'assistenza di un difensore.

76 *Ibid*. note 73.

Vengono qui, d'altronde, in considerazione la sicurezza e l'ordine pubblico suscettibili di esser compromessi da flussi migratori incontrollati. Tuttavia, quale che sia lo schema prescelto, in esso devono realizzarsi i principi della tutela giurisdizionale …

77 *Ibid*. note 73.

78 See Legislative Decree no 241/2004, in *Gazzetta Ufficiale* no 216, 14/9/2004. See Decree of conversion in act no. 271/2004 in *Gazzetta Ufficiale* no. 267, 14/11/2004.

head of police administration is suspended until the decision is confirmed by the court. The hearing takes place *in camera* in the presence of a defence.[79]

The head of police administration must inform the magistrate (*giudice di pace*) within forty-eight hours from the adoption of the expulsion order.[80] This measure will be suspended until the decision of the giudice di pace who must hear the alien subject of the deportation order, assisted by a defence. Consequently, the tribunal is not competent any more to oversee the case and, compared to the previous Article 13(5 bis) Legislative Decree 286/1998, the new paragraph 5 bis as replaced by Article 1(1) Legislative Decree 241/2004, does not foresee that the deportation order is immediately effective.[81] Indeed, the new provision states that the giudice di pace cannot take any decision without the presence of a defence.[82]

In conclusion the new provision establishes more guarantees for migrants liable to expulsion, albeit in an arbitrary way, as the subject awaiting expulsion is kept in a centre of assistance until a decision on his/her expulsion is taken.[83] Indeed, the new paragraph 5*bis* of Legislative Decree 286/1998 as replaced by Article 1 (1) Legislative Decree 241/2004, refers to Article 14 of Legislative Decree 286/1998. However, criticisms concern Article 14(2) which states that irregular migrants who are in centres of assistance have the right to correspondence and to receive telephone calls but not freedom of movement; thus the provision limits personal freedom where a crime has not been committed and before the *giudice di pace* reaches a judgement on the expulsion.[84] The modification

---

79 *Ibid.*

All'articolo 13 del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, … il comma 5 bis e' sostituito dai seguenti:
5 bis. Nei casi previsti ai commi 4 e 5 il questore comunica immediatamente e, comunque, entro quarantotto ore dalla sua adozione, al giudice di pace territorialmente competente il provvedimento con il quale e' disposto l'accompagnamento alla frontiera. Il provvedimento del questore di allontanamento dal territorio nazionale e' sospeso fino alla decisione di convalida. L'udienza di convalida si svolge in camera di consiglio con la partecipazione necessaria di un difensore ….

80 The *giudice di pace* in Italy is competent to over-see minor crimes. The *giudice di pace* was established in Italy with the aim to accelerate criminal trials. Criminal tribunals in Italy are over-loaded, for this reason the Italian parliament decided to approve L.468/1999 which transfers competence to over-see minor infringements such as contraventions and crimes punishable with imprisonment up to four months from permanent employed judges to honorary judges called *giudici di pace.*

81 See Article 13(5 bis) of Legislative Decree 286/1998, cit. note 19. See also Article 1(1) Legislative Decree no. 241/2004, cit. note 78.

82 See Article 1(1) Legislative Decree no 241/2004*,* cit. note 78.

83 *Ibid.*

84 *Ibid.*

introduced by the government on provisions on irregular migration and expulsion appear to be ambiguous because they seem to make irregular migration a crime rather than an administrative infringement as it should be according to Article 13 of Legislative Decree 286/1998 entitled '*Espulsione amministrativa*' (administrative expulsion).

4.3 Obligatory Arrest of Foreigners

In another case the *Tribunale di Torino* asked for a preliminary ruling by the Italian Constitutional Court essentially on Article 14(5*ter*) of Legislative Decree 286/1998 as modified by Article 13(1 letter b) of Act 189/2002 insofar as it provides for compulsory arrest of foreigners who do not respect the head of police administration *questore* order of deportation established by Article 14(5*bis*) of Legislative Decree 286/1998 as modified by Article 13(1 letter b) of Act 189/2002.[85] The *Tribunale di Torino* held that usually compulsory arrest is applicable for particularly serious and socially dangerous crimes, while the offence of Article 14(5*ter*) has contravention nature and it is not particularly serious as it can be punished with arrest from six months to one year only.[86] Consequently, the *Tribunale di Torino* pointed out, that Article 14 (5*ter*) would be in breach of Article 3 of the Italian Constitution, which establishes the principle of equality between citizens and would irrationally compare an infringement of a contravention nature with serious crimes subjected to compulsory arrest and listed in Article 380 of the Italian criminal justice code. Further, Article 14(5*ter*) would create inequality between hypotheses foreseen by Article 13(13 and 13*ter*) as modified by Article 12(1 letter g) of Act 189/2002, where the foreigner deported returns in Italy without the special authorisation issued by the Minister of Internal Affairs. Indeed, in the latter case a facultative arrest is proveded, while in the former obligatory arrest. The *Tribunale di Torino* highlighted that Article 14(5*ter*) also fails to conform to Article 13 of the Italian Constitution because the elements of necessity and urgency required by the latter to follow the obligatory arrest, are not present in the former. Finally, the *Tribunale di Torino*, emphasised that if alien deportation is not possible for problems related to carriers or impossibility of identification, a few hours of imprisonment will not resolve the problem, thus the arrest seems to be useless and lacking of necessity and urgency.

The State Advocate, on behalf of the President of the Council of Ministers, pointed out that obligatory arrest was necessary to avoid that foreigners who stay in Italy, albeit under threat of an expulsion order, become untraceable.[87]

85 See judgement of Constitutional Court, Corte Costituzionale, no. 223, 8-15 July 2004. In *Gazzetta Ufficiale* no. 28, 21/7/2004, section 1. See also section 2.3 of this chapter.

86 *Ibid.*

87 See judgement of Constitutional Court, cit. note 85, section 1.1.

The Italian Constitutional Court held that the questions of the *Tribunale di Torino* were admissible.[88] The circumstances of obligatory arrest shall remain those listed in Article 380 of the Italian criminal justice code only. Article 14(5*ter* and 5*quater* and 5*quinquies*) of Legislative Decree 286/1998 was modified by Article 1 of Legislative Decree 241/2004 and consolidated in Law 271/2004, which states that the foreigner who without justified reason over-stays on Italian territory in breach of the order decided by the head of police administration according to paragraph 5*bis*, is punished with imprisonment from one to four years if the expulsion has been decided on the ground of illegal entry into Italian territory, or for not having required the residence permit within a time limit and in absence of *force major*, or for having been the permit revoked or annulled. The foreigner for whom an expulsion order has already been issued according to paragraph 5*ter*, first part, who is discovered, in breach of these provisions, into Italian territory is punished with imprisonment from one to five years. For crimes established in paragraphs 5*ter* and 5*quater,* the abbreviate procedure will be applied. For crimes established in article 5*ter* and 5*quater* the arrest of the offender is obligatory.[89]

Consequently, the new legislation has not abolished the power of arrest of over-staying foreigners. Thus, the legislator did not choose to abolish the obligatory arrest itself but to specify cases where the obligatory arrest will be applied to meet the Italian Constitutional Court requirements. This confirms the repressive tendency chosen by the actual legislator.

88 See judgement of Constitutional Court, cit. note 85, section 3.1 of the Italian Constitutional Court ruling.

89 See Article 1 of Legislative Decree 241/2004, cit. note 78.

5-ter Lo straniero che senza giustificato motivo si trattiene nel territorio dello Stato in violazione dell'ordine impartito dal questore ai sensi del comma 5bis, e' punito con la reclusione da uno a quattro anni se l'espulsione e' stata disposta per ingresso illegale sul territorio nazionale…ovvero per non aver richiesto il permesso di soggiorno nel termine prescritto in assenza di cause di forza maggiore ,ovvero per essere stato il permesso revocato o annullato.

5-quater Lo straniero già espulso ai sensi del comma 5 ter, primo periodo, che viene trovato, in violazione delle norme del presente testo unico, nel territorio dello Stato e' punito con la reclusione da uno a cinque anni. Se l'ipotesi riguarda lo straniero espulso ai sensi del comma 5ter, secondo periodo, la pena e' della reclusione da uno a quattro anni'.

5-quinquies Per i reati previsti ai commi 5ter e 5quater si procede con rito direttissimo … Per i reati previsti dall'articolo 5-ter, primo periodo, e 5quater e' obbligatorio l'arresto dell'autore del fatto.

4.4 Expulsion due to Unjustified Reason to Stay in Italian Territory

In another case the *Tribunale di Ferrara* raised a question of the constitutionality concerning Article 14(5*ter*) of Legislative Decree 286/1998 as modified by Article 13(1) of Act 189/2002[90] where this Article punishes illegal immigrants who, without a justified reason (*senza giustificato motivo*), continue to stay on Italian territory without leaving within five days, although the head of police administration *questore* issued a decision of expulsion.[91] The *Tribunale di Ferrara* pointed out, in a dispute regarding four immigrants that Article 14(5*ter*) would be in breach of Article 25(2) of the Italian Constitution because the expression *senza giustificato motivo* is too generic. Article 25(2) of the Italian Constitutional Court states that no persons can be punished otherwise than in accordance with a law which has entered into force before the act is committed.[92]

According to the *Tribunale di Ferrara* the expression *senza giustificato motivo* is so wide as to leave too much open to interpretation. The State Advocate intervened on behalf of the President of the Council of Ministers and asked the Constitutional Court to reject the questions raised by the *Tribunale di Ferrara*.[93] The State Advocate asserted that the Italian legislator has set out on other occasions the reasons related to the family and the right to work which justify the presence of the foreigner on Italian territory. Further, common words in criminal law have often been considered compatible with Italian Constitutional law. The *Tribunale di Torino* also raised a question of the unconstitutionality of Article 14(5*ter*) because it would leave too much discretion regarding the carrying out of deportation orders.[94] Indeed, the provision under examination would create an objective responsibility *responsabilità oggettiva* on persons who already live in great poverty, Article 14(5*ter*), which would be in breach of the constitutional principles of social and economic solidarity listed in Article 2 and 3 of Constitution.

The Italian Constitutional Court rejected all issues because the expression *senza giustificato motivo* was well defined by Article 14(5*bis* and 5*ter*)[95] consisting

90 See section 3.3 of this chapter.

91 See judgement of the Italian Constitutional Court, Corte Costituzionale, no.5, 13/1/2004, in *Gazzetta Ufficiale* of 21/1/2004. Section 1.1.

92 See Article 25(2) of the Italian Constitutional Court, cit. note 64.

Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso.

93 See judgement of the Italian Constitutional Court, cit. note 91, section 1.2.

94 See judgement of the Italian Constitutional Court… cit. note 91, section 2.1.

95 See section 3.3 of this chapter.

in not leaving the Italian territory within five days.[96] Furthermore, the Constitutional Court pointed out how the expression *senza giustificato motivo* or similar are often used in Italian criminal law. Finally, the fact that the foreigner is incapable of fulfilling the expulsion order would be a justified reason for not leaving the Italian territory.[97] Consequently, the Constitutional Court rejected the questions raised by the *Tribunale di Torino* that suggested that Article 14(5*ter*) was in breach of Articles 2 and 3 of the Italian Constitution because it would create a case of objective responsibility on a person who is in poverty. There is no objective responsibility because if the foreigner was unable to acquire tickets to travel within five days of the head of police administration *questore* decision, for instance, there would be the justified reason for excluding the commission of a criminal offence.[98]

4.5 Expulsion as Alternative Measure to Imprisonment

Another Constitutional Court ruling examined Article 16(5 *et seq*) of Legislative Decree 286/1998 as modified by Law 189/2002. Specifically, Act 189/2002 introduced paragraphs 5 *et seq.* to Article 16. The original Article 16(1, 2) stated that judges who sentence foreigners with imprisonment for no more than two years could, in some cases listed by Article 16, order expulsion instead of imprisonment.[99]

Article 16(5 and 6) states that expulsion applies to a foreigner who must serve a sentence no greater than two years, even if suspended, if they are in one of the situations listed in Article 13. The decision on deportation is communicated to the alien who, within ten days, can appeal the decision before the Tribunal of surveillance.[100]

---

96 See judgement of the Italian Constitutional Court, cit. note 91, section 2.1 of the Constitutional Court ruling.

97 See judgement of the Italian Constitutional Court, cit. note 91, sections 2.2 and 2.3 of the Constitutional Court ruling.

98 See judgement of the Italian Constitutional Court, cit. note 91, section 2.3 of the Constitutional Court ruling.

99 See Article 16(1 and 2) Legislative Decree 286/1998, cit. note 19.

Il giudice, … quando ritiene di dovere irrogare la pena detentiva entro il limite di due anni ... può sostituire la medesima pena con la misura dell'espulsione per un periodo non inferiore a cinque anni.
L'espulsione di cui al comma primo e' eseguita dal questore ….

100 See Article 16(5) of Legislative Decree 286/1998, cit. note 19 as introduced by Law 189/ 2004, *op. cit.* note 23.

Nei confronti dello straniero, … che si trova in taluna delle situazioni indicate nell'articolo 13, … che deve scontare una pena detentiva, anche residua, non superiore a due anni, e' disposta l'espulsione

This new provision does not leave discretion to Italian judges to find in favour of the individual, although the foreigner's right of appeal is recognised. The *Magistrato di sorveglianza di Alessandria*[101] raised a constitutional question on Article 16(5 *et seq*) that according to his interpretation was contrary to Articles 2, 3 and 27 of the Italian Constitution.[102] Article 2 of the Italian Constitution states that the Italian Republic recognises and guarantees fundamental rights to all persons, while Article 3 establishes the principle of freedom and equality between Italian citizens.[103] Further, when the *Magistrato di sorveglianza di Alessandria* refers to Article 27 of the Italian Constitution, paragraph 2 is to be taken into consideration because it is strictly related with questions raised by the interpretation of Article 16(5 *et seq*) inserted in Article 16 of Legislative Decree 286/1998 by Act 189/2002. Article 27(2) of the Italian Constitution states that punishment cannot consist of treatment against humanity and shall have the objective of the re-integration of the sentenced person into Italian society.[104]

The *Magistrato di sorveglianza di Alessandria* does not specify in his reference Article 27(2), but this can be deduced by his successive points. Indeed, he emphasises how the deportation measure does not contain re-integration purposes and it cannot be classified either as a criminal punishment or as an alternative measure to detention. The *Magistrato di sorveglianza di Alessandria* asserted that the deportation measure could be justified by considering it as a suspension of criminal imprisonment and a temporary state refusal to apply a criminal punishment. The *Magistrato di sorveglianza di Alessandria* also pointed out that Article 16(5 *et seq*) would set up a discrimination between persons who engaged in bad conduct in prison and persons whom had successfully been re-integrated. Discrimination would also be created between legal migrants and irregular migrants because, in the latter case, migrants would be allowed to leave prison because of their illegal status and thus deported. Finally, the *Magistrato di sorveglianza di Alessandria* emphasised that Article 16(5 *et seq*) would be contrary to Article 2 of the Italian Constitution because deportation would not be linked to the subject's consent, a fundamental right recognised by this Article. On behalf of the President of the Council of Ministers the State Advocate intervened, and asserted that expulsion ex Article 16(5 *et seq*) would be an alternative measure

---

… Il decreto di espulsione e' comunicato allo straniero che, entro il termine di dieci giorni, può disporre opposizione dinanzi al tribunale di sorveglianza …

101 According to Italian law the *Magistrato di sorveglianza* is responsible of applying or modifying imprisonment to a person who is imprisoned.

102 See Ordinance no. 226 8-15/7/2004, in *Gazzetta Ufficiale* no. 28, 21/7/2004.

103 See Articles 2 and 3 of Italian Constitution, cit. note 64.

104 See Article 27 of Italian Constitutional Court, cit. note 64.

Le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato.

to detention, thus Article 27(2) of the Italian Constitution cannot be applied. Furthermore, the State Advocate continued, the legislator has the discretionary power to decide when to inflict criminal sanctions and when, on the contrary, to apply alternative measures not of a criminal nature. In this case the alternative measure of expulsion is more favourable to the irregular migrant as it anticipates a procedure that would in any case be followed after detention. Finally, the State Advocate concluded that it is not essential to hear the illegal immigrant because he/she can appeal against the decision of deportation and thus suspend expulsion. The *Magistrato di sorveglianza di Cagliari*, the *Magistrato di sorveglianza di Reggio Emilia* and the *Magistrato di sorveglianza di Bologna* raised similar questions to that of the *Magistrato di sorveglianza di Alessandria,* asking the Italian Constitutional Court to abolish the automatism of Article 16(5 *et seq*) and thus leave the discretionary power to the *Magistratura di Sorveglianza* in general to decide each time the concrete and specific case arises, in the presence of the defendant and in cross-examination with the opportunity for the defendant to organise a defence. The Italian Constitutional Court joined the different questions raised by the three *Tribunali di sorveglianza* because of their similarity and decided to reject the questions. The Constitutional Court motivated this decision by finding that deportation under Article 16(1) of Legislative Decree 286/1998 is administrative in nature because it must be carried out by the head of police administration *questore* and not by the Public Prosecutor.[105] Expulsion under Article 16(5) also is administrative in nature because this paragraph refers to Article 13 of Legislative Decree 286/1998, which permits administrative deportation. Further, according to Article 16(6) Legislative Decree 286/1998, the decision on deportation taken by the *magistrato di sorveglianza*, can be appealed by the foreigner before the *Tribunale di sorveglianza*. This provision contributes to guaranteeing cross-examination and an adequate defence for the illegal immigrant for whom the deportation order will remain suspended till the end of the appeal. In any case the Constitutional Court did not take into consideration the short time of 10 days within which the alien could appeal against the decision on deportation, nor that there could be bureaucratic problems that could delay and *de facto* render ineffective guarantees set out in Article 16(6) of Legislative Decree 289/1998.

5. Conclusions

This chapter highlights the fact that Italy only began to pay attention to the phenomena of assisting illegal immigration, trafficking in human beings and irregular migration in 1998. In this year the legislator approved the Legislative Decree 286/1998, which included other important laws such as Act 40/1998.[106]

105 See Article 16(2) of Legislative Decree 286/1998, cit. note 19.

106 See section 3.1 of this chapter.

Act 106/2002 and especially Act 189/2002 modified some provisions of Legislative Decree 286/1998. The new Act 189/2002 is an improvement insoafar it introduces provisions in order to reinforce co-operation with other states belonging to the European Union such as police and judicial co-operation. It also anticipates the readmission agreements which the EC was negotiating because it introduces the possibility of concluding readmission agreements with states not belonging to the European Union. Nevertheless, it is repressive, although it this partly a continuation of Legislative Decree 286/1998, which first introduced repressive measures against those who assist or seek to assist illegal immigrants. However, it is important to highlight that Act 189/2002 is more repressive than Legislative Decree 286/1998 because it introduces restrictive measures against irregular migrants and ambiguities. An example is when the irregular migrant enters Italian territory for the first time. He/she does not commit a crime but only an administrative infringement. On the contrary, when an irregular migrant seeks to enter Italian territory after an expulsion order has been issued and executed or he/she does not leave Italy albeit a deportation order has been issued, the irregular migrant commits a crime. Further, irregular migrants, in respect of whom an expulsion order has been issued, are kept in centres of assistance and their personal freedom is limited, although they have not committed a crime. This ambiguity is problematic: the legislator should specify if illegal immigration is a crime or an administrative infringement. If it is an administrative infringement, the legislator should not then transform it into a crime by the application of a penalty which is fundamentally penal in nature.

However, this ambiguity may also be caused by European legislation, in particular the Schengen Acquis which, as emphasised above,[107] classifies unauthorised entry as a criminal offence. Currently, there is a paradox as Italy is in breach of the Schengen Acquis because it considers unauthorised entry an administrative infringement rather than a crime. Therefore, before Italian law on irregular migration particularly is challenged directly, the Schengen Acquis should be reviewed, especially Article 9 of the Schengen Implementing Agreement and all EU policies on illegal immigration including the readmission agreements.

Finally, neither Legislative Law 286/1998, nor Act 189/2002 pay enough attention to the crime of trafficking in human beings. Legislative Decree 286/1998 introduced Article 18 which, as emphasised above,[108] is incomplete and ambiguous and only focuses on some types of protection towards victims of trafficking in human beings.

107 See section 3.3.

108 See section 3.2 *supra*.

*Raffaela Puggioni**

LOOKING FOR SOME COHERENCE: MIGRANTS IN-BETWEEN CRIMINALISATION AND PROTECTION IN ITALY

1. Introduction

The following pages will look at the socio-political aspects as implicated in the phenomenon of smuggling and trafficking, and especially at the tension between declared intents and covered ones, between national policies and local praxis, between processes that aim to criminalize migrants and those that aim to protect them. Special attention will be given to the current debate, from which it will emerge that the subjects involved in smuggling and trafficking are often debated in such a way that makes them disentangled (partially or totally) from those very 'events'. In this respect, the case of trafficked women, who are forced into the prostitution market, is an exemplary case. While, on the one hand, trafficking in human beings is understood as a deplorable phenomenon whose victims have to be protected; on the other hand, prostitutes seem to remain always already prostitutes, as if prostitutes cannot fall into the category of victims. The public campaign organised by the *Lega Nord* (Northern League Party) – which is part of the centre-right governing coalition – moves precisely in this direction. Foreign prostitutes are not at all understood as victims but indeed as the main cause of public disorder and urban insecurity and the only option against their invasion is their forced removal from Italian soil altogether.[1] The public campaign against foreign prostitution clashes with the one operated by the government on human trafficking and on the programme of social protection for its victims,

* Ph.D. in International Relations from the University of Kent

1 Segreteria Politica Federale, *La Battaglia della Lega Nord Contro la Prostituzione di Strada, la Pedofilia e la Pornografia* (Milano: Boniardi Grafiche, 2002), pp. 11-13. For a detailed analysis of the ideology of the Northern League Party, see also Biorcio, R., *La Padania Promessa. La Storia, le Idee e la Logica d'Azione della Lega Nord* (Milano: Il Saggiatore, 1997).

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *169-200.*
 ISBN 90 04 15064 1.

and paradoxically the message of the Northern League Party has been effective enough to influence and shape part of public opinion on this matter.

Given the peculiarities of the Italian political framework, and especially the impressive (direct and indirect) control of mass media in the hand of the President of the Council of the Ministers[2] – Silvio Berlusconi – what seems important to evaluate is not simply the way in which smuggling and trafficking in human beings are understood, and hence the way in which the debate has been constructed, but also, and perhaps more importantly, what has been excluded from the political debate. Dominant messages reproduce images of constant and unstoppable invasions of *clandestini* (illegal entrants), but not of what happens to them; of the high price paid to criminal transnational organisations for being smuggled in, but not of the insurmountable difficulties in getting through the legal route; of the inhumane conditions of the journey, but not of the equally inhumane conditions of detention in camps; of the 'indecency' of allowing thousands of (foreign and illegal) prostitutes on Italian streets, but not of their (national and legal) clients; of the urgent needs to clean cities from foreign criminal organisations, but not from their Italian counterpart; and last but not least of the high number of irregular workers, but not of their employers who are *in primis* responsible of their irregular working conditions. This list does not aim to be exhaustive, though it well represents the way in which the debate has been manoeuvred, and such an operation has been enormously facilitated by an impressive control of the mass media by the governing coalition.

The argument in the chapter is going to be organised into two main sections, though more attention will be devoted to the phenomenon of smuggling, which has dominated Italian political agenda since mid-1980s. The first part will consider the phenomenon of smuggling, and attempt to demonstrate why an involution has occurred in the way in which the issue of illegal immigration is understood and tackled. Although it is undeniable that during the previous legislature, led by a centre-left coalition, many tough measures against illegal entrants were introduced – as for instance detention centres – it seems that now the scene is dominated exclusively by repressive policies, which have been coupled with a public campaign of criminalisation. Such a politics of repression and criminalisation emerges visibly in the new immigration legislation – the so-called Bossi-Fini Law,[3] in the way in which border patrolling is operating, in the high number of '*clandestini*' kept under detention, in the high number of (possibly trafficked) prostitutes expelled, and in the constant diffusion of the equation *clandestini* = criminals. Moreover, the events of summer 2004 illustrate precisely the way in which the government is dealing with new influxes of

2 See Ginsborg Paul, *Silvio Berlusconi: Television, Power and Patrimony* (London: Verso, 2004).

3 Act no. 189, 30/07/2002, 'Modifica alla Normativa in Materia di Immigrazione e di Asilo', *Gazzetta Ufficiale*, no. 199, 26/08/2002.

'irregular' migrants, and especially on the shifting the responsibility to prevent and stop any (illegal) outflows to its Mediterranean neighbour countries.

The second part of the chapter will, conversely, consider the way in which article 18 on social protection[4] has been put into practice, and especially the way in which trafficked women – and particularly those forced into the sex market – are protected and assisted. In consideration of the great attention that the phenomenon of prostitution and trafficked women has received in the country, the analysis will be mainly devoted to such a group, though acknowledging that men and, regrettably, many minors are as well victims of trafficking. The decision of devoting attention to article 18 and to the modalities of protection – and not so much to the way in which the phenomenon of human trafficking has been understood in the country – mirrors the interest shown in the country. Quite astonishingly, mass media have demonstrated an impressive lack of interest in the debate. Although questions on human trafficking, new forms of slavery, high level of exploitation, sexual abuses, trafficking of organs have been debated, what has not emerged yet is a public and political debate that would have contextualized all these aspects to the Italian framework. This would have probably required the courage to engage with a debate that would have evaluated all those actors who are, directly or indirectly, involved in the perpetuation of human trafficking, including many nationals.

2. Immigration: An Historical Overview

A brief historical overview of the Italian politics of migration will help to clarify the way in which the taken-for-granted assumption of being a mere country of transit, and not one of destination, has enormously impacted on the way in which border controls have operated, and hence, on the way in which the phenomenon of smuggling has been understood and tackled. As it will emerge later on in the chapter, what seems important to consider, in the Italian case, is not simply the official position, but also the way in which local populations, especially those living along the border areas, have responded to the 'illegal' entry of migrants, which often represented a visible phenomenon before their eyes. This has been especially the case for those living in the northeast borders close to Slovenia, in the northwest along the Italian-French borders, and those of the southern regions, especially in Apulia, Calabria and Sicily. What seems interesting to look at is the stark contrast between the attitude toward illegal entrants of the people in these border areas and the attitude in other areas of the country, especially in the northern regions where the anti-immigration messages of the Northern League Party have found more sympathies.

4 Legislative Decree, no. 286, 25/07/1998, 'Testo Unico delle Disposizioni Concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero', in *Gazzetta Ufficiale*, no. 191, 18/08/1998.

Italy, likewise some southern European countries,[5] has started to experience the phenomenon of immigration only recently, after a century-long history of mass emigration.[6] During this long period, migration was certainly not a free choice but the only way of life for many Italians, particularly for those living in the southern regions and on the two major islands of Sardinia and Sicily. In some geographical areas the phenomenon reached such a magnitude that a culture of emigration emerged, picturing 'migration and life abroad' as 'normal, rather than exceptional'.[7] It was only in 1973 that the migration flux registered a reverse course. Italy was starting to become a country of immigration not only for many Italians, who found their way back to their homes, but also for many foreigners and for some groups of refugees.[8] However, unlike other European northern countries, such an important shift occurred within an economic framework characterised by a process of de-industrialisation, an impressive development of an underground economy, long-standing disparities between the northern and southern regions and a high rate of (official) unemployment.[9] The peculiarities of the internal informal market certainly had a strong impact in creating those pull-factors that encouraged immigration,[10] though they simultaneously determined the exclusion of the vast majority of migrants not simply from the legal economy, but also, and more importantly, from legal residence.

---

5 Sapelli G., *Southern Europe Since 1945: Tradition and Modernity in Portugal, Spain, Italy, Greece and Turkey* (London & New York: Longman, 1995).

6 See Leenders, M. 'From Inclusion to Exclusion: Refugees and Immigrants in Italy Between 1861 and 1943', *Immigrants and Minorities*, 1995, 14, (2), 115-138; and Gabaccia, D. *Italian History and gli Italiani nel Mondo, Part I and Part II*, *Journal of Modern Italian Studies*, 1997, 2, (1), 45-66.

7 Gabaccia, ibid., p. 45.

8 According to U. Melotti, migration fluxes began slowly to be directed towards southern European countries soon after the 1973 oil shock, once northern European countries started reconstructing their own internal economies and closing down their immigration doors. Countries such as Italy, Spain and Greece became consequently second choice countries, and the inexistence of immigration policies facilitated unnoticed entries. See Melotti, U. 'Migrazioni Internazionali e Integrazione Sociale: il Caso Italiano e le Esperienze Europee', *in* M. Delle Donne, U. Melotti and S. Petilli (eds.), *Immigrazione in Europa* (Roma: Cediss, 1993).

9 Veugelers, J.W.P. 'Recent Immigration Politics in Italy: A Short Story', *West European Politics*, 1994, 17, (2), 34.

10 See Cotesta, V. *Sociologia dei Conflitti Etnici. Razzismo, Immigrazione e Società Multiculturale* (Roma-Bari: LaTerza, 1999); Andal, J. 'Women Migrant Workers in Italy', *Women's Studies International Forum*, 1992, 15, (1), 41-48; Bonifazi, C. *L'Immigrazione Straniera in Italia* (Bologna: Il Mulino, 1998); Campani, G. 'Immigration and Racism in Southern Europe: The Italian Case', *Ethnic and Racial Studies,* 1993, 16, (3), 507-535; and Colombo, A. 'Hope and Despair: "Deviant" Immigrants in Italy', *Journal of Modern Italian Studies,* 1997, 2, (1), 1-20.

It was not before mid-1980s that the country stated to realise that an immigration policy needed to be formulated and that something had to be done for all those living in the country irregularly. The inexistence of migration regulations and the impressive diffusion of an underground economy – generally referred to as 'informal economy' – has allowed immigrants to live and work in the country, even for some years, without possessing a regular working permit.[11] In other words, they were living as '*clandestini*' and that very condition was, directly or indirectly, facilitated and accepted by the Italian system as a whole: easy access into the territory, a widespread informal economy – and Italian workers *in primis* accepted informal working contracts – no controls on employers, access to medical assistance and schooling for their children. Moreover, the very notion of '*clandestini*' well represents the way in which the phenomenon of illegal entrants was perceived. The most worrying political aspect of illegal entrants was not exclusively the access into the Italian territory 'illegally' – a 'natural' phenomenon for a country considered, for years, to represent simply a territory of transit – but more importantly their permanence in the territory 'clandestinely'.

The sudden urgency for the introduction of new migration norms was not at all dictated by a political interest in the protection of any social, economic and health rights of foreigners, but it was indeed dictated by security issues. It was only starting from August 1985, after a public speech of the then-President of the Council of Ministers, Bettino Craxi – who drew a direct link between some terrorist incidents to the high number of *clandestini* – that the presence of irregular migrants became politically visible. The terrorist attack, the following year, at the *Leonardo da Vinci* International Airport in Rome, became the *casus belli* for public opinion to criticise policy-makers for the inexistence of any immigration policy, and hence for the *laissez-faire* approach adopted so far.[12]

The first immigration legislation was enacted in that very same year and the need for constant revision – four times since 1986[13] – exemplifies the difficulties of the Italian political institutions to fully grasp the complexities of the migra-

11 See Reyneri E., 1998, 'The Role of the Underground Economy in Irregular Migration to Italy: Cause or Effect?', *Journal of Ethnic and Migration Studies*, 1998, vol. 24, no. 2, pp. 313-331.

12 Veugelers, cit., p. 37.

13 See respectively Act no. 943, 30/12/1986, '*Norme in Materia di Collocamento e di Trattamento dei Lavoratori Extracomunitari Immigrati e Contro le Immigrazioni Clandestine*', *Gazzetta Ufficiale*, no. 8, 12/01/1987; Decree Law (*decreto legge*) no. 416, 30/12/1989, converted into Law no. 39, 28/02/1990, '*Norme Urgenti in Materia di Asilo Politico, di Ingresso e Soggiorno dei Cittadini Extracomunitari ed Apolidi già Presenti nel Territorio dello Stato*', *Gazzetta Ufficiale***,** no. 49, 28/02/1990; Decree Law no. 489, 18/05/1995; Act no. 40, 06/03/1998, '*Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero*', *Gazzetta Ufficiale*, no. 59, 12/3/1998; Act, no. 189, 30/07/2002, '*Modifica alla Normativa in Materia di Immigrazione e di Asilo*', *Gazzetta Ufficiale*, no. 199, 26/08/2002.

tory fluxes, to predict their impact on the labour market, and to question the very understanding of Italy as being merely a country of transit. And it was this very understanding that played a significant role in shaping migration policies. Being identified as a territory of transit meant that the country represented simply one of the routes through which migrants, as well as would-be refugees, could cross easily before reaching their final destination. Although it was acknowledged the high number of irregular entry, the number of outflows was as high, and the inexistence of effective border controls facilitated migrations fluxes in both directions: entry and exit. Moreover, the adoption of the instrument such as the decree of expulsion – introduced in 1990 – exemplifies the way in which the transit along the peninsula was understood and tacitly accepted. The decree, known as well as a '*foglio di via*', simply ordered the 'illegal' to leave the country spontaneously within the following fifteen days. Up to 1997, Italy acted as if a country of mere transit, though starting from that very year, the country has been forced from its Schengen partners to take more seriously the international obligations derived from the entry into force of the Dublin Convention (01/09/1997) and of the Schengen *Acquis* (26/10/1997).

The political approach has now definitely changed. The dominant attitude of *laissez-faire* of the 1970s and 1980s, characterised by lax migration controls and considerable lacunae in the legislation, has been supplanted by a closed-door policy where "the need for control takes priority over the one for solidarity".[14] The prevalence of a politics of control over a politics of solidarity emerges clearly in the most recent immigration legislation – the so-called Bossi-Fini Act – whose rationale is clearly repressive.[15] A look at the way in which the patrolling of the coastlines is carried out, the number of '*clandestini*' rejected at the borders, the number of detainees held in camps – so-called *centri di permanenza temporanea e assistenza*, cpta (centres of temporary permanence and assistance) – and the stipulation of re-admission agreements,[16] offers a clear picture of the

14 Pugliese, E. 'Italy Between Emigration and Immigration and the Problems of Citizenship', *in* D. Cesarani and M. Fulbrook (eds.), *Citizenship, Nationality and Migration in Europe* (London & New York: Routledge, 1996), p. 119.

15 The repressive rationale of the Bossi-Fini Act has been recently confirmed by a judgement of the Italian Supreme Court, see Corte di Cassazione, judgement no. 3162, 31/01/2003. See also Nascimbene, B., 'Nuove Norme in Materia di Immigrazione. La Legge Bossi-Fini: Perplessità e Critiche', *Corriere Giuridico*, 2003, (4), 532-540.

16 Up-to-date Italy has signed twenty-nine re-admission agreements with the following countries: France, Greece, Spain, Austria, Switzerland, Bulgaria, Slovakia, Romania, Hungary, Albania, Bosnia Herzegovina, Slovenia, Macedonia, Georgia, Lithuania, Lithonia, Estonia, Tunisia, Cyprus, Croatia, Malta, Moldavia, Poland, Serbia Montenegro, Algeria, Morocco, Nigeria, Sri Lanka, and Philippines. See Ministero degli Interni, 'Lo Stato della Sicurezza in Italia', 15/08/2004, p. 119, in <www.interno.it/assets/files/6/20040816172018_10-113-232-21.pdf>, accessed on 22/09/2004.

government immigration politics. At the institutional level, it seems that very little is done to differentiate between economic migrants and would-be refugees: whoever tries to reach the Italian soil irregularly is automatically considered as a *clandestino* who has to be sent back to the country of origin or of provenance. The new aggressive politics of control is now operating towards two directions: internally and externally. Internally, in the sense that any migrants found in the peninsula without the necessary papers are to be (automatically)[17] expelled or taken to a cpta for the identification before the expulsion. However, internal controls aim, quite exclusively, to target foreigners as very few controls at the employers are taking place. Externally, in the sense that border patrolling has enormously increased and the patrolling itself is no longer restricted to Italian territory. Controls in international waters along the Mediterranean Sea are now part of the politics of control operated by the government.[18]

What has not, perhaps, changed is the way in which the presence of '*clandestini*' has been tackled by the Berlusconi government: a legalisation for the many living in the country irregularly, as done during past legislature – six legalisations since 1982.[19] It is precisely because of the constant adoption of processes of legalisations that many have argued that irregular migrants in Italy do not represent a problematic group of foreigners, because the vast majority have experienced a period of 'clandestinity', followed by a legalisation *ex-post*. As Pugliese has put it: "[a]lmost all the immigrants, before the regularisations, have entered Italy without following the rules, because there were no rules".[20] A similar position has been expressed in Sciortino's work, which understands irregular entries not as exceptional events, but indeed as a mass phenomenon

> whose origin is located in the rationale of the Italian migration policies, which are characterised by a restrictive orientation toward legal entry, by a weak or

17 Automatic expulsion can no longer be carried out if the irregularity is simply due to bureaucratic delays, and any decrees of expulsion have to be authorised by a juridical authority, see the Court of Constitution, judgement no. 222, 08/07/2004, in *Gazzetta Ufficiale*, no. 21/07/2004.

18 See Ministero dell'Interno, ministerial decree, 'Disposizioni in Materia di Contrasto all'Immigrazione Clandestina', 14/07/2003, in *Gazzetta Ufficiale*, no. 220, 22/09/2003.

19 See Sciortino, G. 'Le Politiche Governative verso gli Immigrati Irregolari', in Sciortino, G., Palidda, S., Petti, G. and Ruspini, P. 'Easy Scapegoats: Sans Papiers Immigrants in Europe', August 2000, pp. 7-11, in <www.freudenbergstiftung.de/documents/ispitalia.rtf>, accessed on 03/03/2004.

20 Pugliese, E., 'Tutti Sono Stati Clandestini', in *Il Manifesto*, 10/05/2002; "*Quasi tutti gli immigrati, prima delle sanatorie, sono arrivati in Italia fuori dalle regole, perché non ci sono regole*".

> insufficient control of the labour market and by an increasing emphasis on the control of the frontiers as opposed to internal controls within the territory.[21]

Being identified as a mass phenomenon, and hence as a 'normal' event, can help to explain why the government's political campaign against *clandestini* has provoked such a strong opposition. As noted in Mezzadra and Neilson's recent article, an important role in publicly protesting against present immigration legislation has been played by migrants themselves, especially since the G8 in Genoa, which resulted in "a more or less permanent mobilization against the Bossi-Fini laws".[22] And the self-organised migrant protest, which saw the participation of some 100,000 and 150,000 people in Rome on 19th January 2002, is an important example of the entity of the opposition against the government migration politics.[23]

3. The Difference that the 'Local' Makes

Given the historical differences within each Italian region, as well as given the traditional discretion that each region retains in implementing national policies, a look at the way in which local responses towards '*clandestini*' have been produced is crucial for any serious investigation of the way in which both smuggling and trafficking have been tackled. Moreover, the shift from a politics of solidarity toward one of control has determined a crucial reconceptualisation of the concept of frontiers. This is especially visible along the so-called regions of entry, where the points of crossing are much more indefinite and broader than in the past.

An overall picture of the differences between regions, as well as within regions, is offered in a quite recent and unpublished report, the so-called *Rapporto Nausicaa*,[24] which relied mainly on data collected locally, and not on offi-

---

21 Sciortino, G., cit., p. 7, "*L'immigrazione irregolare in Italia è stata … un fenomeno di massa, che ha le sue origini nel disegno stesso delle politiche migratorie italiane, caratterizzate da un orientamento restrittivo verso gli ingressi legali, da un debole o scarso controllo del mercato del lavoro e da una crescente enfasi sui controlli delle frontiera rispetto ai controlli interni sul territorio*". See also Sciortino, G., 'Planning in the Dark. The Evolution of Italian Immigration Control', in Brochmann, G. and Hammar, T., *Mechanisms of Immigration Control* (Oxford: Berg, 1999), pp. 233-259.

22 Mezzadra, S. and Neilson, B. (2003) 'Né qui, né altrove – Migration, Detention, Desertion: *A Dialogue*', *Borderlands e-journal*, 2(1) <http://www.borderlandsejournal.adelaide.edu.au/vol2 no1_2003/mezzadra_neilson.html>.

23 *Ibid*.

24 Consorzio Italiano di Solidarietà, 'Dossier Nausicaa. Primo Quadro sulla Tutela del Diritto d'Asilo in Italia', Dec. 2000, unpublished paper.

cial statistics, which are virtually inexistent. The aim of the report was to get an overall picture of the kind of reception offered to asylum-seekers, looking especially at the way in which information, accommodation and assistance was provided. What was interesting reading the report was the way in which the phenomenon of smuggling has been tackled locally, especially the widespread attitude of police forces of not providing information on asylum procedure, which resulted in the issuing of an impressive number of decrees of expulsion and in an outflows of would-be refugees toward northern European countries. The report distinguishes four geographical areas according to the way in which they are generally 'affected' by immigration influxes and according to local responses, as following:

– regions of entry (Apulia, Calabria, Sicily and Friuli Venezia Giulia);[25]
– regions of exit (Trentino Alto Adige and Liguria);[26]
– regions of permanence (Veneto, Piedmont, Emilia Romagna and Tuscany);[27]
– metropolitan areas (Rome and Milan).[28]

What interests us is mainly the policies adopted at the points of entry, as it is here where the fate of 'newcomers' is established. It is here where police forces draw the dividing line between a *clandestino* and a refugee, between those who will have access to information and those who will not be offered any chance, between those who are going to be forcibly sent back and those who will have the possibility to stay.

Although more repressive immigration rules have been established since 2002, which makes many of the figures of the report out of date, apparently the overall approach has not changed. What have indeed changed are the instruments adopted, whose consequences, especially for would-be refugees, are probably more devastating than in the past. As well-documented in the report, save a very few cases, Italy has never seriously attempted to create a system of protection for asylum-seekers, as if they were 'institutionally invisible',[29] and assistance from local charity networks was often the only option available. While in the past, the impressive ab(use) of the decree of expulsion could be understood as a 'benevolent' action of the police forces – as it allowed 'newcomers' to legally transit the Italian territory and hopefully toward a better future in another part of Europe – present rejections at the borders offer a dramatic return to the coun-

25 *Ibid*., pp. 21-39.

26 *Ibid*., pp. 40-45

27 *Ibid*., pp. 46-55.

28 *Ibid*., pp. 56-66.

29 See Puggioni, R., *Exploring the Inclusion/Exclusion Dynamic: The Kurdish Refugees in Italy*, University of Kent, PhD thesis, 2003.

try from where they initially escaped. The rationale of asylum policies seems the same, in the sense that the country continues to adopt a politics of non-protection, though what is delivered now is not a piece of paper – a *foglio di via* – but indeed a forced permanence in camps before the expulsion is carried out. The shift from what might be defined as a 'benevolent non-inclusion' toward an 'hostile exclusion', as well as a stricter implementation of the Dublin Convention, offers very little hope of life in the 'European Fortress'. The only hope is perhaps to enter the country through the 'right' borders, where the destiny of '*clandestini*' is not left exclusively to policies forces, but also to independent legal experts and more specialised charity networks.

3.1 Points of Entry

The geographical areas most visibly affected by (irregular) migration fluxes are those in the southern regions, namely Apulia, Calabria, and Sicily. In very general terms, each region has become a landing area according to the patrolling of the coastlines. Initially migration routes tended to be directed toward the region of Apulia until roughly year 2000 when the high level of militarization[30] re-directed 'smugglers' toward Calabria and more recently to the southern part of Sicily, and especially the two small isles of Lampedusa and Pantelleria.[31] The table below offers a picture of the number of immigrants who have reached the southern coastlines during 1999 and 2002. Unfortunately, these figures cannot be evaluated – because of the lack of data – together with the figures relating to asylum requests, the number of expulsion or rejection at the borders, and the number of those stopped before they reached the coastlines. All these data would have probably offered a much more comprehensive picture of the entity of the influxes as well as their 'destiny'. However, if those figures are compared to the aggregate number of those stopped during 2003, and during the first semester of 2004, it will emerge the extent to which the increased patrolling operations have impacted on the number of immigrants who reached safely Italian borders, and respectively 14,331 and 9,464.

30 See the decree relating to the reinforcement of the military contingent in Apulia, Ministry of the Interior, ministerial decree no. 233, 02/01/1996, 'Regolamento per Azione dell'art. 2 del Decreto-Legge 30 Ottobre 1995, no. 451', converted into law no. 563, 29/12/1995 'Disposizioni Urgenti per l'Ulteriore Impiego delle Forze Armate in Attività di Controllo della Frontiera Marittima nella Regione Puglia', in *Gazzetta Ufficiale*, no. 255, 31/10/1995.

31 See Commissione Parlamentare d'Inchiesta sul Fenomeno della Mafia e delle Altre Associazioni Criminali Simili, 'Relazione sul Traffico degli Esseri Umani', XIII Legislature, Doc. XXIII, no. 49, approved 05/12/2000, pp. 20-61; and Ministero degli Interni, 'Lo Stato della Sicurezza in Italia', cit., 15/08/2004**,** pp. 115-122.

Regions	*Apulia*	*Calabria*	*Sicily*
1999	46,481	1,545	1,973
2000	18,990	5,045	2,782
2001	8,546	6,093	5,504
2002	3,372	2,122	18,225

Source: Ministero degli Interni, 'Lo Stato della Sicurezza in Italia', 15/08/2004.

In very general terms, the non-delivering of information on asylum procedure and the generalised attitude of indifference of the police forces seem to represent the minimum common denominator in all the three regions. In the past years, no information was generally provided on asylum applications nor on the importance for would-be refugee – generally identified as *profughi* – to express verbally their clear intention to submit an asylum request. Without such declared intentions, decrees of expulsion were automatically issued even if fleeing from countries where human rights abuses were well known. The entry into force of the Dublin Convention did not play a significant role in modifying the attitude of the police forces. Even in situations where would-be refugees made explicit their intention to submit the application in another European country, the legal implications of the Dublin Convention were not always been given accurately, if at all.[32] The odds of receiving the necessary information of asylum procedures depended more on the refugees' country of origin than on their fear of persecution, however well-founded. For example, while Kurds tended to be admitted into Italian territory and given access to the asylum procedure, Albanians, Roma and those from Maghrib were admitted in the territory and expelled soon after, while Chinese were rejected immediately.[33]

There have been also a few cases in which no identification process took place, hence no acknowledgement of their transit in the peninsula was officially made, as in the case of 374 Kurds who reached Monasterace on the Calabrian coast on November 1997.[34] A small piece of paper was given to all the *profughi*, a paper containing simply the appointment for the identification, which was supposed to take place after fifteen days.[35]

Friuli Venezia Giulia represents another region of entry, via Slovenia, and the influxes during the past decades have been quite constant, though less visible, if compared with the high number of 'boat-people' that reaches the southern Italian coasts. The partial invisibility was acknowledged during an interview with an official of the Ministry of the Interior:

32 Consorzio Italiano di Solidarietà, cit., pp. 22, 25.

33 Ibid., p. 21.

34 'Emergenza: Sbarcano altri 400 Curdi', *Il Corriere della Sera*, 20/11/1997.

35 Ahmad, S., Consiglio Italiano Rifugiti (Italian Refugee Council) – Calabria, interview held in Badolato Superiore 22/05/2001.

> The landing of some thousand people in an old cargo-boat is definitely impressive. In comparison, the Questura of Gorizia stops between fifty and one hundred people every day. To this figure, one should add the figure of those who are not stopped. Hence, in terms of numbers, the transit via terra through the oriental borders is probably bigger than the transit through the maritime routes.[36]

The partial invisibility of those influxes might explain why the landing of '*clandestini*' at the southern borders has always been reported in national press and major TV channels, while the transit along the northeast frontiers has virtually remained unnoticed. The entity of the phenomenon was, however, well known as, in the region, the so-called 'bulletin of the expelled' was established, reporting daily the number of the decrees of expulsion.[37] What seems impressive is the high number of those expelled and the ridiculous number of those who applied for asylum.

The provinces where the transit was more visible were those of Gorizia and Trieste, though the local responses were completely different. In the case of Gorizia, the general attitude of the police was to issue decrees of expulsion, after having stopped the '*clandestini*' at the local railway station.[38] During 1999 something like 2,890 were expelled and 1,507 rejected, while in 2000 the number increased up to 12,763 expulsions – out of a total of 15,000 stopped – and only 2000 have been readmitted in Slovenia. The number of asylum requests during the year 2000 was surprisingly low – only ten – despite big influxes from Iran, Turkey, Sri Lanka and Afghanistan.[39]

The situation in Trieste is quite unique. While the municipality has demonstrated a willingness to provide information – and the creation of a 'section for political asylum' and of an information centre operating since 1999 are two clear examples[40] – the approach of the police forces at the port frustrates most of the efforts of the city. During the past years, the complete absence of information has resulted in lots of rejections at the borders. Even in cases where a willingness to apply for asylum was expressed, the police often conducted some sort of

---

36 Official of the Ministry of the Interior, interview held in Ghent (Belgium), 12/11/2001;

> *Lo sbarco fa più impressione, perchè certamente vedere una carretta con centinaio di persone fa impressione. A paragone, la questura di Gorizia, nè ferma mediamente dalle cinquanta alle cento al giorno. A questi poi si aggiungono quelli che non ferma. Quindi numericamente, il passaggio via terra con il confine orientale forse é più grosso delle rotte marittime*.

37 Consorzio Italiano di Solidarietà, cit., p. 31.

38 *Ibid*., p. 32.

39 *Ibid*.

40 *Ibid*., p. 34.

discretionary pre-examinations.[41] In the region, the number of entry drastically dropped between the end of 2001 and the very beginning of 2002, partially as result of an intensification of controls along the borders – through a stricter implementation of the re-admission agreement with Slovenia – and as result of the 9/11 events, which provoked an intensification of border controls in the countries of transit.[42]

To conclude, given the Italian traditional absence of any serious politics of protection and the dominance of an impressive level of discretion, the difference that locals make in implementing immigration rules is hence crucial in providing asylum information at the points of entry, in offering medical assistance if needed, and in evaluating carefully each case individually, without labelling simplistically everyone as clandestine.

3.2 Some Spontaneous Initiatives

While the preceding section has looked at the way in which officials, especially police forces, have dealt with irregular entry, this section will evaluate, quite briefly, the way in which some local people have understood the phenomenon, especially during the past years. Some important acts of solidarity, humanity and assistance, especially on occasion of big influxes, will help to better understand why the entry of '*clandestini*' has not been necessarily considered in a negative way. In many cases, the strong memories of Italian emigration played a crucial role in shaping a positive, or at least non-hostile, perception of irregular entry. Such a positive perception was often reinforced by national and local media as well as by the Catholic networks, and especially by the so-called '*Caritas*'. Moreover, given the poor Italian social service, images of *clandestini* as queue jumpers, 'wealth stealers', or 'benefits abusers', as often perceived in some European countries, have not been normally produced. Even the most radical positions of members of the Northern League Party and of National Alliance (*Alleanza Nazionale*) have not diffused any messages along those lines, focusing instead on the issue of uncontrolled influxes, criminality, the presence of foreign prostitutes in the streets, and more in general on the question of order, security and legality.

Despite the difficulties in making generalisation as result of different approaches and perceptions within each geographical area, positive attitude has traditionally been expressed within the so-called regions of entry, especially in the south, while more hostile positions tended to occur in richer areas, which attracted more (regular and irregular) workers. As well described in *Frontiera Italia*, the constant transit of "silent" migrants has always been known and

41 *Ibid.*

42 Galieni, S. and Patete, A. *Frontiera Italia*. (Troina: Città Aperta Edizioni, 2002), p. 103.

silently accepted and, in the worst scenario, people expressed indifference but never intolerance.[43]

Acts of solidarity and assistance from local people have emerged especially once conditions of 'emergency' exploded, in the sense that the 'newcomers' after a dreadful journey were in urgent need of food, clothes, and medical assistance and the institutional responses were inadequate, too slow or completely inexistent. The most familiar cases of local solidarity were those expressed towards the Albanians in March 1991, and the Kurds in December 1997. Regarding the first case, 640 Albanians landed in Otranto, 4th March, and received help exclusively from the local population, who provided them with hot meals and warm clothes.[44] After 48 hours of complete silence from Rome, some civil servants were finally sent to Otranto but only to examine the legal situation of these "*transfughi*", and to establish what to do against future influxes.[45] That openness toward the Albanians was, however, quite unique, as the following influxes of big proportions – some 20,000 landed in Brindisi after a few days;[46] 17,000 in Bari in August 1991;[47] and 15,000 in early March 1997 – have been handled quite exclusively by Italian officials. What seems important to emphasise is that the media, save for the first group, played a key role in uncritically reproducing political decisions and in representing them, especially in 1997, as a "dangerous menace", as "hooligans" and as barbarians invading the Italian soil.[48]

The case of some 837 people, mainly Kurds, who disembarked from the cargo-boat *Ararat* on 26th December 1997 in the Calabrian coast, has been considered for years the symbol of reception and openness. During the whole of 1998, the city of Badolato attracted many political Italian figures, some European MPs and many national and international journalists. The media certainly played an important role in propagating stories of remarkable acts of solidarity and humanity of the local population, of the exceptional personal involvement of the local administration, of efficient co-ordination amongst the different public institutions and of the willingness to create those social and economic conditions that would have allowed the Kurds not simply to integrate but, more importantly, to re-populate an area that has experienced a long history of emi-

43 Pugliese, E. 'Introduzione', in *ibid*., p. 12

44 'Fuga dall'Incubo Albanese. Sbarcano a Otranto 640 'boat people'', *La Repubblica*, 05/03/1991.

45 *Ibid*.

46 'Loro Hanno Fame e Noi diamo Bastonate', *La Repubblica*, 09/03/1991; 'Da Brinsisi SOS Disperato. "Intervenga l'Esercito"', *La Repubblica*, 9/3/1991.

47 'Rimpatriati a Forza con un Ponte Aereo. L'Ordine: Non Sbarcheranno più', *La Repubblica*, 09/08/1991; Dal Lago, A., *Non-Persone: L'Exclusione dei Migranti in una Società Globale* (Milano: Feltrinelli, 1999), p. 186; Balbo, L., and Manconi, L., *I Razzismi Reali* (Milano: Feltrinelli, 1992), p. 31.

48 'Ideologia del Rifiuto', *Il Manifesto*, 15/03/1997.

gration.[49] The whole of positive stories diffused by the media had as well a positive impact in the emergence of many reception responses towards the Kurds in many other areas of the country.[50]

A myriad of positive responses, perhaps less visible but as significant, has been expressed if one considers all the voluntary services, especially medial assistance, that have been provided during the past decades to irregular migrants, which have been for long excluded from any social services and their children officially denied access to schooling.[51] Cases of migrants excluded from official services and helped unofficially were not so rare, given the high number of foreign workers, who had a job but not a regular contract.

4. Toward a Politics of Suspicion?

As evaluated so far, different understanding of migration fluxes has had (and continues to have) a tremendous impact on the way in which '*clandestini*' were treated. The question is not simply whether local authorities – especially *Questure* (police headquarters) and Prefectures – manage public security in accordance to what is established by the Ministry of the Interior, but also the way in which local officials understand the phenomenon of smuggling and trafficking, their victims and, perhaps more importantly, their institutional role. In this respect, it is worth mentioning a recent event, which exemplifies quite effectively two opposing, though dominant, understandings of border patrolling against illegal entry. The operation of rescue of some 298 "*disperati*" (desperate people) along the Sicilian coastlines – among the many that occurred during the past summer – was understood, by the Minister of the Institutional Reforms, Roberto Calderoli, as a failure of the patrolling operations. According to the minister – and to his colleagues of the Northern League Party – *clandestini* are always already illegals and, *qua* illegals, the only possible response is their immediate removal from the country, and tougher patrolling operations in order to prevent them to enter

49 Apparently something like two hundreds newspapers articles have appeared at the time in the Italian and foreign press. See Gesualdo, A. *Storia Politica di Badolato. Dal 1799 al 1999* (Cosenza: Edizione della Biblioteca Gesualdina, 2000), p. 197.

50 See 'Kurdi, Sbarco dei Mille in Calabria', *Il Giornale*, 28/12/1997; 'Calabria, "Terra Promessa" per i Kurdi', *Il Giornale di Calabria*, 28/12/1997; 'Kurdi, lo Sbarco dei Disperati', *Il Tempo*, 28/12/1997; 'Aiutiamoli a Raggiungere gli Altri Stati', *Il Corriere della Sera*, 29/12/1997; 'La Proposta del Sindaco di Badolato: Cento Abitazioni per i Profughi', *Il Quotidiano*, 30/12/1997; 'Esperimento Pilota a Badolato: Comune e Prefettura Insieme Cercano Casa a Interi Nuclei Familiari', *Liberazione*, 02/01/1998; 'A Badolato, Progetto 'Multietnico' Elaborato dal Comune', *Il Quotidiano*, 09/01/1998.

51 Dossier di Ricerca, *Migrazioni. Scenari per il XXI Secolo* (Rome: Agenzia Romana per la Preparazione del Giubileo, 2000), pp. 851-854.

into Italian waters.[52] A complete different understanding was expressed by the Admiral Eugenio Sicurezza – captain of harbour-master's offices and of Italian coastguard – who understands his institutional role differently. According to him, no policy of combating illegal entry can be properly developed as long as "desperate people" are smuggled in through unsafe and overloaded boats. Any operation that would attempt to prevent, at all costs, any boats from entering into Italian waters would put human lives at risk. The very idea of combating clandestine entries, as advocated by many members of the ruling coalition, is refused as *clandestini* are not seen primarily as illegals but indeed as desperate and 'ship-wrecked persons', who cannot be abandoned to their fate in the sea. As the admiral has put it:

> the truth is that we are forced to take on board the life of these desperate people. … No mariner would ever let people die in the sea. … This year alone, some 4,500 desperate people have been saved, 70,000 since 1992. No operation of prevention … exists, it can only be done by those countries where desperate people embark and the country of origin. … Controls do exist. … But the truth is that we find ourselves before situations, which are only and exclusively of rescue.[53]

For a country as Italy with miles of coastlines, the attempt to seal the borders – as advocated by many – seems impossible to achieve unless the country is prepared to put human lives, including those of Italian coastguards, at risk. And this aspect seems utterly irrelevant at the eyes of many members of the Northern League, including the (engineer) Minister of Justice, Roberto Castelli, who has strongly criticised the way in which the Ministry of the Interior has handled the influxes during the past summer and especially the inability to combat and prevent illegal entry.[54]

Moreover, within a political framework dominated by security, whose rationale is 'no *clandestini* at all costs', the dividing line between rescue operations and smuggling is becoming thinner and thinner. During the most recent years, any rescue operations carried out by non-officials have started to be seen

52 'Sbarchi: 298 Disperati', *La Sicilia*, 16/08/2004.

53 *Ibid*., "*la verità è che noi siamo costretti a farci carico della vita di questi disperati. … chi è marinaio non lascerebbe mai morire gente in mare. … Solo quest' anno sono stati salvati 4.500 disperati, 70mila dal '92. Il contrasto … non esiste, … possono farlo soltanto i paesi da dove i disperati prendono il mare e i paesi di* origine*. C'è il controllo … Ma la verità è che ci troviamo di fronte a situazioni che sono soltanto ed esclusivamente di soccorso*". See also Delle Donne, M., *Un Cimitero Chiamato Mediterraneo* (Roma: Derive Approdi, 2004).

54 'Sbarchi, la Lega contro Pisanu, "Arrivano troppi clandestini"', *La Repubblica*, 13/09/2004.

suspiciously, and the engagement of some Italian fishermen in rescue operations have resulted in some legal procedures and the accusation of smuggling.

The recent case of the rescue operations carried out by the crew of the 'Cap Anamur' is quite telling. The so-called Cap Anamur case exploded at the end of June when the chair of the homonym German humanitarian organisation, Mr Elias Bierdel, rescued thirty-seven ship-wrecked people, presumably of Sudanese origin, in the Mediterranean Sea, and directed toward the closest coasts: the Porto Empedocle in Lampedusa.[55] For three weeks, Italian authorities refused entry into the port, fearing that such an authorisation would have encouraged future influxes of (illegal) migrants thanks to the (presumed) complicity of NGOs.[56] Despite the impressive national and international pressure that vigorously demanded their protection, the decision of the Minister of the Interior was, from the very beginning, a decision of closure, in violation of Italian international obligations. The very refusal to authorise the disembarkation of the rescued profughi exemplifies the position of Italian officials, which expressed no intention to provide protection and a strong determination in discouraging any future rescue operations. The disembarkation finally took place the 12th July, once the captain declared a situation of emergency in the Cap Anamur, against the many prohibitions of the Italian authorities.[57] The operations of disembarkation were soon followed by their forced permanence in the cpta in Agrigento (Sicily), and the orders of expulsion for the profughi – even in the wrong countries, Nigeria and Ghana – and the accusation of smuggling for the members of the crew.[58] Neither the requests of asylum submitted at the German authorities – as result of the German provenance of the Cap Anamur – nor the ones submitted at the Italian ones guaranteed some forms of protec-

55 See 'Sulla Nave dei Profughi Arrivano gli Avvocati', *La Repubblica*, 08/07/2004; La Cap Anamur Verso il Porto Bloccata da due Motovedette', *La Repubblica*, 11/07/2004; 'Cap Anamur, Ufficiali in Manette. Arrestati il Capitano e l'Armatore', *La Repubblica*, 12/07/2004; and 'Libero Comandante della Cap Anamur', *La Repubblica*, 16/07/2004.

56 'Sulla Nave dei Profughi Arrivano gli Avvocati', *La Repubblica*, 08/07/2004; 'Nuove Frontiere Marittime e Respingimenti Collettivi, *Il Manifesto*, 08/07/2004; 'Il Viminale E' una Questione di Diritto, si Rischia un Precedente Pericoloso', *Il Corriere della Sera*, 10/07/2004; and 'La Cap Anamur Attracca in Porto**',** *La Repubblica*, 12/07/2004.

57 'La Cap Anamur Attracca Dopo 31 giorni. Ma il Capitano Rischia l'Arresto**,** *l'Unità*, 11/07/2004.

58 See, 'All'ombra della Cap Anamur', Il Manifesto, 03/08/2004 ; 'Cap Anamur - Parte processo per diritto di asilo', *Il Manifesto*, 06/08/2004 ; 'Sulla nave dei disperati', *L'Unità,* 08/07/2004; and 'L'Europa? Un paravento, le colpe sono dell'Italia', *Il Manifesto,* 10/08/2004.

tion.[59] Despite the attempts of the many NGOs and municipalities involved in the case, of the appeal presented at the European Court of Human Rights,[60] the Ministry of the Interior decreed the forced deportation of all of them. The decision was, however, contested by the court (Tribunale di Roma), which declared that the fourteen profughi, who appealed against the deportation, could have remained in the country.[61] Unfortunately, the Minister of the Interior carried out the deportation before the decision of the court, which saved the only one whose forced removal from the country had not been carried out.[62]

The epilogue of the Cap Anamur is highly disturbing, not simply because of the quick and unlawful expulsion of thirty-six of them, but more importantly, because it might lead to future situations in which rescue operations along Italian and international waters are not carried out unless authorised to do so. Human life of migrants is becoming so meaningless to be deemed by many, though not all, not worth to be saved. As put it provocatively in *Il Manifesto*, "Adesso è vietato salvare naufraghi in mare aperto"[63] *(now it is forbidden to rescue* shipwrecked persons *in open sea)*.

5. *Clandestini*: Workers not Criminals

Nowadays, it seems that acts of solidarity from common people are less in numbers, which is possibly the result of the public campaign of criminalisation operated by many members of the governing coalition – especially the diffusion of the equation *clandestini* = criminals; the significant change of attitude of part of the Catholic network;[64] and the recent counter-terrorist politics. An analysis of the messages reproduced in the mass-media seems to reinforce such a shift.

59 'Pisanu: Asilo, Domande Irricevibili. Scontri al Centro', *Il Corriere della Sera*, 15/07/2004; and 'Attracca in Porto la Cap Anamur. La Germania non Vuole i Profughi', *La Repubblica* 12/07/2004.

60 'Sulla Cap Anamur Indaga la Corte Europea', *La Repubblica*, 23/07/2004.

61 *See 'Cap Anamur, Sbugiardato il Governo: per il Tribunale Espulsioni Illegali', L'Unità*, 30/07/2004.

62 *Ibid*.

63 'Adesso è vietato salvare naufraghi in mare aperto'*, Il Manifesto*, 10/08/2004.

64 See Spicacci, V. 'Coscienza Civile, Coscienza Cristiana e Immigrazione Clandestina in Italia', *La Civiltà Cattolica*, 1999, 1, (3569), 425-438; 'Accogliere gli Immigrati Solo se Cattolici', *La Repubblica*, 14/09/2000; 'Il Monito della Chiesa*:* "L'Accoglienza è un Dovere"', *La Repubblica*, 10/11/1998; and Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Migration at the Threshold of the Third Millennium* (Vatican: Rome, 1998).

Nowadays whoever reaches the peninsula is by definition a *clandestino*, and the many newspapers articles of the past summer are quite telling.[65]

A politics of migrants criminalisation is not new, it already started a few years ago, and in this respect the analysis presented in Alessandro Dal Lago' work, *Non-Persone*,[66] is highly instructive. What seems important to capture from Dal Lago's analysis is his understanding of migrants as non-persons, in the sense that the country has developed such a juridical system to exclude them and treat them as persons whose life is not worth of respect as the one of nationals. A close look at legal norms seems to suggest that migrants are strongly marginalised and exploited. This exclusion, embedded in migrants' juridical condition, has led Dal Lago to affirm that migrants are trapped within a legal and political framework, which is highly hostile to them.[67] Although no open and violent hostility against foreigners is generally advocated, save for some isolated cases, a more subtle and hidden hostility exists. It is a hostility that probably has more negative effects, one which has been appropriately described as a "strategic hostility", because it aims "to 'control' the juridical condition of foreigners", through apparently "neutral technical definitions" ably incorporated within the whole body of the legislation related to migrants.[68] Consequently, migrants find themselves trapped within a framework that, on the one hand, advocates the respect of democratic principles and of the dignity of the migrants and on the other, it excludes them. Such exclusion operates within strategies that are democratic only in appearance, hence Dal Lago's definition of "democratic exclusion".[69] Processes of exclusion and stigmatisation are further reinforced by the many negative pictures offered in public media, which have been extremely 'efficient' in reinforcing the political equation immigration=criminality. An equation often proposed together with the national figure of prisons population, according to which migrants are over-represented.[70] No in-depth analysis is generally offered, and the gravity of the crimes committed by nationals are rarely, if at all, mentioned or compared with the offences committed by foreigners. They are often

65 See 'Emergenza a Lampedusa: 1.257 Immigrati', *Il Corriere della Sera*, 04/10/2004; 'Lampedusa: Sbarcati 298 Clandestini', *Il Corriere della Sera*, 16/08/2004; 'Lampedusa: 130 Clandestini', 18/08/2004, *Il Corriere della Sera*; 'Sicilia, Sbarco Record. Arrivano Quasi 800 Clandestini', *La Repubblica*, 12/09/2004; 'Lampedusa, Sbarco nella Notte sull'Isola 275 Clandestini', *La Repubblica*, 24/08/2004; 'Gommoni al Largo di Lampedusa. Sbarcati Cento Clandestini, *La Repubblica*, 03/08/2004; and 'In Porto a Lampedusa il Barcone con 203 Clandestini', *La Repubblica*, 11/08/2004.

66 Dal Lago, A., *Non-Persone*, cit.

67 *Ibid*., pp. 21-23, 32-42.

68 Dal Lago, A. A. *The Impact of Migrants on Italian Society. The Italian Case*. EC-DG XII – TSER, 1998, p. 42.

69 *Ibid*.

70 *Ibid*., p. 37.

detained, even when small crimes were committed, because of their impossibility of providing a permanent address, which results in the judges' failure to establish alternative measures other than jail.[71]

Although (cover or uncover) processes of criminalisation and exclusion are not new, the shift from a Left coalition to a Right one has enormously radicalised anti-immigration positions. The 2002 legislation has introduced many measures that severely punish anyone found without a regular permission of stay, and established their immediate expulsion irrespectively of the reasons for their irregularity. The introduction of important changes related to the minimum economic requirements have prevented many, especially self-employees, to renew their permit of sojourn. The impossibility of renewal has resulted in the emergence of what has been defined as 'new clandestinisations' (*clandestinizzazioni*),[72] if not re-clandestinisations. Given the Italian framework, where the vast majority of migrants have normally experienced a period of 'clandestinity', the establishment of stricter rules has resulted in a forced return to the initial irregular situation, hence a return to a new phase of 'clandestinity'. One of the outcome of the Bossi-Fini Act has been the paradoxical situation of expelling not new comers, but indeed migrants who have been living in Italy for quite some years, even more than thirty.[73] It is them that have been subjected, most recently, to measures of forced detention into cpta and deportation. What has significantly changed is not the fight against the phenomenon of illegal entrants, but indeed against any '*clandestini*'. As Pugliese has put it

> Not the fight against clandestinity, but indeed the fight against *clandestini* is proceeding quite well. They are detained, expelled, humiliated, transformed into objects of arrogance and more importantly defamed by the Right and nowadays even by the Left. … But why this obstinacy in expelling the *clandestini*?[74]

Hence for Pugliese the question is to understand why the government is diffusing, more than ever, the concept that all *clandestini* are criminals, and why all those found without a regular permission ought to be expelled, irrespective of the reasons of their irregularity, especially when it is due to bureaucratic delays.

---

71 *Ibid*.

72 See 'Come si Diventa Clandestini per Legge', in *Il Manifesto*, 01/02/2001; and 'Non Clandestini ma Cittadini', in *Città Aperta*, in <http://www.ecn.org/zip/cittadini.htm>, accessed on 03/02/2004.

73 See 'Un Artista Senza Carte né Parte', in *Il Manifesto*, 17/04/2001.

74 Pugliese, E**.,** 'Tutti sono stati clandestini, *Il Manifesto*, 10/05/2002; "*Non la lotta alla clandestinità, ma la lotta ai clandestini va avanti benissimo. Vengono detenuti, cacciati, umiliati, fatti oggetto di prepotenze e soprattutto diffamati dalla destra e ora anche dalla sinistra. … Ma perché questa fissazione con l'espulsione dei clandestini?*"

Despite the strong efforts at the institutional level to stress that the aim objective of present immigration policies is to build an inclusive system for those that are already in the country, and to punish those who do not respect the immigration rules, the political message is not convincing. And it is not convincing for the very reason that the governing coalition refuses to acknowledge the impressive role played by the informal economy, and it severely punishes foreign employees and not their national employers. As noted in Pugliese's article, a radical shift has occurred in the way in which irregular migrants are treated, and that very inhumane shift is, first and for most, visible at the borders. As he put it:

> Earlier things were much more disorganised, but more humane: people were caught, possibly they were given some food for some times and then released with a '*foglio di via*', through which one started his/her career as a clandestine in Italy: the *honest working career* of the great majority of those who entered Italy via its borders.[75] (emphasis added)

It is important to emphasise this very concept: the *honest working career of a clandestine*, a concept that has been recently diffused by many leftist newspapers, migrants organisations, trade unions, jurists associations, and part of the religious networks. What they are advocating is not simply a more serious debate on irregular immigration, but also a serious revision of present legislation. Moreover, what the governing parties are advocating 'workers yes, clandestini no' cannot be attained, unless the whole of the economic system is revised, and the generalised assumption that the *clandestini* are always already criminals is abandoned. This has been expressed quite clearly in Giovanna Zincone's article, '*Italia tra Clandestini e Lavoratori in Nero*' (Italy Between Clandestini and Irregular Workers).[76] According to Zincone the recurrent political motto 'yes workers, no clandestini' is based on an unfounded assumption that *clandestini* are not workers. In a country where the percent of irregular workers is impressively high – between 30 % and 55 % – the failure of possessing a regular contract does not imply that migrants' only way of living is within the criminal underworld. The presence of '*clandestini*' can be reduced once it is publicly acknowledged that the informal economy plays a key role in the job market, and once significant political and economic steps are taken for modifying such a system. Until that time many of the so-called *clandestini* will continue to remain honest workers without the right papers. As Zincone has put it:

75 Pugliese, Enrico, 'Introduzione', in Galieni and Patete, cit., p. 11.

76 Zincone, Giovanna, 'Italia tra Clandestini e Lavoratori in Nero', in *La Repubblica*, 07/12/2000.

> [t]he point is that the black market does not represent a deviating element in many of our productive systems, on the contrary, it represents a constitutive element. … If we want immigrant legal workers and not clandestini, we ought to reduce the importance of the informal economy. And if we want to reduce the importance of the informal economy, we ought to re-think the whole of our productive model.[77]

6. Human Trafficking and Social Protection

The phenomenon of human trafficking has not received the same public and political attention, as compared to the one of smuggling. The few occasions of debate have often failed to contextualize the issue to the Italian framework, and question the common assumption that the root-causes of human trafficking and new forms of slavery are to be found exclusively in 'undeveloped' part of the world and not in our 'liberal and democratic' world. It is not rare to read, in official documents, that trafficking is the result of the tragic economic conditions, such as "poverty, unemployment, shortage of education and lack of access to resources", which characterise all the countries of provenience of trafficked victims.[78] Although these events might explain one of the reasons for easier 'recruitment' operations by criminal transnational organisations, they cannot *per se* make sense of new form of slavery, as embedded in the very concept of trafficking. Moreover, what is missing is a debate that would have evaluated the intimate link between trafficking and local demand especially in the sex and labour market, without which human trafficking would probably not take place or would have different connotations. Although a public campaign against trafficking has been organised, especially in favour of trafficked women forced into prostitution, no clear public distinction has been made between being a trafficked prostitute and being a 'clandestine' prostitute who has to be expelled from Italian soil. This has led to the tragic situation that, in some areas and under some circumstances, trafficked prostitutes are protected because recognised as victims of trafficking, while in other areas they are seen and treated exclusively as '*clandestine*' to be expelled from the country. These discrepancies in implementing prevailing rules, and especially in distinguishing between

77 *Ibid*., "Il fatto è che il lavoro nero non rappresenta un tratto deviante in molti dei nostri sistemi produttivi, ne costituisce al contrario un elemento costitutivo. … Se vogliamo lavoratori immigrati regolari e non clandestini, dobbiamo ridurre il peso dell'economia informale. E se vogliamo ridurre il peso dell'economia informale, dobbiamo ripensare il nostro modello produttivo nel suo insieme".

78 Ministero Pari Opportunita, 'Il fenomeno della tratta', in <http://www.pariopportunita.gov.it/I-SERVIZI/ATTIVITA/notizie/Legge_Tratta.doc_cvt.htm>; accessed on 10/09/2004; "*la povertà, la disoccupazione, la carenza di educazione e il mancato accesso alle risorse*".

victims and irregular migrants, have often resulted in police round-ups and in the indiscriminate expulsion of all foreign 'irregular' prostitutes. The number of expulsion has recently increased as result of the so-called '*vie libere*' (free roads) national operation, initiated in August 2002, with the aim of cleaning cities from "generalised criminality" such as, among others, "prostitution and clandestine immigration".[79] Although the implementation of article 18 on social protection for victims of trafficking is advocated, in many geographical areas security, or pseudo-security, prevails over protection. This seems to be especially the case in those areas where the absence of professional and well-coordinated local networks has left protection operations exclusively in the hands of (male-dominated) police forces.

What the following pages will attempt to do is to offer a general overview of the way in which the phenomenon of trafficking has been understood, and especially the way in which article 18 has been implemented in favour of trafficked women forced into the sex market. The question of prostitution is certainly a sensitive and highly contested issue, which so far has encouraged different routes of protection according to the way in which the persons implicated in the phenomenon have been perceived.

7. Debating Trafficking: An Overview

As already mentioned, no serious discussion on the question of human trafficking has so far emerged in the press, which has often reproduced, quite blandly, the messages of closure and exclusion advocated by many members of the governing coalition. In this respect the politics advocated by the Northern League Party have received impressive media coverage, especially in reference to the creation of more secure cities via the expulsion of all the *clandestini* – and prostitutes *in primis* – the reaffirmation of the traditional role of the family and the creation of special sites for the practices of pay sex within a highly controlled and secured environment. [80]

More serious consideration has been given to the issue, during the past legislature, at the higher institutional level, and especially at the Ministry of the Interior – which has devoted impressive efforts in both the question of combating the phenomenon and in protecting its victims – and at the so-called 'Parliamentary Inquiry Committee on the Phenomenon of Mafia and Other Similar

79 Between August 2002 and March 2003, some 1,203 have been arrested for prostitution or clandestine immigration; and some 8,811 expelled. See The Ministry of the Interior, 'Operazione Vie libere (agosto 2002 - marzo 2003)', Dossier 17/03/2003, in <www.governo.it/GovernoInforma/Dossier/operazione_vielibere/> and <www.interno.it/news/pages/2003/200307/news_ 000018576.htm>, accessed on 27/09/2004.

80 See Segreteria Politica Federale, cit..

Criminal Organisations' (*Commissione Parlamentare d'Inchiesta sul Fenomeno della Mafia e delle Altre Associazioni Criminali Simili*) – which has produced a report on human trafficking.[81]

Regarding the Ministry of the Interior, an important step was taken already in June 1996, which led to the subsequent elaboration of article 18, that benefited from important suggestions of the many charities already operating in that area.[82] It was only after the creation of the special inter-ministerial committee for the implementation of that article that the co-ordination of its connected programmes moved from the Ministry of the Interior to the Ministry of Equal Opportunities. Such a shift has not, however, prevented the Ministry of the Interior to organise an international conference after less than a year since the programme of protection had started, a conference that represented an important forum for discussing the issue and for combining different perspectives.[83] What seems interesting to capture from this important occasion of debate is the different interest expressed by those at the higher institutional level and those working in close contacts with victims of trafficking.

The then Minister of the Interior, Enzo Bianco, expressed a quite traditional and anachronistic reading of the phenomenon, understood exclusively as the result of the divide between rich and poor areas of the world, which requires, as an adequate response, a coordinated approach, especially with the countries of origin, in order to establish specific strategies of cooperation and intervention.[84] In other words, according to Bianco, the adequate strategy for tackling the phenomenon was through the reduction of the economic gap, thanks to the delivering of financial help and closer cooperation strategies. These aspects have been discussed in more details in the final part of the conference – on 'International Cooperation Against Trafficking: from Recommendations to Actions' – which saw the participation of some Italian representatives from the Ministry of Foreign Affairs, Equal Opportunity and Justice, from foreign countries such as Moldova, Albania, Turkey, Macedonia and Nigeria, as well as representatives of security agencies such as Interpol and Europol.

---

81 Commissione Parlamentare d'Inchiesta sul Fenomeno della Mafia e delle Altre Associazioni Criminali Simili, 'Relazione sul Traffico degli Esseri Umani', XIII Legislature, Doc. XXIII, no. 49, approved 05/12/2000.

82 See Gulia, P. and Tavassi, M.T., 'Tratta di Esseri Umani: una Sfida per Istituzioni e Società', in Da Pra Pocchiesa Mirta, and Grosso Leopoldo (eds.), *Prostitute, Prostiuite, Clienti. Che Fare? Il Fenomeno della Prostituzione e della Tratta degli Esseri Umani* (Torino: Edizioni Gruppo Abele, 2001), pp. 141-148.

83 Faramondi, G., and Izzi, P. (eds.), *Traffico di Esseri Umani. Alla Ricerca di Nuove Strategie di Intervento*, Rome, 24-25 October 2000 (Roma: Ministero dell'Interno, 2001).

84 Enzo Bianco, 'Introduzione', in *ibid.*, pp. 11-17.

Contrary to the institutional approach, the many associations working in the field brought the issue closer to the Italian 'streets' and especially to the victims of prostitution. In this respect, it is worth mentioning briefly two papers, delivered respectively by Don Oreste Benzi from the association 'Papa Giovanni XXIII', who had direct experience of the province of Rimini (in the Adriatic coast) and Mirta Da Pra Pocchiesa, representative of the so-called 'Gruppo Abele', operating in Turin.[85] Don Benzi's intervention focused on the contradiction that emerged in a judgement of the Re-examination Tribunal of Perugia, which acknowledged that trafficked women are treated as slaves but rejected the proposal of persecuting clients.[86] What Don Benzi was advocating was the institution of a norm that would have allowed not exclusively the punishment of the traffickers, but also anyone who contributes, directly or indirectly, to the perpetuation of slavery.[87] As he provocatively put it: "we cannot keep slavery alive because of the problems of nine million of men looking for girls".[88]

The contribution of Mirta Da Pra Pocchiesa focused on two important practical issues: on the ambiguous figure of the client, and on the limits of protection as connected to the initial implementation of article 18. Although Da Pra Pocchiesa sees the client as the second most important actor in the street – i.e. the demand without which no supply would exist – she acknowledged his important role in helping the victims in denouncing the trafficking. However, while on the one hand, she acknowledges the contribution of the public campaign against trafficking in developing greater awareness – which is clearly visible in the high number of clients that help 'prostitutes' – on the other hand, insufficient attention has been devoted to trafficked minors. Apparently, many clients who encouraged many victims to denounce the trafficking, accompanying the victims themselves, were often completely unaware of committing a criminal offence, because of the involvement of a minor.[89] Moreover, the fact that police forces continue its round-ups against foreign 'prostitutes' demonstrates that the efforts of the Ministry of the Interior in providing adequate information and training to its personnel and especially to those of the *Questure* and Prefectures have been insufficient. It is precisely the police round-ups that frustrate most all the efforts of the organisations working in the streets. Police operations do not solve the problem, but they simply move the trafficking elsewhere, completely

85 See Don Oreste Benzi, pp. 113-118; and Mirta da Pra – Gruppo Abele pp. 119-125, in Faramondi, G., and Izzi, P. (eds.), cit.

86 Don Benzi, ibid., p. 116.

87 *Ibid*.

88 *Ibid*., p. 117; "*Non si può mantenere in vita la schiavitù per i problemi di 9 milioni circa di maschi che vanno a cercare le ragazze*".

89 Mirta Da Pra Pocchiesa, p. 121. Regarding the issue of trafficked minors, see the extensive report produced by the Censis, 'Project Against Child Sexual Exploitation', in <http://www. pacse.censis.it/pacse/inglese/main.html>, accessed on 11/12/2003.

nullifying the previous approaches with many victims, many of whom are often sent to a cpta before expulsion.[90]

This latter aspect has been mentioned at the very end of the report produced by the Parliamentary Inquiry Committee, which has recommended the preparation of some guiding lines for the *Questure*, in order to "avoid useless indiscriminate and mass interventions against foreign prostitutes", generally followed by decrees of expulsion.[91] Although the report draws attention to important aspects relating to the modalities of trafficking and smuggling, there is a sense of a lack of in-depth analysis, especially when the phenomenon of smuggling and of irregular influxes along the Italian borders is considered. What is missing is an analysis that would have made important distinctions in reference to irregular entry, instead of using a variety of expressions without any clear definition. Words such as "clandestine entry of migrants", "clandestine immigrants", "people", "immigrants found along the borders", "*extracomunitari* citizens landed clandestinely", "migration fluxes", "migrants", "people landed" are all used to describe illegal entrants.[92] Although tables containing the number of irregular entrants – officially identified as "immigrants landed and caught"[93] – have been accurately provided, no attempt to evaluate, who they are and which protection they needed, was made.

8. Trafficking and Prostitution

Contrary to the little interest demonstrated by the media in developing a serious debate on the phenomenon of trafficking and prostitution, the literature available seems quite rich, a literature that is coupled with extensive materials produced by the many organisations working in the field.[94] It is mainly thanks

90 Mirta Da Pra Pocchiesa, *ibid.*

91 Commissione Parlamentare d'Inchiesta, cit., p. 107; "*evitare inutili interventi indiscriminati e di massa nei confronti delle prostitute straniere*". The Ministry of the Interior has followed the suggestion, as demonstrated by the ministerial circular that encouraged the respect of article 18 for social protection, see Ministry of the Interior, Ministerial Circular, no. 300.C/2000/ 276/P/12.214/18, 17/04/2000 and ministerial circular, no. 300.C/2000/334/P/12,214/18/1^DIV, 22/05/2000.

92 Commissione Parlamentare d'Inchiesta, *ibid*., pp. 27-46.

93 All the tables included in the report are those provided by the Ministry of the Interior, which identifies irregular immigrants precisely as "*immigrati sbarcati e rintracciati*". See *ibid*., pp. 47-61.

94 See Pastore, R., Romani, P., and Sciortino, G., L'Italia nel Sistema Internazionale del Traffico di Persone', Roma, CeSPI, Dec. 1999; Ambrosini, M., and Zandrini, S., (eds.), *La Tratta Infame. La Prostituzione delle Donne Straniere* (Milano: In Dialogo, 1996); Arlacchi, P., *Schiavi. Il Nuovo Traffico di Esseri Umani* (Milano : Rizzoli, 1999); Da Pra Pocchiesa, M., *Ragazze di Vita. Viaggio nel Mondo della Prostituzione* (Roma : Editori Riuniti, 1996); Associazione Studi Giuridici sull' Immi-

to such a production that it is possible to grasp the typology of the phenomenon, as well as the way in which programmes of social protection have so far worked out. However, as it will emerge in the next section, many of the limits of social protection are intimately connected not simply to the economic resources, but also, and more importantly, to the way in which the phenomenon and the subjects/'objects' involved are understood. As discussed in Monzini's work, *Market of Women* (*Il Mercato delle Donne*),[95] while a public and political debate on trafficking has emerged, the issue of prostitution has been left out. No comprehensive analysis has been put forward in reference to the economic aspects of the trafficking, and especially on the organisation of the sex market, i.e. the demand that sustains the market, and the modalities of sexual exploitation in the country of destination.[96] As long as a serious debate on trafficking *and* prostitution is missing, it is difficult to fully grasp some of the political measures adopted, measures that mirror the "concrete interests of some clients: interests that generally hide behind false moralism or issues of public order".[97]

Unfortunately, because of the prevalence of a highly stigmatised understanding of the figure of the prostitute, many victims of trafficking are not immediately perceived as such. There exist many, also at the institutional level, who believe that prostitution is always voluntary and that all the foreigners that came to Italy were well aware of their future before reaching the country. A close reading of the way in which various social and political actors have perceived prostitution allows for the emergence of two different understanding of the phenomenon and of its victims. On the one hand, prostitution is seen as a threat to public order, health and morality, which call for policies of repression and control, and especially for police round-ups. Within this group, it should be included those 'moralists' (or pseudo-moralists) who see prostitution as always already a disease that has to be stamped out, though refusing, at the very same time, to recognise publicly that the disease exists because there is a high demand in the sex market. However, as reported often by many 'prostitutes', it is not infrequent that many of those 'public' moralists resort to 'private' pay sex. On the other hand, there are those who are not concerned with the prostitution *per se* but with the subjects directly involved in it, and especially those more exposed to risk, iso-

---

grazione, *Dal Permesso alla Carta di Soggiorno. I Nodi Problematici di un Percorso di Integrazione* (Roma: Dipartimento per gli Affari Sociali, 2001); Garosi Eleonora, 'Vendute e Comprate', in *Transcrime*, no. 4, 19/02/2000; Virgilio Maria, 'Le "Nuove Schiavitù" e le Prostituzioni, in *Diritto Immigrazione e Cittadinanza*, 2000, (3), 39-52.

95 Monzini Paola, *Il Mercato delle Donne. Prostituzione, Tratta e Sfruttamento* (Rome: Donzelli Editore, 2002).

96 *Ibid*., p. 104.

97 *Ibid*., p. 108; "*gli interessi concreti di una certa parte di clienti: interessi che generalmente si nascondono dietro falsi moralismi o questioni di ordine pubblico*".

lation and exploitation – i.e. the prostitutes – who are in need of help, assistance and social protection.[98] This very distinct understanding of the phenomenon is crucial as it draws the lines not simply between protection and non-protection, but also between the modalities of protection themselves.

8.1 Evaluating Programmes of Protection

A look at the way in which trafficked women have progressively been protected and assisted will illustrate why they have been *primarily* considered as victims. Such an understanding emerges clearly both in the legislation and in the programmes of protection and assistance that have been developed since 1999. However, the main question is not simply whether victims of trafficking are considered, *de jure*, as victims, but which modalities of identification are used. It is this latter aspect that seems more problematic. Quite often, the stigmatised image of the figure of the prostitute has resulted in the prevalence of prejudice over any accurate assessment of the existence of trafficking. Many victims have been, however, identified thanks to the intense activities of many laic and religious organisations, which have ensured the delivering of correct information. Moreover, although the Berlusconi's government has reduced some of the economic resources for the implementation of programmes of assistance and social integration, the general process of protection has not been stopped, and the rationale has not being modified. As an official at the Ministry of the Interior has recently clarified:

> We have always given a great importance to the humanitarian aspect, hence the trafficked person is always a victim. Hence, as a consequence, s/he will be provided with all the necessary opportunities for solving his/her situation.[99]

Although the programme started to be implemented only recently, some important results have been achieved, both in terms of a generalised awareness of the phenomenon and in providing programmes of protection, particularly to women victims of prostitution. This was mainly due to an information campaign, which involved TV and radio advertisements, posters translated in ten languages, and the institution of a national free number – which started to operate at the end of

98 See Carchedi F., Picciolini A., Mottura G., and Campani Giovanna (eds.), *I Colori della Notte. Migrazioni, Sfruttamento Sessuale, Esperienze di Intervento Sociale* (Milano: FrancoAngeli: 2000).

99 Official at the Department of Civil Liberties and Immigration, the Ministry of the Interior, interview held in Rome, 18/12/2003**; '***Noi abbiamo sempre dato molta importanza all'aspetto umanitario, per cui una persona trafficata, trattata, e' una vittima. Quindi di conseguenza le vengono date tutte quelle opportunità necessarie per risolvere la sua situazione*'.

July 2000 – which guarantees a more direct and efficient delivery of information and help.[100]

Victims of trafficking are also offered the opportunity to participate to a programme of voluntary return. Since the end of July 2001, a programme of voluntary repatriation has started to be implemented, thanks to the coordination provided at the Ministry of the Interior and the work done by the personnel of the International Migration Organisation. The funds provided by the Ministry of Equal Opportunities allows the safe return of eighty victims only, who will benefit from some socio-economic assistance, in their country of origin, during the following year.[101]

What is, so far, unclear is the way in which programmes of protection have been selected by the Ministry of the Equal Opportunities, that establishes which organisations should provide the funding for carrying out the projects as established, every year, through the invitation to tender. It seems that a restrictive interpretation of article 18 has prevailed at the Ministry. Although the legislator intended to protect *any* victims of trafficking,[102] the Ministry of Equal Opportunities, who coordinates the overall programme, has so far considered only those programmes intended for the assistance of trafficked prostitutes.[103]

According to the ministerial guidelines, programmes *ex* article 18 are to be developed following a few key phases, starting from the first approaches with the prostitutes to the final stage when a more independent life, free from violence and coercion, is realised. Such a process might take more than a year, according to the personal situation and/or involvement with the criminal procedures, to the way in which the choice of starting a different life is made, and finally according to the possibilities offered at the local level.[104] Four main stages tend to characterise the process:

---

100 See On The Road, *Article 18: Protection of Victims of Trafficking and Fight Against Crime* (Martinsicuro: On the Road Edizioni, 2002).

101 Markejonaj, E., International Migration Organisation, interview held in Rome, 15/12/2003.

102 See Decree of the Presidency of the Council of Ministers, 'Indicazione dei Criteri e Modalità Preordinati alla Selezione dei Programmi di Assistenza e di Integrazione Sociale Disciplinati dall'art. 18 del Testo Unico delle Disposizioni Concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero', in *Gazzetta Ufficiale*, no. 291, 13/12/1999.

103 Ministero Pari Opportunità, 'Il fenomeno della tratta', <http://www.pariopportunita.gov.it/I-SERVIZI/ATTIVITA/notizie/Legge_Tratta. doc_cvt.htm>, accessed on 10/09/2004.

104 See, Da Pra Pocchiesa Mirta, and Grosso Leopoldo (eds.), *Prostitute, Prostiuite, Clienti. Che Fare? Il Fenomeno della Prostituzione e della Tratta degli Esseri Umani* (Torino: Edizioni Gruppo Abele, 2001); Giammarinaro Maria Grazia, 'Prime Valutazioni sull'Attuazione delle norme sul Traffico di Persone', in *Diritto Immigra-*

First stage:	the dissemination of the necessary information relating to the programme of protection through direct contacts with the prostitutes is made. This can be achieved through different channels: such as street units, police forces, NGOs, local institutions, free national number (*numero verde*), and clients as well.
Second stage:	the decision of participating in the programme is made, and the necessary arrangements with the police forces and the specialised organisations running programmes of protection are established.
Third stage:	the protection plan starts, and the conditions of reception within 'communities of protection' are established. This phase includes a few sub-stages according to personal needs and protection, though every community seems to go through four main steps: 1) protection, security, and new documents; 2) reorganisation of everyday life; 3) acceptance of new rules and some restrictions of freedom; and 4) 'elaboration of the self'.
Fourth stage:	shift from communities to a more independent life after a period of training and/or work experiences.

There exist, however, a few important limits that prevent the programme of protection to achieve highest results, and some of these limits are, however, constitutive of the way in which plans of protection and assistance are understood and implemented in the country. These regard in particular the way in which the different competences are distributed between the national and the local institutions; and the huge impact that the Catholic networks play in providing assistance and in shaping the very meaning of integration within the society. Regarding the first aspect, because local municipalities and/or regions are the entities responsible for putting into practice nation policies, important local differences in terms of protection, assistance and reception exist. There are for instance regions – such as Piedmont, Emilia Romagna, and Veneto – that have actively participated in the assistance and integration of migrants during the past decades, and it is these very regions which have more than others responded rapidly and effectively to the phenomenon of human trafficking.[105] However, the programme of assistance follows a logic of temporary protection, which is sub-

zione e Cittadinanza, 2000, (3), 53-61; Negarville Massimo (ed.), *Barcellona, Parigi, Torino: Interventi sulla Prostituzione Extracomunitaria* (Milano: Selecta, 2002).

105 See, F. Carchedi and G. Mottura, 'Il Progetto Prostituzione dell'Assessorato alle Politiche Sociali, Ufficio Integrazione ed Accoglienza della Regione Emilia Romagna, in Carchedi F., Picciolini A., Mottura G., and Campani Giovanna (eds.), *I Colori della Notte. Migrazioni, Sfruttamento Sessuale, Esperienze di Intervento Sociale* (Milan: FrancoAngeli: 2000), pp. 251-266, and F. Carchedi and C. Dona-

ordinated to the re-allocation of the necessary funding for the continuation of the programmes. What is, hence, delivered is a service, that has not yet become a right, and because a service it is subjected to revision not according to the need, but according to political evaluations.

Regarding the role played by the Catholic networks, it has to be acknowledged that they possess the necessary resources and a *national* network that no other laic organisation is able to provide. The Catholic Church as a whole is able to organise the 're-settlement' of many victims in another part of the country, away from their original forced residence, as no other association is able to do. However, their understanding of assistance to victims of prostitution is very traditional: a strong sense of 'redemption' from past life dominates, and the process of integration is understood more in terms of assimilation to the dominant culture than in terms of accommodation of the culture of origin with the Italian one.[106]

9. Some Concluding Remarks

What the preceding pages have attempted to demonstrate is the complexity that smuggling and trafficking entails. The issue of 'clandestine' entry seems to represent the most controversial one, not simply because of the *laissez-faire* migration policies that the country has adopted for years, but because the question of '*clandestini*' cannot be merely understood in terms of legal permit of residence. In a country where the informal economy plays a key role in labour relations, 'clandestine' workers cannot be simplistically identified as criminals, solely because of their failure to possess a work permit. A coherent politics that aim to reduce the number of '*clandestini*' living in the peninsula would require, first and foremost, more serious controls within the working places. What seems completely missing is a political debate that would have the courage to evaluate more coherently the very phenomena of smuggling and trafficking, and distinguish between criminals and victims, between rescue operations and illegal entry, between trafficked women forced into the sex market and irregular prostitutes, between criminal foreigners and honest working '*clandestini*', between would-be refugees and irregular entrants. Until the emergence of such an act of courage, the country will continue to produce politics that are dominated by repression and suspicion, by indiscriminate punishment, and by arbitrary processes of implementation. As the application of article 18 has demonstrated, it is insufficient to have a very progressive legislation in favour of victims of trafficking, if it is not followed by a substantial campaign and public debate that would

del, 'Il Servizio <Città e prostituzione> dell'Assessorato alle Politiche Sociali del Comune di Venezia', in ibid., pp. 266-277.

106 Chaloff, J., interview held at Censis, Rome, 17/12/2003.

engage with a comprehensive and fully-inclusive analysis of the phenomenon of trafficking, of its victims and of the people who benefit of their forced services.

*Bregje Pieters**

DUTCH CRIMINAL AND ADMINISTRATIVE LAW CONCERNING TRAFFICKING IN AND SMUGGLING OF HUMAN BEINGS THE BLURRED LEGAL POSITION OF SMUGGLED AND TRAFFICKED PERSONS: VICTIMS, INSTIGATORS OR ILLEGALS?

1. Introduction

In June 2000 Europe was startled by the death of 58 Chinese persons. They had been suffocated while being smuggled in a lorry from the Netherlands to England. Since that event, it was clear that smuggled people could be victims, while before smuggled people were seen as people who made use of a service to get illegally into another country by paying a lot of money. Nine suspects in the Dover case stood trial in Rotterdam.[1] The most severe punishment, ten years of imprisonment, was imposed on the leader of the criminal organisation. This sentence was still considerably lower than the fourteen years prison sentence the lorry-driver got in the U.K. The differences in punishment exist because the lorry-driver was sentenced for 58 times intentional homicide, while in the Netherlands the leader was only sentenced for death by negligence.[2] In 2003 the Dover-case gained renewed media-attention because Sister P., the woman who is seen as the alleged owner of a smuggling monopoly for Chinese persons between the Netherlands and the U.K. and who was presumably the actual leader of the Dover smuggle, stood trial in Rotterdam.[3] Eventually, her involvement in the Dover-case could not be proven, nor was she held responsible for the death of the Chinese people. In first instance she was sentenced for some indicted smug-

* Lecturer in Criminal Law at the Radboud University of Nijmegen.

1 District Court Rotterdam 11 May 2001, no. 10/150064-00 and District Court Rotterdam 29 August 2001, no. 10/150146-00.

2 Death by negligence (article 307 CC) carries a maximum prison sentence of nine months while manslaughter (article 287 CC) carries a maximum prison sentence of fifteen years.

3 District Court Rotterdam 27 June 2003, no. 10/150018-02.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *201-239.*
 ISBN 90 04 15064 1.

gling offences[4] to three years imprisonment. In appeal the sentence remained unaltered. However the Court of Appeal stated, as opposed to the District Court, that the evidence derived from a German investigation ('Sade case') was not too dated to be admissible. Therefore the prosecution is inadmissible. The Court of Appeal has referred the case back to the District Court. Sister P. can therefore be convicted for more smuggling cases, if found guilty by this Court.

The Dover case resulted in new EU legislative proposals on trafficking and smuggling. Implementations of the Directives of the EC and Framework Decisions of the EU concerning trafficking and smuggling have led to reforms of the Dutch criminal law.

In this chapter the consequences of the European legislation for the Netherlands will be analysed. The Dutch criminal offence of trafficking, the offence of smuggling and related offence on enforcing immigration law will be described by analysing current legal provisions in section 2 and by analysing relevant case law in section 3. One main difference between the Dutch offences of trafficking and smuggling is the position of the trafficked and the smuggled person. In section 4 it will be explained why only trafficked persons can be victims of trafficking, while smuggled persons cannot be victims of smuggling. In section 5 the position of victims and their role in the criminal proceedings will be explained. Since only trafficked persons are seen as victims, smuggled person are only entitled to these rights to a very limited extent. In section 6 a concluding analysis will be made by linking the aims of the offences of smuggling and trafficking to the legal position of the trafficked and smuggled persons. In section 7 the reforms of Dutch criminal law will be described due to implementing European law. It will be shown that the implementation of the European legislation has consequences for the legal position of smuggled and trafficked persons in Dutch criminal law. The required reforms are not always in line with the Dutch criminal system and the Dutch system of criminalising trafficking and smuggling.

2. An Historical Overview of the Dutch Offences of Trafficking in and Smuggling of Human Beings

2.1 Trafficking in Human Beings

In 1912 the Netherlands ratified a Treaty of 1910 on trafficking in women.[5] This Treaty penalises the recruitment, transportation, transfer etc. of women and girls for the purpose of engaging them in sexual activities. The treaty aims at protecting the physical integrity and the right to sexual self-determination of these women and girls. Due to this aim the offence of trafficking in human beings was

4 Court of Appeal Den Haag 21 October 2004, no. 10/150018-02.

5 Law of 30 March 1912, *Staatsblad* 1912, 123. Publication on 27 November 1912 (*Staatsblad* 1912, 355).

in 1911 placed in the section on offences against morality in the Dutch Criminal Code (CC). Since then, trafficking has been related to the exploitation of *sexual* activities. Therefore it was not placed in the section on crimes against the personal freedom where slave trade, a similar offence, can be found. As opposed to trafficking, slave trade (article 274 CC) became a criminal offence in the early 1800's.[6] Like trafficking, this offence also seeks to protect personal freedom and personal integrity by penalising forms of exploitation of persons. Nevertheless, there has never been prosecuted successfully on the grounds of slave trade, mainly because slave trade is supposed to mean that the owner holds complete power over the slave (see article 4 ECHR).

In 1911 the offence of trafficking was penalised in article 250ter CC.[7] Trafficking then carried a maximum prison sentence of five years. The article did not comprise a description of what the conduct of trafficking contained. In the explanatory memorandum the Minister of Justice declared that trafficking includes 'every action undertaken from the moment one makes contact with the woman till one actually exploits her in prostitution or till one hands her over to someone who will exploit her in prostitution'.[8] Travelling with a woman with the intention of sexually exploiting her amounts to trafficking in women, even though the exploitation has not taken place. Crossing borders has never been a requirement to indicate an action as trafficking. Women can also be trafficked within the national frontiers.

Prostitution itself has never been criminalised in the Netherlands, however brothels were prohibited. To maintain this prohibition, bringing about or promoting prostitution was a criminal offence under article 250bis CC. At the time of the penalisation of trafficking, the reasoning was that without brothels there would be no trafficking in women and without women, there would be no brothels. This contemporary abolutionistic movement considers prostitution as an evil force, and brothels are a source of that evil force. Therefore both should be banished.

The enforcement was aimed at all forms of prostitution, voluntarily or involuntarily.

However, through the years the support of this movement decreased. Maintaining the prohibition on brothels did not lead to the expected eradication of trafficking. The government reformed their enforcement policy and developed a policy of non-enforcement, which is called *gedoog*-policy. This policy is also the basis of the Dutch policy on soft-drugs. It entails that all brothels are pro-

6 Prohibition of slave trade: Law of 20 November 1818, *Staatsblad* 1818, 39, and slavery: Law of 23 December 1824, *Staatsblad* 1824, 75. These penalisations are implemented due to a treaty between the Netherlands and Great Britain of 4 May 1818 against slave trade (*Staatsblad* 1818, 79)

7 Law of 20 May 1911, *Staatsblad* 1911, 130.

8 Handelingen *II* 1910-1911, p. 1573-1577.

hibited according to the law, but in practice some of them are tolerated. The police and the Prosecution Service only deal with brothels in which women are forced to work. Thus, stress shifted from combating immorality in general, to combating specifically exploitation in forced prostitution. Because the offence of trafficking contained no definition of the crime, police, Prosecution Service, and judges could easily make the definition of trafficking fit the at that time generally received views on prostitution and trafficking. Therefore, an alteration of law has not taken place in a long time.

It was not until 1994 that the offence of trafficking in article 250ter was reformed.[9] The reform legalised the existing situation in which only involuntary prostitution was prosecuted. Therefore a description of trafficking was incorporated in the article and trafficking was defined as bringing someone into the prostitution by force, violence, deceit, etc. So, only forced prostitution was criminalised. The article did not only penalise the trafficker, but also the exploiter who forced someone to work in the prostitution.

In 1935 the Netherlands had ratified the 'International Treaty on combating trafficking in women of full age'.[10] This treaty penalises 'the recruitment, transportation, etc. of a person into another country with the aim of sexual exploitation'. Due to this definition the criminalisation of the transborder-trafficker does not depend on the existence of force or other means to influence the will of the victim. This obligation was not in line with the policy of non-enforcement. One could even say that since the reform in 1994 this criminalisation contains a breach of the Dutch aim to criminalise trafficking. However, the Netherlands have not wanted to renounce the Treaty, because this would be a wrong international signal. Therefore, a subsection was implemented in the new criminalisation of trafficking in 1994. This subsection criminalises the recruitment, transportation, or abduction of a person to another country with the intention of bringing that person to work in the prostitution. This criminalisation of the transborder-trafficker has not been made conditional on the use of force.

In 1994 the sanction of article 250ter was increased from a maximum prison sentence of five years to a maximum of six years with the possibility of a maximum fine of € 45,000.[11]

Till 2000 the policy of non-enforcement against brothels was pursued, but then the prohibition of brothels was abolished. A new law legalised this

9 Law of 9 December 1993, *Staatsblad* 1993, 679. Coming into force on 1 February 1994.

10 Geneva Treaty of 11 October 1933, S. 1935, 598, JW. Law of 2 August 1935, *Staatsblad* 1935, 443. Entering into force on 19 November 1935.

11 In 1995, it became possible to impose a prison sentence and a fine for one criminal offence, before that the judge did not have that possibility. Law of 21 December 1994, *Staatsblad* 1995, 32. Entering into force on 27 January 1995.

policy and brothels were no longer criminalised.[12] Article 250ter CC was therefore absorbed in a new, wider article: article 250a CC. Due to the replacement of 'bringing someone in prostitution' with 'engaging in sexual activities against remuneration' the scope of the offence was widened. Also, deliberately receiving financial advantage from forced sexual activities of another person was criminalised.[13] So, article 250a CC not only penalised the trafficker, but also the exploiter and the beneficiary of forced prostitution.

In 2002[14] indirect contact with the client, for example in peep shows or dancing in strip-clubs, was also penalised by deleting 'with a third party' out of the offence.

Besides, the jurisdiction of sexual offences, like trafficking in humans, was extended. Not only people with Dutch nationality,[15] but also people who live in the Netherlands but do not have Dutch nationality[16] can be prosecuted in the Netherlands for sexual offences *against minors abroad*. This was a consequence of the implementation of the Joint Action of the EU on combating trafficking in and the sexual exploitation of children.[17] The jurisdiction with regard to sexual offences against people of full age was not extended. This would lead to problems with the requirement of 'double criminality': the Netherlands, as one of few countries, has abolished the prohibition of brothels and therefore prostitution is only criminalised when force is used.

In 2005[18] the offence of trafficking was altered due to the implementation of the European legislation. The scope of the offence is widened. Not only forced prostitution is criminalised, but every form of exploitation. Due to this, the offence is transposed from the section on crimes against morality to the section on crimes against the personal freedom. In the new offence on trafficking, article 273a CC, it is stated that exploitation amounts at least exploitation of another person in prostitution, or other forms of sexual exploitation, forced or completed labour, or services, slavery, or slavery like practices.[19] To anticipate to the Greek Framework Decision on the prevention and control of trafficking in

12 Law of 28 October 1999, *Staatsblad* 1999, 464. Coming into force on 1 October 2000 (*Staatsblad* 2000, 38). A bill to abolish the prohibition of brothels was already introduced in the beginning of the eighties of the last century (*Kamerstukken II* 1991-1992, 21 027, no. 10 and *Kamerstukken II* 1985-1986, 18 202, no. 6.), but the time was not right for this proposal and it died a silent death.

13 Article 250a subsection 4, 5 and 6 CC.

14 Law of 13 July 2002, *Staatsblad* 2002, 388. Coming into force on 10 September 2002.

15 According to article 5 CC.

16 According to article 5a CC.

17 PbEG L 1997, 63/2-6.

18 *Staatsblad* 2004, 645. Coming into force on 1 January 2005 (*Staatsblad* 2004, 690).

19 Article 237a subsection 2 CC.

human organs and tissues,[20] this behaviour is also criminalised in article 273a CC. In § 7 the reforms will be more extensively described. It will be analysed whether the reforms will alter the Dutch system of criminalising trafficking.

2.2 Smuggling of Human Beings

Due to the Schengen agreements of 1985[21] and 1990,[22] the Netherlands were obliged to impose appropriate penalties on any person who 'for motives of gain assists an alien to illegally enter or reside within the territory of Schengen'. This obligation should reduce the negative effects of the free movement of persons, like illegal immigration. The Netherlands chose criminal sanctions to punish this behaviour and inserted the offence in article 197a in the Criminal Code.[23] The legislator indicated smuggling of humans as a serious crime. The *actus reus* exists out of elements, like a high profit and transportation of illegal persons, which deserve a high punishment. Therefore, the competent judge should be the criminal judge.[24] Behaviour adjacent to smuggling, for example the criminal responsibility of carriers, does not comprise these elements and is indicated as behaviour with a low criminality level. This behaviour is therefore implemented as an infraction in the administrative Aliens Act and not in criminal law (this will be discussed extensively in § 2.3).

In 1993 article 197a CC included two subsections. Subsection 1 contained the same description as article 27 of the Schengen Convention of 1990. The behaviour of smuggling carried a maximum prison sentence of one year and a maximum fine of € 45,000,-. In subsection 2 of article 197a CC an aggravating circumstance was added. This made it possible to heighten the maximum prison sentence with one third when the offence of smuggling of subsection 1 was committed in an official or professional capacity.

In 1996, the offence of smuggling was reformed.[25] This alteration was necessary because some judges had imposed the maximum sentence. This is an indication that the sanction is not sufficient. Besides, the Minister of Justice wanted to use the criminalisation of smuggling as an effective means to combat criminal organisations. The Minister pointed out that smugglers particularly dominate

20 PbEG C 2003, 100/27.

21 *Tractatenblad* 1985, 102. The Schengen Agreement on the Gradual Abolition of Checks at the common borders.

22 *Tractatenblad* 1990, 145. The Convention applying the Schengen Agreement of June 14, 1985.

23 Law of 24 February 1993, *Staatsblad* 1993, 141 and Kamerstukken *II* 1991-1992, 22 142.

24 Kamerstukken *II* 1990-1991, 22 142 B, p. 13.

25 Law of 7 October 1996, *Staatsblad* 1996, 505 and Kamerstukken *II* 1994-1995, 24 269.

the entry of aliens. These smugglers mainly operate in organised groups.[26] These groups constitute a severe threat to the legal order, because their only aim is to make as much money as possible and they have no pity at all on the smuggled people. The Minister supposed that the only way to deter these people was by punishing them more severely.[27] Therefore, the penalty clause on smuggling was heightened to a maximum prison sentence of four years. The sanction of the aggravating circumstance in subsection 2 was increased to a maximum prison sentence of six years. Also a new aggravating circumstance was added in subsection 3. This made it possible to impose a maximum prison sentence of eight years when the offence was committed professionally, or out of custom, or in association with others. This heightening of the maximum prison sentence made it possible to put suspects of smuggling into pre-trial detention.[28] This enabled the use of other, more intensive, investigation methods, like observation, infiltration, house-searching, and taping of telecommunication. According to the Minister, these more intensive investigation methods should lead to more successful investigation and prosecution of smugglers by the legal authorities.[29] However, before the reform the Prosecution Service and the police already used these investigation methods by applying other criminal offences that imposed a maximum prison sentence of four years, like participating in a criminal organisation (article 140 CC). This has also been stated by the Dutch International Police Institute in a research on the effectiveness of the heightening on the punishment of smuggling.[30] The reform could not be the direct consequence of problems with the (in)effectiveness of investigation or prosecution. A more likely declaration is that the sanctions on smuggling in others Member States of the EU were considerable higher. In view of effectiveness it was only logical that the Dutch maximum prison sentence was increased.[31]

The criminal offence of smuggling is a crime with an international feature. Borders must always be crossed. People can only be smuggled when they come from a foreign country. The smuggled persons must illegally enter or must ille-

26 Kamerstukken *II* 1994-1995, 24 269, no. 3, p. 2: the Minster refers to research done by the Immigration and Naturalisation Service (Immigratie en Naturalisatie Dienst, for short IND).

27 Kamerstukken *II* 1994-1995, 24 269, no. 3, p. 2.

28 The judge decides whether a suspect can stay pre-trial detained (remand in custody (section 63 Code of Criminal Procedure) and will remand in detention (section 65 Code of Criminal Procedure) after the police arrest and police custody (section 61 and 57 Code of Criminal Procedure).

29 Press report (*persbericht*), Ministry of Justice, 13 November 1996.

30 D.F. Slobbe and M.M.C. Kuipers, *Verhoging van de strafmaat op mensensmokkel* (Heightening of the punishments of smuggling of human beings), Internationaal Politie Instituut Twente, Universiteit Twente Enschede, oktober 1999.

31 Kamerstukken *I* 1995-1996, 24 269, no. 293a, p. 2 and p. 5.

gally reside in the country after entering (legal or illegal). This differs from trafficking: persons can also be trafficked within the national frontiers.

A feature of the crime that has always been object to many debates is the element of profit of gain.

It is suggested many times to scrap this element of the offence, while it is hard to prove, especially when smugglers are caught red handed at the border and no investigative methods are used. However more importance has been attached to the fact that due to this feature humanitarian aid to illegals is not criminalised.[32] The implementation of the EU-obligations obliges the Member States to scrape out the element of profit of gain, anyway for assisting illegal residence.[33]

For assisting in illegal entry is now also criminalised without the element of profit or gain, it is separated from assisting in illegal residence. Both forms of smuggling are criminalised in different subsections of article 197a CC on smuggling. The criminalisation on assisting in illegal residence stays unaltered on that point.

Also the offence is altered by not only criminalizing the smuggling of people inside the Schengen area, but also within the whole EU, Iceland, Norway and all countries that ratified the UN-Protocol against smuggling of migrants. In § 7 these reforms will be extensively analysed.

2.3 Adjacent Offences on Enforcing Immigration Law

The Banning of an Alien to Return by Official Order

Trafficking and smuggling are combated by criminal law. Smuggling is criminalised as a complicity crime: *assisting* someone to illegally reside in or illegally enter the Netherlands. In general the person who illegally resides in or enters the Netherlands is not punishable by criminal law. Yet, there is made an exception to this rule. The alien can commit the offence of article 197 CC when he knows or suspects that he is banned from returning to the Netherlands by an official order (*ongewenstverklaring*). When the alien resides in the Netherlands in spite of such an official order, he risks a maximum prison sentence of six months and a maximum fine of 4,500 Euro.

The official order to ban an alien is an administrative measure, incorporated in the Aliens Act.[34] The consequence of this order, given by the Minister of Justice, is that the alien has no legal residence in the Netherlands (any more) and that he can therefore be expelled[35] immediately. The Minister must particularly

32 Handelingen *II* 82, 15 May 1996, p. 5548-5560.

33 *Staatsblad* 2004, 645. Coming into force on 1 January 2005 (*Staatsblad* 2004, 690).

34 Article 67 Aliens Act.

35 Article 63 Aliens Act.

incorporate the right to family life (article 8 ECHR) in his decision, because the order will be likely to end this.

Firstly, the order to ban an alien can be issued when public order is at stake, for example when an alien is illegal and has repeatedly infringed the obligations of the Aliens Act (that will be discussed below). Secondly, the order can be given when an alien, illegal or legal, is sentenced for a crime that carries at least a maximum prison sentence of three years.[36] To determine if such an order should be given, the so-called 'sliding scale' is used. The Minister must weigh the interests of the community against the interests of the alien: the duration of the sentence is set against the duration of legal residence in the Netherlands.[37] Thirdly, the order can be made if a legal alien jeopardises public order or national safety. These can be at stake when a legal alien is sentenced to at least six months imprisonment. The conviction does not have to be irrevocable, which is different from the second possibility for an order. The risk of relapsing into crime figures as a factor in this third method. The height of the punishment and the nature and seriousness of the crime are used to indicate this recidivism.

Thus, illegal residence is only criminalised in the Dutch Criminal Code when persons reside in the Netherlands in spite of an order from the Under-Minister banning the return.

When an alien is considered a threat to public order or to national security, he can also be reported as unwanted (*ongewenstsignalering*).

One alternative in administrative law is the obligation for the alien to leave the country immediately when he is refused to enter the Netherlands. Not conforming to this obligation is an infraction according to the Aliens Act.[38] Other alternative measures to combat illegal residence indirectly will be discussed below.

Penalising Carriers

Combating illegal residence and illegal entrance is also pursued by penalising carriers who do not fulfil certain obligations. The obligations are implemented in articles 4 and 5 of the Aliens Act. A carrier, as expressed in these articles, is someone who, acting as a business or not, transports aliens to an entry point at

36 Other grounds for such an order are the pursuance of a treaty (when someone is banned out of all Benelux-states conform the Benelux-treaty) or in the interest of international relations of the Netherlands (that does not imply other Schengen countries) (see article 67 Aliens Act).

37 Article 6.5 jo. 3.86 Aliens Decree. Article 3.86 Aliens Decree contains the so-called 'sliding scale'. When the residence permit of a legal alien is been withdrawn because of he has been irrevocably convicted, than automatically the alien is given the official order to ban him.

38 Article 5 subsection 1 jo. 108 Aliens Act.

an exterior border[39] or transports an alien on the Dutch territory in the course of which an entry point at an exterior border is crossed. Since the Schengen Agreements border, control and checks on movement of persons are only executed at exterior borders that means at airports, at harbours and in specific situations on trains.[40]

Firstly, the carrier has to take the necessary measures and has to exercise supervision that can reasonably be expected from him to prevent illegal aliens from entering.[41] Secondly, the carrier can be obliged to make a copy of the documents that are necessary for crossing the border and can be obliged to hand these copies over to the officials in charge of the border control.[42] This last obligation only counts for transport companies that transport people by sea or by air. The carrier that transports by land does not have to conform to this obligation. However, every carrier can be punished for smuggling of humans by article 197a CC, if he assists in the illegal entry or illegal residence of aliens.

Carriers who do not fulfill the administrative obligations can be punished with a maximum detention[43] of six months and a maximum fine of € 11,250.[44]

Extraterritorial jurisdiction concerning article 4 Aliens Act has been created,[45] because the actions will usually be situated abroad.

The carrier cannot be held criminally liable under article 4 Aliens Act if he can successfully make a claim to a justification, for example necessity (article

39 Article 1 Aliens Act: exterior borders are the Dutch see-borders, and also the airports and seaports where border control is executed.

40 For example when a train from a country outside Schengen, like England, stops for the first time in the Netherlands (a Schengen country) then border control and checks on the movement of persons take place by verifying the travel documents, see article 50 Aliens Act. These checks do not conflict with the fee movement of persons in Europe. See: Court of Justice (EC), 21 September 1999, *Wijsenbeek v. the Netherlands*, C-378/97, in: *Jurisprudentie* 1999 PI-06207.

41 Article 4 subsection 1 Aliens Act.

42 Article 4 subsection 2 Aliens Act. Article 4 is a result of the implementation of article 26 of the Schengen Convention of 1990.

43 Detention is, like imprisonment, a detaining sanction. Detention is the sanction that is, in general, reserved for infractions and less severe crimes, while imprisonment is the sanction for crimes. The difference between the sanctions however is not as rigid any more.

44 Article 108 Aliens Act. The sanction has been increased in 2004 due to implementation of the Council Directive 2001/51/EC supplementing article 26 of the Schengen Convention of 1990. Law of May 2004, *Staatsblad* 2004, 212. Coming into force on 15 September 2004 (*Staatsblad* 2004, 439).

45 Article 4 subsection 4 Aliens Act. See: Directive of 3 January 1994, *Staatscourant* 1994, 4.

40 CC)[46] or absence of substantive unlawfulness (unwritten justification).[47] A circumstance that could lead to justification is that the carrier transported an alien who was a refugee according to article 3 ECHR or article 33 of the Geneva Refugee Convention. Such justification does not only entail a heavy burden of proof on the carrier, it can also only be invoked when the carrier has conformed to certain obligations described in a Directive of the Minister of Justice: when the carrier wants to transport a refugee, he has to contact the UNHCR or the IND (Dutch Immigration and Naturalisation Office) before he transports the alien to the Netherlands.[48] This makes it all not very appealing for a carrier to transport aliens who claim to be refugees.

The offence of smuggling and the infractions of article 4 Aliens Act show some resemblance: they both penalise the person who assists an alien in illegally crossing borders. Smuggling however is indicated as a severe crime (see § 2.2), while the penalisations in the Aliens Act contain less punishable behaviour, which is therefore held punishable as an infraction. The aim of these infractions differs from smuggling of humans. The criminal liability for carriers aims to prevent that the carrier does not check the documents of the passengers adequately. When the carrier does not conform to this obligation, this could (it does not have to!) lead to the entry of illegals into the territory of the state. This will lead to problems concerning of expelling aliens because it is hard to prove what the country of origin of the alien is. Another problem is that the alien can only be expelled to a country to which the admission of the alien will be guaranteed according to international law. This leads to high costs for the countries of transit or destination in question. Therefore, not complying with the obligations of article 4 Aliens Act has been made punishable.

The differences between these infractions of the Aliens Act and the offence of smuggling are also shown in prosecution policy. The infractions in general lead to settlements. In severe cases when the carrier repeats this behaviour, or in cases when there is much media coverage, the Public Prosecutor will issue a summons.[49] The level of the amount of the settlement is indicated by the seriousness of the crime, the unwanted consequences of the entry of so-called non-expel-

46 Anyone who commits an offence as a result of a force he could not be expected to resist.

47 This is the case when an act is in conflict with the law, but it serves the same interest as is guaranteed by law.

48 *Staatscourant* 1997, no. 191, p. 8, section 2.7.

49 There has been one case where the Public Prosecutor summoned the carrier (KLM). The carrier was sentenced to 27 times (27 persons) a fine of 1,500 guilders. Supreme Court 11 July 2000, *NJ* 2002, 373.

lable aliens and the costs that are attended with that.[50] Smuggling on the other hand will always have to lead to summons and a trial before criminal court.

The Obligation of the Carrier to Return Aliens

Another obligation for the transport company is that the company is obliged to return the alien to the country of origin if an alien has entered the Netherlands by that company and the request of the alien to enter is refused.[51] This obligation also exists when an alien is in transit, but is refused to travel to the land of destination. The transport company which does not conform to this obligation can be punished with a maximum detention of six months or a maximum fine of € 2,250. The obligation to return aliens even remains six months after entry of the illegal by that company.[52]

The obligation to return aliens must be fulfilled within a 'reasonable time'. This could lead to expulsion of the alien by another carrier, paid by the carrier who was responsible for expulsion in the first place.[53]

This obligation to return the alien is detached from the criminal liability under article 197a CC, smuggling of humans, and article 4 Aliens Act, responsibilities for carriers concerning transporting. When a carrier successfully claims not to be punishable under article 197a CC or article 4 Aliens Act, for example because of a justification, the carrier can still remain (financially) responsible to return a refused alien to the country of origin. The alien can still be refused entry, because he did not have sufficient means of subsistence or is a threat to public order or national security. The responsibility to return an alien only depends on the indication by the state concerning an alien to be illegal. This system encourages carriers, which already exists due to the heavy burden of proof for justification, to transport aliens who claim to be refugees.

---

50 Richtlijn inzake de strafrechtelijke aansprakelijkheid voor de aanvoer van niet of onjuist gedocumenteerde vreemdelingen (Directive concerning the criminal liability for the import of not or unjust documented aliens) *Staatscourant* 1995, 59, p. 4. Valid till: 30 april 2005 (*Staatscourant* 2004, 227, p. 14). According to the guideline for the Prosecution Service the height of the amount of the settlement should be about € 550 for one illegal. It is common that the Public Prosecutor claims a fine of a higher amount than the proposed amount for settlement when the case comes on for trial; about € 650 for an illegal.

51 Article 5, subsection 2 Aliens Act.

52 Article 65, subsection 3 Aliens Act. This form of expulsion does only apply when an alien is not or has not been allowed after the entrance to reside in the Netherlands according to article 8 of the Aliens Act.

53 This is emphasised in article 65, subsection 2 Aliens Act due to implementation of Directive 2001/51/EG: *Staatsblad* 2004, 212. All costs of return and residence of the alien should be paid by the carrier, see article 6.3 Aliens Decree and Kamerstukken *II* 2002-2003, 29 016, no. 3, p. 4.

Restraining and Detaining Measures in the Aliens Act

To prevent illegal entry in the Netherlands, officials charged with border control under command of the royal constabulary can check persons for possession of legal documents. An alien, for example, who travels in or out of the Netherlands must do this at a border control point (*grensdoorlatingspost*). He must show, when asked, travel documents and give information about duration and purpose of his journey and about his financial means.[54] Aliens not only have to conform to obligations concerning exterior border control, they also have to conform to obligations concerning interior supervision. This supervision is pursued under command of the chief of police (*korpschef*). An example is the obligation of the illegal alien to report himself and to co-operate in obtaining personal information through identification, for example allowing the making of pictures or the taking of fingerprints. Infringements by aliens of these obligations regarding exterior border control and internal supervision are punishable by the Aliens Act.[55]

Further, the Aliens Act contains restrictions of the freedom of movement for aliens. These restrictions can be divided in measures with a restraining character (*vrijheidsbeperkende maatregelen)* and measures with a detaining character (*vrijheidsbenemende maatregelen*).[56] The less restrictive restraining measure is the obligation for the alien that when he has lodged a request for a residence permit he should keep himself available in a certain place for investigation concerning his request,[57] for example in a centre for registration (*aanmeldcentrum*), a reception centre (*opvangcentrum*), or a centre for asylum seekers (*asielzoekerscentrum*). This will be, in general, an initiative of the chief of police, but the ultimate authority lies with the Minister of Alien Affairs and Integration.[58]

Further, an alien to whom entry in the Netherlands is immediately refused at an entry point can be restrained for the purpose of departure.[59] The area that will be used for this purpose will usually be a lounge at Schiphol Amsterdam Airport. This lounge can only be left by getting on board a plane. When a request for a temporary residence permit is rejected (after entry permission is given in the first place), the alien can be restrained for expulsion by placing him

54 See: articles 4.4-4.7 Aliens Decree.

55 Article 54 jo. 108 Aliens Act jo. articles 4.37-4.52 Aliens Degree and article A3/3 Aliens Circular (maximum detention of six months and maximum fine of € 2,250.

56 A. Kuijer a.o., *Nederlands Vreemdelingenrecht* (Dutch Aliens law), Boom Juridische Auteurs, 2002, chapter 10.

57 Article 55 jo. 108 Aliens Act.

58 Article 56 jo. 108 Aliens Act. EU/EER nationals and holders of a permanent residence permit cannot be restrained in their freedom of movement on the basis of this article, see article 56, subsection 1, under b Aliens Act.

59 Article 6, subsection 1 Aliens Act.

in a specific place or space, like a reception centre.[60] Only when it is suspected that the alien will seek to avoid expulsion by hiding he can be detained, for example, in a border hospice.[61] This contains a greater violation of his freedom of movement than the restrictive measure. When the alien fails to comply with these restrictive or detaining measures he is punishable by the Aliens Act.

Measures to Combat Illegal Employment

To prevent and combat illegal residence, regulations also exist concerning illegal employment.

In article 197b of the Dutch Criminal Code the employer who permits a person to work when he knows or suspects that this person is an illegal is penalised with a maximum prison sentence of one year and a maximum fine of € 45,000. This offence not only aims at combating illegal residence. It also aims at protecting the public purse while no income tax and insurances are paid in case of illegal work.[62] The employer can be held criminally liable for this crime when the alien has worked illegally with his consent or knowledge. Can an employer also be held criminally responsible when the illegal is working for an employment agency? From the explanatory memorandum it can be concluded that the employer is criminally liable when an agreement or a contract exists between the employer and the employee.[63] Yet, an employer cannot avoid his responsibilities by contracting workers through a contracting firm: he must check the papers of all his workers and thus also the work permits of the temporary workers.[64]

When the employer cannot be held liable for the conduct of article 197b CC, he can still be held responsible for infringing obligations of the Aliens Employment Act (*Wet Arbeid Vreemdelingen*).[65] According to article 2 of this Law it is forbidden for the employer to take on an alien who has no work permit.

When the employer takes on an alien and the work is in reality carried out for another employer, the first employer mentioned is obliged to make a copy of the identification document of the alien, according to article 15 of the Aliens Employment Act. According to this article the alien is obliged to give

60 Article 57 Aliens Act.

61 Article 58 Aliens Act.

62 Since the *Koppelingswet* (Linking Act, *Staatsblad* 1998, 203) illegal aliens are not ensured and therefore no obligation exists to pay any contribution.

63 Kamerstukken *II* 1991-1992, 22 735, no. 3.

64 There is an exception formulated in case law. An employer is not criminally liable when the illegal employee from the employment agency conducts activities that do not fall within the normal activities of the company. For example a computer programmer from an employment agency who is placed at a law firm.

65 Article 2 subsection 1 the Aliens Employment Act that states it is 'forbidden to permit an alien to work without fulfilling the conditions of the Aliens Employment Act'.

the employer his identification document. When an infraction of this obligation is observed by the Labour Inspectorate (*Arbeidsinspectie*), this can lead to the imposition of an administrative fine. A natural person can be subjected to a maximum fine of € 11,250 and a legal person a maximum fine of € 45,000.[66] The intention is that an employer who infringes the obligation of article 2 of the Aliens Employment Act, will be fined € 3,500 for every illegal who is employed.[67] For an infraction of article 15, the obligation of identification, the fines for the employer will be about € 1,500. For the alien, the fines will be lower due to their lesser financial strength and the fact that responsibility to identify an alien lies primarily with the employer. The fines will be about € 150.[68]

Beside this punishment, the employer can also risk a civil action by the state. The state could make a claim for the unpaid tax. The employer risks a claim for wages for a minimum period of six months (the working time that is presupposed).[69] The employer is allowed to provide counter-evidence, but it is an arduous burden of proof.

In this section the elements of the criminal offence of trafficking and the offence of smuggling have been elaborated and characteristics of both offences come to light. Trafficking in human beings is historically related to sexual exploitation. Smuggling of human beings is a correlative of the EU laws on immigration. Deduced from the above, the Netherlands maintain immigration regulation by criminal law and by administrative law.

3. Case Law:[70] Central Issues

Before analysing the features of the offence of trafficking and the offence of smuggling by studying case law I will make reference to a verdict of the Supreme Court in 2001. Since this verdict, the overlap of 'robbing of persons' (article 278 CC) with smuggling and trafficking has increased.[71] Before this verdict, only

66 This law has entered into force on 1 January 2005 (*Staatsblad* 2004, 705). Before, the infractions did not lead to administrative fines, but to criminal sanctions. The criminal sanction system was not found effective. This can be reproached to the long time that existed between the discovery of the infringement by the Labour Inspectorate and to imposing of the criminal fine by the judge (approximately a year). The new law should increase the chance getting caught and should give the punishment more a 'tit for tat' character.

67 Kamerstukken *II* 2003-2004, 29 523, no. 3, p. 6.

68 Kamerstukken *II* 2003-2004, 29 523, no. 3, p. 7.

69 According to article 24 Aliens Employment Act.

70 Many cases can be found on <www.rechtspraak.nl>.

71 Supreme Court 20 November 2001, *NJ* 2003, 632.

abduction to a foreign country that was not part of 'the Empire of Europe'[72] out of the Netherlands was punishable by this offence. Now the transportation out of a foreign country into the Netherlands also falls within the scope of this crime. Due to this, the offence of robbing can easily be confused with the offence of smuggling, since the verdict robbing contains not only transportation out of but also in the Netherlands, just as smuggling. However, to be punishable for robbing of humans it is not required that the behaviour contains a durable deprivation of movement. Because of this, violations of human rights are not vividly present. This is a lesser issue for trafficking, because this offence requires a form of exploitation, by which violations of human rights are shown more clearly. This adds to the confusion between the offence of robbing of people and the offence of smuggling. With smuggling a breach of human rights is not required and with robbing of persons breaches of human rights are not so clear.

3.1. Case Law concerning Trafficking

The Consent and the Willingness of the 'Victim'

Characteristic for trafficking is the use of certain means resulting in breaking the will of the victim. These means are coercion, or another act of violence (in the offence of trafficking defined as 'fact'), or threatening with these means (coercion or another act of violence), or deception, or abuse of authority resulting from an act of violence. By using these means a person is induced on placing her/himself at another person's disposal to engage in sexual activities with or on behalf of a third party. When a minor is induced to engage in prostitution the use of these means is not required. A minor is not considered a person with a sufficiently developed will to make a decision to work as a prostitute.[73] A plea of an alleged trafficker that he could not have forced them to work in the prostitution because the minor girls had already worked in prostitution was therefore dismissed.[74]

When persons are recruited, transferred, etc. to *another country* to work in the prostitution the use of means to break the will of the victims is, just the same as with minors, not required.[75] However, to consider foreign persons as not sufficiently developed or as immature is somewhat debatable. In many cases the transborder-trafficker is prosecuted for these offences, because then the Pros-

72 By this archaic phrase the legislator wanted to state that it is only punishable to abduct people to a foreign country from the Netherlands. Other countries that are part of the Dutch kingdom, like the Antilles, do not fall within the scope of the offence.

73 This has been confirmed in Court of Appeal 's-Hertogenbosch 13 June 2000, *NJ* 2000, 619.

74 Supreme Court 7 April 1998, *NJ* 1998, 729.

75 See § 2. Also: Supreme Court 18 April 2000, *NJ* 2000, 443.

ecution Service does not have to prove that the use of means has led to forced prostitution by the trafficker.[76]

The Use of Means and the Will of the Victim

The question whether a circumstance can be defined as a means of coercion, violence, etc. is not purely objective, but to a great extent factual in its nature.[77] It depends upon how the victim interprets the circumstances. The use of voodoo for example has led in some cases to the proving of 'threatening with coercion or another act of violence'. In a case of the District Court of The Hague, a criminal organisation was sentenced to considerable prison sentences (three years imprisonment). It was proven that the organisation had smuggled women from Nigeria to the Netherlands and had exploited these women in prostitution by using voodoo.[78]

In section 2.1 it has already been stated that the criminal offence of trafficking exists even though the victim has not actually been working in prostitution.[79] The Supreme Court has confirmed this.[80] It is sufficient that the victim is or has been at the disposal of the trafficker and that the trafficker had the intention to force the victim into prostitution. Therefore an action of the trafficker quite quickly leads to the completing of the crime of trafficking. In the Netherlands an attempt is punishable if the offender manifests his intention by initiating the crime (article 45 CC).[81] The Supreme Court[82] has formulated the criterion to indicate behaviour as an attempt: the behaviour must be considered by its external appearances (in other words by a third objective party) as being aimed at the completion of the crime. For the offence of trafficking the space for an attempt is very narrow. In a case of 2001[83] a person sent letters to women to persuade them under false pretences to come to the Netherlands. He pretended to be willing to start a relationship with these women, but in fact his intention was to force them to work in prostitution. By sending these love letters it became

76 For example: District Court Leeuwarden 2 September 2004, no. 17/080143-04 VEV. The trafficker is acquitted from trafficking with force, but convicted for the offence of trafficking to another country (without force).

77 Supreme Court 21 February 1989, *NJ* 1989, 668.

78 District Court Den Haag 7 May 2001, no. 09/754201-00. Also Court of Appeal Den Haag 11 July 2002, no. 2200101101. In this last case the perpetrator was sentenced to five years imprisonment.

79 See the explanatory memorandum of the Minister of Justice at the act of 1911 described in § 2.1.

80 Supreme Court 6 July 1986, *NJ* 1986, 737.

81 P.J.P. Tak, *The Dutch criminal justice system, organisation and operation*, WODC Onderzoek en Beleid, second edition, 2003, p. 46.

82 Supreme Court 3 June 1977, *NJ* 1979, 52.

83 Supreme Court 2 October 2001, *NJ* 2002, 187.

clear from external appearances that the behaviour of the trafficker had been *aimed* at completing the crime. Therefore he was sentenced for the attempt of trafficking and not for completing the crime, because he did not have the women at his disposal yet. This case also shows that sending love letters and conceiving the actual intention of this behaviour can be interpreted as using the means of 'deception'. Other forms of deception are situations where victims are told that they are going to work in a factory, or in the hotel, or catering industry, when in reality they have to work in prostitution.

That persons want to work in prostitution does not in first instance alter the fact that they can be victims of trafficking. If these persons are not allowed to leave prostitution or if the working conditions are inhuman (they are forced to give up all their earned money, they are forced to work long hours, etc.) this can be an indication of a forced situation and therefore an indication of trafficking.[84]

The dividing line between 'coercion' and 'another act of violence' cannot be drawn sharply. Creating a situation where the victim is dependent on the trafficker can be indicated as 'another act of violence'. The trafficker can put the victim under such physical pressure that the victim will find her(him)self not able to resist and sees her(him)self forced to work in prostitution.[85]

The term 'abuse of authority resulting from an act of violence' has been more clearly expounded. The legislator has indicated this as a situation of exploitation. A situation of exploitation exists when a prostitute finds her/himself in a situation not equal with the situation in which an emancipated prostitute in the Netherlands is used to find him/herself in.[86] Due to this unequal situation the prostitute is not, or to a lesser extent, found capable of making a free choice engaging or continuing the relationship with the exploiter. In a case of 27 January 2004, the abuse of authority resulting from an act of violence was proven because the trafficker prostituted the women under circumstances in which the women had no working permit, were forced to give up all their earnings, and were locked up in a residence.[87] In another case the dependent situation was evidenced by the fact that the prostitutes were illegal.[88] Other circumstances that could indicate a dependent situation are: not being able to have disposal of sufficient financial means, incurring debts to travel to another country, and being addicted to drugs.

The enumerative circumstances will not automatically be sufficient to prove the abuse of authority. They are only indications. It must still be proven that the

84 Kamerstukken *II* 1988-1989, 21 027, no. 3, p. 8.

85 Supreme Court 16 November 1999, *NJ* 2000, 820.

86 Kamerstukken *II* 1988-1989, 21 027, no. 3, p. 4.

87 District Court Den Haag 27 January 2004, no. 09/754039-03 and no. 09/004104-3.

88 Supreme Court 5 February 2002, *NJ* 2002, 546.

alleged trafficker had the intention to force the victim to work in prostitution. Therefore it must be proven that the trafficker was conscious of the relevant acts of violence from which the authority proceeds. This is not the case when a man is going to marry a woman who he met through personal advertisement and arranges her arrival and that woman, after arriving in the Netherlands, prefers to become wealthy by working in prostitution. It cannot be concluded from these circumstances that this man had the intention of using the illegality of the woman as a way of 'abuse of authority' to force her into prostitution.[89]

Summed up, it can be stated that the offence of trafficking in humans is characterised by the feature of 'involuntariness'. The fact that the victim is not engaging in sexual activities by her/his free will must be deduced from the use of means, like force or deception. The interpretation of the term 'abuse of authority' in case law can be seen as a derogation of this characteristic feature of trafficking. Abuse of authority implies a situation of exploitation. 'The emancipated prostitute in the Netherlands' is applied as the standard. Therefore, the circumstances that are used to prove this 'abuse of authority' are to a great extent objectified. Proving this does not depend upon the person in question and his will.[90]

3.2 Case Law Concerning Smuggling

The Scope of the Offence of Smuggling: Protecting the Dutch Public Authority
Since the amendment of the penalisation in 2004 (extensively elucidated in § 7), smuggling of human beings is defined in article 197a CC as assisting someone to illegally reside or enter in the Netherlands, another country of the European Union, Iceland, Norway, or a state that has ratified the UN-Protocol against smuggling of migrants. It is punishable to assist someone to reside illegally in or illegally enter a country mentioned in the offence.

So, it is not punishable to transport an illegal from the Netherlands to a country not mentioned in the penalisation. However, when this behaviour is preceded by illegal entry or illegal residence in a country that is defined in the law, the smuggler can be prosecuted and sentenced for smuggling for this behaviour.

The Court of Appeal 's-Hertogenbosch has restricted the scope of the offence.[91] In its view the aim of the offence of smuggling is combating illegal residence in the Netherlands. This aim means that one can only be held punishable for illegal smuggling when a Dutch concern is at stake. This means that the

89 Supreme Court 5 February 2002, *NJ* 2002, 546, r.o. 5.6 and 5.8. Also: Y. Buruma, Strafprocesrecht in de Unie (Procedural criminal law in the Union), In: *Delikt en Delinkwent*, 2002, p. 238.

90 R. Haveman, *Voorwaarden voor strafbaarstelling van vrouwenhandel* (Conditions on the criminalisation of trafficking in women), Deventer 1998, diss, p. 250.

91 Court of Appeal 's-Hertogenbosch 21 October 2003, *NJ* 2003, 731.

Dutch public authority must be violated, which implicates that it must include illegal entry or illegal residence *in the Netherlands*. This explanation of the offence has consequences for the criminalisation of smuggling of aliens from the Netherlands to another country described in the penalisation of smuggling. For this behaviour will only fall within the scope when there has also been illegal entry or illegal residence in the Netherlands before the illegal was transported further. Thus, in these cases it must be proven that the alien has been illegally transported into the Netherlands or that he illegally stayed in the Netherlands and that the alien is illegally passed on to another country (mentioned in the penalisation).[92]

Due to this explanation of smuggling, a gap exists when a person legally resides or legally enters the Netherlands and is transported without or with forged or fake travel documents to another country (within or outside the scope of the offence of smuggling). The Dutch public order is not violated in these cases and therefore it is not punishable as smuggling.

The prosecutor-general, who advises the Supreme Court, has disputed this explanation of the offence of smuggling.[93] He claims that the explanation given by the Court of Appeal is in defiance of the aim of the offence. This aim is, contrary to the aim the Court of Appeal ascribes to the offence, the protection of the *Schengen area* against illegal entrance and illegal residence. It would be a derogation from the aim of the Schengen Convention if the crime only aimed at the protection of the Netherlands. It is therefore also punishable by the offence of smuggling to assist people in illegally entering or residing in other Schengen countries than the Netherlands. However, the Supreme Court has not given a judgement on the explanation of the offence given by the Court of Appeal, and the Prosecution Service had not appealed in cassation.[94] Yet, I would agree with the explanation of the prosecutor-general, while it would be in defiance of the aim of the Schengen Conventions, by which internal borders in the Schengen area have been abolished.

So, it is not yet clear if it is also punishable by the offence of smuggling to assist in illegal entry and illegal residence to other Schengen countries than the Netherlands. But considering the aim of the Schengen Convention, the verdict

92 When this is not proven there is no conformity with the explanation of 'illegal entrance'. So, the summons should be declared invalid while the charge is 'intrinsic conflicting' according to the Court of Appeal 's-Hertogenbosch (*NJ* 2003, 731).

93 Supreme Court 15 March 2005, no. 01745/04, see conclusion of procurator-general A. Machielse.

94 The Supreme Court does not deal with the facts, but reviews the lawfulness of the judgements of the lower courts and the manner of proceedings on the basis of questions in writing asked by the suspect or the Prosecution Service. In this case neither the Prosecution Service, nor the suspect asked questions about the the lower court's explanation of smuggling.

of the Court of Appeal will probably be overturned as an incidental mistake due to an incorrect interpretation of the explanatory memorandum of the offence of smuggling.[95]

The Elements Illegal Residence and Illegal Entry

For a smuggler to be punishable for smuggling he does not have to assist in the illegal entry to *and* the illegal residence in a country. It is sufficient that he assists in one of these acts.[96]

Residing has been defined as physically being present and does not have to have a durable character. Before the amendment of the penalisation in 2004, it was not punishable to smuggle persons to the UK. In one case[97] therefore the transport from the Netherlands to the UK of a group of Sri Lankans did not fall within the scope of the offence of smuggling. However, the court did describe this behaviour as smuggling. The transport itself from Alkmaar to Hook of Holland (two places in the Netherlands) was deemed illegal residence in the Netherlands.

So, to be punishable for smuggling it is not necessary that one also assists in the illegal entry. It is sufficient that one has in some way promoted or eased illegal residence.[98] This interpretation of the element 'residence' makes it possible that assisting in illegal entry to a country not mentioned in the offence, which therefore is not criminalised by the offence of smuggling, can be punishable even when there is illegal transport on Dutch territory.

For the rest, a so-called 'bogus marriage' falls within the scope of smuggling. Marrying an illegal person only for the purpose of gaining a residence permit for the illegal person is assisting a person in illegally residing in the Netherlands.[99]

Implementing Illegal Transit: Solution to a Legislation Gap

Another gap in the penalisation of smuggling was the helping of illegal persons changing flights at Schiphol Amsterdam Airport, the so-called people in transit. Because the penalisation of smuggling only criminalised illegal entry and illegal residence in the Netherlands, the behaviour of illegal transit itself was not pun-

95 See consideration 4.9 of the conclusion of procurator-general (Supreme Court 15 March 2005, no. 01745/04).

96 Kamerstukken *II* 1995-1996, 24 269, no. 5, p.11.

97 Supreme Court 21 October 2003, no. 00084/03.

98 Supreme Court 7 April 1998, *NJ* 1998, 558.

99 Among others: Supreme Court 7 April 1998, NJ 1998, 558 and Supreme Court 20 October 1998, *NJ* 1999, 48. Also: Betty de Hart, *Onbezonnen vrouwen. Gemengde relaties in het Nationaliteitsrecht en het Vreemdelingenrecht* (Thoughtless women. Mixed relations in the Law of Nationality and in Aliens Law), Askant 2003 (diss.), Chapter 7.

ishable. For these people do not pass the border control at the airport and therefore they do not illegally reside or illegally enter the Netherlands.[100] However, making use of transit situations is a commonly practiced method to smuggle people. In one case in 2001,[101] for example, people who were legally residing in the Netherlands checked in at the airport. These 'in-checkers' disguised themselves as Schiphol employees by putting on a Schiphol uniform. Then they entered a restricted area, while being attended by real Schiphol employees. These employees have so-called Schiphol passes, by which they can go from the public area to the security area. In this area the in-checker switched jackets with the illegal person and handed over the boarding pass and the luggage to the illegal. The illegal person then went into the aeroplane on the boarding pass of someone else and entered illegally another country. While a conviction for smuggling was not possible, the District Court convicted the 'helpers' for fraud in this case (article 326 CC).

However, the implementation of the EU-legislation has filled up this gap in the Dutch offence of smuggling. Now not only illegal entry and illegal residence is criminalised, but also the illegal transit. Due to this alteration of law a problem concerning the prosecution of these people is resolved. That it is a problem is shown by the announcement that over the last five years 675 persons, who were mostly working at Schiphol, have been arrested by the military police on suspicion of smuggling. They all used their Schiphol-passes to smuggle people.[102]

Humanitarian Aid

As stated in § 2.2 a feature of smuggling is that the assistance to the illegal residence or the illegal entry is offered with the intention of profit (since the alteration in 2005 this feature is no longer an element for assisting in illegal entry). This feature is considered important as it excludes humanitarian aid to aliens from being criminalised. In practice some smugglers misused this feature by claiming that they did not assist the aliens for profit or gain. To make this defence plausible one has to demonstrate that one acted out of idealistic motives. In one case[103] the defendant stood trial for participating in a criminal organisation that smuggled people from Sri Lanka to the UK by means of look-a-like passports, which were supplied by an employer of a travel agency. He claimed he acted out of idealistic motives. He had wanted to help nationals who lived in miserable situations and he had wanted to offer them a decent existence, just as he was once offered one. However the Public Prosecutor disproved his noble motives by

100 Kamerstukken *II* 2001-2002, 27204, no. 15, p. 8 and p. 9.

101 District Court Haarlem 16 November 2001, no. 15/030038-01 and no. 15/035079-01.

102 *NRC Handelsblad*, 20 January 2005.

103 District Court Middelburg 9 March 2001, no. 12/000005-00 and no. 12/000018-00 and no. 12/01511790-00.

proving that the alleged smuggler assisted the aliens not at all free of charge. The District Court therefore rejected the defence of the smuggler. It was also noted that the defence would have been more credible if it had been demonstrated that the smuggled people were actually living in miserable circumstances and that no large sums of money were earned by this so-called humanitarian aid.

Defence: No Illegal Entrance or Illegal Residence

Another defence that is often invoked is that the smuggled people were not *illegally* entering or *illegally* residing in the Netherlands, because the aliens could make a claim to a legal ground for residence.[104] According to the Aliens Act an alien can claim for a residence title on two legal grounds. Firstly, one can legally reside if one possesses valid travel or residence documents and behaves oneself in conformity with the rules.[105] The second possibility is that an alien can apply for a residence permit as a refugee.[106] The fact that the alien is illegally residing in the Netherlands does not alter the situation that, when he applies for a permit as a refugee, he can gain a legal status. This second possibility for legal entry and residence is invoked by alleged smugglers to indicate that the entry or the residence was not illegal. However, this defence is only accepted if the intention of the alien to apply for such residence permit is apparent. This means that the alien must have applied or has the intention to apply for status as a refugee. In one case the District Court of Rotterdam[107] concluded that the aliens were illegally residing in the Netherlands because they had no valid travel documents, nor valid residence documents, nor did the aliens apply for residence permits as refugees. In addition, the circumstance that they were found hidden in a car on its way to the UK, did not make the defence that these aliens wanted to apply for a residence permit as refugees in the Netherlands very credible.

It can be concluded that article 197a CC penalises illegal entry and illegal residence to a country described in the penalisation. Assistance in illegal entry or illegal residence in a country not mentioned in the penalisation does not fall within the scope of the offence of smuggling.

4. The Role of Smuggled Persons and Trafficked Persons According to the Law

In the introduction it has been stated that the different positions of smuggled and trafficked persons is one main difference between the offence of smuggling and that of trafficking.

104 Kamerstukken *II* 1991-1992, 22142, no. 6, p. 21.

105 For example: the alien should not be a threat for the public order (terrorism).

106 Article 29 Aliens Act.

107 District Court Rotterdam 10 August 2000, no. 10/150504-00.

The offence of trafficking infringes the human right of personal freedom and of personal integrity. The trafficked person can therefore be considered as a victim of this crime. Smuggling, however, is a crime that infringes the public authority of the state and therefore the victim of this crime is the state. The smuggler thwarts legislation concerning immigration and asylum. While the state has to maintain this legislation smuggling encroaches on the public authority of this state. In view of criminal law, smuggled persons are not victims of this crime. This has an impact on the role of smuggled persons in the criminal procedure. A smuggled person does not have the same rights as the victim of trafficking has in the criminal procedure. The smuggled person can even be prosecuted for instigating or for being accessory to the crime of smuggling.

It is difficult to obtain testimonies in smuggling cases and in trafficking cases. Because smuggled people are, in criminal law, not victims of smuggling and cannot claim any kind of protection – policy prescribes that they should be expelled immediately – it is not easy to get testimonies from these people. For trafficked persons who can be labelled as victims in the criminal procedure, this problem is less, but still a considerable issue (see § 5).

Since the Dover case, it has become vividly clear that smuggled persons cannot be victims of smuggling. In the Netherlands this has influenced the using of the investigative method of the 'letting through of people' (which sounds in Dutch as silly as it sounds in English).[108] This method consists of the police not making arrests when alleged smugglers or traffickers are spotted. Instead the police proceed by observing the transport of the people to collect more evidence or to catch the 'main man' of the criminal organisation. This method can be compared with the 'controlled delivery' (article 73 of the Schengen Agreement 1990) but without arresting and seizing the goods (in smuggling cases the smuggled persons). Since the Dover case this method was no longer considered acceptable to investigate certain criminal offences, such as smuggling and trafficking, not even if there are ponderous interests of investigation.[109] This view made investigations by the police considerably more complicated. Therefore, it was decided to make the prohibition on 'letting through' less strict: the method is only not allowed when it is certain that persons are being transported in or will be ending up in inhuman circumstances.[110] If police or the Prosecution Service do not comply with this rule they can be held responsible for violating the human rights of the victims.

---

108 Kamerstukken *II* 2002-2003, 28 638, no. 1, p. 10 and Direction investigative methods from the Board of Prosecutors-General, chapter 1.3.5, *Appendix Staatscourant* 13 July 2001, no. 133.

109 According to the motion of Rouvoet m.p., Kamerstukken *II* 1998-1999, 25 403, no. 30. The letting through of drugs was already forbidden because it is injurious for public health, see article 126ff Code of Criminal Procedure.

110 Kamerstukken *II* 1998-1999, 25 403, no. 35.

In some cases[111] the alleged smuggler claimed that the police had made use of this illegitimate method. Therefore his right to a fair trial was violated and the case should be dismissed.[112] The Supreme Court has never accepted such a defence. The Court states that the reason for prohibiting the letting through of people in smuggling cases and in trafficking cases is the protection of the rights of the smuggled and trafficked people. The rights of the defendant are not at stake. This practically means the end of the judicial testing of the prohibition of this method.[113] Only when the method causes a glaring violation of fundamental principles of law by which the foundations of the criminal procedure are breached, could the court dismiss the case.[114] This would be the case when, for example, police and the Prosecution Service let a lot of smuggling and trafficking transports through. The state could then be punishable for complicity in the crimes of smuggling and trafficking.[115]

Judicial supervision has been very limited. However, police and the Prosecution Service must supervise these actions themselves: they are the ones that decide when human rights are at stake and they will decide when it is necessary to take legal action (this can also be defined as a sort of policy of non-enforcement, see § 2.1).[116] So, it could be stated that there is some kind of control.

In the next section it will be analysed how the rights of the victims are protected in the criminal procedure, and to which rights smuggled and trafficked persons are entitled.

5. The Rights of the Victim in the Criminal Procedure

5.1 The B9 Procedure concerning a Short-term Residence Permit for Victims of Trafficking

The rights of victims of trafficking differ from the rights of smuggled persons. This is a consequence of the different interests that are protected by the offences

111 The Dover case, District Court Rotterdam 11 May 2001, no. 10/1500064-00 and also Supreme Court 5 February 2002, *NJ* 2002, 546 (trafficking case).

112 When the rights of the defendant are violated the most extreme sanction is dismissing the case. Other options according to article 359a Code of Criminal Procedure are exclusion of evidence (evidence that is unlawfully obtained and this has violated the right to a fair trial of the defendant), or reduction of the punishment.

113 Supreme Court 2 July 2002, *NJ* 2002, 602. Also the note of Y. Buruma (*Coke-taxi of Maastricht*) and Supreme Court 28 May 2002, *NJ* 2002, 601 (*Desert research*).

114 Supreme Court 19 December 1995, NJ 1996, 249 (Zwolsman case).

115 Supreme Court 30 September 1997, no. 105363, not published, and Supreme Court, *NJ* 1999, 567. If the government can be prosecuted is detached from this.

116 This has been confirmed by the Supreme Court in two verdicts: 30 March 2004, no. 00281/03, and 30 March 2004, no. 01842/03.

of trafficking and smuggling. Victims of trafficking can claim for a short-term residence permit, because of a special procedure: the B9 procedure. This procedure is named after the Chapter B of the Aliens Circular in which the criteria for such a residence permit are laid down.[117] A victim of trafficking can obtain a short-term residence permit for the time the case against the trafficker is sub judice. The victim has a three months reflection period to decide if he wants to testify against the trafficker. The permit will be withdrawn when the proceedings in the fact-finding instance are completed. Because the victim then becomes illegal again, he must leave the Netherlands. A victim-witness is only eligible for such a permit when the Prosecution Service considers its presence necessary.

The aim of the procedure is to allow the victim to stay in the Netherlands for the purpose of investigation because it is difficult to obtain testimonies of victims when they have already returned to their country of origin before the trial (voluntarily or otherwise). The organisations often control the victims, even after their return. They threaten the victims and their families. Therefore many victims and witnesses do not want to co-operate with the police or even cease co-operation and withdraw their testimony.[118] The B9 procedure has the aim of coping with these difficulties. Therefore a residence permit by the B9 procedure does not only enable the victim to legally reside in the Netherlands, it also enables the victim to factually reside. The victim has the right to shelter and to health care and to means of subsistence. The state must make it possible that victims can exercise these rights.

The residence permit by the B9-procedure still does not allow the victim to work in the Netherlands. However, the government decided to reform this policy. Victims who are permitted to stay should also be given the possibility to participate in the regular production process, yet with the exception of working in prostitution.[119] This is decided because victims are almost always pressured by traffickers to pay off their so-called debts (debts for the journey to the Netherlands or for the residence in the Netherlands). Therefore victims often feel compelled to return to the prostitution. When the government tolerates this way of paying off debts they theoretically are an accessory to the crime of trafficking. On the other hand one could find the prohibition on working as a prostitute patronising. Other women who are legally residing in the Netherlands are not forbidden from working in prostitution.

If the residence permit is withdrawn, the victim can always apply for a residence permit on humanitarian grounds. Victims must then prove that by return-

117 The judicial basis for such a residence permit can be found in article 3.4 subsection 1 under s Aliens Degree and article 3.5 subsection 2 under o Aliens Degree. The criteria are laid down in article 3.48 Aliens Degree and in B9 of the Aliens Circular.

118 Conny Rijken, *Trafficking in persons, Prosecution from a European perspective*, Asser Press, Den Haag 2003, Chapter 6.3.

119 Kamerstukken *II* 2003-2004, 29 291, no. 7, p. 5.

ing to their country of origin they will be in danger because they testified against their traffickers. A residence permit for humanitarian reasons is not granted often while requirements are strictly interpreted.[120]

The Witness Protection Act

In the criminal procedure a victim can appeal to a protection based on the Witness Protection Act (articles 226a-226f CCP). The Prosecution Service grants this form of protection. This form of protection can run parallel with the short-term residence permit by the B9 procedure, but does not have to.[121]

In the Netherlands, hearings and questioning of witnesses mostly take place by the police and the examining magistrates during pre-trial stages.[122] The defendant and his councillor or the prosecutor could call a witness to trial. The judge will only allow these witnesses to make a statement at trial when the right of defence might be breached if he rejects the request.[123] This will hardly ever be the case for in general the witness will be heard in pre-trial phase and both parties will be given the possibility to ask questions to the witness. However, the judge maintains the right to hear witnesses when he finds this necessary (without a request of the two parties).[124] For this practice it is unlikely that the witness will have to be heard again in court after the police or the examining magistrate has heard the witness. If a victim or a witness does not want to testify at the trial because he fears for his life, his health, his security, or for disruption of his family life, or his socio-economic status, the examining magistrate can order to veil the identity of the witness from the defence and/or from the Prosecution Service. The parties who are allowed at the hearing of the threatened witness are given the opportunity to submit questions in writing.[125] The judge decides which questions the victim should answer. In trafficking cases this kind of protection complemented with a short-term residence permit by the B9-procedure could

120 Kamerstukken *II* 2002-2003, 28 638, no. 1, p. 13. In the years 2001-2003 only 28 applications on humanitarian grounds have been submitted and only 7 of them were granted (in 9 cases there has not yet been a decision), Kamerstukken *II* 2003-2004, 28 638, no. 2, p. 5.

121 The authority to grant the residence permit is regulated in the Aliens Instruction (*Staatscourant* 2000, 10, p. 10, chapter 3, division 2 and chapter 4: the authority lies with the chief of police and the Minister of Justice).

122 In the Netherlands the principal of orality is obtained. This requires that the trial proceeding is oral. However this principle has been influenced by a verdict of the Supreme Court of 1926. In the 'De Auditu case' it was allowed for the first time that facts not experienced by the witness itself could be used as evidence. Supreme Court 20 December 1926, NJ 1927, 85.

123 According to articles 260 and 263 jo. 264 Code of Criminal Procedure.

124 According to articles 315 and 316 Code of Criminal Procedure.

125 EHRM 26 March 1996, *NJ* 1996, 741 (*Doorson* case).

lead to more testimonies of victims of trafficking. Therefore the number of convictions of traffickers could increase.

Compensation Measures
Victims of offences can also obtain compensation within the criminal proceedings as a civil claimant. A person is only considered a victim of an offence when the penalisation aims at protecting rights of these persons. The crime then infringes these rights. Trafficked persons are, as stated before, victims (smuggled persons are not) and therefore they can obtain compensation. In 1995 the procedure to obtain compensation was extended by the Victim Act Terwee (Wet Terwee).[126] Before, victims had the possibility of requesting compensation through the civil courts, but that is a lengthy and costly procedure. The only criminal possibility for the victim of a crime was to file a claim for damages during the trial. The judge could then impose compensation as a special condition to a (partially) suspended sentence. Problem was that the victim had to be present at the trial and when the court awarded the claim, it was completely up to the victim to ensure the collection of the money. The claim should also not exceed the amount € 680 for felonies and € 272 for misdemeanours.[127] This could not cover the actual costs in most cases. Due to the Victim Act Terwee a new article, article 51a CCP, was implemented and that widened the possibilities for the victim to obtain compensation.[128]

First of all, a victim can claim compensation when the claim is clear and simple in the sense that no experts or witnesses are necessary to clarify or support the claim. It could be that one part of the claim is simple and therefore can be handled in the criminal court, while the other part is complicated and the victim has to take that part to a civil court. In one case[129] women from the Dominican Republic were induced to work in prostitution in the Netherlands. These women were terrorised in a gross manner (sexual abused, threatened, violently abused). They claimed damages during the trial against their traffickers. One part of the claim, for material damages, was found simple. The other part, for non-material damages, could not be appointed precisely and the victims therefore had to turn to civil court.

126 Law of 23 December 1992, *Staatsblad* 1993, 29. Coming into force on 1 April 1995 (*Staatsblad* 1995, 160).

127 M.E.I. Brienen and E.H. Hoegen, *Victims of Crime. In 22 European Criminal Justice Systems*, Wolf Legal Publishing, Nijmegen 2000, Chapter 17, p. 657.

128 Reneé Kool and Martin Moerings, *De Wet Terwee. Evaluatie van juridische knelpunten* (The Victim Act Terwee. An evaluation of the sticking points), Willem Pompe Instituut Utrecht, Gouda Quint, Arnhem 2001.

129 District Court Arnhem 25 February 2000, no. 05/072588-98 and no. 05/078014-98 (05/070001-99) and no. 05/072587-98 (05/070000-99).

The compensation measure (article 36f CC) was also introduced alongside the civil claim for compensation in the criminal procedure. This measure should enhance the likelihood for the victim to receive compensation. Contrary to fines, the compensation benefits the victim. An advantage is that the state is responsible for executing the measure. It is also possible to impose a special condition to a suspended sentence to the perpetrator concerning the payment of a certain sum of money to a fund. This fund promotes the interest of victims of violent crimes (for example the State Fund for Victims of Violent Crime) (article 14c CC). Every victim can appeal to the local victim support centres (*Buro's slachtofferhulp*). A victim can also apply for legal aid of a counsel by the legal advice centre (*Buro voor Rechtshulp*).

While trafficked people are victims of the crime of trafficking the police and the Prosecution Service should make use of the B9 procedure and all other possibilities for victims described above.[130] This means that these possibilities must be pointed out to victims of trafficking.

It is estimated that in the year 2002 there were 3,500 trafficking cases. The figures of 2003 show that 108 victims applied for a residence permit on grounds of the B9 procedure. Only 35 of these requests were granted.[131] A research of the Dutch National Reporter of Trafficking in human beings (*Nationaal Rapporteur Mensenhandel*) shows that in the period 1998 up to and including 2002, 524 applications for a B9-residence permit were lodged and 411 applications have been granted.[132] Academic researchers,[133] politicians,[134] and the Dutch National Reporter[135] found this far too little and it was pointed out that the B9 procedure should be used more often.

Because smuggled persons are not seen as victims of the offence of smuggling, they can not make a claim for any of these rights. So, the function smuggled persons will have in the criminal procedure is reporting the crime to the police and testifying against the smuggler. However, smuggled persons will be very reluctant to fulfill this function because it will not produce anything worth-

130 Direction on combating trafficking in human beings and other forms of exploitation in the prostitution of the Board of Prosecutors-General, 29 June 1999, *Staatscourant* 2000, 188 (Valid till: 1 May 2005, *Staatscourant* 2004, 184, p. 16).

131 Kamerstukken *II* 2003-2004, 28 638, no. 2, p. 5, Appendix 1.

132 *Mensenhandel. Derde rapportage van de Nationaal Rapporteur* (Trafficking in human beings. The third report of the National Reporter), Bureau NRM Den Haag, July 2004, p. 92-100.

133 For example: Connie Rijken, *Trafficking in persons*, 2003, chapter 7.1.4.

134 For example: Kamerstukken *II* 2003-2004, 28 638, no. 6, motion of Van der Laan and Arib.

135 *Mensenhandel. Eerste rapportage van de Nationaal Rapporteur* (Trafficking in human beings. The first report of the National Reporter), Bureau NRM Den Haag, March 2002.

while for them. Their situation will even deteriorate because it is likely that they will be expelled from the country immediately when they come into the hands of the (immigration) police. And the very thing smuggled persons wanted most was to enter and reside, legally or illegally, in the Netherlands. The consequence of this is that smuggled people will be even more reluctant to testify against their smugglers than victims of trafficking against their traffickers.

6. Concluding Analysis: The Aims of the Offences of Trafficking and Smuggling and The Legal Position of Trafficked and Smuggled Persons

Aim of the Offence of Trafficking

The offence of trafficking aims at protecting the individual rights of freedom and integrity. The penalisation has always been linked to prostitution, maintaining of brothels, and combating sexual offences. A feature of the offence is the protection of the right of self-determination and therefore only forced prostitution was prosecuted and punished. The will of the prostitute is of importance to determine when certain behaviour can be criminalised as trafficking. For this very feature it is remarkable that the inducing of a person of age from another country to work in the prostitution in the Netherlands is being criminalised as trafficking. The will of that person is irrelevant for determining if this behaviour is punishable by the offence of trafficking.

Aim of the Offence of Smuggling

Trafficking is often confused with smuggling, despite the differences between the aims of the offences. The obligation to criminalise smuggling results from the Schengen Agreements and the offence is linked to the free movement of persons. As explained in § 3.2 the Supreme Court has not clarified what the aim of the offence entails and if it is also punishable to smuggle people to other countries in the Schengen area. If one follows the explanation of the Court of Appeal[136] and one states that smuggling aims at protecting the public authority of the Netherlands, then it is a logical consequence that for behaviour to be punishable by smuggling it should include illegal entrance and illegal residence in the Netherlands.

However, it would be more logical to conclude that the aim of the offence is to protect the Schengen area, looking at the Schengen Convention. The explanation of the scope of the offence by the Court of Appeal infringes these European obligations. Therefore, I would say that the aim of the offence of smuggling is to protect the Schengen territory and that therefore smuggling to Schengen countries is also penalised by article 197a CC.

136 Supreme Court 15 March 2005, no. 01745/04.

The Netherlands have always attached importance to the element of pursuit of gain in the offence of smuggling. Firstly, for churches and charity institutions should not be held criminally liable for smuggling. Secondly, the aim of the offence is not only protecting migration and asylum legislation, but also combating of organised crime. Especially criminal organisations that smuggle persons constitute a threat to public authority. While these criminal organisations will usually pursue gain, the element emphasises that the research and prosecution must be focused on these organisations. Since September 11th, the Minister indicated that the penalisation of smuggling is an essential instrument to combat terrorism,[137] especially when it is focused on criminal migration organisations.

Due to the implementation of the EU legislation, profit of gain has been scraped from the offence of assisting in illegal entrance. The Minister of Justice states that this does not alter the aim of the offence.[138] However, this statement can be doubted.

Confusion between Trafficking and Smuggling

A feature of smuggling is that borders must be crossed. Trafficking does not require this transnational element, but in practice many prostitutes come from abroad. As stated before, it does not make a difference for the criminal liability of the trafficker if foreign prostitutes want to work in the prostitution of their free will. This increases the confusion between trafficking and smuggling. For it could be the case that a woman decides of her own free will to work in prostitution. She pays a lot of money to get her self transported to another country. At first sight this looks like a smuggling case. However, because the will of a foreign woman to work in prostitution does not affect the criminal liability of the trafficker, this could also be a trafficking case. Because the element of 'abuse of authority' is measured by the 'emancipated prostitute in the Netherlands' this element is to a great extent objectified. This also causes a breach with the feature of 'involuntariness' of the offence of trafficking (see § 3.1).

Another reason for confusion between trafficking and smuggling is that in many cases trafficking has a transnational character and therefore it has interfaces with immigration legislation. Yet, a major difference is that smuggled persons are always illegal (or else the behaviour cannot be described as smuggling, see § 3.2) and therefore it always concerns migration legislation. The victims of trafficking do not have to be illegal, but they are in many cases.

Smuggling differs from trafficking in that smuggled people are not victims of smuggling, while trafficked persons are. Trafficked people can make a claim to the rights of victims in the criminal procedure, while smuggled people in general can not. However, smuggled people can claim (some) rights for victims,

137 Kamerstukken *II* 2002-2003, 27 204, no. 18, p. 3.

138 Handelingen *I* 8, 7 December 2004, p. 390.

but only when their human rights are violated by crimes that attend the crime of smuggling, like physical abuse, illegal deprivation of freedom of movement, kidnapping or extortion. While the Prosecution Service does not often prosecute the smuggler for these crimes, smuggled persons are never able to make such a claim.

Recent developments assign the victim a more important role in the criminal procedure. Some academics call this a process of 'victimisation of criminal law',[139] because rights are assigned to victims of crimes as in the civil procedure ('civilly-sation' would have been a more correct term to indicate this development). This development also entails a political emphasis on victims of trafficking. They should not be expelled from the country like all other illegal persons (for example smuggled people) but police and Prosecution Service should use the means to protect these victims more sufficiently.[140]

The next and last section will analyse the reforms of the Dutch offences of trafficking and smuggling due to implementation of the EU legislation and how they will influence the system of criminalisation of trafficking and smuggling in the Dutch Criminal Code.

7. Implementing EU Legislation: Alteration of the Dutch System of Criminalising Trafficking and Smuggling?

Due to EU legislation on trafficking and smuggling, the criminal offences of trafficking and smuggling were altered in January 2005 (see § 2). In this section the reforms will be analysed. The question that is asked is: what are the effects of the reforms in these Dutch offences for the Dutch system in criminalising the behaviour of trafficking and smuggling.

Against the obligation of the Framework Decisions to penalise the offences with a certain minimum prison sentence much criticism has been raised many criticism in Dutch politics. In the Dutch penal system judges are limited in their imposition of punishment by maximum penalties. It is found that the introduction of these minimum penalties in Dutch criminal law will constitute a breach with the Dutch penal system.[141] Therefore the compromise is reached that the

139 H. Boutellier, *Het geëmancipeerde slachtoffer. Een nadere beschouwing over solidariteit en slachtofferschap* (The emancipated victim. A closer examination on solidarity and victimisation), in: M. Moerings (ed.), *Hoe punitief is Nederland?*, Arnhem 1994, p. 101.

140 Kamerstukken *II* 2003-2004, 28 2638, no. 7, motion Tonkens c.s.

141 More information can be found in: A.M. van Kalmthout and P.J.P. Tak, *Ups en downs van de minimumstraf: een verkennende studie naar het voorkomen van de minimumstraf in Frankrijk, België, Duitsland, Engeland en Wales* (Ups and downs of the minimum penalty: an explanatory research on the minimum penalty in France, Belgium, Germany, the U.K. and Wales), Wolf Legal Publishers, Nijmegen 2003.

EU obliges the Member States only to implement penalties with at least a certain maximum prison sentence (minimum-maximum penalty). The Netherlands accepted this, but are not extremely willing!

The Widening of the Scope of the Offence of Trafficking: Not only Sexual Exploitation

Due to implementation of EU legislation concerning trafficking in human beings, the scope of the offence of trafficking is widened from only sexual exploitation to all forms of exploitation, such as slavery, slavery like practices, and forced or compelled labour (see § 2.1).

This alteration of the offence will have consequences for the approach of trafficking. The victims support centres, prevention, investigation, and prosecution are confronted with new criminal behaviour in various sectors outside prostitution.

Many forms of illegal employment will also fall within the scope of the new offence of trafficking. Illegal employment can also be combated through other criminal law (article 197b CC) and administrative law (Aliens Employment Act) provisions (see § 2.3). The difference between the offence of labour exploitation and these other instruments concerning combating of illegal employment is the element of force. The feature of exploitation is that it will include a continuous violation of the civil rights of the persons involved.

The offence of trafficking is also widened to the trade in organs. This form of trafficking also amounts a limitation of the freedom of choice.

From different sources it can be concluded that illegal employment is a part of the Dutch economy that cannot be neglected. It is also concluded in the study *slavery-like practices in the Netherlands* (2004) that these practices are of limited extent. It seemed that the excesses must be sought in the illegal employment in business and in house-keeping.[142]

The alteration of the offence of trafficking means that not only victims of sexual exploitation can be offered a temporary residence permit during the criminal trial according to the B9-procedure, but every victim of exploitation.[143]

---

142 J. van der Leun and L. Vervoorn, *Slavernij-achtige uitbuiting in Nederland. Een inventariserende literatuurstudie in het kader van de uitbreiding van de strafbaarstelling van mensenhandel* (Slavery-like exploitation in the Netherlands), Boom Juridische Uitgevers, Den Haag 2004, p. 38.

143 *Nationaal Actieplan Mensenhandel. Aanvullende maatregelen van het kabinet in het kader van de aanpak van mensenhandel in Nederland* (National Actionplan Trafficking in human beings. Supplementing measures from the government concerning the approach of trafficking in human beings), December 2004, Kamerstukken *II* 2003-2004, 28 638, no. 10.

Trafficking and the Agreement of 'Victims': Alteration of the Role of Trafficked Persons?

As stated in § 2.1 one of the main features of trafficking is the violation of personal freedom of the victim, in that it takes place against the will of the victim for instance by force or threat.

In the Netherlands the feature of involuntariness is historically of great importance in the matter of crimes against the personal freedom. This can be clearly shown by the fact that only recruitment for involuntarily prostitution is criminalised. The consent of a person to prostitution (or to another form of labour) will result in that the person who recruits this other person will not be criminalised for trafficking. When a person consents to certain behaviour, this behaviour will in general not be unlawful.

However, in the EU legislation concerning trafficking it is stated that the consent of the person involved is not an obstacle to a conviction of the trafficker, for one cannot consent to exploitation (see article 1 subsection 2 of the Framework Decision on trafficking). A defence of the trafficker that the victim consented to the behaviour will not be a barrier to a successful prosecution and conviction. Decisive is whether the perpetrator had the intention to use the means of force, deception, etc. to recruit persons for exploitation. In the Netherlands it depends upon the victim whether it could be proven that the use of means are the consequence for his/her involuntariness. Decisive is whether the victim indicates the means used as means of force, deception etc., which have resulted in an involuntarily act.

The Minister of Justice, however, states that the provision on the consent of the victim in the EU Framework Decision on trafficking has no consequences for the Dutch offence of trafficking.[144]

It could be that the different view on the role and the will of the victim of trafficking will lead to differences between prosecution and conviction of traffickers in countries of the EU. Further, was the aim of the Framework Decision not to have common definitions, which lead to common incriminations and common sanctions against trafficking in human beings?

The Widening of the Scope of the Offence of Smuggling: Deletion of Profit or Gain and Penalisation of Smuggling to and from more Countries

The aim of the Dutch offence of smuggling is the protection of the government policy concerning the combat of illegal residence. On the one hand, smuggling organisations are seen as a big, if not yet the biggest, threat to this policy. On the other hand, humanitarian aid by churches and charitable institutions should not be criminalised. The element of profit or gain gives expression to

144 Kamerstukken *II* 2003-2004, 29 291, no. 3, p. 10.

both these Dutch aims of the offence of smuggling. Proving this element is hard in cases were a smuggler is caught red handed at the border.[145] In cases which concern smuggling organisations this is not as much of a problem. In such cases evidence is gained by observation, or by house searching, or by taping of (tele)communications, and therefore enough evidence will be available to prove the aim of profit. While criminal organisations are seen as the ones who infringe the protection of the government's policy on migration the most and proving the intention of profit or gain is not an obstacle in these cases, the element is only abolished, because smuggling had to be aimed at combating every form of assistance in illegal entry, which can be designated as the main aim of the EU.

The aim of the EU legislation concerning the offence of smuggling is to combat the aiding of illegal immigration in connection with unauthorised crossing of the borders and sustaining networks which exploit human beings. The EU sees every form of unauthorised crossing of the EU borders as a breach of the policy on migration. Therefore every illegal movement constitutes a violation of the authority of the EU and its Member States, and so it should be criminalised. This explains why profit or gain was removed from the proposal by France for a Directive on smuggling.

As a result of resistance of, among others, the Netherlands, it was decided to replace the element of profit or gain with a humanitarian clause in national legislation. It was left to the Member States to decide whether they wanted to insert this possibility and not criminalise assistance out of humanitarian motives.

Nevertheless, the penalisation of smuggling in the Directive still constitutes a breach of article 27 of the Schengen Convention. The offence is widened because profit or gain is no longer required to sentence someone for assisting in illegal entry. The humanitarian clause must be made plausible by the smuggler. The burden of proof is reversed with regard to article 27 of the Schengen Convention. The Public Prosecutor does not have to prove that the smuggler had the intention of profit or gain. However, the smuggler has to make a plausible case that he assisted the illegal persons out of a humanitarian motive.

The penalisation of smuggling in the EU Directive is also not in line with the underlying ideas of the penalisation of smuggling in migrants in the UN Protocol.[146] This Protocol supplements the UN Convention on Transnational Organised Crime. Therefore assisting in the illegal entry or residence of aliens is

145 This also appears from an evaluating-research on the ground of which the heightening of the punishment of smuggling in 1996 was researched: D.F. Slobbe and M.M.C. Kuipers, *Verhoging van de strafmaat op mensensmokkel* (Heightening of the punishment of smuggling of humans), International Police Institute Twente, University of Twente, October 1999.

146 B. Pieters, Mensensmokkel: volgt Nederland de VN of de EU? (Smuggling of humans: do the Netherlands follow the UN or the EU?), *Delikt en Delinkwent*, 2003, p. 178-191.

only criminalised when the crime has features of transnational organised crime. The EU-Directive does not have this pronounced linkage with organised crime. However, while the offence of smuggling in the UN Protocol is linked to organised crime, profit or gain is still a requirement in the penalisation of smuggling. As stated in the definition of organised crime in article 2 of the UN Convention on organised crime, one of the features of such criminality is that they have the intention to obtain, directly or indirectly, a financial or other material benefit. This justifies the duty in the UN Protocol to criminalise the behaviour of smuggling in *criminal* law.

The EU finds it justifiable to oblige the Member States to impose criminal penalties even when there is no intention of gain in case of the assistance in illegal entry. The EU strives for a different aim than the UN. For the EU aims primarily at combating illegal immigration, not, as the UN, combating organised crime.

The Netherlands have been tacking between these two aims to combat smuggling. In the first instance they strived for implementation of the humanitarian clause, and succeeded in their objective. However a change of the political colour of the government has ultimately led to rejection of the clause. This entails that for assisting in illegal entry no longer profit or gain is required, nor is there a specific justification ground (the humanitarian clause) inserted in the offence. For assisting in illegal residence the offence stays unaltered compared to article 27 of the Schengen Convention.

An argument for rejection of the clause was that the element of profit or gain is hard to prove, especially when a smuggler is caught red handed at the border.[147] Apart from the fact that this problem does not or hardly arise with organised crime and that deleting this element will not be necessary from the perspective of combating organised crime, it is strange that the reason that an element is hard to prove may lead to striking it out. The offence of rape is hard to prove, but this does not lead to deletion of the requirement that force is used with the sexual intercourse.

Besides, it is stated that the smuggler who assists an alien out of humanitarian motives can always appeal to a general justification or excuse ground. This, however, constitutes a reverse of the burden of proof, for the smuggler must now make it plausible that he acted out of humanitarian motives.

The deletion of the element of profit or gain makes it clear that the Netherlands follows the EU (and not the UN). The aim to use the offence of smuggling as an instrument to combat illegal immigration is strengthened by the deletion of the element of profit or gain (and maybe it even sets aside the aim that smuggling must be combated as organised crime).

The scope of the offence of smuggling is widened due to implementation of the EU legislation concerning smuggling. Every form of assistance in illegal

147 Handelingen *II* 84, 16 June 2004, p. 5402.

entry is now criminalised. By doing so, the aim of the offence of smuggling is more directed towards the combating of illegal immigration.

The scope of the offence will not only be widened due to the deletion of profit of gain. As a result of the implementation of the EU legislation, the penalisation of smuggling will not only be aimed at protecting the Schengen area, but also at all Member States of the EU, and Iceland, and Norway and every state that joins the UN-protocol against smuggling of migrants. This solves problems concerning smuggling from the Netherlands to countries that are not Schengen members, and vice versa (see § 3.2). Before, this behaviour was not penalised by the offence of smuggling. At that time regard was had to the criminalisation of illegal residence in the Netherlands, which also entails the illegal movement of persons on Dutch territory. But when illegal residence in the Netherlands could not be proven, this behaviour did not fall under the scope of the offence of smuggling.

So, the implementation of the EU legislation on smuggling widens the scope of the offence on two points: smuggling to and from more countries is penalised and assisting in illegal entrance is also criminalised when there is no intention of profit or gain.

Implementation of Aggravation Circumstances: Alteration of the Role of Smuggled Persons?

The EU has compelled its Member States in the Framework Decision on smuggling to implement certain aggravating circumstances. The Netherlands therefore added two aggravating circumstances to the offence of smuggling in article 197a CC.

Firstly, the maximum prison sentence is raised to twelve years imprisonment when the smuggled person experiences physical harm or when he has dread danger of life due to the smuggling (article 197a section 6 CC). Secondly, the maximum prison sentence is raised to fifteen years when a smuggled person dies as a consequence of the smuggling (article 197a section 7 CC).

These aggravating circumstances involve the violation of the human rights to personal integrity and to the right to life of smuggled persons. Consequently, it seems that smuggled people can become victims of smuggling, when their human rights are violated by the smuggler while being smuggled. However, this would lead to difficult practical situations. Smuggled persons are always illegal. In the Netherlands it is government policy to expel illegals immediately from the country.[148] But should they also be expelled immediately when the smugglers

148 Terugkeernota, Maatregelen voor een effectievere uitvoering van het terugkeerbeleid (*Measures concerning a more effective execution of the policy of returning aliens)*, Directoraat-Generaal Internationale Aangelegenheden en Vreemdelingenzaken, Den Haag 21 November 2003.

violated their human rights during the committing of the offence of smuggling? When they are also sexually, or in other ways, exploited, then they are victims of trafficking. Then it is obvious that they should be offered legal rights as victims, and that they should be offered a short-term residence permit according to the B9 procedure.

In many cases smuggled persons are not exploited within the meaning of the offence of trafficking. However, the smuggler could have locked them up because he wanted to ensure that the family pays for the debts of the journey. In other cases the smuggler physically abuses the smuggled person to claim his money or he transports them in an inhuman manner to keep the costs low. In all these cases human rights of the smuggled persons are violated, but by which offences? Not trafficking. They could be victims of deprivation of freedom of movement[149] or victims of abuse. So, the turning point between the offence of trafficking and the offence of smuggling is not the violation of human rights. Sometimes the human rights of smuggled persons are breached, but they are still not victims of trafficking. This legal gap could cause problems concerning the legal position of smuggled persons in the criminal procedure. Is it justifiable that a smuggled person whose human rights are violated by the smuggler while being smuggled is expelled from the country before he can make a claim to any legal rights as a victim?

In addition, it would be more satisfactory when a smuggled person who is subject to the criminal procedure is also given a short-term residence permit. The EU has sought this also and has introduced a directive on a short-term residence permit not only for victims of trafficking, but also for victims of actions to facilitate illegal immigration (smuggling).[150] This seems to affirm the idea that smuggled people can be victims of smuggling and that they should have the same rights as trafficked persons, including the short-term residence permit.

This conflicts with the Dutch point of view, were only the state is a victim of smuggling (see § 2.2). The Dutch government is therefore not going to accept the directive for the part that smuggled people are also given a short-term residence permit.[151]

If smuggled persons are seen as victims of the crime of smuggling, then they should also be given the right to obtain compensation from the smuggler that violated his human rights in the criminal procedure (see § 5). When the rights of the smuggled persons are violated then they can claim compensation from the smuggler for the material damage (for instance incurred expenses for

149 For example: District Court Haarlem 18 March 2002, no. 15/031884-01.

150 PbEG L 261/19, 6 August 2004.

151 Handelingen *I* 8, 7 December 2004, p. 391. The EU has left the opportunity open for Member States to decide whether they would award the short-term residence permit to smuggled people.

hospitalization or medical assistance) and immaterial damage, but only when the claim is clear and simple.

When the implementation of the EU legislation was discussed it was not stated if not only the state, but also the smuggled person could be seen as victims of the crime. By doing so, it is unclear if the aggravating circumstances express that the authority of the state is even more violated when the crime of smuggling goes with violation of human rights, or that the smuggled persons should be protected against these violations. When the latter is the case, then this would entail a breach of the Dutch system of penalising this form of behaviour. For crimes concerning the protection of the public authority do not (also) protect human rights.

The amendments of the Dutch offences of trafficking and smuggling due to the EU legislation have not only widened the scopes of both offences, they also evoke questions concerning the position of the trafficked and smuggled persons. First of all, it is not clear if smuggled persons are victims of the crime of smuggling when their human rights are breached during the smuggling or if they should be criminalised, for example because they instigate the crime. And when they are seen as victims of smuggling should they be entitled to a temporary residence permit like trafficked persons and not be expelled immediately?

In addition, it is unclear if the consent of a person to trafficking can really not be a barrier to a conviction for trafficking, as the EU would like to see. If so, this would constitute a breach of the Dutch system in criminalising behaviour. While the consent of a person with the criminal behaviour could mean that the behaviour is not unlawful.

The position of both smuggled and trafficked persons has become slightly blurred due to EU legislation concerning trafficking and smuggling.

*Richard Staring**

CONTROLLING IMMIGRATION AND ORGANIZED CRIME IN THE NETHERLANDS. DUTCH DEVELOPMENTS AND DEBATES ON HUMAN SMUGGLING AND TRAFFICKING

1. Introduction

Human smuggling as an offence attracted a great deal of official attention in the past decade. Within white papers and governmental studies the importance and responsibility of human smugglers for the nature and size of migration flows, especially the influx of asylum seekers in the Netherlands is stressed (see e. g. IND 1998, IAM 2000, 2002; DNRI 2005). In an effort to combat human smuggling, specific analysis and investigation services have been founded, such as the Information and Analysis Center on Human Smuggling (IAM) and a national operational unit (Unit Human Smuggling) solely responsible for combating human smuggling. The Dover tragedy[1] not only illustrated the involvement of organized crime and stressed the importance of the Netherlands as a transit country for human smuggling, but also fuelled the law's focus on human smuggling organizations. Recently an amendment of the law on human smuggling as well as trafficking in humans has been sent to the House of Representatives (TK 29291/1). Opposite to the UN Protocol against human smuggling, one of the main changes has been the removal of the 'profit element' in article 197a of the Criminal Code.[2] As a consequence, Public Prosecutors no longer have to prove

* Department of Criminology, Erasmus University Rotterdam. The author would like to thank the editors of this volume, as well as Don Kalb, Henk van de Bunt, and René van Swaaningen for their valuable comments on an earlier draft of this paper.

1 On June 18, 2000, 58 Chinese smuggled immigrants on their way to the United Kingdom suffocated in a refrigerated cargo container (see for instance BBC News, June 20, 2000).

2 The smuggling of migrants is defined in the United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air under article 3 as "the procurement, in order to obtain, directly or indirectly, *a financial or other material benefit*, of the

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *241-269.*
 ISBN 90 04 15064 1.

that smugglers are motivated by profit. Instead, people accused of smuggling have to prove that they are altruistically or idealistically motivated. Simultaneously, the concept of human trafficking is also being redefined and broadened in law under the influence of European Union guidelines.[3] Just in 2004, the newly established National Criminal Investigation Service fighting organized crime in the Netherlands pointed at human smuggling and human trafficking among the seven main areas of organized crime that needed their special attention.

Human smuggling and human trafficking are not only at center stage in criminal law, but are also dealt with in the policy field of immigration control. This is not a typical Dutch phenomenon. Cornelius, Martin and Hollifield (2004) observe an increasing similarity among industrialized, labor-importing countries in the policy instruments chosen for controlling immigration. They also foresee a greater gap between the goals of these migration policies and their outcomes. Industrial countries increasingly try to control immigration by further tightening entry restrictions as well as by building up high administrative walls that marginalize and exclude illegal immigrants[4] from full participation in society. However, these same countries have to deal with internal economic interests and push pressures in the sending countries as well as the structural demand for formal and informal labor in Western receiving countries. Simultaneously, West-European governments are confronted with sensitivity to public opinions concerning the consequences of the influx and settlement of immigrants for the identity and unity of their nation state.

But how are these global developments dealt with in the field of human smuggling and the trafficking in human beings on the Dutch national level? How do the Netherlands handle global processes such as international migration, transnational organized crime and international terrorism in a tradition of migration control led by economic interests and humanitarian considerations (Muus 2004: 283-86)? In retrospect, one wonders how political actors, media, and the public in the Netherlands have discussed and dealt with these global developments in the field of human smuggling and the trafficking in human beings. By discerning and describing these various global processes, local (Dutch) incidents, as well as their interrelatedness, it should first of all become

illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (*UN protocol* 2000: 3; italics added by author)

3 See the contribution of Pieters in this volume on the redefing of human smuggling and human trafficking in criminal law.

4 Illegal immigrants are defined here as immigrants who do not have permission to enter or reside in the Netherlands. This definition includes people who overstay their visa, immigrants who come to the Netherlands without valid travel documents and have no valid residence permits, and asylum seekers who were denied entry into the Netherlands, ignored the order to leave the country and stayed without documents.

clear how the political and public perception of human smuggling and trafficking in human beings in the case of the Netherlands have developed over the last decades. It should also shed light on how smuggling and trafficking have become criminalized and adopted in criminal law and, finally, became one of the top priorities in the Dutch fight against transnational organized crime.

2. Global Flows and Local Incidents

One can discern several global developments as well as local incidents that are crucial for understanding the debates on human smuggling and trafficking in human beings in the Netherlands and the way these crimes were implemented in Dutch law.[5] Globalization is nothing more than a process in which "people and places in the world are becoming more extensively and densely connected to each other as a consequence of increasing transnational flows of capital/goods, information/ideas, and people" (Kalb 2000: 1). As all western industrialized countries, the Netherlands was confronted, along with other transnational flows, with this movement of people, among which illegal immigrants and asylum seekers (cf. Staring 2000). Processes of international migration have many faces, but one important observation in the Dutch context relates to a gradual process of criminalization of illegal immigrants during the last decades that at the start of the third millennium evolved in a rather intolerant political and public climate towards undocumented immigrants. Secondly, the Netherlands witnessed an increasing number of asylum seekers during the 1990s that were more and more portrayed as economic fortune seekers or criminals.

A second major manifestation of globalization and its flows points to transnational organized crime and international terrorism (Van de Bunt 2004). According to Paoli and Fijnaut, globalization processes have "accelerated the interconnection between previously separate domestic illegal markets and increased the mobility of criminals across national borders" (2004: 3). Especially during the 1990s there was growing political, judicial, as well as scientific attention for transnational organized crime as human smuggling and trafficking in human beings in the Netherlands. Lastly, after September 11, 2001, human smuggling was increasingly linked with international terrorism. These processes contribute to a hostile image of all different modes of gaining entrance in the Netherlands, be it legally by way of marriages with partners from abroad or clandestinely with the support of human smugglers.[6]

---

5 I will not go into further detail on the legal definitions of human smuggling and trafficking in the Netherlands, but instead refer to the contribution by Pieters on the Netherlands in this volume.

6 There is, for instance, a proposal to reduce the number of immigrants that settle in the Netherlands through marriage by restricting some of the conditions for marrying a spouse from abroad.

Besides international migration flows and transnational organized crime, human smuggling and trafficking are also related to the field of human rights, albeit in a different way (Aronowitz 2001, Kleemans et al. 1998, 2002). One could state that whereas human smuggling is perceived primarily as an international migration issue as well as an issue of organized crime, trafficking is, by and large, seen as an issue of (organized) crime as well as of human rights (with victims and violations of fundamental rights). Human smuggling in the Dutch media is seldom related to the issue of human rights – except in a situation where people died during the act of smuggling, as was the case in the Dover tragedy. The idea that smuggled immigrants made a choice out of free will, conflicts with notions about victims. Instead, under the heading of giving cause to human smuggling, there are efforts to perceive smuggled immigrants as co-offenders instead of victims. Trafficking – as a rule – is never associated with the issue of international migration movements (see Koser 2001 as an exception to the first rule).

In addition to these global flows and manifestations that will be discussed in more detail in the sections which follow, some local Dutch incidents seriously shaped the debate around human smuggling and the trafficking in human beings in the Netherlands. The already mentioned Dover tragedy fueled attention towards human smuggling and criminal investigations in the field. But in general, these incidents were to a large extent outside the domain of human smuggling and trafficking. Instead these incidents contributed to an overwhelming feeling of insecurity and fear that in turn added to what Garland defined as a 'culture of control' (2001). September 11, the assassination of politician Pim Fortuyn in 2003 as well as of film director Theo van Gogh in 2004, and Islamic terrorism among others, all contributed to a climate where everything is perceived as a risk and a feeling that insecurities should increasingly be controlled. Before starting with a description of these global processes and local Dutch tragedies, the focus will be on all these different law enforcement agencies and organizations in the Netherlands dealing with controlling human smuggling and trafficking.

3. Dutch Law Enforcement Agencies Handling Human Smuggling and Trafficking

In the Netherlands, several law enforcement agencies are concerned with human smuggling and trafficking. In this context only the main actors, according to the Taskforce Human Smuggling, will be described. All specific actors dealing with the fight against human smuggling were established only after imposing criminal penalties on human smuggling in the end of 1993. The 'fight against human smuggling' sets off slowly and accelerates around 1997 as the Ministry of Justice starts with a national approach and a special focus on human smuggling. Among others the Taskforce Human Smuggling as a successor of the as unsuccessful characterized Coordinating Consultation on Alien Smuggling (AOM),

was initiated, but only became effective in 1999 (Faber 2002). The main tasks of this taskforce lie in controlling irregular migration and human smuggling. According to Faber (2002: 11) it is unclear which organizations or institutions belong exactly to this specific taskforce under the heading of the Department of Justice. For sure is the already mentioned IAM established in 1999 in which the Royal Military Police (KMar), the Dutch Immigration and Naturalization Service (IND) as well as the DCRI collaborate. In the same year the Alien Smuggling Unit (UMS), a special investigative unit as part of the core team North and East Netherlands also started its activities (TK 26345/1: 20-21). Besides the IAM and the UMS, the focus will also be on the Royal Military Police (Kmar) and the Dutch Immigration and Naturalization Service (IND).

Between 1993 and 1995, several so-called *core teams*, to combat supra-regional organized crime, were set up. Until the summer of 2003 members of these core teams were extracted from regional police forces. Only recently (January 1, 2004) these core teams were transformed into an independent National Criminal Investigation Service (Nationale Recherche). The core teams were formed around *geographical areas* as, for instance South America or Eastern Europe, around *infrastructures* as Schiphol Airport or the main port of Rotterdam; or around certain *types of organized crime* as human smuggling or synthetic drugs (Van de Bunt 2004). The core team that has a special Alien Smuggling Unit (UMS) resides at the core team 'North and East Netherlands'. After it became operational in 1997, this unit directed its attention fully to human smuggling and has investigated numerous cases of organized human smuggling. In the same year a special national Public Prosecutor on Human Smuggling, who was also made responsible for offences as different as human trafficking and child pornography was employed. Next to this operational Alien Smuggling Unit and the employment of a specialized public Prosecutor in this field, 1997 witnessed the 'birth' of the Information and Analysis Center on Human Smuggling (*IAM*). The main goal of the center is to gather (and actualize) information on the nature and size of human smuggling organizations related to the Netherlands. This means that the IAM not only analyses human smuggling within the irregular migration process, but should also play a central role within the coordination of information (all data should be gathered by the IAM) as well as in proposing new criminal investigations in the field of human smuggling (Feenstra 1999: 17-18). Next to the core teams and the UMS, the Royal Military Police (*KmAR*) investigates human smugglers and human smuggling organizations due to their border enforcement task.

In general, organizations of human smugglers and traffickers are dealt with at the level of core teams or specific units as the UMS, often in collaboration with other services as, for instance, the IND, the IAM or the Royal Military Police. The Dutch Immigration and Naturalization Service (*IND*) is responsible for the enforcement of the Aliens Act. Within the context of human smuggling and/or trafficking investigations, the IND is first of all responsible for provid-

ing relevant information to core teams on request. As in respect of the IAM, employees of the IND analyze stories of, for instance, asylum seekers in order to describe and publish human smuggling routes and trends. Occasionally, these data are used for scientific analysis of human smuggling by 'independent' researchers (see for instance Hesseling and Taselaar 2004)

Contrary to the recent history of human smuggling in criminal law, human trafficking in the Netherlands has a history dating back to early 1900 and has always been strongly rooted in the fight against 'immoral behavior' and prostitution. In 1911 several regulations were adopted in order to oppose 'immorality', among which the prohibition of brothels and women trafficking. After some 'small' alterations, it was only in 1993 that 'women trafficking' was changed in the gender-neutral term 'human trafficking' thereby also including the sexual exploitation of adult males. During the last decades of the twentieth century the government focused more on regulating voluntary prostitution and fighting exploitative and compulsive forms of prostitution (NRM 2002: 16-17). After a period of ninety years, Dutch government regularized its informal policy of tolerating brothels. Dutch government abolished the prohibition of brothels in 2000 in order to control and regulate the exploitation of voluntary prostitution and fight human trafficking as well as prostitution by illegal immigrants (NRM 2002: 22-23).

Already in 1904, The Netherlands subscribed to the 'International regulation with respect to the fight of the so-called trafficking in women and girls' and obliged itself to gather information on women trafficking through a separate institution. After the foundation of the first National Office by Dutch government in 1908 the independent National Observer on Human Trafficking was appointed in 2000. This was done so after a meeting of the European Union Member States where a statement on human trafficking (the so-called The Hague Declaration) including the recommendation to install independent national observers on human trafficking in all EU member states (NRM 2002: 50-51. 68).[7] Among the main goals of the National Observer are collecting information on human trafficking and reporting on this to the Dutch government (NRM 2004: 6).

Attention to human trafficking increased especially after the break down of socialist regimes in the early 1990s. After East-European borders opened, there has been an influx of female sexual labor towards the Netherlands as well as other West-European countries. According to the Foundation against Women Trafficking the number of reports on women trafficking doubled in 1993-1994 with offenders as well as victims mainly originating from Central and East-European countries (Parlementaire Enquetecommissie Opsporingsmethoden 1996).

7 Until 2002 only Belgium and Sweden have a comparable 'national reporter on human trafficking'. Other EU member states have not shown similar initiatives (*NRM* 2002: 68).

In the table below the activities of different teams and units are translated into the investigation cases brought before the Public Prosecution Service (PPS).

Table 1. Number of smuggling and trafficking cases at the Public Prosecution Service, 1994-2002

Year	Human Smuggling	Human Trafficking
1994	4[3]	63[3]
1995	69[3]	152[3]
1996	89[3]	117[3]
1997	137[3]	116[3]
1998	222[3]	134[4]
1999	224[1]	103[4]
2000	298[1]	138[4]
2001	266[1]	130 [4]
2002	201[2]	201[4]

Source: 1 = IAM (2002); 2 = http://www.om.nl/opportuul0307l2.htm; 3 = Boerman (2000), 4 = NRM (2004). The numbers refer to the absolute numbers of criminal cases.

These figures say little about the supposed increase in the activities of human smugglers and traffickers. One could state, however, that the increase in human smuggling and trafficking investigations during the years mirrors the priority to this type of crime given by the PPS and the police as well as the impact of the Dover transport disaster of 2000 (IAM 2002: 94). The problems with 'facts and figures' around human smuggling and trafficking are huge. According to Salt and Hogarth (2000: 31) there is a lack of data, and if available it is often unclear how the data are gathered. According to these IOM researchers most statistical data on the number of smuggled people are at best rough estimates based on a set of assumptions. Further, in most countries there is no central registration of human smuggling and/or trafficking; different institutions mean different definitions and ultimately poor and incomparable figures. Third, human smugglers are not always prosecuted on 197a of the Dutch Criminal Code but in many cases on different grounds as, for instance, organized crime, forgery or false documents. According to the NRM insights into the 'dark number' of human trafficking are restricted, but the figure could be substantially as the victims often are reluctant to step forward out of shame, fear for the traffickers and their possible expulsion. Above this, not all cases of human trafficking are recognized as such, nor are they systematically registered (NRM 2004: 1).

Although human smuggling and trafficking are often mentioned as though they were synonyms and treated as equivalents, they do have a different history and refer to different topics. Human smuggling is first of all a newly defined crime in the Netherlands and, secondly, has always been directly related to controlling international migration. After September 11, human smuggling is also increasingly connected with the global fight against international terrorism. Human

trafficking has a history dating back to the beginning of the twentieth century and traditionally has been associated with prostitution in Dutch criminal law. It is only in a much latter stage that Dutch government explicitly links human trafficking with global processes as international migration and transnational organized crime (Nationaal Actieplan Mensenhandel 2004) Still, as the NRM already mentions in their first informative report (2002), human trafficking can occur within national territory, without victims crossing borders. Both crimes are positioned within organized crime and dealt with by special teams within the National Criminal Investigation Service and both have their own information center; the IAM for human smuggling and the NRM for human trafficking. A major difference between human smuggling and trafficking lies in the route towards this position: the latter crime has its roots in debates on morality whereas human smuggling started as a border control issue.

Researchers such as Faber (2002) as well as Public Prosecutors dealing exclusively with human smuggling and trafficking all argue that the first should be dealt with more effectively. Human smuggling is simultaneously related to criminal, immigration, as well as administrative law. As a consequence, prevention and investigative approaches to human smuggling and trafficking are fragmented and scattered over numerous organizations. Obviously, this situation hampers effective action and cooperation between different governmental organizations in the field. Besides this fragmentation, some Dutch public prosecutors claim that human trafficking and other 'urgent' organized crimes such as drugs trafficking are perceived as much more severe than human smuggling. Labeling human smuggling as a top priority, does not automatically lead to a situation where it is perceived as a priority, let alone that it is translated into actual working practices. According to Faber (2002: 17-18) who analyzed the Coordinating Consultation on Alien Smuggling (AOM), this priority thinking should primarily be perceived as symbolical; as a paper tiger above all (cf. Staring, Engbersen et al. 2005: 206-7). This leads to the conclusion that human smuggling in the investigation services field is not perceived as a priority and that the fragmentation and poor cooperation between different law enforcement agencies should improve in order to deal much more effectively with human smuggling (Vroomans 2003).

4. Policies against Illegal Entrance and Illegal Stay in the Netherlands, 1960s Onward

According to Muus (2004: 265), immigration control policies of the Netherlands can be characterized as rather pragmatically, as "an inevitable outcome of economic needs and humanitarian considerations". He describes Dutch immigration policies during the last decades as largely ad-hoc, reactive instead of "proactively shaping the conditions for immigration" (ibid. 266). In retrospect, the overall tendency is towards a more restrictive Dutch migration policy, a dis-

couragement of illegal stay, and a further tightening of the opportunities for illegal aliens on the formal labor market and in gaining access to the facilities of the welfare state. The focus of immigration policies slowly shifted from external to internal control; from controlling physical borders to raising barricades with administrative measures (cf. Entzinger 2002).

Contrary to what policy-makers at first expected, most of the immigrants stayed and initiated further migration. The absolute number of immigrants – or ethnic minorities – gradually grew from 206,000 in 1971 to 648,000 in 1985 to around 1,600,000 people with a non-western background in the Netherlands (Statistics Netherlands 2002, cf. Van der Leun 2003: 12). As a consequence almost ten percent of the total population residing in the Netherlands by 2002 has a non-western background (Statistics Netherlands 2002).[8] To a large extend these immigrants are living in the urban areas. With respect to the position of Dutch government towards the influx and settlement of illegal immigrants from the early 1960s onwards, three phases can be distinguished (Engbersen 1999: 15-20). All phases are characterized by specific formal migration patterns and accompanied by illegal migration flows and the settlement of illegal migrants from different source countries. During all phases personal networks play an important driving force behind the formal and informal migration flows from the sending countries to the Netherlands. The different phases are accompanied by different migration regimes and attitudes towards the residence of illegal aliens.

The *first phase* of *gastarbeiter* recruitment started in the early 1960s and lasted until 1969. This period of labor recruitment is also characterized as a period in which immigrants irrespective of their legal status were welcomed. Although a large part of the labor force was recruited formally by employers and soon under the supervision of Dutch government, labor immigrants also started to travel on their own to the Netherlands. Those immigrants that came 'unofficially' and not through formal recruitment channels were labeled

8 The figure of almost 1,600,000 people with a non-Western background in this text refers to first and second-generation people with a non-Western background. The total number of people with a foreign background is over 2,900,000 (Netherlands Statistics/Statline 2002). According to the broad Netherlands Statistics definition, people have a foreign background if at least one parent has been born abroad. Netherlands Statistics also differentiates between people born abroad (first generation) and people born in the Netherlands (second generation). Foreign background is determined by the country of birth of the person (first generation) or the country of birth of the person's mother (second generation). If the mother was born in the Netherlands, the person is classified according to the father's country of birth. People with a non-Western background are from Turkey and countries in Africa, South America and Asia except for Indonesia and Japan. Indonesia and Japan are categorized with the Western countries on the basis of their socio-economic and socio-cultural position. For more detailed information see <http://statline.NetherlandsStatistics.nl>.

as 'spontaneous immigrants'. Instead of excluding them, employers welcomed them as much as the formally recruited. The 'spontaneous labor immigrants' were motivated and cheap as no mediation costs had to be met, and could easily be included in the booming labor market. Formal entry restrictions were scarce and rather easily to fulfill. In 1968 a law was implemented that should end the spontaneous influx of labor immigrants as from then on everyone was obliged to obtain a work permit in their home countries (Engbersen 1999: 16). Sometimes human smugglers are mentioned in research reports, but their activities are not problematized. In this period, illegal immigrants could easily get a work permit after finding a job, and in the long run a residence permit awaited them in this period (Staring 2001, Engbersen & Van der Leun 2001).

The *second phase* is characterized by family reunification and started in 1969 onward till the end of the 1980s. Although there were some new entry restrictions for foreigners implemented as, for instance, visa controls for people from Mediterranean countries as Turkey and Morocco, the number of immigrants increased during this period especially due to family reunification programs and the arrival of immigrants from (former) Dutch colonies such as Surinam. This period is portrayed as a period of 'tolerance'; although illegal immigrants were not allowed to enter the country and stay without 'documents', their stay and activities in different labor markets was "silently tolerated as 'necessary workforce'" and no active policies were implemented. Many illegal immigrants were registered at their municipality and possessed a social-fiscal number that allowed them to participate in the formal labor market.

During the *third* and still ongoing *phase*, the number of immigrants in the Netherlands has grown as a result of birth, family formation and the entrance of asylum seekers and refugees. Among the unintentional outcomes of former colonial policies, economic interventions and the recruitment of guest workers in the early 1960s are the economic, cultural, and relational linkages and bridges created between the Netherlands and non-European countries, resulting in sizeable ethnic populations in the Netherlands (Engbersen, Staring et al. 2002: 138-139). During this period that is characterized as a period of *exclusion* of illegal immigrants several laws were implemented to combat illegal entry and discourage illegal stay and illegal labor.[9] According to Engbersen et al. (2001) this change into a policy of exclusion was motivated by two developments. First, the increasing number of asylum seekers into the Netherlands, and, secondly,

9 Among the most important laws that were implemented during the 1990s that had a direct impact on the position of illegal immigrants in Dutch society are the linking of the social-fiscal number to a valid residence status in 1991, which excluded illegal immigrants from participating in the formal labor market, the Compulsory Identification Act of 1994, the Marriage of Convenience Act of 1994, the Linking Act in 1998 and the Aliens Act in 2000 (cf. Staring 1998, Engbersen & Van der Leun 2001).

the end of a lenient policy towards long-term unemployed Dutch citizens. These changes affected the position of illegal immigrants in the Netherlands as they were driven towards the informal economy and into the hands of labor recruiters and more or less informal employment agencies (cf. Staring 2004). During this phase the presence of illegal immigrants is increasingly associated with the abuse of social services as well as with crime.

During the last four decades we have witnessed a social reclassification of illegal immigrants from 'spontaneous laborers' to 'undesired and excluded illegal immigrants' (Engbersen & Van de Leun 2001). This reconfiguration of the 'spontaneous labor migrant' into the 'new untouchable' (Harris 1995) coincides with an increasingly tougher control on illegal stay and entry. For the moment, the formal exclusion of illegal immigrants has culminated in two complementary white papers *Return policy. Measures for a more effective enforcement of return policies* (TK 29344/1, 2003) and *Illegal Aliens* (DVB, 2004).[10] After measures aiming at reducing the asylum influx, these white papers stress the necessity of an effective return policy combined with measures aiming at discouraging illegal stay. In the document *Illegal aliens*, minister Verdonk of Immigration and Integration proposes several correlated measures to complicate and discourage the illegal stay of aliens. Among the central domains of action are more severe measures against those people who profit from the illegal stay of aliens. Exploiters such as conning landlords, unreliable employers and especially human traffickers as they "not only profit but sometimes also violate human rights" (2004: 5) have to be dealt with more severely. Although human trafficking is considered as a separate policy domain in this white paper, it is also stated that trafficking is related to illegal stay and should be one of the main points of attention. According to the minister of Immigration and Integration, structures that facilitate human trafficking encourage illegal stay. By tackling these criminal structures an important contribution to the approach of illegal stay will be provided (*ibid*.: 14). Although the activities of human smugglers will account for the arrival of a much more significant part of those who stay illegally in the Netherlands, human smuggling – surprisingly – is not referred to in the context of criminal structures facilitating illegal stay.

Looking back at the 1990s it is difficult to sustain the view that Dutch immigration policies still can be characterized as reactive. Increasingly, it is noticed that these migration policies are proactive in a sense that politicians and policy makers actively seek to control the entrance of new immigrants and is keen on discouraging illegal stay. The two latest white papers described above are exemplary for these proactive migration policies. According to Cornelius et al. (2004) most attempts of Dutch government to narrow the gaps between immigration

10 The policy document 'illegal aliens' refers to the following political document: '*Illegalennota. Aanvullende maatregelen voor het tegengaan van illegaliteit en de aanpak van uitbuiters van illegalen in Nederland*' (2004).

control policies and its outcomes, especially in the field of irregular migration, have not seriously altered the image of the Netherlands as a welcoming country and come with unintended consequences. Especially in the field of entry and irregular migration these efforts resulted in a stronger position of human smuggling organizations (2004: 30).

5. A Farewell to Dutch Tolerance

After gradually admitting that former *gastarbeiter* would stay in the Netherlands a group-based integration policy that included the "maintenance of immigrants own identity" developed during the 1980s. During the 1990s, however, this policy was increasingly criticized for its lack of success and changed into a more individually based integration concept (Ghorashi 2004: 164). Starting with Bolkestein, then the former leader of the conservative liberal party (VVD), negative consequences of immigrants for Dutch society (economic, social, as well as cultural) were stressed. Bolkestein and his successors therefore defended a tough integration approach of immigrants that comes closest to assimilation and left little room for maintaining ones culture or identity (*ibid.*).

In general, the public attitude towards immigrants in Dutch society, and particularly immigrants with a Muslim background, has hardened during the 1990s, and especially around the change and beginning of the new millennium. Politicians, scientists, as well as the public increasingly question the 'successes of Dutch integration policies and the Netherlands as a multi-cultural society'. Above all 'traditional' Muslim immigrants such as, for instance, Turks and Moroccans, are blamed for their lack of integration into Dutch society. Policies that address the high unemployment figures among immigrants as well as the high share of poor households among the immigrants are high on the political agenda during the 1990s. The focus of these policies during this period is on controlling social security in order to reduce the use of social security services (Snel, Engbersen and Vrooman 2000). According to the Social and Cultural Planning Office of the Netherlands, this attention for the social-economic integration of immigrants in the political and public debate slowly shifts towards problematizing their cultural integration as for instance the strong orientation of immigrants towards their home countries (SCP 2004: 152). The criminal involvement of young Antilleans and Moroccan Dutch as well as the supposed sympathy of a few young Moroccan Dutch for Islamic terrorism has triggered a process in which all Muslims are brought into disrepute (TK 29203/2: 3).

Several events as well as some violent incidents are instructive in understanding this farewell to 'Dutch tolerance'. The publication of the essay 'A multicultural drama' by publicist and journalist Paul Scheffer[11] on the fail-

11 Paul Scheffer was appointed professor by special appointment of Urban Sociology at the University of Amsterdam in 2003.

ure of Dutch integration policies in 2000 had an important impact; September 11, 2001, the political success of former sociology professor Pim Fortuyn and his national party *Lijst Pim Fortuyn* and his assassination nine days before the national parliamentary elections on May 15, 2003, and, more recently, the murder on November 2, 2004 of Theo van Gogh, publicist and film director of controversial movies such as *Submission* in which Islamic culture is criticized are also central. All these events have brought a polarization into Dutch society where native Dutch citizens – stand against 'the other' – Muslim immigrants.

Publicist Paul Scheffer stated in his controversial essay 'The multicultural drama' (2000) that a policy of generous admittance and limited integration would lead to further inequality and estrangement of immigrants from mainstream society. His essay, which ends with emphasizing the need for a parliamentary inquiry, evoked intense discussions in politics, science as well as in society.

At the 2002 elections, Pim Fortuyn and his political party *Lijst Pim Fortuyn* captured 'out of the blue' 26 seats (out of 150) in parliament. The party became a coalition member of the government. Political analysts explained this success by vague notions of a growing discontent of Dutch citizens with immigrants and the way Fortuyn expressed these feelings in populist and rather 'extreme' views on immigration and integration. In his interviews and publications on these topics Fortuyn stated that Islam is a backward religion and the Netherlands an overcrowded country that should be closed for immigrants, especially those with a Muslim background. Fortuyn promised extremely restrictive immigration policies among which featured closing of the borders, the reintroduction of border control and a prohibition on 'import marriages' (*De Volkskrant*, February 9, 2002). These promises coincide with the general attitude of Dutch citizens towards more restrictive migration entry policies (SCP 2004: 167).[12] Although the political movement of Fortuyn lost a significant part of their power after the 2002 elections, they succeeded in keeping immigration, asylum and integration topics high on the political agenda (Cornelius et al. 2004: 30).[13]

In between the assassinations of Fortuyn and Van Gogh, a parliamentary inquiry was dedicated to the question of the success or failure of Dutch integration policies during the last decades. The Committee on Integration Policy that started in December 2002, answered questions as big and complex as what was the integration policy pursued by the Netherlands in the past 30 years? What were the objectives and results of this policy in important areas such as housing, leisure, income, employment and education? Was the integration policy coherent,

12 In a survey conducted by the Social and Cultural Planning Office of the Netherlands one of the propositions was that the entry policies of the Netherlands in the next five years should be tougher; 80 per cent of the respondents agreed (SCP 2004: 167).

13 In November 2004, Fortuyn was chosen as the 'greatest Dutchman of all times' by the Dutch public (cf. Mak 2005a: 48).

consistent and successful? Early January 2004 their final report *Building bridges* was published.[14] The central conclusion read that integration of immigrants by and large has been successful despite Dutch immigration policies. Published in a period where politicians and public representatives felt that the integration of immigrants in Dutch society was a disaster and a failure, the nuanced findings of *Building bridges* were mistrusted by and large. The three leading political parties, the Christian Democrats, List Pim Fortuyn, as well as the Liberals, dissociated themselves from the central conclusion of the Committee on the successful integration of immigrants in the Netherlands. Above all, however, *Building bridges* was met with silence.

Early November 2004, the Netherlands was confronted with the murder of Van Gogh, a person well known in public life. Immediately after the murder of Van Gogh, the minister of Justice wrote a letter to the House of Representatives stating among other things that there was a serious chance that the offender acted out of radical Islamic conviction (TK 2004-2005, 29854, nr. 1). The letter found on the body of the murdered Theo van Gogh and directed at politician Hirsi Ali[15], left little room for discussion on the religious motives of the offender. The suspect, arrested shortly after the murder on Van Gogh, turned out to be a 26-year male, born in Amsterdam with the Dutch and Moroccan nationality. The suspect was already known to the Dutch Intelligence Service in the context of research on radical Islamic terrorism in the Netherlands. Immediately after the assassination of Van Gogh two politicians including Hirsi Ali – co-director of the movie *Submission* – went into hiding. Several mosques, Islamic institutions, as well as churches and schools were damaged or set to fire and the government[16] as well as the media spoke of a growing commotion and polarization in Dutch society in the weeks after the murder.

The German sociologist Ulrich Beck reacted in a lecture shortly after the murder of Van Gogh on this polarization that "it is not a matter of 'us' or 'the

14 For the complete text of the report see: <www.tweedekamer.nl/organisatie/voorlichting/commissies/eindrapport_integratiebeleid.jsp>.

15 Ayaan Hirsi Ali, in 2005 chosen by *Time Magazine* as one of the world's most influential people, is a Member of Parliament for the Liberal Party in the Netherlands. Originally born in Somalia, she was granted asylum in the Netherlands. She wrote the script for the film *Submission* that was directed by Theo van Gogh. This short film tells stories of the abuse of Muslim women and the violence they encounter under Islam.

16 In his second letter on Van Gogh's murder, dated November 10, 2004, the Minister of Justice writes: "After the murder on Van Gogh a downward trend of violence and counter violence is at stake. Politicians as well as others are being threatened; there is violence against mosques, churches and schools. […] Our society runs the risk of facing an unbridgeable us-them opposition and of polarizing Dutch Muslims and the rest of the population. (TK 2004-2005, 29854, 3: 15).

others'. No sharp boundaries between the European and Islamic world can be drawn any more" (Beck 2004: 7). Certainly some Dutch politicians did not agree with the nuanced thoughts of this German sociologist. For instance, shortly after the killing of Van Gogh politicians proposed resolutions in the House of Representatives among which one for creating a ministry of National Security. One motion proposed to ban foreign television and radio channels that call for violence against non-Muslims. A different resolution focused on the establishment of *imam* schools in the Netherlands instead of granting residence permits to foreign *imams*. Another motion proposed the immediate arrest and deportation of 100 to 200 people identified as potential Muslim terrorists by the National Intelligence Service. Even a vote of censure was proposed against the minister of the Department of the Interior.[17]

Of course, international media also focussed on the killing of Van Gogh. *Migration News*, a highly respectable journal on global migrations and related issues, brought the news as follows:

> Dutch filmmaker Theo van Gogh, who mocked conservative Muslims, was killed in November 2004 by a man the police described as a Muslim extremist, setting off a debate about whether Europe's most liberal society could be fragmenting, with the violence a harbinger of integration debates in other European countries. The government's response has been to promise more money to fight terrorism and stricter immigration laws (*Migration News* 5-1-2005).

It is exactly this explicit linking of anti-terrorism measures with immigration policies that led the European Monitoring Centre on Racism and Xenophobia to point at the growing atmosphere of insecurity and intolerance in the Netherlands, especially if Muslims are presented as an 'internal security threat' (MN 04/01/2002). Mak in his second polemic pointed at the overall presence of 'fear' in the Netherlands in the aftermath of the incidents described above. Fear that according to Mak is sometimes based on real threats, but is increasingly inspired by non-personal, intangible incidents resulting in feelings of insecurity (2005b: 48-52). It is exactly this 'perpetual sense of crisis' that, according to Garland (2001), strongly contributes to a culture of control; something that is also observed by Cornelius et al. (2004) with respect to immigration.

In the context of the incidents described and the way politicians reacted, an atmosphere in which the idea that especially Muslim immigrants in the Netherlands should integrate much more and better could flourish. In order to realize this integration, the Dutch government emphasized that a successful integration could only be accomplished if international migration flows to the Netherlands could be restrictive and controlled. As such these statements in politics pave the

17 All motions were rejected except the one on expelling foreign media that call for hatred and violence.

road to measures that favor immigration control, amongst which those laws that improve border control and could prevent human smuggling. Other elements that contributed to these restrictive measures can be derived from the asylum debate. It is especially during the third phase of exclusion in the 1990s that the number of asylum seekers in the Netherlands sharply increased and gave way to several 'new' debates on 'the Netherlands is full up', asylum seekers as freeloaders and as criminals.

6. Asylum Seekers and Human Smuggling

The increasing influx of asylum seekers, among which a growing number of unaccompanied minors, dominated the political and public debate during the 1990s and prompted Dutch government to some increasingly restrictive asylum policies. Especially during the end of the 1990s the number of applicants rose to around 40,000 yearly. Among policymakers there was a general belief that the Netherlands due to its generous asylum procedures was among the most attractive countries in the European Union. Table 2 witnesses to this increase but also shows the downfall of the number of asylum applicants during the first years of the third millennium. Starting in 2001 this upward trend has retreated to a number below 10,000 applicants in 2004.

Table 2. Asylum applications in the Netherlands 1990-2004 (in absolute numbers)

Year	Number	Year	Number
1990	21,208	1998	45,217
1991	21,615	1999	39,299
1992	20,346	2000	43,895
1993	35,399	2001	32,579
1994	52,576	2002	18,667
1995	29,258	2003	13,402
1996	22,857	2004	9,782
1997	34,443		

Source: IND

Looking at the debate one could get the impression that most contemporary newcomers in the Netherlands can be associated with asylum seekers and that by far the majority of these newly arrived have a non-western background. If we look at the figures and the reasons behind the formal migration movements towards the Netherlands another picture emerges. During the years 1997-2001 over forty per cent of the newly arrived immigrants came within the context of family reunification (21,3 %) and marriage (19,5 %). Almost twenty per cent of the influx during this period could be labeled as labor migration (19,5 %) around thirteen per cent for study or other reasons. Just slightly more than twenty-five

per cent of the newly arrived can be labeled as asylum seeker (26,3 %) (Minderhoud 2004: 13). This means that in the migration policies discussions the 'asylum problems' (and its related topics as human smuggling) is over represented and enlarged.

The arrival of asylum seekers gave rise to several smaller and bigger debates among which the portrayal of asylum seekers as economic refugees and as criminals is an important one. Beyond this, asylum seekers were increasingly associated with the activities of human smugglers as well as traffickers. The settlement of new reception centers always evokes protests from local residents who worry about the prices of their real estate and who fear increasing insecurity and rising crime figures.

During the 1990s the length and characteristics of the asylum application procedure were increasingly criticized. The reception centers were not equipped to deal with asylum seekers living there for years without the permission to work. It was perceived as the 'University for Crime' (*De Volkskrant*, 2 May 1998). In 1999 the prime suspect of cruel homicide on a young female in the northern region of the Netherlands was sought in a nearby reception center for asylum seekers. This 'Vaatstra case' attracted a lot of media attention as local residents suspected an Iraqi asylum seeker as the murderer. Although DNA research proved that this suspect was innocent, local residents still blame the government for not finding the offender. Afterwards, there were several violent incidents with asylum seekers threatened or maltreated by local residents. A year later, plans for opening a new reception center in the same district evoked large protests among the locals. Opponents of the new reception center portrayed the reception center amongst others as 'a hotbed for organized crime as human trafficking and drugs'; a message that was broadly covered by the national media.

A confidential police report entitled *Asylum seekers more criminal?* (Regiopolitie Groningen 1999) made public in 2001 stated that asylum seekers were more frequently arrested for crimes than Dutch citizens. This led the city mayor to the statement that crime rates among asylum seekers were five times as high as among 'ordinary' citizens. Although the report was highly criticized on its methodological merits and classified as 'unreliable' it did fuel a broader discussion as well as scientific research on the criminal involvement of asylum seekers (De Haan and Althoff 2002). Based on their research, these criminologists argue that it is highly excessive to pose the criminal involvement of asylum seekers as a national problem in the context of asylum policies.

The reception centers where asylum seekers stay during their approval for admittance often are portrayed as centers for organized crime. Organized crime in these centers had two faces: human smuggling and trafficking. First, human smuggling organizations supposedly used the asylum centers as cheap hotels for their clientele on transit to the United Kingdom or other countries. Secondly, asylum centers – so the story goes – were used as a recruitment area for traffickers in their search for exploitable (young) females. During the 1990s the media

increasingly associated and equated asylum seekers with economic refugees, who in their search for economic goals and in cooperation with human smugglers even exploit Dutch reception centers for their own benefit. During the last years it turned out that several police investigation on organized human smugglers witnessed that human smugglers and traffickers employed asylum centers in their modus operandi. According to the media reports, smugglers used the reception centers as a transit and 'safe house' before smuggling the 'asylum seekers' to the United Kingdom or Scandinavian countries. Traffickers are frequently reported to recruit (minor) asylum seekers for forced prostitution (see for instance *De Volkskrant,* July 14, 1999).

As already mentioned in the introduction, in governmental documents the importance and responsibility of human smugglers for the nature and size of migration flows, especially for the arrival of asylum seekers in the Netherlands, is stressed (see e.g. INS 1998; IAM 2000, 2002; DNRI 2005). In its preface to the second report on human smuggling in the Netherlands (IAM 2002: 7), the chairman of the Coordinating Consultation on Alien Smuggling refers to the dynamic in the top-ten of most important sending countries, thereby linking this dynamic to the activities of human smugglers. Based especially on figures of the IND, human smuggling organizations were to a large extent held responsible for the increasing number of asylum applicants. According to De Bruin, in 1999, spokesman of the Public Prosecution Service, human smugglers do facilitate the entrance of two thirds of all asylum seekers into the Netherlands. As such Dutch government holds "these criminals" to a large extent responsible for the pressure on the asylum procedure in the Netherlands. According to the same employee of the Public Prosecution Service it is also rather structural and not an accident that human smugglers abuse asylum seekers centers for their activities (ANP July 13, 1999).

The increasing number of applicants, the length of the procedure, the costs involved as well as the debates surrounding the asylum topic during the 1990s, paved the road to more restrictive asylum procedures in the Netherlands, among which the Aliens Act 2000 – adopted in April 2001. This Act was primarily created for reducing the number of asylum applicants and shortening the procedures. Among the major changes to accelerate the procedure were the goal to cut down the procedure to six month and the introduction of a 48 hours decision model that in a very early stage should separate the bogus asylum seekers from the 'real asylum seekers' (cf. Muus 2004: 285).

Among others, Human Rights Watch (HRW) severely criticized the Netherlands for their newly established asylum procedures. The title of their report *Fleeting Refuge. The triumph of efficiency over protection in Dutch Asylum Policy* (2003) expresses the fundamental critique that expeditious procedures at the reception centers led to violation of international human rights norms. HRW also claims that the provisions for asylum seekers do not meet basic international standards such as housing and food. Beyond this HRW is concerned about the

treatment of (un)accompanied young children during the asylum procedure that in their view does not comply with international commitments for the treatment of children (2003: 31-32). Again, the first Minister for Immigration and Integration Nawijn[18] (member of the *List Pim Fortuyn* and former IND director) replied to the critique formulated by HRW by pointing to the relevance of a restrictive migration policy in order to ensure the best possible integration of immigrants residing in the Netherlands. The foundation of Dutch aliens policies is strong integration combined with restrictive entry policies guided by stern and just principles, according to Nawijn (TK 19637-738). The 1990s are not only characterized by (emotional) debates around the asylum procedure, but also by a growing concern for organized crime in the Netherlands.

7. Concentrating on Organized Crime in the Netherlands

According to criminologist Van de Bunt "the general public as well as the politicians [were] seriously concerned about the problem of organized crime and both were in favour of far-reaching measures" (2004: 3). The main object of the attention focused on drugs, and human trafficking and smuggling are only slowly positioned into this focus on organized crime. Around 1990 several studies by scientists, police analysts and journalists were published, presenting a picture of Dutch organized crime that convinced the public and politicians that the Netherlands had more or less a serious organized crime problem that until then was underestimated (Middelburg 1988, Van Duyne et al. 1990, cf. Van de Bunt 2004: 6-7). In 1992 a white paper on organized crime was published advocating a more repressive as well as preventive approach to fight organized crime, thereby explicitly including wider society in this fight. This is in sharp contrast with one of the latest white papers on crime *Towards a safer society* (October 2002) in which 'security' is at the center of interest.[19] Apparently organized crime plays no part

18 On 22 July 2002, Nawijn – former director of the Dutch Immigration and Naturalization Service – was appointed as Minister for Immigration and Integration in the Balkenende I government on the nomination of the List Pim Fortuyn (LPF). The appointment of a minister dealing exclusively with matters of immigration and integration reflects the importance attached to these topics for the new government. Within three months the government resigned and after the installment of Balkenende II in May 2003, sociologist Verdonk was appointed as the successor of Nawijn as Minister for Immigration and Integration. In June 2005, Nawijn – still a Member of Parliament for the LPF – announces closer cooperation on the topics of migration policies and integration with the Belgian Filip Dewinter, leader of the Flemish Interest (Vlaams Belang), the former popular Flemish Block (Vlaams Blok) that was convicted for racism in April 2004.

19 Moreover, 'security' together with integration, health care, and education, make up the key elements in the newly established government in May 2003 ruled by the

in the discussion around security and measures that should increase security, as readers will unsuccessfully search the document for organized crime.

A scandal[20] on the 'controlled delivery' of drugs into the Netherlands by police informants under the guidance of interregional investigation teams in 1993 resulted in a "parliamentary inquiry into the methods used by the police and the Public Prosecutor's Service to investigate organized crime" starting in October 1994 (Van de Bunt 2004). The final report (Parlementaire Enquêtecommissie Opsporingsmethoden 1996) by the committee that was partially written by a team of criminologists presented an accurate picture of the various shapes of organized crime in the Netherlands and how it was embedded in the Netherlands. This commission also paid attention to the use of special investigation methods and the way these methods were supervised by the judicial machinery. The commission criticized the number of judicial bodies and organizations engaged with fighting organized crime without sufficiently exchanging information. A lot of attention was paid to organized crime around the drug business. Human smuggling and human trafficking were dealt with only marginally.

Policies developed during the last decade are repressive and aimed at 'catching criminals' as well as preventive by focusing on measures that try to disturb the various circumstances that facilitate organized crime instead of focusing solely on the perpetrators. Regarding the latter preventive approach this meant amongst other measures trying to tackle money laundering and improving the integrity of public administration.[21] As part of this preventive approach, local governments, citizens, and private enterprises were increasingly held accountable for reducing the opportunities for organized crime. Van Swaaningen (2004) observed that this general trend of responsibilization of non-penal actors is less influential in the Dutch context than it is in the United States or in the UK. Nevertheless, with respect to human smuggling and illegal immigration towards the Netherlands, transportation companies or carriers were made responsible for controlling accurately the travel documents of their passengers at the risk of confronting fines or other penalties (Van de Bunt 2004: 20, cf. Pieters this volume).

The presence of organized crime is often linked with concerns of corruption and collusion of the legal world. Specific studies on organized human smuggling and trafficking conclude that the activities of smugglers in general do not urge for infiltration or corruption (IAM 2001, Staring et al. 2005). Human smugglers, above all, employ methods that utilize existing transportation opportuni-

Christian Democrats (CDA), the Liberal Party (VVD) as well as the List Pim Fortuyn (LPF) (Government Policy Statement, Balkenende I, 2003).

20 This so-called IRT scandal is described by Van de Bunt and Nelen (2001).

21 In 1994 the MOT-Act (Act on the Disclosure of Unusual Transactions) was introduced that obliged financial institutions to report unusual financial transactions.

ties without the knowledge of the carrier or border officers.[22] This means that measures aimed at improving the integrity of (public) administration have little impact on preventing organized human smuggling.

Transnational organized crime in the Netherlands is above all presented as an internal threat to society. As a result, attention was focused on researching present or incoming forms of organized crime. Much less attention was paid to transit oriented organized crime that was only passing through the Netherlands or export oriented organized crime. This preference for 'incoming crime' was also mirrored in the preferences of those dealing with the fight against organized crime. The majority of the police investigations on organized crime focused around the illegal drug business (Van de Bunt 2004: 33). Other lucrative forms of (transnational) organized crime such as fraud, human trafficking and smuggling lacked priority. It is only recently that the Dutch government explicitly calls for more attention to criminal networks active on these fields of crime (Ministerie van Justitie 2001: 33). Beyond this, with the establishment of the National Criminal Investigation Unit in 2002 one of its formulated ambitions is to acquire knowledge on and to intervene in the logistics of organized crime, thereby explicitly referring to the transit character of organized crime in the Netherlands. As already stated, among the seven main areas of attention the National Criminal Investigation Unit is responsible for human smuggling as well as the trafficking in human beings.

At the end of the 1990s political and public attention for organized crime slowly decreases. According to Van de Bunt one of the reasons for this lack of interest lies in the fact that other crimes such as street violence and the issue of 'insecurity' demanded more attention. Another important reason refers to the factual knowledge gathered by scientists on the subject of organized crime. The 'moral panic' regarding organized crime during the early 1990s turned aside for more or less threatening images of organized crime based on 'facts' produced by criminologists and other social scientists (Van de Bunt 2004: 13). In the meantime, a highly developed infrastructure to fight organized crime has been developed in the Netherlands. Human smuggling and human trafficking both have been assigned as core target areas within these law enforcement agencies. Although there is on-going interest in the media and with the public for

22 If corruption is mentioned in the context of human smuggling it is mostly positioned in the immigrants' countries of origin. There are, however, several incidents (especially at Schiphol Airport) where employees are involved in human smuggling. Recently, the Kmar published figures of the number of apprehended employees of Schiphol Airport for human smuggling. During the last five years 675 Schiphol employees – among which some members of the Kmar themselves – were apprehended for supporting illegal immigrants entering the Netherlands (*NRC Handelsblad* January 20. 2005).

the increasing number of assassinations of 'well-known criminals',[23] attention shifts unarguable towards a new face of 'insecurity': Muslim fundamentalism and (inter)national Islamic terrorism. Attention that as we shall argue in the next section also had its impacts and effects on controlling irregular migration.

8. Terrorism and Human Smuggling

As a reaction to the terrorist attacks of Osama Bin Laden's Al Qaeda on US targets on September 11, 2001, Dutch government formulated within two month a *Framework for action on terrorism control and security*. In summary, up until June 2003 six 'progress reports' were published on how Dutch government plans to cope and actually deals with the threat of international terrorism. The action programs focus around the prevention of terrorism; protection of public or social order; and the investigation and prosecution of terrorist crimes. Among the main points of action, are those dealing with or at least affecting human smuggling and irregular migration movements, as for instance, the increase of control at the Dutch external borders (airports and harbors), and the exploration of the possibilities of biometrical identification. Besides these more indirect measures, one of the action points is targeted directly on controlling human smuggling. Several measures are proposed, summarized by an enlargement of the broadly composed capacity of the special task force Unit Human Smuggling (UMS). Three elements are put forward in this first *Framework for action on terrorism control and security*. First, to improve the information position on the interrelatedness of human smuggling and terrorism by, secondly, increasing the capacity to analyze this information, and thirdly, by increasing the opportunities to exchange this information between all organizations involved (2001: 12). In the following frameworks for action these thoughts are operationalized by increasing the capacity of the Unit Human Smuggling, the IAM, the Public Prosecution Service, the taskforces of Transnational Crime (GOC), as well as the Kmar (2003: 11). The annual overall budget, starting 2003, for these different capacity enlargements is almost 6 million Euros (ibid: 12).

Although these measures within the *Framework for action on terrorism control and security* are all primarily aimed at preventing and hindering terrorism, they all have a direct and immediate impact on investigating and prosecuting (organized) human smugglers irrespective of their connectedness with terrorism. In their second report on human smuggling, the IAM (2002), concludes that so-called 'Islamic terrorism' is closely connected to illegal immigration and as such the IAM writes of a 'security risk'. In the perspective of the IAM, one should seriously take account of the fact that terrorist groups employ false documents in order to achieve their goals (2002: 131). Although members of these

23 For an overview of these assassinations until May 2004, see *De Volkskrant*, May 18, 2004: 11.

terrorist networks do not utilize commercial human smugglers for their transport between different countries, they do rely on the practice of smuggling for their attacks (*ibid*.: 136-38). In August 2002, the first twelve suspects of 'Islamic terrorism' were apprehended and accused of supporting the al-Qaeda network materially, financially, as well as logistically (TK 27925/66: 4). In the end, however, all suspects were cleared of the accusations due to lack of evidence as well as unauthorized status of the court evidence. There is no further evidence, at least in the Dutch context that underscores the relationship between organized human smuggling and terrorism, be it Islamic or otherwise. In their latest 'state of the art', the IAM cautiously concludes that terrorists, in order to finance their activities, rely, among others, on the gains out of human smuggling (DNRI 2005). Clear evidence or convincing arguments that could underscore this link between terrorism and human smuggling can, however, not be presented. The central point is that by focusing on terrorism, human smuggling is not only dealt with more intensively in terms of control, but human smuggling is also increasingly connected to and associated with the fear for Islam and Islamic fundamentalism.

9. Concluding Remarks

Although 'trafficking in human beings' and 'human smuggling' are divergent crimes that refer to different articles in the Dutch Criminal Code, they both became strongly attached to the 'world' of (transnational) organized crime. In addition, both human trafficking and especially human smuggling became crimes related to issues of international migration and controlling immigration. Whereas trafficking in human beings is foremost defined as a human rights issue, human smuggling is hardly ever analyzed in terms of human rights. Consequently, the government speaks of victims in the case of people being trafficked and increasingly of offenders for those being smuggled. Whereas the victims of trafficking 'enjoy' some rights, the smuggled immigrants face the danger of being penalized.

In this contribution, several global developments and incidents within the Netherlands have been described that have contributed to a climate in which human smuggling has evolved from a non-problematic fact or activity to a serious criminal offence that deregulates Dutch immigration and integration policies and ultimately threatens national security.

Among these processes of globalization, the focus in this contribution was on the flows of people, transnational organized crime and international terrorism. As in most other western countries, migration policies in the Netherlands are increasingly characterized in terms of migration control. For the Netherlands this meant a shift from reactive and pragmatic policies towards proactive policies. Dutch government increasingly tries to control global migration flows by building up administrative walls. Simultaneously migration policies focus on the

integration of settled immigrants at the expense of marginalizing and excluding illegal immigrants. During this policy transformation, immigrants lacking valid residence papers were reclassified from spontaneous labor immigrants during the 1960s to illegal immigrants as undesired freeloaders or even criminals in the third millennium. This reclassification was fueled by three processes: a changing attitude towards long-term unemployed in the Netherlands; the notion that the integration of settled immigrants can only be achieved by restricting the entrance of newcomers; and by the growing number of asylum seekers during the 1990s. In debates around the Dutch asylum procedure, asylum seekers were increasingly portrayed as economic fortune seekers and criminals benefiting from a generous Dutch procedure.

The political, judicial, as well as scientific attention for transnational organized crime as human smuggling and trafficking in human beings in the Netherlands during the 1990s resulted in a highly developed infrastructure of organizations and law enforcement agencies dealing with organized crime and later on with the threat of international terrorism. Within this infrastructure human smuggling and the trafficking in human smuggling was announced as one of the top priorities, but to some extend still remained a paper tiger. Beyond this, the fragmented structure of the different agencies dealing with these expressions of organized crime, led to poor cooperation and hindered effective investigations. Transnational organized crime, and later on international Islamic terrorism was linked with human smuggling and presented as an internal threat to society.

Appointing human smuggling, as one of the priorities must be perceived, above all, as a politically enforced priority and not as a priority born out of human smuggling itself. Directed by European Union changes and measures as well as harrowing incidents such as the Dover case, human smuggling became criminalized and was placed high on the political agenda of the Netherlands. The perception of human smuggling on the work floor – especially in comparison with trafficking in human beings – is, as with many enforced priorities, much less severe. At the same time, being appointed as a priority, it is difficult for law enforcement agencies to achieve the targeted number of cases.

These, to some extent related, global processes and local incidents created a feeling of fear and insecurity in the Netherlands in which more restrictive migration policies and changes in criminal law could be advocated and were implemented. These developments also paved the way for further adaptations of the law on human smuggling and trafficking in human beings, especially by the broadening of certain definitions. One of the most recent changes is the abandonment of the element of 'profit' in the law. Instead of fighting criminal human smuggling organizations, these adaptations of article 197a CC tries to address above all the decrease of illegal or irregular immigration into the Netherlands. Consequently immigrants who offer support to, for instance, family members in their home country to settle irregularly in the Netherlands can be accused of

human smuggling. Although the amendment of the law includes a humanitarian clause, one can only wonder about the possible criteria to successfully employ this section. This amendment of the law on human smuggling could criminalize a substantial part of the immigrant population.

It is difficult to continue perceiving migration policies of Dutch government as reactive. Especially during the last decade the Netherlands actively tries to control the integration of its immigrants by immigration, criminal law, as well as administrative law. The paradox of these alterations in the law on human smuggling is that they do not change the conditions in the sending countries for potential immigrants that stimulate or urge them to migrate in the first place. External push factors, often too easily put outside the sphere of influence of Dutch or other Western European countries, will continue to motivate potential immigrants to seek their fortune elsewhere. Further entry restrictions or criminalization of supportive, altruistically motivated networks will only further marginalize these migration movements and increase the market for organized migration crime.

The *credo* of the Dutch government is that a successful integration of immigrants (read immigrants with a non-western background) can only be achieved with restrictive migration policies.[24] In line with this 'justification', only by reducing the number of newcomers, and by excluding newly arrived migrants from social services of the Netherlands, can welfare provisions be continued. In contemporary Dutch society this means first of all an assimilative completion of the concept of integration for immigrants, and, secondly, a refined and improved internal as well as external system of exclusion. The amendments of the human smuggling article fit curiously well in these patterns of exclusion.

References

ANP (Algemeen Nederlands Persbureau) (1999), Mensensmokkelaars brengen tweederde deel asielzoekers binnen (binnenland), July 13, 1999.

Aronowitz, Alexis (2001), Smuggling and trafficking in human beings: the phenomenon, the markets that drive it and the organizations that promote it, *European Journal of Criminal Policy and Research* 9, pp. 163-195.

BBC News 2000, The Dover Tragedy: Europe reflects, 20 June, 2000. <news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/798603.stm>.

Beck, Ulrich (2004), 'We moeten elkaar vergiffenis schenken', *NRC Handelsblad*, 22 november 2004.

24 As an example I could point at the most recent integration proposal (dated February 21, 2004) by the Dutch liberal party VVD (party in office) entitled "Policy note integration of non-western migrants in the Netherlands". Already in the first section of this extended statement the liberal party unfolds its three main starting-points: limit immigration, encourage integration, and fight discrimination <http://www.vvd.nl>.

Boerman, F. (2000), *Een analyse van landelijke gegevens van het openbaar ministerie met betrekking tot mensenhandel, bordeelhouderij, mensensmokkel en mensenroof*, conceptrapportage.

Bunt, H. van de (2004), Organised crime policies in the Netherlands, in: C. Fijnaut & L. Paoli (eds.), *Organised crime in Europe. Concepts, patterns and control policies in the European Union and beyond*, Dordrecht: Springer, pp. 677-716.

Cornelius, W. (2004), Controlling immigration: the limits of governmental intervention, in: W.A. Cornelius, T. Tsuda, P. Martin & J. Hollifield (eds.), *Controlling immigration. A global perspective*, Stanford: Stanford University Press, pp. 3-48 (second edition).

Dijk, R. van, J.A. Nijboer & J. Vocks (2001), Sociale en culturele achtergronden van vrouwenhandel, *Tijdschrift voor Criminologie* 43, pp. 390-400.

DNRI (2005), *Mensensmokkel in beeld, 2002-2003*, Zoetermeer: KLPD-DNRI.

Duyne, P., R. van Kouwenberg & G. Romeijn (1990), *Misdaadondernemingen: ondernemende misdadigers in Nederland*, Deventer: Gouda Quint.

DVB (2004), *Illegalennota. Aanvullende maatregelen voor het tegengaan van illegaliteit en de aanpak van uitbuiters van illegalen in Nederland*, 5282929/04, 23 april 2004.

Engbersen, G. & J. van der Leun (2001), The social construction of illegality and criminality, *European Journal of Criminal Policy and Research* 9, pp. 51-70.

Engbersen, G. (1999), De illegale vreemdeling, in: J. Burgers & G. Engbersen (red.), *De Ongekende Stad 1. Illegale vreemdelingen in Rotterdam*, Amsterdam, Boom: pp. 11-29.

Engbersen, G., R. Staring, J. van der Leun, J. den Boom, P. van der Heijden & M. Cruijff (2002), *Illegale vreemdelingen in Nederland. Omvang, overkomst, verblijf en uitzetting*, Rotterdam, RISBO.

Entzinger, H. (2002), *Voorbij de multiculturele samenleving*, Assen: Van Gorcum.

Faber, W. (2002), *De macht over het stuur. Onderzoek besturingssysteem aanpak mensensmokkel*, Oss: Faber Organisatievernieuwing.

Feenstra, C. (1999), Trends in mensensmokkel, in: W. de Bruijn, H. de Jong, H. Pauwels & I. Voorhoeve (red.), *Mensensmokkel naar Nederland. Een bundeling van lezingen over mensensmokkel in relatie tot de bestrijding van de (georganiseerde) criminaliteit*, 's Gravenhage: Elsevier: pp. 9-20.

Garland, D. (2001), *The culture of control. Crime and social order in contemporary society*, Oxford: Oxford University Press.

Ghorashi, H. (2004), Ayaan Hirschi Ali: daring or dogmatic? Debates on multiculturalism and emancipation in the Netherlands, *Focaal – European Journal of Anthropology* 42, pp. 163-69.

Haan, W. de & M. Althoff (2002), *Vreemd en verdacht. Een verkennend onderzoek naar criminaliteit in en om asielzoekerscentra*, Groningen: Rijks Universiteit Groningen, sectie Criminologie.

Harris, N. (1995), *The new untouchables. Immigration and the new world worker*, London: Penguin Books.

Hesseling, R. & A. Taselaar (2001), Asielmigratie en mensensmokkel, *Tijdschrift voor Criminologie* 43(4), pp. 340-349.

Human Rights Watch (2003), *Fleeting refuge: the triumph of efficiency over protection in Dutch asylum policy*, New York: Human Rights Watch.

IAM (Informatie en Analysecentrum Mensensmokkel en Landelijk Parket Rotterdam) (2002), *Mensensmokkel in beeld 2000-2001*, Zeist: Uitgeverij Kerckebosch BV.

IAM (2000), *Dreigingsbeeld 2000. Inzicht in aard en omvang van mensensmokkel in relatie tot Nederland*, Zoetermeer: Informatie- en Analyse centrum Mensen-smokkel.

IND (Immigration and Naturalization Service) (1998) *Keten in kaart: trends en ontwikkelingen in de vreemdelingenketen 1998*, Den Haag: Ministerie van Jusititie, IND.

IND (no date) *Asielinstroom in 2001*, <www.immigratiedienst.nl>.

IND (no date), *Asielinstroom in 2002*, <www.immigratiedienst.nl>.

IND (no date), *Historie_asiel_instroom_1995-2000.pdf*,<www.immigratiedienst.nl>.

Kalb, Don (2000) Localizing flows: power, paths, institutions, and networks, in: D. Kalb et al. (eds), *The ends of globalization. Bringing society back in*, Lanham: Rowman and Littlefield, pp. 1-29.

Kleemans, E.R., E.A. van den Berg, & H.G. van de Bunt (1998), *Georganiseerde criminaliteit in Nederland. Rapportage op basis van de WODC-monitor*, Den Haag: Ministerie van Jusitite, WODC.

Kleemans, E.R., M. Brienen & H.G. van de Bunt (2002), *Georganiseerde criminaliteit in Nederland. Tweede rapportage op basis van de WODC-monitor*, Den Haag/Meppel: WODC, BOOM.

Koser, K. (2001) The smuggling of asylum seekers into Western Europe: contradictions, conundrums, and dilemmas, in: David Kyle & Rey Koslowski (eds.), *Global human smuggling. Comparative perspectives*, Baltimore, London: The Johns Hopkins University Press, pp. 58-73.

Leun, J. van der (2003), *Looking for loopholes. Processes of incorporation of illegal immigrants in the Netherlands*, Amsterdam: Amsterdam University Press.

Mak, G. (2005a), *Gedoemd tot kwetsbaarheid*, Amsterdam: Uitgeverij Atlas.

Mak, G. (2005b) *Nagekomen flessenpost*, Amsterdam: Uitgeverij Atlas.

Middelburg, B. (1988) *De mafia in Amsterdam*, Amsterdam: De Arbeiderspers.

Minderhoud, P. (2004), Het immigratiebeleid, in: Han Entzinger & Jelle van der Meer (eds.), *Grenzeloze solidariteit: naar een migratiebestendige verzorgingstaat*, Amsterdam: De Balie.

Ministerie van Justitie en Ministerie van Binnenlandse Zaken en Koninksijksrelaties (2001), *Nota criminaliteitsbeheersing. Investeren in een zichtbare overheid,* Den Haag: Ministerie van Justitie.

Muus, P. (2004) The Netherlands: a pragmatic approach to economic needs and humanitarian considerations, in: W.A. Cornelius, T. Tsuda, P. Martin & J. Hollifield (eds.), *Controlling immigration. A global perspective*, Stanford: Stanford University Press, pp. 263-88 (second edition).

Nationaal Actieplan Mensenhandel (2004), *Aanvullende maatregelen van het kabinet in het kader van de aanpak van mensenhandel in Nederland*, Tweede Kamer 28638, 13.

Nationaal Rapporteur Mensenhandel (2002) *Mensenhandel – Eerste rapportage van de Nationaal Rapporteur*, Den Haag: Bureau NRM.

Nationaal Rapporteur Mensenhandel (2003), *Mensenhandel – Aanvullende kwantitatieve gegevens. Tweede rapportage van de Nationaal Rapporteur*, Den Haag: Bureau NRM.

Nationaal Rapporteur Mensenhandel (2004), *Mensenhandel – Derde rapportage van de Nationaal Rapporteur*, Den Haag: Bureau NRM.

NRC Handelsblad (2005), Schiphol: 675 man vast wegens mensensmokkel, *NRC Handelsblad*, January 20, 2005.

Paoli, L. & C. Fijnaut 2004. General introduction, in: C. Fijnaut & L. Paoli (eds.), *Organised crime in Europe. Concepts, patterns and control policies in the European Union and beyond*, Dordrecht: Spinger, pp. 1-18.

Parlementaire Enquetecommissie Opsporingsmethoden (1996), *Inzake opsporing*, Den Haag: SDU.

Regiopolitie Groningen (1999), *Asielzoekers crimineler?,* Groningen. Accessible at<http://www.acp.nl/nieuws/archief/kort101.htm>.

Salt, J. & J. Hogarth (2000), Part I. Migrant trafficking and human smuggling in Europe: A review of the evidence. *Migrant trafficking and human smuggling in Europe. A review of the evidence with case studies from Hungary, Poland and Ukraine*, Geneva: International Organization for Migration.

Scheffer, Paul (2000), Het multiculturele drama, *NRC Handelsblad*, 29 januari 2000, p. 6.

SCP (2004), Minderheden en integratie, in: *In het zicht van de toekomst. Sociaal en cultureel rapport 2004*, Den Haag: Sociaal en Cultureel Planbureau, pp. 131-177.

Smit, M. (2001) Mensenhandel: een moderne vorm van slavernij, *Tijdschrift voor Criminologie* 43, pp. 378-89.

Snel, E., G. Engbersen & J. Vrooman (2000) Arm Nederland: verandering en bestendiging van armoede, in: G. Engbersen, J. Vrooman & E. Snel (red.), *Balans van het armoedebeleid. Vijfde jaarraport armoede en sociale uitsluiting*, Amsterdam: Amsterdam University Press: pp. 13-52.

Staring, R. (1998) 'Scenes from a fake-marriage'. Notes on the flip-side of embeddedness, in: K. Koser & H. Lutz (eds.), *New migration in Europe. Social constructions and social realities*, London: Macmillan, pp. 224-241.

Staring, R. (2000) Flows of people: globalization, migration, and transnational communities, in: D. Kalb et al., *The ends of globalization. Bringing society back in*, Lanham: Rowman and Littlefield, pp. 203-215.

Staring, R. (2001), *Reizen onder regie. Het migratieproces van illegale Turken in Nederland*, Amsterdam, Het Spinhuis. (Guided journeys. The migration process of illegal Turks in the Netherlands)

Staring, R. (2004), Facilitating the Arrival of Illegal Immigrants in the Netherlands: Irregular Chain Migration versus Smuggling Chains, *Journal of International Migration and Integration*, 5(3), pp. 273-294.

Staring, R., G. Engbersen, H. Moerland et al. (2005), *De sociale organisatie van mensensmokkel*, Uitgeverij Kerckebosch.

Swaaningen, R. van (2004), Veiligheid in Nederland en Europa. Een sociologische beschouwing aan de hand van David Garland, *Justitiële Verkenningen*, 30(4): pp. 9-23.

Tijdelijke Commissie Onderzoek Integratiebeleid (2004) *Bruggen bouwen. Eindrapport*, Den Haag: SDU Uitgevers.

Tweede Kamer (2003), *Terugkeernota. Maatregelen voor een effectievere uitvoering van het terugkeerbeleid*, vergaderjaar 2003-2004, 29344, nr. 1, 2003.

Tweede Kamer, vergaderjaar 1998-1999, 26 345, nr. 1

Tweede Kamer, vergaderjaar 2001-2002, 27 925, nr. 21.

Tweede Kamer, vergaderjaar 2001-2002, 27 925, nr. 66.

Tweede Kamer, vergaderjaar 2002-2003, 27 925, nr. 96.

Tweede Kamer, vergaderjaar 2003-2004, 29 203, nr. 2 (*Rapportage Integratiebeleid Etnische Minderheden 2003*).

Tweede Kamer, vergaderjaar 2003-2004, 29 291, nr. 1 (*Uitvoering van internationale regelgeving ter bestrijding van mensensmokkel en mensenhandel*).

UNHCR (2004), *Asylum Levels and Trends: Europe and non-European Industrialized Countries, 2003. A comparative overview of asylum applications submitted in 44 European and 6 non-European countries in 2003 and before*, 24 February 2004, <http://www.unhcr.ch>.

United Nations (2000), Protocol against the smuggling of migrants by land, sea and air, supplementing the united nations convention against transnational organized crime. <http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf>.

De Volkskrant (2004), Afrekeningen in Amsterdam en omstreken, *de Volkskrant*, 18 Mei 2004, sectie Binnenland, p. 11.

Vroomans, M. (2003), Voor een effectief bestrijdingsbeleid is ketenaanpak vereist, *Opportuun, Tijdschrift voor het Openbaar Ministerie*, vol. 9, juni 2003.

C. Gortázar Rotaeche, E. García Coso and A. Obregón García

I. TRAFFICKING IN AND SMUGGLING OF HUMAN BEINGS: THE SPANISH APPROACH*

1. Presentation

In this chapter, we will study Spanish legislation and practice as regards trafficking in and smuggling of human beings. An examination will first be made of the treatment given to such conduct by administrative law, mainly through the Aliens Act, as well as the regulations included in Spanish criminal law.

Our objective, as shared by the rest of the co-authors of this work, consists of contributing to the combined analysis of the present situation of European comparative law. That is to say, the collective work must clarify to what extent the legislations of the Member States of the EU concerning trafficking in and smuggling of human beings coincide and where they differ from each other, even openly.

Nevertheless, undoubtedly the analysis of the internal legislation, which in our case is obviously only Spanish legislation, ultimately endeavours to clarify the numerous unknown factors which currently exist with regard to the extent of the success of the harmonisation process which the EU has begun. This process intends to achieve improved and more effective prosecution of trafficking in and smuggling of human beings, which are the most worrying aspects of inevitable migratory movements towards the industrialised countries in general and the Member States of the EU in particular.

Finally, we must be aware that this combined work will, at best, only be a starting point of the important sociological, judicial and political debate required by the common fight against trafficking in human beings.

An example which indicates the magnitude of the enterprise to be addressed is the recent enlargement of the EU to include 10 new Member States and the

* Part I is written by C. Górtazar Rotaeche, Faculty of Law, Universidad Pontificia Comillas of Madrid.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *271-324.*
 ISBN 90 04 15064 1.

further enlargement being prepared, which present serious challenges to the harmonisation process for the EU combat against trafficking and smuggling of human beings. It is easy to suppose that the traffickers will use this "new part of the common EU border" in order to perpetrate their offences.

2. Where Are We Going? Trafficking in and Smuggling of Human Beings in The Spanish Aliens Act and Criminal Code: Main Highlights

Before beginning the description of Spanish legislation, the harmonisation policy of the EU institutions which is still only at the draft stage should be mentioned. A presentation of the present European legislation or the legislation in the making on this matter is beyond the scope of this chapter. Nevertheless, a brief outline of the current situation will be useful when we analyse the latest reforms of the administrative and criminal legislation in Spain, and so it will be easy to verify to what extent these modifications are in conformity with the guidelines proposed by the European documents which tend towards harmonisation.

It is likely that we will have the opportunity to observe how a substantial part of these legislative reforms in Spain have been carried out hastily. At times, they lack a sufficiently coherent technique and there is overlap and incongruence. Thus, the legislation could undergo further modifications in the short term. We hope to be able to contribute to making these possible changes the result of calm, logical reflection which is compatible with the objectives to be achieved.

As is already known, the main document on the European harmonisation process at the present time is the *Council Framework Decision of 19 July 2002 on combating trafficking in human beings*.[1] Its article 1,1 provides a common definition of trafficking in human beings[2] and its main points should be stressed:

---

1 (2002/629/JHA), Offical Journal of the European Communities (OJEC), 1.8.2002. L 203/1. Hereinafter, 2002 Framework Decision.

2 "Each Member State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:
a) use is made of coercion, force or threat, including abduction, or
b) use is made of deceit or fraud, or
c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
d) payments or benefits are given or received to achieve the consent of a person having control over another person
for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or

1. A number of activities are described, including recruitment, transportation, reception, etc., each and every one of which constitute *trafficking*;
2. In addition, these activities have to be carried out using threats or coercion, fraud or deceit, abuse of authority, or through charging money in order to obtain the consent of the person who may have control over the person who will be the victim of the trafficking;
3. Furthermore, it is specified that the above activities must be carried out with the intention of exploiting the person as regards his labour and/or sexually.

Another article of the 2002 *Framework Decision* to be taken into account in our comparative analysis is 3,2. This article establishes that the maximum punishment involving privation of liberty cannot be less than 8 years imprisonment for those cases which involve certain aggravating circumstances:[3] the use of violence or causing serious injuries, danger to the life of the victim, cases involving victims who are especially vulnerable (minors) on condition that the trafficking is carried out within the criminal organisation. Apart from these cases, the punishment can be less.

The most significant Spanish legislation concerning combating *trafficking and smuggling in human beings* is article 318 bis of the Criminal Code.[4]

---

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

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

4 This article arose from the the Second Final Provision of Law 4/2000 of January 11 on the Rights and Freedoms of Aliens in Spain and their Social Integration (2000 Aliens Act), which includes a new Title XV bis in the Criminal Code on "*offences against the rights of alien citizens*", and article 318 bis has been inserted into this Title.

In the third section of this chapter, we will examine and make a detailed commentary of this article and the extent to which it approximates to articles 1 and 3,2 of the 2002 *Framework Decision*. Besides article 318 bis of the Criminal Code, which is a consequence of the final provision of the 2000 Aliens Act, the Spanish Criminal Code already included the criminal conduct involved in trafficking with a view to exploitation at work, in article 313, and with regard to sexual exploitation in article 188,2.[5]

The Spanish legislation on aliens[6] describes the following cases of smuggling as very serious infringements if they do not constitute offences:

> procure, promote or facilitate the smuggling of persons in transit through Spain or with Spain as destination or their permanence in Spain with a view to making profit, individually or as part of an organisation, on condition that the act does not constitute an offence.[7]

These activities are sanctioned by the Aliens Act with a fine of between € 6,001 to € 60,000, and, instead of the fine, expulsion from the country may be applied if the perpetrator is an alien. It should be taken into account that, in Spain, *smuggling* is only prosecuted when carried out with a view to making profit, and aid given to undocumented immigrants for humanitarian reasons is not included in the infringement described.

Besides the 2002 *Framework Decision*, there is another document of much interest to our comparative study on the current Spanish legislation and the future common regulation of the EU on the *trafficking in and smuggling of human beings.* This is the *Directive on Short-Term Residence Permits*.[8]

This Directive provides that the Member States must grant short-term renewable permits to the victims who decide to cooperate with the authorities in order to unmask the traffickers. The period of the permit is not imposed. The permits can also be granted to the persons who are victims of smuggling, but there is no obligation to do so.

As on other occasions, the initial Draft of the Directive was reduced by the reluctance of certain States to accept some of the clauses. Thus, with regard to the obligation the States have to permit the victims access the employment

5 *Vid infra*, section III on *Main Issues on Spanish Criminal Law and Practice on Trafficking in and Smuggling of Human Beings.*

6 Organic Law 4/2000 of January 11 on the Rights and Freedoms of Aliens in Spain and their Social integration modified by Organic Law 8/2000 of December 22 and by Organic Law 14/2003 of November 20 (Integrated Text). Hereinafter, *Aliens Act* or *Spanish Aliens Act.*

7 Article 54,1 (b) of the 2003 *Aliens Act*.

8 COM (2002) 71 final, 11, 02, 2002, adopted on 29 April 2004: Directive 2004/81, 2004 OJ L261.

market, the current draft only mentions that the States "can" authorise this access. The Directive also proposes that the States grant the victims a period of reflection during which they will take the decision whether or not to cooperate with the authorities. The first proposal was that this period should last for 30 days, but in the final version there is no mention of a time period.

Moreover, the residence permit ends when a judicial decision finalises the process and the general law on aliens is applied to the victim. In our opinion, it is clear that the intention of the legislator is not grounded so much on the protection of the victim, but on his collaboration in the process.

As regards Spain and the permits for the alien victims of trafficking, article 59 of the Aliens Act provides that:

> The alien who has crossed the Spanish border and has not complied with the steps laid down for this purpose or has not complied with his obligation to declare his entry and is in Spain irregularly or is working without a work permit, without documentation or with irregular documentation, due to being a victim or a witness of an act involving the smuggling of labour or exploitation in prostitution by abusing a situation of need, can remain exempt from administrative liability and will not be expelled if he reports the perpetrators of or those cooperating in this smuggling to the competent authorities or cooperates and collaborates with the police authorities with competence for aliens by providing essential data or possibly testifying in the cases against these perpetrators.
>
> The aliens who are exempt from administrative liability can choose to be returned to the countries they came from or to stay and reside in Spain with a work permit and facilities to ensure their social integration in accordance with what is stipulated in this law.

The measures against *trafficking and smuggling* are a serious sticking point for the EU harmonisation process for combating irregular immigration. However, this is not the only one. There are other legislative provisions of the EU which are intended to unify legislation of the Member States as regards other questions. These are measures which the Community institutions consider to be essential in order to reduce the irregular migratory movements towards Europe.

One of these is the establishment of responsibilities and the possible serious sanctions for transport companies which transfer and bring immigrants in irregular situations into the Member States of the EU.[9] Further, the legislation against irregular immigration also sanctions the entrepreneurs who hire immigrants who are in irregular situations.

Thus, we consider that the study of the measures adopted in Spain concerning the prosecution of *trafficking and smuggling* must be placed in relationship

9 Directive 2001/51/EC.

to the other European provisions, many of which have already been transposed to internal legislation and which declare the transport companies responsible when they do not prevent irregular immigrants accessing the territories of the Member States and the employers responsible when they hire undocumented persons, punishing both the transport companies and the employers.

In this regard, article 66 of the *Spanish Aliens Act* includes a meticulous list of the obligations the transporters have as regards notifying the Spanish authorities of the persons transported, checking the validity and expiry dates of passports, travel permits, etc., as well as taking responsibility for and paying the cost of the return of the aliens transported who are refused entry to Spanish territory due to defects in the documentation.

Article 54, 2 of the *Aliens Act* states that failure to comply with the obligations laid down for the transporters in article 66 are very serious infringements. As regards the sanctions, article 55, 1 (c) of the Aliens Act provides that the fine will be between € 3,000 to € 6,000 for each alien transferred irregularly, or a lump sum of € 500,000 regardless of the number of passengers transported. Article 61, 2 of the Aliens Act stipulates that:

> In the sanctioning proceedings concerning the commission of infringements by transporters if they infringe the obligation to take responsibility for the alien transported illegally, the following resolutions may be adopted: to suspend its activities, to provide sureties, guarantees or the impounding of the means of transport used.

With regard to the sanctions on the employers when they hire aliens who are in irregular situations, article 54,1 (d) of the Aliens Act classifies the following as a very serious infringement:

> The hiring of alien workers who have not previously obtained the relevant work permits, and each of the alien workers employed will involve an infringement.

The corresponding sanction is a fine of € 6,001 to € 60,000, if the person committing the infringement is an alien, he may be expelled from the country instead of being fined. Moreover, article 55,6 of the Aliens Act stipulates that the governmental authority can decide to close the establishment or the premises for between six months and five years without prejudice to the corresponding sanction.

3. What is the Good protected by the European, Spanish Legislation against Trafficking in Human Beings? Is the Good Protected by the Legislation against the Smuggling of Human Beings Different?

Trafficking in human beings undoubtedly constitutes an offence against the dignity and the freedom of persons as the objective of this trafficking is their sexual or labour exploitation. The smuggling of human beings consists of the provision of the cooperation required for an immigrant to irregularly access the territory of a state. From the perspective of the EU, *smuggling* may take place even when there is no financial profit, which would make it possible to sanction "altruistic" collaboration in the irregular entry of an immigrant. Moreover, *smuggling* necessarily involves crossing a border while the *trafficking* of a person to be exploited sexually or at work could take place simply at domestic level.

Therefore, the response to the question which are the goods protected by the legislation which combats *trafficking and smuggling* in Europe seems to be simple. The legislation which prosecutes *trafficking* should clearly be grounded on the defence of the human rights of the person. In contrast, the legislation against *smuggling* is logically based on the protection of an important State interest, which is the prevention of irregular immigration.

However, Spain is precisely one of the Member States of the EU where it is more legitimate to defend the consideration of the persons who undergo *smuggling* as victims. The geographical situation of Spain means that it is especially prone to the attempted irregular entry into Spanish territory across the Straits of Gibraltar. In addition, the waters which separate the coast of Africa from the Canary Islands become tragic passages to death. Thus, there is no doubt that that, on many occasions, *smuggling* infringes fundamental human rights and the persons who try to emigrate through these "services" are or may become true victims. This does not prevent them being sanctioned for infringing the legislation on aliens as irregular immigrants.[10]

Further, as has been pointed out in other chapters of this work, the activities of trafficking and smuggling are not always easy to differentiate. For example, occasionally the price the immigrant must pay to enter irregularly through the services of a *smuggler* is so high that the immigrant is subsequently exploited sexually or at work in order to pay off the debt. A logical consequence of this is that Spanish legislation against *trafficking* and *smuggling* should be grounded to a large extent on fighting tooth and nail in defence of the dignity and freedom of the human being as universal, indivisible and inviolable fundamental rights.

10 The *Spanish Aliens Act* includes the fact that an alien is on Spanish territory in an irregular situation or is working in Spain without a work permit as a serious administrative infringement subject to a fine of from € 301 to € 6,000, a fine which could be replaced by expulsion from Spanish territory.

However, the study of the Spanish legislation in this regard, in particular the latest reforms of the Criminal Code, could lead us to a different hypothesis which, in our opinion, are ill-founded as the Spanish legislator gives greater weight to the reasons related to the defence of the interests of the State,[11] even placing these above the protection of the rights of the person. It is possible that Spanish legislation, which is supposed to follow the guidelines adopted by the EU with regard to this question, is inadequate. This cannot be presented as an excuse, especially when the European Union must be constructed based on the scrupulous respect for fundamental human rights.

11 *Vid infra* section III of this Chapter.

II. MAIN ISSUES ON SPANISH ALIEN LAW AND PRACTICE CONCERNING TRAFFICKING AND SMUGGLING OF HUMAN BEINGS*

1. Introduction

The aim of this section is to analyse how Spanish administrative legislation has been drafted and adapted to the fight against clandestine immigration and the traffic of human beings. Spain and its European partners agreed to contribute through legislation and the operations of their police forces to combating this criminal activity in the European area. In this regard, we explain Spanish legislation and the resources available in Spain to limit illegal immigration as an activity related to organised crime allegedly due to the substantial financial earnings involved and, until recently, the short prison sentences. We will begin with illegal immigration[12] as regards its two aspects of trafficking in and smuggling of human beings.[13] These are different legal concepts but may be complementary or successive activities involving the same case.

As mentioned, in Spain, both these concepts involve dual legislation. Depending on the cases, this duality results in the application of the most important administrative law on aliens, the Aliens Act 4/2000 on the Rights and Liberties of Aliens in Spain and their Social Integration[14] or the priority application of the criminal legislation included in the Spanish Criminal Code. Both the

---

* Part II is written by E. García Coso, Faculty of Law, University Pontificia Comillas, Madrid.

12 The Europol definition of organised illegal migration according to its Convention implementing the Schengen Agreement of 19.6.1990, is "*activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the Member States of the European Union, contrary to the rules and conditions applicable in the Member States*".

13 The UN established the differences between trafficking and smuggling in its two Protocols of UN Convention against Transnational Organized Crime. In some aspects, trafficking in persons resembles the smuggling of migrants. However, the smuggling, while often undertaken in dangerous of degrading conditions, involves migrants who have consented to the smuggling. On the other hand, trafficking victims have never consented or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of the traffickers. Another major difference is that smuggling ends with the arrival of the migrants at their destination, whereas trafficking involves the ongoing exploitation of the victims in some way in order to generate illicit profit for the traffickers. Finally, smuggling is always transnational, whereas trafficking may not be. At <http/ww.unodc.org/>.

14 Organic Law 4/2000, of January 11 on the rights and liberties of aliens in Spain and their social integration with the drafting given by Organic Law 8/2000 of Decem-

administrative and the criminal aspects have acquired greater social relevance, taking into account the impact of globalisation, the reduction of internal border controls in the Schengen Area, as analysed in this paper, and the migratory pressure on Europe. Illegal immigration is constructed as an attractive and profitable activity for organised crime, on the basis that it combines with other activities of a similar nature as it uses networks, transport, companies and routes which are like those used for drug trafficking and money laundering.

Spain is especially sensitive to these activities due to its special geographical position as an external European border. This situation has given rise to organised smuggling and trafficking networks which are active on Spanish territory. Spain is considered by some experts as one of the main points for illegal entry into Europe. The special aspect detected is that organised crime is using the traditional routes for drug trafficking in the Straits of Gibraltar in order to bring in illegal immigrants who come under the legal provisions on smuggling and trafficking. It is argued that on occasions, with a view to distracting the attention of the Customs Surveillance Service and the Civil Guard, the criminals organise simultaneous operations involving the sea transport of illegal immigrants and drugs with a view to minimising the possible capture of one or other "merchandise" by the Spanish security forces.

One evidence of the success of this perception of the fight against smuggling and trafficking has been the implementation of the *SIVE* (*Servicio Integrado de Vigilancia del Estrecho*; Integral System for the Surveillance of the Straits) which detects any movement of boats in the zone, even at night, and these are then detained. However, the negative consequences for the victims of this organised crime is that the operations for the transfer of illegal immigrants has been diverted to geographical zones which are not controlled by the SIVE (Málaga, Almería, the Canary Islands), and these entail greater risk for the lives of the illegal immigrants affected.

Other negative factors of the Spanish position as regards clandestine immigration and the traffic of human beings are the following: the lack of historical experience in the regulation and control of migratory flows towards Spain, since the first waves came over in 1990, the successive modifications of the applicable administrative and criminal legislation, and the processes undertaken by the Spanish Administration in order to regularise the situation of the illegal immi-

---

ber 22, by Organic Law 11/2003 of September 23 and by Organic Law 14/2003 of November 20. Hereinafter, Aliens Act.

The Implementation Rules to the Organic Law 4/2000 of 11 January reformed by Law 8/2000 of December 22, were given by Royal Decree 864/2001 of July 20. Official State Gazette of 21.7.2001. Hereinafter, 2001 Implementation Rules.

The Implementation Rules to the new Organic Law 14/2003 of November 20 are currently under discussion.

grants in Spain which had the subsequent "call effect" in the countries of origin of the immigrants.

Although it may seem obvious, it should be firmly stated that every person has the right to emigrate and try to find a better life as migration in itself is not illegal. However, migration becomes illegal when laws are passed describing it as such. In Spain such laws state that when persons themselves or with the help of organised criminal groups enter clandestinely, move, remain and work withoud permission in Spain, they act unlawfully. It is a very complicated matter exactly to determine the number of illegal immigrants who try or manage to enter illegally. This statistical gap is due to the secret nature of the activity and the growing participation of mafias involved in illegal immigration.

Thus, in this section, as we pointed out at the beginning, only the Spanish administrative measures which define these acts will be studied, together with the sanctions stipulated for this type of conduct, how the so called "legal smuggling" carried out by the European and international transport companies is regulated and sanctioned and the measures taken to combat exploitation at work and the sexual exploitation of illegal immigrants. The questions which are strictly related to the application of Spanish Criminal Law will be analysed in the following section although we will draw attention to the finer details in this part in order to establish the line which divides the administrative and the criminal interventions. In this regard, we stated that the basic principle as regards the possible intervention through one branch or the other lies in the fact that the administrative procedure must be suspended whenever the smuggling and trafficking conduct constitutes an offence, a priori, in all the cases involving the reforms made to the Spanish Criminal Code by Organic Law 11/2003 of November 20,[15] in an endeavour to deter persons from carrying out these acts through the threat of criminal penalties.

2. Trafficking in and Smuggling of Human Beings and the Spanish Aliens Act

Spanish administrative action against clandestine immigration and the illegal trafficking of human beings is contained in the Aliens Act 4/2000 of January 11 on the rights and liberties of aliens in Spain and their social integration as drafted by the Organic Law 11/2003 of September 23 and by Organic Law 14/2003 of November 20, and in Royal Decree 864/2001 of July 20 whereby the implementation rules of the Aliens Act were approved.[16]

The starting point for the administrative treatment of clandestine immigration and illegal trafficking by the Spanish authorities is shown clearly in

15 Last modification to the Spanish Aliens Act, see *supra* footnote 3.

16 Aliens Act and 2001 Implemetation Rules. See *supra* footnote 3.

Memorandum 1/2002 of the Spanish Attorney General[17] which defines its administrative commission:

> … in all the cases involving the transfer of persons illegally, that is to say, not subject to the stipulations regarding the entry, transfer or exit contained in the legislation on aliens [article 25 et seq. AA] … With regard to the entry into Spanish territory, illegality is evident in all the cases of clandestine passage avoiding the authorised posts and preventing the authorities from controlling access … The entries made through fraud must also be deemed to be illegal as these cases involve the initial wish to access and remain in Spain and the proper administrative control is avoided either through documentation which is not physically false but does not respond to the reality of things (letters of invitation which are untrue, visas obtained through false allegations, etc.). This intends to differentiate between criminal and administrative action.

The contentious-administrative case law guaranteeing the principle of *ne bis in idem* has clarified the preference for the criminal procedure rather than the administrative in cases of certain conduct. Thus, the *Decision of the High Court of Justice of Madrid of December 18, 2001* lays down a procedure for the expulsion of persons presumed to have belonged to an organised group which brought illegal Russian immigrants into Spain, which:

> Taking into account that the events which brought about the expulsion of the appellant, as recorded in the resolution challenged, are the same events which led to the initiation of criminal proceedings, the core question regarding this appeal is reduced to the clarification of whether the principle 'ne bis in idem' entails the requirement that, apart from prohibiting the dual criminal and administrative sanction, the sanctioning administrative procedure stops when the events are the subject of criminal proceedings until the judicial authority resolves the case … in accord with the constitutional doctrine mentioned, the Administration has been going beyond the limits of article 25 of the Constitution when it fails to respect the substantial primacy of the criminal procedure as regards the decision on the events, or in the words of Constitutional Court, "the impossibility that the bodies of the Administration carry out sanctioning action or procedures in those cases in which the events might constitute an offence or an infringement according to the Criminal Code or the Special Criminal Laws during the time that the judicial authorities have not pronounced on these "… In short, as the Decision of Court No. 3 of the Supreme Court of July 23, 1998 laid down, citing the decisions of December 18, 1991

17 Memorandum of 1/2002 of the Spanish Attorney General on civil, criminal and contentious –administrative aspects of the intervention of the Prosecutor concerning aliens, p. 8, <http//www. fiscalía.org/>.

> and of April 26, 1996, we must declare that, given that the events involved in the sanctioning administrative proceedings and the criminal proceedings are identical, as has been shown, and the administrative proceedings have been the first to reach the decision stage, the principle "non bis in idem", in its strictly procedural aspect required that the administrative proceedings stop in order to await the results of the criminal proceedings … thus, the resolution challenged is invalid in law.

With regard to this differentiation between the administrative and the criminal intervention, attention should be drawn to the important *Decision of the Provincial Court of Seville of May 14, 2003* concerning the case involving an offence against the rights of alien workers or the exploitation of illegal Chinese workers at work which states when the intervention should be made under criminal or under administrative proceedings. As regards this work, the judge provides us with all the aspects which must be evaluated in order to determine the intervention under criminal legislation (articles 312 and 313 of the Criminal Code) or under the administrative legislation.

Thus, with regard to article 312, the Provincial Court of Seville establishes that:

> As concerns the offence in article 312-2 of the Criminal Code, it has been put forward that the conduct of the entrepreneur condemned goes beyond the limits of the sanctioning administrative law, therefore, it is necessary to examine *which aspects of the offence are typified in article 312-2* 'in fine' of the Criminal Code, the differences with the type of offence of article 311-1 *and determine the conduct which, due to its gravity, must be taken from the scope of Administrative Law and fully enter the sphere of Criminal Law*. The fact that the aforementioned types and all those which the new Code includes in Title XV of Book 11 under the heading 'On the offences against the rights of workers' exist, is justified, precisely, by the importance which is conferred on these rights by our Constitution, thus, we must take into account that questions such as *stability and security in employment, health and the physical integrity of the workers and, in short, their rights as recognised by the laws are of the utmost importance in a State which, among other things, classifies itself as social* (article 1-1 of the Constitution) ... From the aforementioned, it can be understood that *the judicial good protected*, is not single but plural and, thus, this precept protects the judicial security of the worker, the stability of the employment market and the legitimate expectations of the workers who legally comply with the conditions to access employment. *In addition, the intention is to protect from the exploitation of many alien workers by unscrupulous 'entrepreneurs', who take advantage of the fact that they are in an illegal situation in order to submit them to sub-human working conditions* which are completely humiliating, *and thus, they get round the administrative procedures established in this*

> *regard*. Furthermore, the active perpetrator of this offence can only be the individual or collective employer or entrepreneur, and *the passive perpetrator, in the case of article 312-2 is the alien worker who does not have a work permit* … The typical action taken is to impose employment or social security conditions on the workers who do not have work permits, which harms, suppresses or restricts the rights recognised through legal provisions, collective agreements or individual contracts … Precisely, *the social reality of our country shows us that there is an increasing number of undocumented workers who are forced to survive by accepting any type of work under any kind of illegal conditions, a situation of necessity which undoubtedly certain types of entrepreneurs take advantage of in order to obtain substantial profit. This conduct is despicable and the State endeavours to put a stop to it by using the Criminal Code*, as demonstrated by the fact that penalties have been made more severe with the very recent modification of article 312 by Organic Law 4/2000 of 11, which raises the penalty involving the privation of liberty to five years … *the nucleus of this type of offence is the mere employment of alien workers without Work Permits*, as, undoubtedly, those who have this valuable document are in better conditions when it comes to finding a job and they can, in a way, reject other jobs where their rights may be undermined as the sword of Damocles of administrative expulsion does not hang over them … *With regard to the distinction between the administrative and the criminal illegality, we must start from the basis that, by virtue of the principle of minimum intervention, criminal law must only act in those cases involving greater gravity, such as this one*. In fact, the contracting of an alien worker without a work permit in those cases, like this one, where this is necessary constitutes a serious administrative infringement. In this regard, article 35-1 of Law 8/1988 of April 7 lays down that, concerning infringements and sanctions in the social area, 'The following will be deemed to entail conduct which constitutes a very serious infringement: Entrepreneurs who use alien workers who have not previously received the compulsory Work Permit, or its renewal, incurring an infringement for each of the alien workers they have employed'. In this case, there is another circumstance involving the fact *that the aforementioned workers had not been registered in the Social Security system*, and this is a specific obligation which falls on the entrepreneur and *is so serious that it alone justifies the application of the criminal procedure*, apart from the fact that other employment rights have also been infringed.[18]

Therefore, taking into account these case law considerations, only when there are none of the interpretational circumstances of articles 312 or 313 of the Criminal Code, will criminal law intervention not be required and the applicable administrative sanction will suffice. If the case involves exploitation at work, the employment sanction referred to in the Aliens Act for cases involving hiring

18 Italics are mine.

without a work permit will suffice. However, the extent of these interpretational circumstances leads us to state that all the cases of immigrant workers who are not registered in the Social Security Register and are not guaranteed minimum work conditions will constitute a criminal offence as contained in article 312 or if the case involves trafficking in alien workers, the criminal sanction laid down in article 313 of the Criminal Code will apply and there can be no administrative sanction.

However, one Decision of the High Court of Justice of Castile and Leon of March 15, 2002 has given rise to certain problems of interpretation. It should be pointed out that we cannot agree with the decision as it confirms that the great majority of cases of smuggling and trafficking will be tried under criminal law and, if the Criminal Court Judge deduces that there is no offence, it is not possible to continue or initiate administrative proceedings for an infringement of the Aliens Act, despite the fact that this AA includes the promotion, encouragement or facilitating of clandestine immigration, while forming part of a profit making organisation, as an administrative infringement.

In short, this decision establishes that:

> This reason for expulsion does not exist judicially from the time that there is a stay of criminal proceedings initiated for participating in the offence of collaborating with clandestine immigration … There is a well known doctrine of the Constitutional Court which establishes that the facts which have been considered to be proved or which have served as a basis for a judicial decision dictated within a determined jurisdictional order impose the obligation to consider these to be true in the other jurisdictional orders as it cannot be admitted that same facts exist judicially or not in a determined jurisdictional order and not in another … Therefore, when it is deemed in the criminal law area that the participation in the events constituting the offence included in articles 318 bis 1-2 and 5 of the Criminal Code has not been demonstrated, the person cannot be considered to have committed the administrative infringement which served as a basis for the expulsion order as, in the criminal area, the events attributed to the person are considered not to have taken place ….

As was stated above, if we accept this thesis, it will be very difficult to find a case in which a serious infringement of letter b) of article 54.1 of the Aliens Act is considered to exist. This affirmation is sustained by the fact that, due to the identical drafting of the administrative and the criminal norms, the preference for the criminal law will always lead to its analysis in the light of criminal law and, when there is no criminal responsibility, the exemption from administrative responsibility would also be determined. In our opinion, this is not the response sought by the Spanish legislator.

After these considerations on Spanish case law, it is necessary to analyse the administrative legal system applicable to those persons whose conduct con-

stitutes an administrative infringement related to a case of clandestine immigration and there are no penal elements which would make it necessary to put a stop to the administrative process in favour of the criminal process.

2.1 Definition and Administrative Nature of Trafficking in and Smuggling of Human Beings

Article 54 of the Aliens Act is the norm which includes the conduct constituting an administrative infringement considered to be very serious. The list of situations typified as such infringements reveals the intention of the Spanish legislator to act and delve more deeply into the fight against clandestine immigration and the illegal trafficking of human beings. Taking these basic objectives into consideration, we find that the cases classified as very serious infringements are aimed not only at the aliens who are in Spain but at the acts carried out by Spanish nationals, especially companies in general and transport companies, which can incur a very serious infringement. Nevertheless, the sanctions stipulated for aliens and Spanish citizens involved in these acts are very different.

2.1.1 Trafficking in and Smuggling of Human Beings as a Very Serious Administrative Infringement

Following on from the above, in letter b) of article 54.1. of the Aliens Act the Spanish legislator has tried to cover all the possible situations involving aliens implicated in illegal immigration and the illegal trafficking of human beings. Thus, it specifies the conduct of individuals and persons forming part of an organisation who induce, promote, encourage or facilitate the clandestine immigration of persons in transit, whose destination is Spanish territory or who wish to remain there. This means that these persons can be prosecuted administratively on condition that the conduct does not constitute an offence. As was stated above regarding the determination of whether there is a penal classification or not, it is necessary to have recourse to the stipulations of article 318 bis of the Criminal Code, which establishes that the aliens who promote, encourage or facilitate the illegal trafficking of persons, are criminally responsible and can be condemned to prison sentences of between six months and three years, as well as four years with aggravating circumstances. These penalties will be dealt with in detail in the following section. In another context, this provision complements those stated in articles 312 and 313 of the Criminal Code which are dealt with fully in the following section.

However, as we have stated, considering the extent of this provision and the principle of preference of the criminal procedure over the administrative, it can be concluded that there is little leeway for a serious administrative infringement as laid down in letter b) of article 54.1. of the Aliens Act, taking into account the similar drafting of both cases. The hypothesis contained in the decision of March 15, 2002 has to be added to this reduced leeway.

In this regard, the *Decision of the Provincial Court of Barcelona of January 5, 2004* is an example of the non-existence of an offence, but, disregarding the decision stated above, the administrative procedure was allowed to be initiated or continued and the perpetrator of an administrative infringement involving clandestine immigration as stipulated in article 54.1.b) of the AA was punished with the corresponding sanction and the procedure for execution which will be explained below.

Likewise, the Decision of the Provincial Court points out the inexistence of an offence related to article 318 bis in the following terms:

> … the true judicial good protected by the criminal category in question, which is none other than the proper protection of the rights of aliens who enter or try to enter Spain, or are in transit or whose destination is Spain, endeavouring to thus avoid that, since they are acting outside the legal channels established in this respect, they might fall into the hands of organised groups or individuals who are habitually involved in this activity or in others tending mainly to favour their own interests and not those of the citizens who wish to enter Spain, whom they tell they wish to help. In short, it is a penal precept which tries to avoid the movement of persons sustained by spurious motives, irrespective of whether these consent to enter Spain. Only from these perspectives, can the term 'traffic' be understood and the situations to which 318 bis, 1 of the Criminal Code can be applied … In the case in question, taking into account the narration of the facts proved in the Decision on the proceedings, it is evident that *the attempt to obtain false documentation, a work and residence permit for a Pakistani brother of the accused, when there is no proof of habitual action or of belonging to a group or organisation which is involved in the promotion, encouragement or assistance as regards the 'illegal traffic' of persons, must not be punished through article 318 bis, 1 Criminal Code*. Consequently, the Decision of the proceedings must be revoked and the accused acquitted of the offence.[19]

Moreover, it should be pointed out that those illegal immigrants who collaborate against the organised networks when they are victims, persons damaged or witnesses, will be exempt from the infringement stipulated in letter b) of article 54.1. of the AA, as, in the terms of article 59 of the AA, they can be granted exemption from administrative responsibility. Article 94 of Royal Decree 864/2001 has extended the scope of collaboration to the immigrants whose situation has been normalised in Spain and these will be exempt in certain proceedings regarding administrative responsibility if they actively cooperate against the organised networks involved in the illegal trafficking of human beings and illegal immigration, on condition that these do not constitute offences.

19 Italics are mine.

The *Decision of the High Court of Justice of the Basque Country of March 14, 2003* analyses the scope of article 59 of the Aliens Act as regards the exemption from administrative responsibility. In short, it refers to an expulsion order against a clandestine immigration network in Spain achieved with the cooperation of a Croatian citizen with the protection of a drug addiction rehabilitation clinic. Since the Spanish Administration refused to grant exemption from responsibility, the Court understood that it was right to reverse the acts to the time previous to the resolution on the expulsion since the Croatian citizen complied with "… the application of the proceedings provided for in article 59 of Organic Law 8/2000, it is sufficient that the data provided by the alien had determined the initiation of the administrative proceedings or the criminal proceedings in order to decide the responsibilities of an organised network with regard to the commission of acts involving the illegal trafficking of human beings, illegal immigration, or the illegal trafficking of labour or the exploitation of prostitution, abusing the situation of necessity of the alien". Cases like this do not help to guarantee the effective protection status for witnesses with a view to fighting effectively against the organised clandestine immigration networks. The Spanish legislator should rethink the adoption of other measures which encourage collaboration and should opt for a more open minded view when authorising exemption from administrative responsibility for immigrants who collaborate with the police in order to dismantle networks.

2.1.2 Exploitation of Clandestine Immigrants at Work

Other administrative infringements considered to be very serious by letter d) of article 54.1. of the Aliens Act are the cases of exploitation at work carried out by Spanish or alien entrepreneurs although the sanction is different for alien entrepreneurs. This very serious infringement refers specifically to the hiring of aliens who do not have work permits. When the Spanish legislator refers to the concept of contract, this does not mean that a formal written contract must exist, but in order to protect the alien worker without a permit, it is understood that there is an employment relationship whenever there is an effective job, apart from formal considerations.

There are a number of decisions of the Spanish Courts which protect the alien worker who does not have a permit and is not registered in the social security system with regard to certain eventualities deriving from the employment relationship, such as accidents, death, etc. Thus, the *Decision of the High Court of Justice of Catalonia of October 31, 2003* confirms the social protection of the alien worker apart from the criminal responsibilities (articles 312 and 313 of the Civil Code) or the administrative responsibilities (article 54.1.d) of the AA) when it establishes that

> … it can be interpreted by considering *that the employment contract is perfectly valid and effective as regards regulating the judicial relationship of the entrepre-*

> *neur and the worker, regardless of the criminal or administrative responsibilities which arise from the failure of the employer to comply with the prohibition to hire an alien worker who does not have a work permit*. This decision of the Court intended to protect and fully sustain the employment rights of the alien worker who does not have a work permit so that he can request that entrepreneur comply with all the employment obligations which arise from any employment relationship in conformity with what is stipulated in the Workers' Statute including a possible claim against dismissal. As can be seen, the current legislation expressly states that the lack of the compulsory administrative authorisation 'will not render the employment contract invalid as regards the rights of the alien worker', and introduces a radical difference concerning the previous legislation. Clearly this intends to show that the employment contract will not be invalidated and this situation will not affect the employment rights of the alien worker, which remain complete and unlimited.[20]

The objective of this administrative infringement is to reduce the exploitation of the immigrant labour force. To this end, the Spanish legislator stipulates that a very serious infringement is incurred for each alien worker who does not have a work permit. Concerning this administrative infringement, it is necessary to take into account the principle of preference of the criminal proceedings and the possible application of articles 312 and 313 of the Criminal Code, which will have to materialise in criminal proceedings as stated in the important *Decision of the Provincial Court of Seville of May 14, 2003* mentioned above.

By virtue of the recourse to the technique of redeployment to other sectors of the Spanish judicial system, when there are questions of an employment nature, the Aliens Act and, in particular, articles 133 et seq. of 2001 Implementation Rules refer these types of acts to the specific Spanish employment legislation. Thus, as regards inspection concerning the exploitation of alien workers, the provisions of Law 42/1997 of November 14 on the ordering of the inspection of the Social Security Register and its implementation rules will apply. With regard to the sanctioning aspect of this infringement involving the illegal use of alien labour, article 134 of Royal Decree 864/2001 determines that the applicable legal regime will be the provisions of Law 8/1998 on Infringements and Sanctions in the Social Order. However, it will be necessary to take account of the criteria on the graduation and the amounts of the sanctions stipulated in the article of the Royal Decree mentioned and what is stipulated by the competent authority, that is to say, the Delegate or Sub-Delegate of the Spanish Government.

20 Italics are mine.

2.1.3 The Administrative Delimitation of the so-called "Legal" Smuggling of Passenger Carriers

The efforts to attenuate this "legal" smuggling were due mainly to the fact that a large number of immigrants entered the country legally as tourists and after three months had elapsed from entry, the immigrant was then in an illegal situation and at risk of exploitation. Thus, sections 2 and 3 of 54.1. of the AA are directed at the transport companies with a view to reducing the so called legal smuggling with certain guarantees. In these sections, the Spanish legislator lays down a number of obligations for legal persons and, in particular, for passenger carriers, and failure to comply with these obligations gives rise to a very serious administrative infringement. The legislative reference concerning these obligations applying to carriers originates from the signing by Spain of the Convention for the implementation of the Schengen Agreement of June 19, 1990 and the reform made to the Aliens Act by Organic Law 14/2003 in order to adapt the obligations stipulated in Directive 2001/51,[21] mentioned above in the introductory section, to Spanish legislation.

In consonance with this obligation contracted by Spain, the Spanish legislator considered the transport of aliens to Spanish territory through any channels when the personnel of the carriers responsible had checked the validity of the entire accrediting document required to enter Spanish territory to be a very serious infringement in article 54.2.a). Complementing the stipulations of the Aliens Act, section 4 of article 30 of 2001 Implementation Rules to the Spanish Aliens Act establish an exemption from compliance with this obligation on condition that the air, sea or land transport originates from another State which is a signatory to the Schengen Agreement. Otherwise, when the alien comes from outside the Schengen Area, section 5 of article 30 of 2001 Implementation Rules stipulate the obligation of the carriers to adopt the measures they consider to be advisable as regards these documentary checks and so reduce the cases of "legal" smuggling. Counter to this, the carriers allege ignorance of the non-existence of the legal requirements demanded by the Aliens Act. In order to prevent these allegations, 2001 Implementation Rules also demand that the companies train their personnel so that they can detect the deficiency, lack, or falsification of the documents submitted by the immigrant.

The second infringement the carriers can incur is that stipulated in article 54.2.b) of the Aliens Act which can accrue with the above. This declaration is sustained by the fact that, when an alien transported to Spanish territory is not authorised to enter, he will have incurred the infringement in letter a), analysed above, and the sanction can be increased if the company does not assume the cost of maintaining the alien in question in the so called "waiting areas". Furthermore, if the border authorities request the carrier to return the alien either directly or by sub-contracting, the carrier must assume the costs involved in

21 Por favor Emiliano escribe el nombre completo de la Directiva.

returning the alien to the State he left or to the State which issued the travel documentation or to any other State where his admission is guaranteed. As regards this last case, it does not add that this State must be a safe country. In this regard, in the *Decision of the High Court of Justice of Madrid of May 29*, the Venezuelan company AVENSA was condemned to assume the costs of returning an alien rejected at the border.

The seriousness of the sanctions for non-compliance with this obligation is seen in the *Decision of the High Court of Justice of Madrid of April 10, 2002* on the refusal to return the stowaways who had boarded an Algerian vessel bound for Spain and the carrier was condemned to pay a fine of € 100,000. The Court stated that

> Consequently, when a vessel brings stowaways, in order to permit these to disembark, the Spanish Authorities must check whether the requirements stipulated have been complied with and the Captain of the vessel must keep these stowaways aboard until he is informed of the decision. The Captain of the vessel does not arrest the stowaways, but has to take care that they remain on board, if he fails to comply, he will cooperate in the illegal entry of these stowaways into Spain, and this is sanctioned in article 115.2.e) of Law 27/1992 of November 25 on Ports.

It is surprising to observe that the obligations imposed in subsections a) and b) of section 2 of article 54 of the Aliens Act are extensive to the transport of aliens from third States and when such transport originates from Ceuta or Melilla. Apart from the fact that these are Spanish territories, the inclusion of both these autonomous cities as covered by these infringements shows the lack of confidence the Spanish legislator has concerning the migratory control and security measures in these cities. Day to day reality shows that Ceuta and Melilla, like all border cities, must accommodate movement of Moroccans and sub-Saharans irrespective of the measures adopted to reinforce the land frontier with Morocco.

The only possibility the carriers have not to incur the infringements described and to be exempt from administrative responsibility is that the alien transported applies for asylum on arrival at the Spanish border without delay and that this application is admitted as stipulated in section 3 of article 54 Aliens Act. The inconvenience of this is that there must be two circumstances which do not depend on the carrier. The first is the fact that the alien transported wishes to apply for asylum, and this must be done without delay. The second is that the competent authority accepts this application for processing. Otherwise, the carrier will incur an infringement involving legal smuggling and will be sanctioned.

2.2 The System of Administrative Sanctions for Cases of Smuggling, "Legal" Smuggling and Trafficking

In this sanctioning area, the Spanish legislator is coherent and European harmonisation concerning the fight against clandestine immigration and the trafficking of human beings has been taken into account. The sanctions have been increased and graded depending on the type of infringement.

2.2.1 Economic Sanctions Applied by the Spanish Administration in these Cases

Concerning the infringements described above as cases of smuggling and trafficking and classified as very serious infringements, article 55.1 of the Aliens Act establishes a fine of from € 6,010.13 to € 60,101.21 in an attempt to financially deter the commission of these administrative infringements. In addition, for the carriers which fail to comply with their obligations, the sanction can entail a fine of from € 3,000 to € 6,000 for each traveller transported or a minimum of € 500,000 as a lump sum regardless of the number of travellers transported. By updating these amounts, Spain has complied with its European commitments to harmonise the fines in an attempt to discourage activities considered to be infringements on condition that these do not constitute an offence.

Once the amount of the sanction is established, it is necessary to determine which authorities are competent in Spain to impose the sanctions. Article 55.2 of the Aliens Act recognises the competence of the Sub-Delegate of the Government or the Government Delegate in the Autonomous Communities with only one province. These authorities must take into account the executive nature of the procedure and the channels for collection, which are referred to in the General Regulations on Collection in Royal Decree 1684/1990, as well as the problems deriving from the possible simultaneous application of sanctions of a different type depending on the type of infringement, on condition that the conduct sanctioned does not constitute an offence. In order to guarantee the efficacy of the collection, the administrative resolutions for the imposition of the fine will have immediate execution once they become definitive through the administrative channel.

With regard to the possible simultaneity of sanctions, article 55.2 of the Aliens Act establishes that, in the cases of sanctions for infringements of an employment nature, that is to say, exploitation of illegal immigrants at work (article 54.1.d) Aliens Act), the procedure will be initiated by an Official Employment and Social Security Inspection in accordance with Law 8/1988 on Infringements and Sanctions in the Social Order, although the sanctions will be imposed by the Delegate or Sub-Delegate of the Government as the competent authorities since this is an administrative procedure. Article 134 of the 2001 Implementation Rules to the Aliens Act graduates the possible sanctions as minimum, intermediate and maximum level. Thus, in the cases of infringements involving

exploitation at work, the minimum level of the fine entails a sanction of from € 6,010.12 to € 12,020.24, except if the competent authority understands that the maximum level should be applied, in which case, the fine will be from € 30,050.36 to € 60,101.21. The effective fight against exploitation at work should determine the application of the maximum level of these financial sanctions.

2.2.2 Administrative Sanctions Complementary to the Fine

Besides these financial sanctions, the Spanish legislator has laid down additional sanctions for specific cases. The first is for those responsible for the illegal immigration networks, the second is for the entrepreneurs, whether these are aliens or nationals, in which case there is no distinction as regards the sanction for those who exploit illegal immigrants at work. The final case concerns the sanction for carriers who transport legal immigrants without the required documentation, that is to say, legal smuggling. It should be understood that none of these cases involves an offence.

Article 55.5 of the Aliens Act establishes that, in the cases of organised networks involved in clandestine immigration (article 54.1.b), the vehicles, vessels, aircraft and the movable goods or real estate which have served for the commission of this infringement may be impounded. This measure intends to reduce the resources of these criminal organisations. Furthermore, it has been laid down that all these resources impounded can be auctioned publicly and the revenue obtained will go to the State to be used for the purposes it considers to be appropriate under the terms of article 123 of 2001 Implementation Rules. To this end, in order to guarantee the impounding, article 111 of said 2001 Implementation Rules states that, if the agents of the authority know of the use of such assets at the start of the investigation, they are authorised to apprehend and put these assets at the disposal of the competent authority while awaiting the result of the Administrative sanctioning proceedings.

In the cases of exploitation of illegal immigrants at work (article 54.1.d)), apart from the sanction of a fine, article 55.5 of the Aliens Act permits the imposition of the sanction entailing the closure of the establishment or the premises for 6 months to 5 years. Despite the fact that article 123 of Royal Decree 864/2001 develops this complementary sanction, it states nothing with regard to the criteria to be followed in order to fix the minimum or maximum level of this sanction. It should be insisted that, in order to eradicate exploitation at work, the maximum level must be chosen depending on the number of workers exploited and their conditions of work.

Finally, with regard to the carriers which incur "legal" smuggling and infringe the obligation to take charge of the alien transported illegally, article 123 of 2001 Implementation Rules permits the governmental authority to agree to any of the following measures: the temporary suspension of its activities for a maximum of six months; the provision of a surety or guarantee depending on

the aliens affected and the damage caused, together with the immobilisation of the means of transport used.

2.2.3 The Dominant Sanction against Smuggling and Trafficking in the Spanish System

In an attempt to stop the illegal entry of clandestine immigrants into Spain and their subsequent exploitation at work and sexual exploitation, the Spanish legislator has established the expulsion of those involved as a sanction on condition that these are aliens. However, the status of the victims has not been taken into account as it stipulates that they be returned to the territory of origin instead of applying the stipulations of article 59 of the Aliens Act and granting them the status of victims who cooperate against the networks which have transported and possibly exploited them. It is interesting to note that, due to the number of small boats reaching the Spanish coast, the immigrants on board those which are intercepted by the Spanish authorities are not even charged so that enquiries can be made into the criminal or administrative responsibilities. The authorities just return all those on board, the skipper and the immigrants who have paid him, through the return procedure which does not require the initiation of proceedings. These will be dealt with below.

The most relevant particularity of this administrative sanction, exclusively stipulated for aliens, whether these are legal or not, is that it has a dual nature. On the one hand, article 63 of the Aliens Act establishes preferential expulsion for certain infringements through an emergency procedural channel. On the other hand, article 57 of the Aliens Act includes ordinary expulsion procedure with its own proceedings.

2.2.3.1 Preferential Expulsion as an Administrative Sanction

It is intended to make this administrative sanction, by its very nature, a basic and effective instrument for the control of the migratory flows towards Spain and, by extension, Europe. Directive 2001/40 on the mutual recognition of expulsion decisions must also be taken into account. In article 63.1 of the AA, among the reasons which can give rise to preferential expulsion proceedings are the following: "to induce, promote, encourage or facilitate the clandestine immigration of persons in transit or whose destination is Spanish territory on condition that the event does not constitute an offence." With regard to the sanction of a fine, it should be pointed out that the sanction of a fine and expulsion cannot be imposed simultaneously.

The fundamental characteristic of preferential expulsion is its immediate execution under the terms laid down in article 112 of Royal Decree 864/2001 and the meagre period for allegations and evidence which cannot exceed forty-eight hours. This limited period makes it practically impossible to guarantee the right of effective judicial protection for the alien recognised by article 24 of the Spanish Constitution. Added to this is the fact that the alien charged cannot apply for

the suspension of the expulsion decision in conformity with article 21.2 of the Aliens Act and article 112.6 of its 2001 Implementation Rules.

In the event that the expulsion of those punishable by an administrative sanction for smuggling or trafficking which does not constitute an offence cannot be carried out within 48 hours, the governmental authority can request the instruction judge to have the alien charged sent to an Internment Centre for Aliens. If the Judge refuses to do so, the competent authority can impose precautionary measures on the alien charged, such as periodic reporting to the authorities, obligatory residence in one place, withdrawal of documents, precautionary detention (article 61 of the Aliens Act), which ensure that the expulsion decision is carried out.

Once the preferential summary expulsion resolution is adopted, the alien charged will be notified of this and he will be made to leave Spanish territory. This decision will entail the entry prohibition of a minimum of three years and a maximum of ten as regards Spain and the Schengen Area. In addition, preferential expulsion entails the extinction of any authorisation to remain in Spain under the terms laid down in article 112 of the 2001 Implementation Rules to the Spanish Aliens Act.

2.2.3.2 The Ordinary Expulsion Sanction

The reasons stipulated in article 57 of the Aliens Act for the ordinary expulsion sanction can be arranged in two groups. On the one hand, those deriving from the commission of a very serious infringement of article 54 of the Aliens Act, among which are smuggling and trafficking, on the other hand, what can be called the ordinary expulsion sanction for the commission of a number of offences which entail a prison term longer than one year instead of serving the sentence in Spain.

We are not going to deal with the latter case as the Spanish legislator expressly excludes the substitution of the prison term by expulsion when the alien has been condemned for any of the offences included in articles 312 and 313 of the Criminal Code (trafficking and exploitation of the labour force), article 318 bis (illegal trafficking of persons) and articles 515.6, 517 and 518 of the Criminal Code (associations involved in the illegal trafficking of persons). This is because section 8 of article 57 of the Aliens Act requires that the prison terms be fully served before expulsion.

With regard to the first group of reasons for ordinary expulsion, it can be seen that there is an overlap of the infringements which generate preferential expulsion proceedings with those stipulated for the ordinary expulsion. This overlap is resolved by stating that the aliens who commit the infringement of smuggling and trafficking contained in article 54.1.b) of the Aliens Act will be subject to preferential expulsion, while those who exploit clandestine immigrants at work contained in article 54.1.d), of the Aliens Act will be subject to ordinary expulsion on condition that neither of the cases constitutes an offence.

The procedure for ordinary expulsion (articles 102 to 108 of the 2001 Implementation Rules to the Spanish Aliens Act) is a clear differentiating aspect as the alien charged and sanctioned with ordinary expulsion, unlike the preferential expulsion, has a period of fifteen days for allegations and can put forward proof, which, if accepted, must be checked within a maximum period of thirty days and a minimum period of ten days. As regards the ordinary administrative expulsion resolution, the period the alien charged will have to leave Spanish territory will be stated in the resolution in accordance with article 100.2. of the Implementation Rules. This period cannot be less than 72 hours and the alien, or his diplomatic or consular representatives must assume the cost of the expulsion. However, if the expulsion cannot be executed within this period, the instruction judge can be requested to send the alien to an Internment Centre for Aliens, and this confinement cannot exceed forty days (article 62 Aliens Act, and articles 127 to 132 of its Implementation Rules).

Once the sanctioning proceedings are over, the alien affected must be notified of the expulsion resolution, stating the appeals he may lodge and the competent body which will attend to these. Finally, it should be pointed out that the Decision of the Spanish Supreme Court of March 20, 2003 held the invalid provisions of RD 864/2001 relative to the expulsion sanctions and the precautionary measures.

2.2.4 The Administrative Measures at the Border: Return

It is surprising that the Spanish legislator systematically applies the mechanism of return (article 58 of the Aliens Act and article 138 of its Implementation Rules) to aliens who attempt to enter Spanish territory avoiding the border controls, that is to say, cases of smuggling. In practice, it supposes that all aliens, whether these are victims or not of a network or of individuals involved in clandestine immigration, who are arrested while attempting to enter Spain illegally, will be returned. This return is intended to be an expeditious instrument for controlling the illegal migratory flows as it does not involve the initiation of any administrative proceedings.

The scope of application of this measure involving return at the border is very extensive as all aliens intercepted at the border, in the vicinity of the border or on national territory in transit or en route and do not comply with the requirements for entry included in article 25 of the Aliens Act will be subject to this measure.

If the origin of those intercepted is known, the application of this measure and its immediacy makes it unfeasible for the victims to cooperate against the networks which have attempted to pass them illegally into Spanish territory so that they can be exploited at work or sexually. The effective fight against the entry of illegal immigrants by land or sea requires rethinking on the return and the status of the victims, despite the fact that they are willing victims, so that the

activity of the organised groups or the individuals involved in this despicable business related to the trafficking of human beings might be reduced.

III. MAIN ISSUES IN SPANISH CRIMINAL LAW AND PRACTICE RELATED TO TRAFFICKING IN AND SMUGGLING OF HUMAN BEINGS*

1. Introduction

In this section, an analysis will be made of current Spanish penal legislation and the corresponding case law concerning the trafficking in and smuggling of human beings. As has already been mentioned, the legislation applicable in this area has undergone substantial reform recently through Organic law 11/2003, of September 29 on specific measures concerning the security of citizens, domestic violence and social integration of aliens,[22] which modifies article 318 bis of the Criminal Code. This adds some difficulty to the drafting of this paper as no corpus of scientific and case law doctrine has been sufficiently developed concerning the new criminal legislation. Therefore, it is necessary to present a number of preliminary considerations:

– It is essential to make at least a summary study of the historical evolution of legislation in this regard in order to be able properly to understand the latest legislative changes together with the bibliography on the theme (largely based on the legislation previous to Organic Law 11/2003) and the more outstanding case law related to trafficking in and smuggling of human beings.
– The historical background and the characteristics of this matter, which is the subject of a continuous, lively, political debate, led us to guess that another legislative reform may take place in the not too distant future. This will involve reforms to administrative and criminal law, especially if we bear in mind that current criminal legislation is not the result of meditated doctrinal thinking but, as will be seen below, it is the result of unstable criminal policy.
– The practical cases which can be analysed have not yet generated established case law which enables us to know the interpretation of the courts concerning the reformed article 318 bis of the Criminal Code with certainty. This is due to the fact that the slowness of the Spanish Courts when resolving cases of some importance prevents accessing a high number of cases tried under the new legislation, and, due to procedural reasons, the highest Spanish jurisdictional court, the Supreme Court, has hardly had the opportunity to resolve cases related to this matter (even less so with regard to recent legislation), therefore the case law which will be quoted cannot be considered to

* Part III is written by Antonio Obregón García, Faculty of Law, University Pontificia Comillas, Madrid.

22 Hereinafter, Organic law 11/2003.

be uniform doctrine, but is a variety of lines of interpretation deriving from the resolutions of many provincial courts.

– As we will see below, it should be pointed out that the recent reform of Spanish criminal law was not due mainly to the need to adapt the Spanish law to European Community law, but was, above all, due to strictly internal political reasons which has used the European framework as an excuse and a cover up rather than as a reference and guide. It is true that, as the stated purpose of the Organic Law 11/2003 expressly recognises, the 2003 reform attempted to include some of the initiatives of the Council of the European Union in order to establish a common penal framework with regard to the fight against the trafficking in human beings and the smuggling of persons, particularly in relation to the sentences for criminal conduct; however, the very title of the law which modifies article 318 bis of the Criminal Code shows that the Spanish legislator had other objectives: Organic Law 11/2003 terms itself as "specific measures", that is to say, it is not systematised, ordered and integrated legislation but rather a series of legal prescriptions which are intended as a penal reaction to a variety of events which give rise to social alarm, and are also intended to extend the protection "against criminal aggression", and this is explicitly admitted in the stated purpose. Considering that the reform of September 2003 addresses another two themes which are currently giving rise to serious worry in Spanish society and the media: domestic violence and public security, it can be said that, in fact, the intention of the legislator was to try to mitigate the social alarm caused by certain circumstances which give the sensation that criminality is increasing and among these circumstances is illegal immigration. In fact, as the stated purpose of Organic Law 11/2003 clearly indicates, the reform of article 318 bis of the Criminal Code is closely related to the penal response to aliens not legally resident in Spain who commit offences (and the fundamental reaction is to decree expulsion from Spanish territory), which permits the inference that the Spanish legal reform was not oriented by European harmonisation in this area, but was due rather to the interest the Spanish State (or the Government) had in making the Criminal Code the symbol of the fight against delinquency, particularly delinquency associated with illegal immigration.

2. Legislative Evolution Throughout History

The legislative landmarks we are about to highlight as regards Spanish criminal law concerning the trafficking in human beings and the promotion of the smuggling of persons, previous to the reform of September 2003, are the following:

– The Criminal Code previous to that of 1995 (Criminal Code of 1944-1973);

- The Criminal Code of 1995, in its original version, drafted in the Organic Law 10/1995, of November 23;
- Organic Law 11/1999 of April 30, modifying Title VIII of Book II of the Criminal Code;
- Organic Law 4/2000 of January 11 on the rights and liberties of aliens in Spain and their social integration.

2.1 Criminal Code of 1944-1973

The Criminal Code previous to 1995 (normally known by the dates 1944-1973) did not include a specific section aimed at punishing the offences we are dealing with, but, within the framework of offences against freedom and safety at work, it sanctioned the "illegal trafficking in labour" and the "involvement in fraudulent employment migrations" (article 499 bis 3). These offences criminalized the trafficking in workers, understood as employment mediation apart from the public employment offices,[23] as well as any act encouraging the movement from, through or to Spain for employment reasons.[24] Nevertheless, these legal precepts scarcely had any real efficacy during the period the previous Criminal Code was in force,[25] and this lack of application led to severe doctrinal criticism.[26]

2.2 Organic Law 10/1995 of November 23 (Criminal Code of 1995)

The 1995 Criminal Code approved through Organic Law 10/1995 of November 23 notably reformed the offences concerning employment relationships by the introduction of Title XV of Book II, which contains "the offences against the rights of workers". The appearance of this Title entailed considerable progress as compared with the old 499 bis of Criminal Code-44/73, as it improved the systematisation of the offences described in it and reconciled its drafting and content with the constitutional principles and the employment legislation in force.[27] Moreover, the 1995 Criminal Code which, in this regard, substantially maintained the same terms as the time it came into force (except for the penali-

23 Baylos Grau & Terradillos Basoco, *Derecho penal del trabajo*, 2ª ed., Trotta, Madrid, 1997, p. 83.

24 Rodríguez Devesa, *Derecho Penal Español. Parte Especial*, 14ª ed., Madrid, Dykinson, Madrid, 1991, p. 362.

25 *Cfr*. Ayala Gómez, "Observaciones críticas sobre el delito social", in *Revista de la Facultad de Derecho de la Universidad Complutense de Madrid*, monográfico 3 (1983), pp. 37 et seq.

26 A warning on this was given in the period of the previous Criminal Code, Rodríguez Devesa, *Derecho Penal..., op. cit.*, p. 347.

27 In this regard, Navarro Cardoso, *Los delitos contra los derechos de los trabajadores*, Tirant lo Blanch, Valencia, 1998, pp. 18 et seq.

sation of some offences as we will see below, extended the number of penal classes involving the trafficking in persons and migratory movements. In short, we can highlight the classes included in articles 312 and 313, which punish those who:[28]

- traffic illegally with labour (312.1);
- employ aliens who have no work permits under conditions which damage, suppress, or restrict their recognised rights under the legal provisions, collective agreements and individual contracts (312.2);
- promote or encourage the smuggling of workers into Spain by any means (313.1);
- determine or encourage the emigration of any person to another country, simulating a contract or a job or by using similar deceit (313.2).

However, despite the extension of the catalogue of types of offences punishable and included in the 1995 Criminal Code, the fact that the offences included in Title XV of Book II of the Criminal Code were limited to the employment area excluded from criminal incrimination the conduct involving trafficking or exploitation which did not entail a victim who was a worker or whose objective was not employment, such as sexual exploitation mainly.[29] In addition, article 313.1 limited the penal sanction to the promotion of the smuggling of persons into Spain, but did not take in the immigration from or in transit through Spain as case law had been drawing attention to.[30] To a certain extent, these insufficiencies gave rise to the subsequent reforms in this regard.

2.3 Organic Law 11/1999 of April 30

In fact, Organic Law 11/1999 of April 30 on the modification of Title VIII of Book II of the Criminal Code on offences against sexual freedom and on freedom from sexual harm modified the aforementioned Title, inter alia,[31] in order

28 The sentences laid down in the original drafting of the 1995 Criminal Code regarding these offences were six months to three years imprisonment and a penalty of six to twelve months; however, Organic Law 4/2000 of January 11 notably increased the sentences, as will be described below.

29 In this regard, Conde-Pumpido Ferreiro, "Delitos contra los derechos de los extranjeros", in *Extranjeros y Derecho Penal*, Consejo General del Poder Judicial, Madrid, 2004, p. 299.

30 For example, the Decisions of the Supreme Court of May 13, 2003 and October 16, 2003.

31 According to the Stated Purpose, the guidelines followed by the Spanish legislator as regards this Law were "*those stated in Resolution 1099 (1996) of September 25, concerning the sexual exploitation of children, drawn up by the Parliamentary Assembly of the Council of Europe. Along the same lines, based on article K.3 of the Treaty*

to regulate the offence of trafficking in persons with a view to sexual exploitation. Thus, as a complement to section 1 of article 187[32] and section 1 of article 188 of the Criminal Code,[33] which defined the offences involving the promotion of the prostitution of minors or disabled persons and causing adults to prostitute themselves, section 2 of article 188 added a specific offence with a view to punishing "the commerce of persons intended for forced prostitution",[34] whose literal transcription is as follows:[35] "The person who directly or indirectly encourages the entry to, the stay in or the exit of persons from national territory in order to sexually exploit them by using violence, intimidation or deceit or by abusing a situation of superiority or need or vulnerability of the victim will be punished with the same sentences".[36]

---

of the European Union, the Council of the European adopted common action in the fight against the trafficking of human beings and the sexual exploitation of children on November 29, 1996. As a consequence of this, the Member States undertake to revise the domestic legislation in force in this regard, inter alia, as regards the sexual exploitation or the sexual abuse of children and the trafficking of children intended for sexual exploitation or sexual abuse. This conduct is deemed to involve criminal offences and effective, proportional and dissuasive sentences are laid own together with increased bases for the competence of the Courts which go beyond the strict principle of territoriality".

32 Article 187.1 Criminal Code: *"The person who induces, promotes, encourages or facilitates the prostitution of a minor or a disabled person will be punished with prison sentences of from one to four years and a penalty of twelve to twenty-four months".*

33 Article 188.1 Criminal Code: *"The person who causes an adult to prostitute himself/herself or continue to do so by using violence, intimidation or deceit, or by abusing a situation of superiority over or the need or vulnerability of the victim, will be punished by a prison sentence of two to four years and a penalty of from twelve to twenty-four months".*

34 Maqueda Abreu, *El tráfico sexual de personas*, Tirant lo Blanch, Valencia, 2001, p. 12.

35 The punishment referred to in the section are the same as those for causing adults to prostitute themselves, that is to say, two to four years imprisonment and a penalty of twelve to twenty-four months.

36 It should be stressed that the incrimination only occurred if one of the special means for the commission determined in the Law (violence, intimidation or deceit) was involved or thee was an abuse of a situation of superiority, need or vulnerability of the victim, but not if the person subjected to prostitution validly gave his consent. The decision of the Supreme Court of October 6, 2003 illustrates this matter, as it granted an acquittal as regards the offence of article 188.2 (although it did condemn under article 318 bis, which will be commented on below), in a case in which, as the decision sates "*the woman considered to be the victim left her country and came to Spain to prostitute herself by a free act of her will, even though the choice of this profession is normally subject to a number of conditions, and, when she arrived on Spanish territory, she "agreed" with the accused, that is to say, she freely accorded*

2.4 Organic Law 4/2000 of January 11

Nevertheless, the reform of article 188.2 of the Criminal Code was insufficient to address all the possible aspects of the trafficking of persons (for example, the trafficking carried out in order to promote begging, or the commission of an offence or, as has been said, those carried out for the purposes of employment but from or through Spain),[37] even when with this precept, together with article 313, the work involved in regulating the more common cases was addressed.[38] This, together with the ever more frequent calls from the European Union for the harmonisation of the fight against the illegal trafficking in and the smuggling of persons, were the reasons why the Organic Law 4/2000 of January 11 on the rights and liberties of aliens in Spain and their social integration added to the Criminal Code, by virtue of its Second final Provision, Title XV bis, termed "on the offences against the rights of alien citizens", were contained in one single article, 318 bis, which is reproduced below:

1. Those who promote, encourage or facilitate the illegal trafficking of persons from, in transit or with destination Spain will be punished with six months to three years imprisonment and a penalty of six to twelve months.
2. Those whose conduct is described in the above section with the intention of making profit or using violence, intimidation or deceit or abusing a situation of necessity of the victim will be punished with imprisonment from two to four years and a penalty of twelve to twenty-four months.
3. The upper half of the sentences laid down in the above sections when the commission of the events entailed danger to life, health or the integrity of the persons or victims regardless of whether he is a minor or not.
4. Those who are involved in these acts using their condition as authority, agent of the authority or civil servant will incur the same penalties as the

---

the financial conditions in which she would carry out her activity as a prostitute with the accused. The accused, who is undoubtedly an exploiter of the prostitution of others, did not impose these conditions abusing his situation of superiority over or the need or vulnerability of the woman, but simply "accorded" these with her and controlled her activities through another accused woman who also prostituted herself at the same place in the city".

37 Pérez Cepeda thoroughly describes this trafficking: *Globalización, tráfico internacional ilícito y Derecho Penal*, Comares, Granada, 2004, pp. 32 et seq., especially 39 et seq.

38 In the opinion of Rodríguez Mesa, *Delitos contra los derechos de los ciudadanos extranjeros*, Tirant lo Blanch, Valencia, 2001, p. 17, "a penal class whereby aliens were protected against situations in which legal rights other than sexual freedom and their rights as workers were required".

previous section with the added absolute incapacity of from six to twelve years.

5. The maximum sentences as regards those stipulated in the above sections concerning the respective cases and the guilty person belongs to an organisation or association, including those of a transitory nature which might be involved in such activities.

In addition, the aforementioned law changed the penalty as regards the types of offences described in articles 312 and 313 of the Criminal Code, increasing the imprisonment from two to five years and a penalty of six to twelve months (First Final Provision), and, according to its Third Final Provision it constitutes a new modality of illegal association punishable under article 515 of the Criminal Code (section 6), and considers that those who promote the illegal trafficking of persons form such an association.[39]

With these modifications, the types of criminal offences related to the trafficking of human beings were diversified in order to try to take in the greatest number of cases deserving penal treatment and to confer consistency and special relevance to the trafficking of persons through the creation of a Title in Book II of the Criminal Code, which precisely and exclusively criminalizes this trafficking. The description of the general conduct was transferred to the new article 318 bis; and the particular conduct involving the trafficking of persons with a view to their sexual exploitation or exploitation at work was included in specific types of offences against sexual freedom or against the rights of workers. The specific conduct was punished with a more serious penalty than that of the basic type of offence of article 318 bis although in this last case, the penalty could be more serious if the offence entails the qualifications laid down in sections 2 to 5 of the aforementioned article.

3. Organic Law 11/2003 of September 29: Principal Innovations

As we stated above, Organic Law 11/2003, which came into force on October 1, 2003, notably modified the content of article 318 bis, included in Title XV bis of Book II of the Criminal Code, which is drafted as follows:

39 According to León Villalba, *Tráfico de personas e inmigración ilegal*, Tirant lo Blanch, Valencia, 2003, pp. 236 et seq., the introduction to section 6 of article 515 is "praiseworthy as regards its pretensions", as it endeavours to prevent gaps in the penalisation of organisations involved in the trafficking of persons, but which is "tremendously problematic regarding its application", due to the problems of overlapping arising in relation to the qualification given in section 5 of article 318 bis (aggravation due to belonging to an association or organisation involved in the illegal trafficking of persons).

1. The person who directly or indirectly promotes, encourages or facilitates the illegal trafficking in or the smuggling of persons from, in transit through or with destination Spain will be punished with four to eight years imprisonment.
2. If the intention of the illegal trafficking or the smuggling of persons is the sexual exploitation of the persons, punishment will be 10 years imprisonment.
3. Those who carry out the activities described in either of the previous two sections with the intention of making profit or using violence, intimidation, deceit, or by abusing a situation of superiority over or the special vulnerability of the victim, or if the victim is a minor or disabled or putting lives, health or integrity of the persons in danger will be punished with the upper half of the penalties.
4. Those who carry out these activities by availing themselves of their condition of authority, are agents of the authority or civil servants will incur the same penalties as the previous section and absolute disqualification from six to twelve months.
5. The penalties greater by one degree than those stipulated in sections 1 to 4 of this article will be imposed in the respective cases and special disqualification as regards the profession, trade, industry or commerce for the period of time of the conviction when the guilty person belongs to an organisation or association involved in such activities even if this is transitory.
   When the leaders, administrators or persons responsible for these organisations or associations are involved, the upper half of the penalty will be applied to them, and this can be raised to the level immediately above.
   In the cases stipulated in this section, the judicial authority can also decree one or several of the measures laid down in article 129 of this Code.
6. Taking into account the seriousness of the activity and its circumstances, the condition of the guilty person and the intentions of this person, the Courts can impose the penalty at the lower level to that stated in this regard.

According to the stated purpose of the Organic Law 11/2003, this change is due to the intention to "combat the illegal trafficking of persons, which prevents the integration of aliens in the country of destination", through "work of consolidation and completion" of the measures against criminality of this kind which were already included in the Criminal Code. In addition, as was stated above, the legislator intended to justify this prompt reform of article 318 bis (just three years after it was included in the Criminal Code) based on the need to contribute to compliance with the objective established in the Treaty of the European Union concerning the fight against the trafficking of human beings, an endea-

vour which materialises in the initiatives of the Council with a view to fixing a common framework in this regard. In particular, the main intention was to respond to the harmonisation of the penalisation of the offences classified.[40] We shall examine the innovations made by Organic Law 11/2003 in more detail in order to more fully explain all the essential aspects of this penal class described in article 318 bis in the following section.

In the first place, Organic Law 11/2003 modifies the definition of the basic offence which contains the first section of article 318 bis in order to clarify or extend the punishable cases. Thus, it adds that, not only the promotion, encouragement or facilitation of illegal trafficking will be punished, but also "the smuggling of persons". Furthermore, it is necessary that these classified actions be completed either directly or "indirectly".

Secondly, a substantial transformation of the offence of trafficking of persons in order to exploit them sexually has come about as this has become a qualified type of the offence dealt with in article 318 bis (second section) and it ceases to be regulated in article 188 as an offence against sexual liberty and freedom from sexual harm, unlike what had been happening since 1999.[41] Moreover, in order to determine this offence, the use or recourse to a special medium for its commission (violence, intimidation or deceit or abuse of a situation of superiority over or need or vulnerability of the victim) is not required, therefore, if any of these means is used, the conduct involving illegal trafficking with the intention of sexual exploitation will have an additional qualification.

Thirdly, Organic Law 11/2003 makes a substantial modification to the other specific reasons for aggravation, the only exception being the one included in section four of article 318 bis concerning the prevalence of the condition of authority, agent of the authority or civil servant, which maintains the same terms. These are the following:

– In section three, the qualification of the offence involving the intention to make profit or the use of violence, intimidation or deceit or the abuse of certain situations is stipulated (as was done previously), but the expression "abuse of a situation of need" contained in the original drafting of section

40 According to the Stated Purpose of the Organic Law 11/2003, *"the thresholds of the resulting sentences fully satisfy the harmonisation objectives which are contained in the Framework Decision of the council of the European Union intended to strengthen the penal framework for the repression of the aid given to the irregular entry, movement and stay"*.

41 For Pérez Cepada, *Globalización...*, *op.cit.,* p. 156, with this modification "the difficulties of overlapping which had appeared as a result of each class, in principle, being introduced at different times are partially rectified". However, as this same author points out neither the content nor the sentence of article 313.1 of the Criminal Code are changed, which complicates the delimitation of this offence with the offence classified in article 318 bis.

2 of article 318 bis is replaced with "abuse of a situation of superiority over or of the special vulnerability of the victim".

– The qualifications applicable due to under age victims and the endangering of the life, health or integrity of the victims are contained in this section. These aggravations were included in a different section in the previous law. The inclusion has important consequences as regards determining the penalisation of the offence as the fact that these are included together in the same section, the simultaneity of two or more different qualification cases of those stipulated in section three does not give rise to successive aggravation of the penalty but only to the qualification stipulated in this section.[42]
– The aggravation due to the disability of the victim is included in the extensive catalogue of qualifications in section three.
– In section five, the qualification based on being a member of an organisation or association, including membership of a transitory nature, involved in the carrying out of activities for the promotion of illegal trafficking in or smuggling of persons, but a specific and particularly serious qualification is added with a view to aggravating the responsibility of the leaders, administrators or those in charge of these organisations or associations (paragraph two of section five).

Fourthly, the penalties associated to the offence described are substantially raised although the sanction stipulated in the original drafting together with imprisonment disappears. The penal framework involving imprisonment assigned to the basic type of offence is increased from imprisonment from six months to three years to imprisonment of four to eight years while the penalty of the offence qualified as trafficking with a view to sexual exploitation is fixed as imprisonment for five to ten years (in the previous law, this involved imprisonment for two to four years). In the event that a qualification is noted, the penalties increase substantially as will be described below.

In the fifth place, it should be pointed out that a specific mitigating circumstance (section six) is included so that the courts can impose the penalty inferior in level to the penalty established in the previous cases, taking into account the seriousness of the activity, its circumstances, the conditions of the guilty person and the intention of this person

Finally, it should be stressed that the third paragraph of section six establishes the possibility that the judicial authority also decree one or some of the measures stipulated in article 129 of the Criminal Code , that is to say, the accessory consequences which can be imposed on legal persons whose functioning

42 In this regard, the Decision of Section 1 of the Provincial Court of Las Palmas of June 8, 2004 can be consulted. This Decision appreciates three circumstances as laid down in the third section (intention of making of making profit, endangering the victims of trafficking, abusing the special vulnerability of the victims).

involves the committing of a criminal offence in the cases where an association or organisation involved in the promotion of illegal trafficking of persons or the illegal trafficking in or the smuggling of persons is involved.[43]

In short, the reform of September 2003 significantly altered essential aspects of Spanish criminal legislation on the trafficking in and smuggling of human beings although, as will be seen below, many interpretational doubts forecast under the previous legislation have not been resolved and other important problems have been created.

4. Analysis of the Offences against the Rights of Alien Citizens (Article 318 bis of the Criminal Code)

We now move on to an examination of the main aspects of the regulation of the offences against the rights of aliens from the dogmatic penal viewpoint and from the point of view of the case law interpretation of the more relevant cases which have been heard in Spain in recent years.

4.1 Protected Legal Right and Offence

One of the most debated issues in Spanish criminal bibliography on this matter is, undoubtedly, the identification of the legal right protected by the offences punished under article 318 bis of the Criminal Code, an issue which has not been definitively resolved by the legislator in 2003 or by the case law. The reason for the doctrinal and case law discrepancies lies in the apparent or real contradic-

43 Article 129 Criminal Code: *"1. The Judge or Court, in the cases stipulated in this Code, having heard the owners or their legal representatives can impose the following, providing reasons:*
a) Closure of the company, its premises or establishments, temporally or definitively. The temporary closure cannot exceed five years.
b) Winding up the company, association or foundation.
c) Suspension of the activities of the company, enterprise, foundation or association for a period which cannot exceed five years.
d) The prohibition to carry out future activities, mercantile operations or business of the type in which the offence was committed, encouraged or concealed. This prohibition can be of a temporary or definitive nature. If it is of a temporary nature, the period of prohibition cannot exceed five years.
e) The taking over of the company in order to safeguard the rights of the employees or the creditors for the time necessary which will not exceed a maximum period of five years.
2. The temporary closure stipulated in subsection a) and the suspension stated in subsection c) of the previous section ante can also be agreed to by the Instruction Judge during the processing of the case.
3. The accessory consequences stipulated in this article will be oriented towards preventing the continuity of the criminal activity and its effects".

tion between the content of the offence (extremely extensive), the meaning of the heading of Title XV bis (offences against the rights of alien citizens) and the location of the precept (after the offences against the rights of workers and other offences against the social and economic order).

Through Title XV of Book II of the Criminal Code, the legislator provides an indication, which in principle must be constituted as definitive, on the legal right protected under 318 bis, termed as "offences against the rights of alien citizens". This is a diffuse legal right which, above all, grants protection to the aliens as a social group and not so much as a particular individual;[44] which is the reason why the precept is located among the offences against the social – economic order[45] and other offences against society.[46] Thus, several judicial resolutions have declared agreement with this right, such as the sentence of the Provincial Court of Las Palmas, Section 2, of January 19, 2004:[47] according to this sentence, the finality of article 318 bis of the Criminal Code

> is none other than the protection of the right which all legal emigrants have to achieve full social integration, preventing any abuse of the situation of need, by attracting them to abandon their countries through the offer of sums of money, which for them are enormous, and they believe that the country of destination offers them more possibilities of welfare, when, in fact, their condition as illegal immigrants subjects them mainly to exclusion, relocation, or the forced acceptance of working conditions which are sometimes more disadvantageous than those they have in their own countries. Thus, the fundamental offence of article 318 bis resides in the lack or reduction of the enjoyment of such liberties by the alien who is the victim of illegal trafficking, through the sanctioning of the conduct which consists of promoting, encouraging or facilitating this illegal trafficking of persons, and its consummation does not require the accreditation of the existence of damage to the victim, regard-

44 As occurs with the offences against the rights of workers included in Title XV of Book II and these are unmistakeably parallel to the criminal offences we are studying, as is demonstrated by the location of the two Titles and the fact that the legislator has used the same grammatical construction in both drafts. *Vid*., with regard to the characteristics of the category of diffuse legal right Martínez-Buján Pérez, *Derecho penal económico. Parte especial*, Tirant lo Blanch, Valencia, 1999, pp. 469 et seq., although this concerns the offences against the rights of workers.

45 Titles XIII, XIV and XV of Book II of the Criminal Code.

46 Title XVI of said Book II of the Criminal Code: offences against the ordering of the territory, the protection of the historical heritage and the environment.

47 Similarly, the sentence of the same Court of February 9, 2004.

> less of whether this victim has consented or not, as this is a legal right which cannot be waived and is not at the disposal of the person.[48]

This thesis is upheld by part of the doctrine which has served to inspire the case law we have quoted.[49]

Proximate to the previous position is the doctrine which maintains that the legal right protected is human dignity (in particular, the dignity of the alien citizens as "members of a sensitive group", thus both the individual and collective dimension of the legal right)[50] or moral integrity, a notion which links up with personal dignity.[51]

Following the drafting of Title XV bis of the Criminal Code almost literally, Rodríguez Mesa points out that the legal right protected is "the legal status of the alien: the rights and liberties recognised by Spanish legislation".[52] Along these lines, Conde-Pumpido Tourón concludes that the rights of aliens who are the victims of illegal trafficking must be considered to be a protected legal right, more specifically, "the rights which the alien citizen could enjoy if his entry into or transit through the Spanish State had been achieved under legal conditions", such as "the rights which are put in danger by the risks involved in the legal entry, transit and settlement",[53] a doctrinal option which is welcomed in case law.[54]

Nevertheless, the designation of the legal right protected cannot normally be applied apart from the analysis of the offence as, logically, the legal right which is assessed from a penal point of view must also be deduced from the con-

48 Thus, the Sentence of the Provincial Court of Málaga, section 7, of 13-3-2001 and the Sentence of the Provincial Court of Barcelona, section 5, of 5-1-2004.

49 Particularly, Serrano[Piedecasas, "Los delitos contra los derechos de los ciudadanos extranjeros", in *Inmigración y Derecho penal*, coordinated by Laurenzo Copello, Tirant lo Blanch, Valencia, 2002, p. 332: "the content of the legal right protected in Title XV bis is none other than the right which all emigrants have in order to achieve full social integration".

50 Pérez Cepeda, *Globalización...*, *op.cit.,* pp. 170 et seq.

51 León Villalba, *Tráfico de personas...*, *op. cit*., pp. 247 et seq.

52 Rodríguez Mesa, *Delitos contra los derechos...*, *op. cit.,* p. 58.

53 Conde-Pumpido Ferreiro, *Delitos contra los derechos...*, *op. cit.,* p. 297.

54 Although normally they refer to the offence of article 313.1 of the Criminal Code (promotion of the smuggling of workers), which is a special type as regards the offence of article 318 bis of the Criminal Code, several sentences reproduce the idea that the legal right protected as regards these offences are the rights which the alien citizen could enjoy if the immigration were not clandestine: e.g. Sentences of the Supreme Court of January 30, 2003 and May 30, 2003, as well as the Provincial Courts of Asturias (section 3) of July 5, 2004; of Valencia (section 5) of March 8, 2004; of Zaragoza (section 1) of February 24, 2004; and of Almería (section 3) of November 14, 2003.

duct described by criminal law. However, in the first approach, it can be seen that the offence of 318 bis of the Criminal Code is described very extensively, and even more so after the reform carried out in 2003, which does not seem to correspond completely with the drafting of the Title which contains article 318 bis of the Criminal Code.[55] In other words, apparently not all conduct which can be subsumed in the criminal offence in accordance with its literal drafting implies an attack on the rights of alien citizens. This prevents the simple assumption of the data which is evident from the drafting of Title XV bis concerning the legal right protected and forces us to study the offence in detail.

The offence described by article 318 bis in force, its basic offence (section one) involves three classes of actions (promoting, encouraging or facilitating) with a view to illegal trafficking in or the smuggling of persons from, through or to Spain. We will now analyse these three elements separately: the action (promoting, encouraging or facilitating), the subject (illegal trafficking, the smuggling of persons) and the complement (from, in transit through or with destination Spain).

According to the definition given by the Spanish Royal Academy and that which is habitually used in case law, promote is understood to mean provoke, incite, procure the achievement, take the initiative; encourage is a synonym of help, support or protect; and finally, facilitate consists of making something easy or enabling the execution of something through the removal of obstacles or the provision of the means to make something possible.[56] It is not surprising that the Sentence of the Supreme Court of October 6, 2003 stated that "the legal prevention of criminal conduct is extremely wide", and this statement is reinforced after the reform made by Organic Law 11/2003, which added the adverbs "directly or indirectly" to the verbs given above. However, among the extensive range of conduct which can be subsumed in the content of the offence, case law usually highlights collection, transport and mediation as the most frequent, as shown in the Sentence of the Provisional Court of Las Palmas (section 2) of March 22, 2004.

From the inclusion of these three verbs in the description of the typical action an important conclusion can be drawn: promoting, encouraging or facilitating the trafficking in or illegal immigration of persons, but not immigration in itself; the person who helps in the movement is punished, but the person who is moved is not.

It is more difficult to specify and possibly differentiate the concepts of illegal trafficking and smuggling, the object of the verbs which constitute the nucleus of the offence. Generally speaking, in the penal area, there is usually agreement on the concept of immigration (drawn up in relation to the conduct stipulated

55 In this regard, Rodríguez Montañés, "Ley de extranjería y Derecho Penal", in *La Ley*, No. 5261, March 6, 2001, p. 3.

56 León Villalba, *Tráfico de personas...*, *op. cit*., p. 254.

in article 313.1 of the Criminal Code), which is defined as "those who were resident in one country arriving in another country in order to settle there" (in the Sentence of the Supreme Court of October 16, 2003). As concerns the concept of "trafficking", the doctrine is inclined to accept the sense which has traditionally been conferred on this word in relation to the illegal trafficking of labour (article 312.1 of the Criminal Code), which identifies trafficking with the idea of commercial transaction or, at least, mediation.[57] Furthermore, another part of the doctrine, in line with many of the international texts which address this matter attempts to restrict the concept of trafficking in persons by relating it to the infringement of human rights implied by this trafficking, for example, León Villalba defines it as "any activity involving the promotion or encouragement of recruiting or transporting persons between countries or regions, with a view to their exploitation at work or their sexual exploitation or subjection to slavery or similar practices, using violence, intimidation, deceit or any form of abuse".[58] From this point of view, illegal trafficking in and smuggling of persons would be differentiated, illegal immigration would consist of "transfer between countries infringing legality as regards crossing borders and/or changing residence", with no need for specific means or objectives regarding the move.[59]

However, much of the doctrine and, especially, the case law (the Sentence of the Provincial Court of Cadiz Section 4, of October 27, 2003 illustrates this) have questioned the commercial sense (mediation with profit) and the finality (activity aimed at exploitation or slavery) of the concept of trafficking, stressing, on the other hand, its dynamic nature; trafficking, understood this way, is equivalent to displacement, movement or transit.[60] As Rodríguez Mesa points out, the fact that the basic type of offence does not require the presence of interest in profit, the use of certain means of commissioning which are harmful or dangerous for the victim or the involvement of organised groups, but that these circumstances give rise to the application of qualified offences leads to the employment of non-restricted acceptance of trafficking (equivalent to displacement or transit).[61] This interpretation, which was dominant before the 2003 reform, means that the mention of "the smuggling of persons", introduced by Organic Law 11/2003, is ineffective as the conduct involving aid to the displacement of persons in order to settle in a country other than the country of origin can be within the scope of the notion involving "promoting, encouraging or

57 Affirmed by Baylos Grau & Terradillos Basoco, *Derecho penal del trabajo*, *op. cit.,* p. 84; and, for example, by Conde-Pumpido Ferreiro, *Delitos contra los derechos...*, *op. cit*., p. 303.

58 León Villalba, *Tráfico de personas...*, *op. cit*., p. 61.

59 León Villalba, *Tráfico de personas...*, *ibidem*.

60 Thus, the Sentences of the Provincial Court of Málaga (section 7) of December 31, 2003, of February 26, 2004 and March 30, 2004.

61 Rodríguez Mesa, *Delitos contra los derechos...*, *op. cit*., pp. 62 et seq.

facilitating the trafficking of persons", understanding trafficking in the widest sense.

Nevertheless, the legislator of 2003 expressly included the mention of the smuggling of persons, which cannot be by chance if the legislator knew of the dominant case law in this regard. His objective must have been to clarify. Probably, apart from attempting to achieve coherence with the texts from the European Union, the legislator wanted to make it clear that the conduct involving help for the smuggling of persons is punishable, regardless of the means used or the objectives of the perpetrator, with no loopholes which might derive from possible interpretations of the term trafficking in its strictest sense. Thus, the offence in article 318 bis of the Criminal Code distinguishes between trafficking and smuggling, but it does not distinguish these in its judicial-penal considerations as it treats both the same.[62] Moreover, as we have already said the fact that the legislator of 2003 expressly wished to include the punishment for the conduct involving aiding the smuggling of persons together with the illegal trafficking of persons (in the same offence, with the same punishment) clearly indicates that this lack of differentiation as regards incrimination is assumed and intended by the law and is not only the result of the difficulty involved in delimiting both these concepts.[63]

Evidently, in order for the offence to be consummated, it is not sufficient for the conduct to encourage the trafficking or the immigration of persons, but the trafficking must also be "illegal" and the immigration must be "clandestine". According to the Sentence of the Provincial Court of Málaga (section 7) of March 30, 2004, trafficking is considered to be illegal when the persons who are the victims do not have the legal requirements in order to be transferred or moved and immigration is classified as clandestine when it is secret or hidden due to fear of the law or to elude the law. In short, as Conde-Pumpido points out, trafficking or immigration are illegal or clandestine when these are carried out outside the established legislation on legitimately crossing borders or by abusing this legislation, which is contained fundamentally in the Aliens Act.[64] A different question which is discussed in case law is when the abuse of the law takes place especially in cases where resources are used to authorise the transitory entry into the country (such as a tourist visa) in order to remain or settle.[65]

---

62 Regarding the confusion (deliberate or not) in the use of the concepts of *trafficking* and *smuggling*, *vid.* the extensive treatment of León Villalba, *Tráfico de personas...*, *op. cit*., pp. 27 et seq.

63 A difficulty highlighted by Pérez Cepeda, *Globalización...*, *op.cit*., p. 30.

64 Conde-Pumpido Ferreiro, *Delitos contra los derechos...*, *op. cit*., p. 304.

65 This is one of the cases in the Courts most debated and the results are different depending on the cases: for example, the Sentences of the Provincial Court of Burgos (section 1)of February 1, 2002, and of the Provincial Court of León (section 2) of November 19, 2003 do not consider that the conduct under trial is an offence as the

Finally, section 1 of article 318 bis clarifies that the promotion of trafficking or immigration is punishable regardless of whether the destination is Spain or whether this is done from or in transit through Spain; in the words of the Sentence of the Provincial Court of Las Palmas (Section 2) of April 22, 2004, the promotion or encouragement are punished "*whether these involve encouraging the entry to any part of Spanish territory or transferring between two points in Spain or towards the territory of another State*".[66]

After this characterisation of the offence, we are now in a position to return to the question of the legal right protected. As we have seen, the basic criminal offence of article 318 bis of the Criminal Code, as it is drafted, takes any conduct which can be imagined as entailing objective aid to the trafficking or immigration of persons involving an infringement of administrative legislation in this regard, with no additional restrictions or requirements. As we have shown, there are numerous reasons which guarantee this statement: the promoting or aiding of illegal trafficking in and the smuggling of persons are punished in order to prevent restrictive interpretations which would give rise to a strict concept of trafficking; it should be stressed that the aiding or promoting of trafficking or immigration can be direct or indirect in order to take in the greatest possible number of offences. Interest in profit is not required in the case of the perpetrator, nor is endangering the life, health or integrity of the victim, nor is the exploitation of the victim required. Moreover, the basic offence does not require the existence of a mafia or being a member of such an organisation, that is to say, an association or organization involved in these activities; also, if the finality of the perpetrator can be considered to be positive (humanitarian reasons, family reasons, ...), the conduct seems also to be sanctioned, although this is mitigated (no other sense can be given to the reference which is contained in section six of article 318 bis of the Criminal Code, to the finality of the perpetrator). In short, all the offences which objectively entail aid to illegal entry to, exit from or transit of

---

entry into Spanish territory was through a border post authorised for this purpose and apparently there was no failure to comply with the requirements for entry into Spanish territory stipulated in Organic Law 4/2000; however, The Sentence of the Provincial Court of the Balearic Islands (section 2) of June 30, 2003 considers that "*illegal trafficking must be understood to be any movement of aliens which attempts to circumvent Spanish legislation on immigration; therefore illegal trafficking (...) also involves what at first apparently is licit but is intended as illegal, thus, this classification can be applied to the entry as a tourist but with the intention of remaining illegally in Spain and not regulate the situation".*

66 Nevertheless, there is a debate in case law regarding whether the conduct involving the transfer of immigrants between two places on Spanish territory when Spain is not used as an intermediary transit can be subsumed in the class, although from the sentence mentioned could give rise to an affirmative response. The Sentence of the Provincial Court of Almería, section 1 of April 28, 2003 discards the classification of this conduct.

aliens through Spain constitute offence. This seems to be how this is understood in several sentences, such as those of the Provincial Court of Malaga, section 7 of December 24, 2002 and March 30, 2004, and the sentence of the Provincial Court of Cadiz, section 6 of December 9, 2003, which punish the person who is involved in aiding a third party (some cases involve family members) in order to facilitate entry into Spain, with no need for this to entail profit, nor belonging to a criminal network or association, nor danger to any legal right of the "victim" (who not only consents, but encourages and promotes the action).

Thus, it can be doubted that those rights expressly stated above (the social integration of the alien, his judicial status….) can really be considered to be protected legal rights. The Sentence of the Provincial Court of Seville (Section 3) of May 14, 2001 states that "*the ordering and regulation is primarily sought through the legal channels and in accord with legal criteria*", therefore, "*the legal right protected as regards the smuggling of persons lies in the interest of the State in the control (…) of the presence of alien citizens in Spain*". Along these lines, the Sentence of the Provincial Court of Cadiz, section 4 of October 27, 2003, understands that the legal right protected is essentially the general interest in controlling migratory flows.[67] Álvarez Álvarez is resigned to this interpretation (the purpose of protection is to order the migratory flows) when he states that "*the rights of aliens are only protected indirectly*", therefore the drafting of Title XV bis of Book II of the Criminal Code is "unfortunate, systematically defective and merely symbolic".[68]

In short, as was pointed out at the start of the section, we find an almost insoluble contradiction as concerns the legal right protected, the title of the law points in one direction and the content in another. In this regard and based on the location of the precept (near to the offences against the social-economic order),[69] Rodríguez Montañés provides a discriminating solution which, lege lata, deserves attention. In his opinion, the offence described in article 318 bis of the Criminal Code is an offence against the social-economic order (understood as the group of basic conditions and institutions required for the maintenance

67 The Supreme Court seems to accept this idea in some sentences although as regards the types of smuggling of workers of article 313.1 and the illegal trafficking of labour of article 312.1, closely related to article 318 bis, as demonstrated by the Sentence of May 30, 2003: *"the penal classes of articles 312 and 313 refer to state legal rights as their finality is to protect the legal regulations of immigration and labour"*.

68 Álvarez Álvarez, "La protección contra la discriminación del extranjero en el Código penal", in *El extranjero en el Derecho penal sustantivo y procesal (adaptado a la nueva Ley Orgánica 4/2000)*, Manuales de formación continuada, Consejo General del Poder Judicial, 2000, Madrid, p. 355.

69 To be exact, the location of the precept is criticised by those who propose other legal rights, for example, León Villalba, *Tráfico de personas...*, *op. cit.,* p. 251, and Rodríguez Mesa, *Delitos contra los derechos...*, *op. cit.,* p. 59.

of the social-economic system in force as regards the purely economic aspect and its social dimension), in which one of the aspects of this order is protected, namely migration, and this protection is given by recourse to intermediate rights (the individual rights of the immigrants as a collective and the respect for the regulation in this regard).[70] Technically, the social-economic order becomes a "spiritualised" or "institutionalised" supra-individual right, while the rights of alien citizens have representative function of the institutionalised right.[71] In the opinion of this author, with this judicial construction, it is possible to coordinate the interests under criminal law: the general interest in controlling the migratory flow and ensuring respect for the rules which regulate it and the interest in protecting some of the basic rights of immigrants as a collective (security, liberty, dignity, employment rights).

As was mentioned above, even considering the difficulties, in our opinion, this explanation is most in keeping with the literal drafting of the law, although, as we shall see below, from a political-penal perspective it cannot be considered to be the most desirable. The characteristics and the extension of the offence lead us to discard the fact that the legal right protected refers only to the rights of the alien citizens (or one of these in particular), however, we are asked to consider the State interest in the control of the migratory flow as such (and this in turn constitutes an aspect of the social-economic order).

The drafting of Title XV bis of the Criminal Code cannot be passed over nor can the institutionalised nature of the social-economic order, which involves the consideration of the rights of the alien citizens as an intermediate legal right. Thus, although the legislator essentially seeks to protect the social and economic order, the law only punishes conduct involving the harm to or, at least, putting the rights of the aliens in danger; that is to say, in accord with this thesis, the conduct which does not entail an attack on the rights of illegal immigrants are excluded from the scope of these offences, although these rights are not the ultimate objective of the protection. This limit is important in order not to consider the aid given to the illegal immigrant in favour of some legal right (such as providing food or clothing) as an offence although this can give rise to an administrative infringement, it does not constitute a danger or harm of any kind.

In short, all actions which objectively imply aiding or encouraging the illegal entry into, exit from or transit of aliens through Spain, attacking some right they have, constitutes an offence in accordance with Title XV bis of Book II of the Criminal Code.

---

70 Rodríguez Montañés, *Ley de extranjería...*, *op. cit*., p. 2.

71 Regarding the categories mentioned (institutionalised legal right and legal right with representative function), *vid*. Martínez-Buján Pérez, *Derecho penal económico. Parte general*, Tirant lo Blanch, Valencia, pp. 98 et seq., and Rodríguez Montañés, *Delitos de peligro, dolo e imprudencia*, Universidad Complutense, Madrid, pp. 300 et seq.

4.2 Perpetrators and Victims

The offence described in article 318 bis of the Criminal Code is a common offence as the perpetrator does not require any special conditions. However, the speciality does require that the victim be an alien as is deduced from the drafting of the Title,[72] excluding the citizens of the European Union as is pointed out in the sentence of the Provincial Court of Las Palmas (section 1) of February 19, 2003. The Sentence of the Provincial Court of Las Palmas (section 2) of April 22, 2004 states that "the perpetrator can be any person and the victim an alien, excluding those whom the administrative legislation in this regard does not apply to".[73]

As was stated while describing the offence, it should be clarified that the illegal immigrant does not commit a criminal offence as such, since the type of offence punishes the promotion, aid or encouragement to the smuggling of persons or illegal trafficking, but not the fact of the illegal immigration itself.

However, it can be understood that the alien (the object of the trafficking or illegal immigration), as object of the offence, becomes a victim of the offence as the type of the offence requires the assigning to a legal right of the immigrant, even though this is indirect. Nevertheless, due to the fact that the legal right protected is of a collective nature, the simultaneity of several victims only gives rise to a single offence.[74]

4.3 Qualifications of the Basic Offence

The qualifications, that is to say, the aspects which aggravate the criminal liability as compared with the liability established in the basic type of offence are contained in sections 2, 3, 4 and 5 of article 318 bis.

Section 2 includes the qualification involving working with a view to sexual exploitation. As was mentioned above, the inclusion of this qualification meant the repeal of the old section 2 of article 188 of the Criminal Code, which lost the character of an autonomous offence describing an offence against sexual

72 That is to say, as article 1.1 of the Aliens Act states, "*those who do not have Spanish nationality".* Curiously, the class in article 318 bis – unlike the drafting of the Title – refers to "persons" and not to "aliens", which has led some authors to believe that the supposed illegal trafficking of Spanish citizens with third countries is also included in this class (*vid*., for example, Rodríguez Montañés, *Ley de extranjería...*, *op. cit*., p. 3); nevertheless, the usual interpretation in case law, as has been mentioned, reserves the condition of victim to aliens.

73 In this regard, the Sentence of the Provincial Court of Las Palmas (section 2), of March 22, 2004.

74 In this regard, the Sentence of the Provincial Court of Malaga, section 2 of October 8, 2003.

liberty. It is noteworthy that the conduct is punishable if there is the intention of sexual exploitation, and there is no need for certain means for the commission, such as violence, intimidation or deceit, which are required for the consummation of the offence involving the causing of prostitution in article 188.1 of the Criminal Code.

Section 3 includes several qualifications which can be subdivided into the following five: a) intention of making profit; b) employment of violence, intimidation or deceit; c) abuse of a situation of superiority or special vulnerability of the victim; d) the victim is under age or disabled; e) danger to the life, health or integrity of the persons. It should be taken into account that all the reasons for aggravation are included in the same number and this means that the simultaneity of several qualifications (not infrequent) receives the same treatment as only one of these, as recorded in the Sentence of the Provincial Court of Las Palmas, section 1 of June 28, 2004.

Qualifications b) and c) are not often applied probably due to difficulties concerning proof since the employment of certain measures or taking advantage of certain situations in order to dominate the will of the victim normally occur at the time these are recruited in their countries of origin. Neither are the qualifications involving the age or disability of the victim frequent.

However, qualifications a) and e) are used assiduously. The former, the intention of making profit, consists of the perpetrator acting "in order to obtain profit".[75] As has been stated repeatedly, it is strange that the basic type of offence does not require the existence of intention to make profit, an objective which is present in almost all the cases tried before the Courts. Unfortunately, the qualification involving the creation of danger to life, health or the integrity of the persons who are the victims of the trafficking is also frequent due to the conditions in which the victims are transported. As the Sentence of the Provincial Court of Las Palmas, section 2 of January 19, 2004 logically reminds us it is not necessary that the danger lead to injury (which would generate a group of offences), it is sufficient that such a result be foreseeable, and the same Court in its Sentence of February 7, 2004 adds that the danger must be specific.

Section 4 lays down the qualification regarding the perpetrator's condition of civil servant or agent of the authority, an aggravation which is relatively normal in the Spanish Criminal Code as regards many of the offences which are common top private citizens and civil servants.

Finally, section 5 sanctions belonging to an organisation or association involved in the illegal trafficking in or smuggling of persons more severely, even if this is temporary, and the leaders, administrators or those in charge of such associations are treated with special strictness. According to the Sentence of the Provincial Court of Malaga, section 7 of December 24, 2002, "the essence of the concept of organisation lies in the presence of a structure characterised

75 Sentence of the Provincial Court of Malaga, section 7 of December 24, 2002.

by a decision making centre and several hierarchical levels and this cannot be confused with the situation where there are co-perpetrators or co-participation since the existence of coordinated persons who are not subject to a hierarchy does not entail the existence of an organisation". This is a qualification which is frequently applied by the Courts.

4.4 Compulsory Mitigation

Section 6 of article 318 bis of the Criminal Code contains a compulsory clause for the mitigation of the sentence, whereby the Courts take into account the gravity of the facts and their circumstances, the conditions of the guilty party and his intentions and can impose the penalty which is one degree lower than the one shown in previous sections. Given the extension of the description of the offence and the considerable penalisation associated with the basic type of offence and the qualified offences, the legislator wanted to moderate the severe penalisation and allowed the judges to reduce the penalty depending on a number of circumstances. Among these, the circumstance which is more usually considered in case law when applying such mitigation is aid due to friendship or, especially, aid due to family links among the persons involved.[76]

4.5 Culpability

As stated in the Sentence of the Provincial Court of Malaga, section 7 of March 13, 2001, the commission of the offence requires mens rea as the negligent commission expressly does not incriminate. It is possible to appreciate an error, which generally can be resolved (such as errors regarding the alien nature of the victim or the illegality of the movement, and even as regards a presupposition of a justification such as a state of necessity); however, it is difficult to imagine the appreciation of an error which has to do with the anti-judicial nature of the conduct, especially when any of the qualifications stipulated in article 318 bis of the Criminal Code is involved.

4.6 Perpetration and Participation

As stated in doctrine and case law, taking into account the typical verbs used (promoting, facilitating, encouraging), the conduct which is usually considered to be participation is raised to the level of perpetration as any causal contribution to the production of the event fits into the type of offence.[77] Nevertheless, some sentences (for example, the Sentence of the Supreme Court of December

76 In this regard, for example, the Sentence of the Provincial Court of Malaga, section 7 of March 30, 2004.

77 Rodríguez Montañés, *Ley de extranjería...*, *op. cit*., p. 4.

26, 2003 and the Sentence of the Provincial Court of Las Palmas, section 2, of March 22, 2004) debatably appreciate complicity and not perpetration in cases in which the contribution of the subject is minimally relevant or secondary.[78]

4.7 Execution

Case law almost unanimously[79] proclaims that the offence described in article 318 bis of the Criminal Code is an offence involving mere activity and advanced consummation, that is to say, it is sufficient to carry out any act involving promoting or aiding illegal trafficking in or the smuggling of persons, and there is no need for the entry to, the exit from or the transit through Spanish territory to occur for this to be considered to be consummated. This is confirmed by the Sentence of the Supreme Court of October 15, 2002, which states the difficulties involved in tentatively appraising the offence in article 318 bis of the Criminal Code.

4.8 Penalisation

The extensive system of qualifications stipulated in article 318 bis complicates the determination of the penalty applicable to each infringement against the rights of alien citizens. In order to establish the penalty, it is necessary to take into account whether any of the qualifications of the following sections occur together with the basic offence (section one). Depending on the sections in which the conduct can be subsumed, the duration of the penalty involving the privation of liberty by imprisonment must be one of the following:[80]

---

78 In both cases, the conduct considered to be complicity consists of carrying or giving food to illegal immigrants who are staying in houses of the organisation involved in encouraging the smuggling of persons.

79 *Vid*., for example, the Sentence of the provisional Court of Malaga, section 7, of September 23, 2002.

80 Except for the second section, in which the Law directly establishes the limits of the penal framework, in the other cases, it is necessary to have recourse to the rules contained in article 70 of the Criminal Code in order to determine the limits of the penal frameworks. According to article is modified, *"the maximum penalty will be formed taking the maximum figure stated in the Law for the offence in question and adding on half this figure again, and the resulting sum will constitute the maximum limit. The minimum limit of the maximum sentence will be the maximum of the sentence stated by the Law for the offence in question increased by one day or a one day penalty depending on the nature of the sentence to be imposed"* and the minimum sentence *"will be formed based on the minimum figure stated for the offence in question, deducting from this figure half the amount and the result of this deduction will constitute its minimum limit. The maximum limit of the minimum sentence will be the minimum of the sentence stated in the Law for the offence in question, reduced by*

Section 1	4 to 8 years imprisonment
Sections 1+3	6 to 8 years imprisonment
Sections 1+5(p1)	8 years and a day to 12 years imprisonment
Sections 1+5(p2)	10 to 12 years imprisonment; possibility of 12 to 18 years imprisonment
Section 2	5 to 10 years imprisonment
Sections 2+3	7 years and 6 months to 10 years imprisonment
Sections 2+5(p1)	10 years and one day to 15 years imprisonment
Sections 2+5 (p2)	12 years and 6 months to 15 years imprisonment; possibility of 15 years and 1 day to 22 years and 6 months imprisonment.
Sections 1+6	2 to 4 years minus one day imprisonment
Sections 2+6	2 years and 6 months to 5 years minus 1 day imprisonment

In addition, it should be taken into account that if the qualification in section 4 is present (the perpetrator uses his condition of authority or a civil servant) the penalty of absolute disqualification for six to twelve years must also be imposed. Moreover, in the case of a person belonging to an association or organisation involved in trafficking, the penalty involving special disqualification for a profession, trade, industry or commerce must be imposed for the duration of the privation of freedom to which the perpetrator is condemned.

5. Analysis of Other Types of Offence Related to Trafficking/Smuggling

Although article 318 bis of the Criminal Code includes the main offence dedicated to the criminal prosecution of the illegal trafficking of persons and aiding the smuggling of persons and this orientation has become stronger with Organic Law 11/2003. The Criminal Code contains other offences which are also related to this matter although more indirectly. Among these we should point out the offences against the rights of workers described in articles 312 and 313; the offence of removal of minors in article 225 bis; and the offence of illegal association in order to promote the illegal trafficking of persons in article 515.6.

5.1 Offences against the Rights of Workers

As was stated in another section, the Criminal Code of 1995 introduced several offences regarding offences against the rights of workers related to the trafficking in or the smuggling of persons which are included in articles 312 and 313.

---

one day or a one day penalty depending on the nature of the sentence to be imposed". (Antonio (aquí Cris?)

According to the Sentence of the Supreme Court of February 5, 1998, these offences are

> to protect all the Spanish and alien workers against a new type of exploitation encouraged by certain features of the world economic structure in our time such as the deepening inequality between rich and poor countries, the multiplication of international communications of all kinds and the logical growth of the aspirations of the populations of the less developed countries to achieve better working and living conditions.

Article 312.1 punishes the trafficking of labour and is distinguished from article 318 bis both as regards the victim (it is not necessary that the victim be an alien) and the trans-border aspect (it is not necessary that the trafficking involve the entry to or exit from national territory). With regard to this type of offence, the term trafficking is usually interpreted in the commercial sense, as a synonym of "assigning" or "selling" workers.

Section 2 of article 312 punishes those who employ alien subjects without work permits in conditions which harm, suppress or restrict the rights they have recognised through legal provisions, collective agreements or individual contracts; in this case the victim must be an alien but no movement or transfer of persons is required only the abuse of his situation of vulnerability deriving from the lack of a work permit.

The type which is most applied is the one described in 313.1, which sanctions the person who promotes or encourages the smuggling of workers into Spain by any means. As was mentioned above, unlike article 318 bis, as regards this type, it is necessary that the subject's destination be Spain. This particularity led case law to understand that the application of article 313.1 prevailed over 318 bis, as demonstrated by the Sentence of the Provincial Court of Valencia (section 5) of November 6, 2002.[81]

However, this preference was logical before the 2003 reform due to the more severe penalty associated with the conduct in article 313 (2 to 5 years imprisonment) as compared with that of article 318 bis (6 months to 2 years imprisonment); with the reform made by Organic Law 11/2003, it is difficult to maintain the criteria maintained until that time, as the basic offence in article 318 bis became more extensive (together with trafficking, smuggling is expressly mentioned in the same terms as those used in article 313.1)and, above all, a greater sanction (4 to 8 years imprisonment). With this situation, if the thesis of the speciality of 313 is maintained, the conduct involving the promotion of the smug-

81 According to this sentence, "in the cases of the transfer of persons in boats or other means of transport in order to access Spanish territory clandestinely, the preferential application of article 313.1 must, in principle, be maintained if the persons clearly come with the intention of looking for work".

gling of persons when the victims are workers would be privileged, which does not seem acceptable as it cannot be understood why aiding the smuggling of persons for work should be considered more benevolently than the immigration which is not of this nature (counter to legislative tradition which had dealt with the promotion of illegal immigration for work specifically and more severely).If primacy is given to article 318 bis, article 313 would have no content. In short, this is an evident error of the legislator, who ignored the existence of the type of offence in article 313.1 while reforming article 318 bis and converted this into an ineffective offence.

5.2 Kidnapping of Minors

Section 1 of article 225 bis of the Criminal Code punishes the parent who removes his or her under age child for no justified reason with two to four years imprisonment and special disqualification as regards the right of patria potestas for a period of four to ten years. Section 2 of said article 225 bis declares that removal is deemed to be the transfer of a minor from his place of residence without the consent of the parent he habitually lives with or the persons or institutions to which his protection or custody was entrusted. Finally, section 3 establishes that, when the minor is transferred outside Spain, the upper half of the penalty will be imposed (3 to 4 years imprisonment).

The consummation of this offence also demands the illegal movement or transfer of a person, who in this case must be a minor. The speciality of article 225 bis in relation to article 318 bis does not lie so much in the offence but in the condition of the subjects (the perpetrator has to be the parent of the victim), which justifies the lower penalisation of this offence in comparison with the penalisation laid down in 318 bis.

5.3 Illegal Association

Section 6 of Article 515 of the Criminal Code sanctions the association which intends to promote the trafficking of persons. As stated in the Sentence of the Provincial Court of Huelva (section 2) of December 4, 2002, this offence requires an organization made up of a plurality of persons with a certain permanence, a hierarchy and a common finality (consisting in the promotion of the trafficking of persons). As stated in this sentence, it is clear that the problem is the delimitation between this offence and that of article 318 bis, particularly when the qualification laid down in section 5 is taken into account. Generally speaking, the doctrine resolves the problem in favour of article 318 bis, due to its speciality and the more severe penalisation, while article 515.6 remains as residuary for the

cases in which the subject is part of the criminal organization but has still not performed any of the specifications of the illegal trafficking of persons.[82]

6. Conclusions

The critical opinion which can be expressed as regards Spanish criminal legislation on the trafficking in and smuggling of human beings cannot be positive. This is clearly stated by Álvarez Álvarez: "the interests and the rights of aliens are used only as bait to calm down the conscience of the legislator and provide a dose of "good conscience" to the citizens".[83] This is confirmed by the problems which have been seen as regards the designation of the legal right protected under article 318 bis, the definition of the offence described in this article and its relationship with other similar criminal offences, difficulties which the 2003 reform has attempted or has in fact increased. In fact, as the author mentioned stresses, the question is, at least, one of "conscience". The legislator has described the offence which does not correspond with the Title given, which also is not in consonance with the location of the precept.

As we are sure that another reform of the criminal legislation in this area will be addressed in the future, this should be based, at least, on judicial honesty and technical skill: that is to say, knowing what is to be safeguarded and act accordingly. If the legislator wishes to protect the interests of the State as regards the control of the migratory flows, it must, first, endeavour to comply with the principle of minimum penal intervention and check the sufficiency of the administrative intervention in order to try to combat illegal conduct.[84] If having to have recourse to the final ratio of the legislator is considered to be relevant, criminal law should include the offence involving assistance to the smuggling of persons among the offences against the State and, in particular, among the offences against public policy. If the objective of the legislator is to protect certain individual rights of aliens who are in a specially vulnerable situation (life, health, sexual freedom, employment rights, etc.), then it will suffice to use the general offences (homicide, injuries, aggression or sexual abuse, trafficking of labour, etc.) with the aggravating circumstances which might be appreciated in the crimes committed. However, if a real endeavour is to be made to combat the exploitation of man by man, independently of the employment, sexual or other finality, the corresponding criminal offence will have to be placed among the offences against the moral or legal dignity or integrity attacked by this offence.

82 Conde-Pumpido Ferreiro, *Delitos contra los derechos...*, *op. cit.,* p. 315

83 Álvarez Álvarez, *La protección contra la discriminación...*, *op. cit*., p. 355.

84 Although, generally speaking, most of the doctrine challenges the idea that this interest could constitute a legal right worthy of penal protection; *vid*., for example, RODRÍGUEZ MESA: *Delitos contra los derechos...*, op. cit., page 56.

*Carmen González Enríquez**

THE FIGHT AGAINST ILLEGAL IMMIGRATION, SMUGGLING AND TRAFFICKING IN HUMAN BEINGS IN SPAIN: AMBIGUITIES AND RHETORIC

1. Introduction: Illegal Immigration in Spain

According to Eurostat data, Spain was, in 2003, the European country which received the most immigrants, followed by Italy. The percentage of aliens in the Spanish population has risen from a small 0.9 % in 1991 to 6.3 % in 2003, it doubled between 2001 and 2003 and has risen fourfold since 1998. Most immigrants who arrived since 2001 have found the doors closed to legality, and as a result in June 2004 there were in Spain between 800,000 and one million irregular immigrants, compared with 1,700,000 foreigners staying legally in the country.[1] Although there is a lack of studies on the living and work conditions of these immigrants, it is known that they are concentrated in some sectors, domestic service, construction, agriculture, shops, hotels and catering, in employment and salary conditions often considered to be unacceptable by the majority of Spanish citizens.[2] The same can be said as regards their housing conditions; in the rural areas, the immigrants who go to the fruit and vegetable harvests live frequently in sub-standard housing, abandoned or half-ruined buildings, and, in the cities, where rented houses are very scarce, the immigrants often share expensive rented flats with other persons or families in overcrowded conditions.

* Professor of Political Science in the Universidad Nacional de Educación a Distancia (UNED) in Madrid.

1 As regards the difficulty of knowing the number of aliens in Spain, see Luis Garrido, 'Para cuantificar a los extranjeros', *Economistas*, No. 99, 2004, pp. 28-37, Colegio de Economistas de Madrid.

2 See Carlos Angulo, 'Condiciones de vida de la población extranjera en España', *Economistas*, No. 99, 2004, pp. 98-107, Colegio de Economistas de Madrid and, in the same edition of the journal, Luis Garrido & Luis Toharia, 'La situación laboral de los españoles y los extranjeros según la Encuesta de Población Activa', pp. 74-86.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *325-343.*
 ISBN 90 04 15064 1.

The "warm beds", which are shared by several persons at different times of the day, can be found in some districts of the large cities.

This chapter deals with the policies devoted to prevent illegal immigration and combat the trafficking and smuggling of immigrants during the period 1998 to 2004, the one which experienced the biggest flow of immigration in Spanish history. The center-right Popular Party was governing during those years, till the electoral victory of Socialist Party in March 2004. In August 2004 the new socialist government announced a new regularization process and legal reforms directed to ease the obtaining of residence permits for former illegal immigrants. At the closure of this paper, in September 2004, these announced changes are still subjected to political negotiations and have not been defined. For this reason this chapter does not refer to this new phase in the immigration policies.

Immigration policy during the period 1998-2004 has been restricted to a defensive, hesitating effort to control the arrival of immigrants, reinforcing frontier surveillance, legislative reforms and administrative and diplomatic measures to facilitate the return of irregular immigrants, an effort, which, in the light of the demographic data, has been fruitless. Thus, in fact the main instrument which has been used as regards the policy for the control of flows of immigration has been the refusal of the Popular Party led Government to open up a new "special regularization", like those which allowed 370,000 immigrants to be regularised in 2000 and 2001, based on the argument that these regularizations have a powerful "call effect" to attract new immigrants. As a result of this closure of regularizations, the immigrants who have continued to arrive have found it impossible to legalise their situations and have been condemned to live in a legal limbo, where they cannot sign a work contract or be registered on the Social Security. The legal norms allow them to access the residence permit only if they can demonstrate that they have lived in Spain for five years (three years in the case that they have a work or family ties with Spaniards or regular migrants), they have arrived through family regrouping, or they have arrived in Spain within one of the contingents of immigrant workers which the Government establishes each year in an attempt to fit the arrival of alien workers to the job market needs. However, due to the extreme fragmentation of the demand for alien workers, mainly coming from small businesses, the system for the centralised collection of information intended to put order into the relationship between the arrival of immigrants and the job market has failed. Thus, in 2002, when about 400,000 immigrants arrived in Spain, the offer for immigrants made by the Government amounted to 30,000 jobs. On the other hand, family regrouping is still very small in Spain (30,000 persons during year 2003), due to the short period of stay in the country of most immigrants.[3]

3 Delegación del Gobierno para la Extranjería y la Inmigración, in *El País*, January 13, 2004.

Whether they have documents or not, the majority of the immigrants obtain work. Again this is not deduced from a systematic study but from verifying that the streets of the country are not full of unemployed immigrants. Moreover, the Spanish social services providing assistance for cases of extreme poverty – social dining rooms or hostels – are very scarce and, although they are now involved in assisting immigrants, their number is very small and, therefore, this does not explain how these immigrants, who supposedly cannot work, can survive.

Irregular immigrants cannot be registered on social security, but they can, however, if registered in the Local Council,[4] have a health card and access the medical services and hospitals in the same basis as Spaniards. This access has become in itself a factor of attraction for immigrants. Whether the immigrants are legal or illegal, they can send their children, from 3 years old onwards, to any school in the network financed with State funds, that is to say, State schools and those which are private but State subsidised. This access to schools not only has an educational aspect; it has also the important effect of liberating parents of the childcare duties during many hours during the day and therefore allowing them to work. Both provisions included in the Aliens Act of January 2000,[5] and not eliminated by the successive restrictive reforms made to the Law, constitute, together with the existence of jobs available for aliens, the main factors of attraction for immigrants into Spain.

In short, Spain offers regular and irregular immigrants work, education and health. In addition, the climate is relatively benign and there is a social environment of tolerance with illegality. In Spain, few denunciations are made of illegal immigrants to the police, and it is at present unthinkable that the Government encourage citizens to denounce them. The only denunciations which occur refer to the victims of sexual exploitation or specially hard exploitation at work, and although both are scarce, the former is much more frequent than the latter. State policy concerning illegal immigration has involved the same calculated ambiguity which has affected the underground economy, which is the origin of between 20 % and 25 % of Spanish GDP,[6] and is much more common in sectors such as tourism and catering, construction, domestic employment and personal services,

4 In order to be included on the Municipal Register, it is sufficient to show a rental, electricity, telephone, gas, etc. contract. Some irregular immigrants, especially sub-Saharians, who have a small network of contacts to facilitate their access to housing, have difficulties obtaining registration on the Municipal Register and, therefore, do not access the public health service except in emergencies. See *Book of Solidarity: Providing Assistance to Undocumented Migrants*, vol. II. Platform for International Cooperation on Undocumented Migrants (PICUM), Antwerp, 2003.

5 Aliens Act 4/2000 on the Rights and Liberties of Aliens in Spain and their Social Integration.

6 F. Schneider & D. Enste, 'Shadow economies around the world: Sizes, causes and consequences', *Journal of Economic Literature* 38:1, March 2000, pp. 77-114

that is to say, in the sectors where the immigrants find most of their "job niches". Until now no Spanish Government has launched a systematic fight against the underground economy due to fear of losing social support in extensive areas of the territory, especially in the coastal tourist areas, and the fear of provoking an economic slump. To these reasons which prevent the coherent combating of the underground economy, it should be added, in the case of illegal immigration, the fear of provoking strong disagreement in a good part of the population which has a feeling of sympathy for immigrants.

On the other hand, the public opinion researches show that the very fast increase in immigration over the last few years is beginning to cause unease among the Spanish population. Distrust and ill feeling is especially strong in the population of the zones where immigration is concentrated, that is to say, in Madrid, Barcelona and all along the Mediterranean coast, where feelings of rejection towards immigrants appear.[7] In fact already in 1999 and 2000 coexistence tensions between Spaniards and Moroccans led to violent clashes in Tarrasa (Barcelona) and in El Ejido (Almería). The main NGO devoted to combat racism, SOS Racismo, denounces a continuous increase in attack against immigrants.[8] Spaniards tend more and more to associate immigration with the increase in criminality which has also occurred over the last few years and this association has been strengthened due to the role played by immigrant Moroccans in the terrorist attack of March 11, 2004.[9]

The Governments of the Popular Party (1996-2004) were immobilised between these two contradictory pressures: the vast social sectors benefiting from the disposal of immigrant workforce, and the increasing social unease at the growth of immigration; trapped in this blocked situation, the Government made "the fight against the immigration mafias" a rhetorical motto planned to cover up the absence of a real policy in this area.

7 See the barometer surveys on immigration carried out by the CIS <www.cis.es> or the texts of Víctor Pérez-Díaz, Berta Alvarez-Miranda & Carmen González-Enríquez, *Spain and Immigration*, <www.lacaixa.estudios.es> 2002, and Carmen González-Enríquez, Opinión pública e integración social de los inmigrantes en España', in *Inmigración y Seguridad (II)*, op cit.

8 <http://www.sosracisme.org/sosracisme/dossier/Dossier%20de%20premsadib.pdf>.

9 For the statistical relationship between criminality and immigration in Spain, see Juan Avilés, 'Inmigracion y seguridad ciudadana', and Mauricio Rubio, 'Inmigración irregular y crimen organizado en España', in *Inmigración y Seguridad (II)*, working paper of the Instituto Universitario de Investigación on Internal Security. (IUISI) Madrid, 2004.

The great majority of immigrants who are legal today previously went through a period involving an illegal stay in the country,[10] which makes illegality a previous stage to legality in the eyes of anyone who is familiar with the matter. In fact, as has already been said, according to current norms, after a five years' illegal stay, it is possible to obtain regularization (three years in the case of immigrants that can show integration in the work market or family ties with Spaniards or regular immigrants). In addition, administrative practices, and not only legislation, turn into illegal the situation of many immigrants who were staying legally in the country. The departments in charge of processing the renewal of residence and work permits for aliens are understaffed, which leads to long delays and the impossibility for immigrants of obtaining the renewal of their permits within the compulsory period. The interminable queues at the doors of the Offices of the Interior Ministry which renew the permits, the delays amounting to months as regards obtaining the administrative response to an application, the telephones for arranging previous appointments almost always engaged, etc., all this leads to "befallen illegality" originating from administrative practice. Thus, in June 2004, the offices of the Government Delegations throughout Spain accrued 374,749 unresolved dossiers referring to applications for residence or work permits for immigrants with delays of up to nine months. Half of these were applications for the renewal of permits,[11] that is to say, during those months, about 200,000 immigrants who were in legal situations became "irregulars" due to administrative delays. Although, according to Spanish administrative norms, the lack of an answer in these cases is equivalent to a positive one, in practice, if immigrants cannot demonstrate with a document the renewal of their permits, they will face difficulties even with other State agencies, such as the Social Security or the Border Police.

With regard to access to the territory, the majority of illegal immigrants enter the country on their own account, with a tourist visa, many of them supported by family members or friends who are already installed in Spain, that is to say, they do not need to have recourse to business oriented networks. Thus, for instance, in 2002, 550,000 Latin Americans entered Spain as tourists, but only 86,000 left.[12]

The government has concentrated its efforts on border control while it has never developed a systematic policy inside the territory involving the search and expulsion of illegal immigrants. The political authorities understand that such a policy would be unpopular as well as very costly in economic and administrative terms. Only on very specific occasions, have the police carried out raids in zones

10 See Juan Díez Nicolás & María José Ramírez Lafita, *La voz de los inmigrantes*, IMSERSO, Madrid, 2001.

11 Department of State for Immigration and Emigration. In *El País*, June 7 and 8, 2004

12 *El País*, July 11, 2003

where immigrants concentrate, generally in leisure areas such as discotheques. The police could easily find the illegal immigrants, especially since the reformed Aliens Act obliges the Town Councils to put the census registers (where the majority of the illegal immigrants have registered themselves in order to access the health services) at the disposal of the Interior Ministry. However, the Spanish State lacks the economic and administrative means to effectively expel the illegal immigrants it detects. Thus, between January 1, 2002 and June 14, 2004, in two and a half years, the Administration made 117,768 expulsion orders for aliens, but it only executed 32,749, that is to say, 72 % of the illegal immigrants detected by the police continued to stay in the country despite the expulsion orders.[13] The financial costs of the expulsion – the travelling expenses of the person expelled and the police officer who must accompany him or her– is one of the main reasons which hinder expulsions and means that many more Moroccans are expelled than Latin Americans or Asians. For example, the repatriation of a Chinese citizen costs € 6,750, that of an Ecuadorian € 3,834 and that of a Senegalese € 2,000.[14]

2. Smuggling and trafficking

2.1 Who Facilitates the Arrival of Illegal Immigrants?

As was mentioned above, the majority of the illegal immigrants arrive in Spain legally with tourist or student visas and do not require the assistance of an organised network to do this. However, in a certain number of cases, the smuggling networks provide the immigrant with the documents and, above all, the cost of the journey and the money to demonstrate to the Spanish border police that they can live in Spain during the time of their supposed tourist stay. It is impossible to know what percentage of the total number of immigrants who arrive in Spain with their visas in order has received the assistance of any of these networks.

The networks are made up of a minimum of three persons in Spain plus their collaborators in the countries of origin. They often operate from inside travel agencies, provide false letters for the immigrants which demonstrate that they have relatives or friends in Spain, give them short courses on how to behave on arrival at the airport, lend them money to pay the journey and to justify that they have the means to live in Spain, offer them reception flats for the first few days and put them in touch with their employers. When the police dismantle one of these networks, usually it can arrest those who are in Spain, but often they do not have sufficient collaboration from the police in the countries of origin in order to dismantle the network there.

13 Secretaria de Estado para la Inmigración y la Emigración. In *El País*, July 20, 2004

14 Cuerpo Nacional de Policía. In *El País*, May 27, 2004

In comparison with those who arrive with a visa, the immigrants who enter national territory with no legal entry documents form a small group. They arrive mainly in small boats from Morocco, usually called *pateras,* but they take up practically all the space in the media dedicated to illegal immigration and consequently they are much more socially visible than the bigger group of visa holders immigrants. In the period of two and a half years from January 1, 2002 to June 18, 2004, 40,500 persons were intercepted when they were entering Spain illegally aboard small boats,[15] while in the same period, as has already been said, the total number of expulsion orders issued was 117,768. That is to say, approximately one third of the illegal immigrants detected by the police arrived in *pateras*. The arrival of these immigrants, who reach the Spanish coast after an arduous voyage with serious risk to their lives, is concentrated in two areas: the Andalusian coast (especially the coast of Cadiz and Granada) and the Canary Islands which are nearest the African coast (especially Fuerteventura), where their arrival gives rise to continual surveillance work at sea by the Civil Guard, a permanent state of emergency for the humanitarian services and the saturation of the social services. It provokes also conflicts among the local institutions, the NGO's, Autonomous Governments and the Central Government as regards the distribution of the financial cost of the attention given to irregular immigrants.

Apart from the arrival in *pateras*, crossing the land borders which separate Morocco from Ceuta and Melilla, the Spanish cities in the north of Africa, is another way which is frequently tried by Moroccan and Sub-Saharian immigrants. These are small, fortified borders with a double metallic fence, which are opened to allow the intense trade between the two cities and Morocco. Illegally crossing this border is much more difficult than arriving in small boats at the coast of Andalusia, however, there are attempts to cross by avalanches of people who place their trust in success through the numerical superiority they have with regard to the police forces and the Civil Guard who patrol the area, already overburdened by their tasks involving surveillance of the smuggling of goods and drugs. During the first seven months of 2004, 39,000 attempts to jump the fence between Melilla and Morocco were aborted by the Civil Guard as compared with 26,000 during all of 2003. In any case, the number of successful illegal entries through this land border is very small in comparison with entries in *pateras*.

The arrival of immigrants in small boats always involves someone who profits from the travel; sometimes this is only the person who steers the *patera*, but in the case of sub-Saharian and Asian immigrants who arrive at the coast of Africa after a long land journey, there are generally more persons involved who organise all the travel. The police efforts are concentrated on the steersmen on the small boats, which were mostly Moroccans till recently. However, since 2003, Moroccans who continue to charter the boats from the north coast of Morocco

15 *La Vanguardia*, August 15, 2004 and *El País*, July 23, 2004.

to the coast of Cadiz or from the Saharian coast to the Canary Islands, leave the steering of these frail boats in the hands of the sub-Saharian immigrants in order to avoid being caught and condemned to prison sentences of up to eight years. This substitution makes the journey even more dangerous due to the majority of the immigrant's lack of experience of the sea. For years almost all immigrants who arrived in *pateras* were Moroccans, so the steersman had the possibility of concealing himself as just another passenger and the Civil Guard could not identify him. But, during the last three years, the sub-Saharians and the Asians have became greater in number than the Moroccans who arrive in this manner and now it is much more difficult to the Moroccan steersman to cover himself.

Throughout the year, but especially in summer, the media offer frequently news about small boats being intercepted and immigrants drowning during the crossing. Sometimes, the steersman of the *patera* throws the immigrants into the water when they are near the coast and he finds himself in danger of being seized. The sentence for the offence of trafficking is so long (from 4 to 8 years) that the steersman sometimes prefers to commit homicide rather than be caught by the Civil Guard. The majority of the sub-Saharian immigrants do not know how to swim and many drown a few metres from the coast. The media provide numerous testimonies of Spaniards who have been resting on the beach and have seen how a small boat approached and the immigrants jumped or were pushed into deep water. Paradoxically the police work and the more severe penalties for the immigrant smuggling networks make their journeys much more risky. During the years 2000 to 2003, according to official sources, 248 persons have died in these crossings, of these, 100 died during 2003.[16] There were another additional 39 deaths between January and June 2004.[17]

Excluding Moroccans, most immigrants intercepted by the Civil Guard while approaching the Spanish coast have not been returned to their countries of origin either because Spain does not have a repatriation agreement with these countries or because the immigrants lie about their origin. When the immigrants arrive at the Spanish coast, the Moroccans immediately flee in order to avoid being returned to Morocco, and the rest remain on the beach waiting to be attended to by the Spanish relief services. Usually they are in a state of hypothermia and general weakness. The images of these arrivals have become more dramatic in recent years with the arrival of more children and pregnant women, which is explained by the facilities which the Spanish norms grant to these groups to avoid repatriation.

The success of the surveillance system implemented on the coast in the Straits of Gibraltar (the SIVE, Sistema Integrado de Vigilancia Exterior) has led

16 Jesús Núñez, 'The Civil Guard and Irregular Immigration', in *Inmigración y Seguridad* (I), IUISI, Madrid, 2004.

17 *El País*, July 16, 2004.

to the displacement of the *pateras* towards the coasts of Granada and Almería, and especially the coasts of the Canary Islands; these last now receive almost half of the total of arrivals, and the journey involves a much longer and more risky adventure. Moreover, the very recent small success of the police cooperation with Morocco to repress the smuggling of immigrants into Spain has led to a displacement of the departure point for the boats farther south. Now immigrants are beginning to arrive in the Canary Islands from Guinea Bissau, Guinea Conakry, Sierra Leone and Senegal, in old rickety boats. As their arrival cannot go unnoticed, the plan of the smuggling networks is to provoke the rescue of the passengers by sinking the boat near the Spanish coast. These operations entail a very high risk of death.

After their arrival by sea, the immigrants receive shelter, food and health care aid from local institutions, the Civil Guard, the NGO's (fundamentally the Red Cross) and from anonymous citizens. With regard to individual citizens, often this aid is not restricted to shelter and food. There are numerous reports about persons in the Cádiz area who have given accommodation or hidden irregular immigrants for periods of time and then have provided them with bus ticket to travel to areas where there is a demand for immigrant labour (for example, Murcia or Almería).[18] But in the case of the Canary Islands, it is the local authorities or the police who provide the irregular immigrants with air tickets so that they can fly to mainland Spain, that is to say, they help them to reach their definitive destination.

On repeated occasions, the Autonomous Government of the Canary Islands has complained because its territory is becoming a "mousetrap" where the immigrants are trapped with no possibility of moving to the rest of the country due to the lack of resources to pay an air ticket. As has been stated, the majority of the irregular immigrants intercepted cannot be repatriated and are freed with no work and no resources, which mean that the beaches, squares and public gardens of the islands become their habitual places of residence. This has negative effects from the point of view of the tourist industry, the main economic activity of the Canary Islands, and in the view of their inhabitants this has become the first problem and has given rise to very explicit outbursts of xenophobia. In 2002, 47.8 % of the Canary islanders believed that immigration was the main problem in the islands, more serious than unemployment, mentioned by 42.8 %, and both were far ahead of any other problems.[19] This implies a more intense concern about this matter than there appears to be on mainland Spain, where immigration appears in third or fourth place in the surveys, after unemployment, terrorism and the cost of housing. In addition, the Government of the Canary Islands

18 See the report in *El Mundo*, July 1, 2001 and the report in *El Semanal*, November 11, 2001.

19 Social Barometer of the Canary Islands, Government of the Canary Islands, <www.gobcan.es/ sociobarómetro>.

does not have the resources required to provide humanitarian attention for these undocumented immigrants. In October 2001, for the first time, the Town Hall of Las Palmas paid an air trip for 200 immigrants, arguing that it was doing so out of "solidarity" with them so that they could reach their embassies. Later, the Government of the Canary Islands publicly recognised that the transfer of immigrants to mainland Spain had become common practice and would increase in the future. In the words of the Head of the Department of Social Services in the Canary Islands, Marcial Morales, "In our territory they are ghosts, therefore, we can only give them a better life".[20]

The transfer of irregular immigrants from the Canary Islands to mainland Spain has continued since then, and after an agreement made by the Government of the Canary Islands and the Central Government, the Interior Ministry took over organising and financing these transfers. Between January 2002 and October 2003, the Interior Ministry flew 10,000 sub-Saharians to mainland Spain, to the Internment Centres for Aliens in Barcelona, Valencia, Murcia, Madrid and Málaga, where they were immediately freed with an expulsion order that could not be executed. The law allows a maximum period of internment in these centres of 40 days, which is often not complied with as the centres are saturated. Many of these immigrants, especially the sub-Saharians go on to live badly from the private and public charity network. Thus, the Prosecutor's Office of the High Court of Justice of Madrid informed that, between July 2002 and December 2003 "2,838 sub-Saharian immigrants who had been flown to Madrid by force from Puerto del Rosario (Fuerteventura) had been abandoned in the streets of Madrid".[21] There have also been transfers of irregular immigrants from one province of Andalusia to another (from Huelva to Cádiz) organised and financed by the police. The attention given to these undocumented immigrants has become a new element in the party competition, not only regarding the financial burden of it, but also the transfers of these immigrants from one Autonomy to another.

In this context, if the Criminal Code were applied literally, numerous citizens, NGO's financed with public funds, such as the Red Cross, and public institutions such as the Autonomous Government of the Canary Islands, the Interior Ministry and the police could be accused of the illegal trafficking of persons (a concept which is not defied in any legal text) since, according to article 318 bis of the Criminal Code, "*Those who promote, encourage or facilitate the illegal traffic of persons from, in transit or whose destination is Spain will be punished with prison sentences of six months to three years and a fine of six to twelve months*".

20 *El Mundo*, March 22, 2002.

21 *El País*, May 17, 2004.

2.2 The Public Debate regarding Trafficking and Smuggling

Until now, there has been no debate on smuggling or trafficking of human beings and on the more appropriate measures to stop these. On the one hand, all the groups involved, whether these are political parties, jurists, NGO's or immigrants associations, they all seem to agree on the negative nature of these trafficking networks and on the advisability of getting rid of them. In this regard, there have been no voices raised in opposition. On the other hand, this consensus is superficial, not based on a debate on the nature and functions of these networks, which has allowed the approval of current Spanish legislation which does not define the term "illegal trafficking" and, even more surprisingly, has made it possible to include in the Criminal Code the article 318 bis which could send to prison those who help illegal immigrants with no intention of obtaining profit. This has not been protested by the NGO's, immigrants associations or any other group. It is very probable that all the parties concerned have taken it for granted that, in no case, would this rule be applied in Spain in order to punish the unselfish help given to illegal immigrants. Neither have the sentences given in application of the rule provoked a debate nor have they received attention from the media.

In the media, the Spanish term corresponding to trafficking, "*trata*", is reserved for the trafficking of women with a view to prostituting them and, in fact, it seems to have gone out of use, perhaps because it was used with the term "white", "*trata de blancas*", or white women slave trade, which does not mean much when now the majority of the women victims are African. The expression "*trata de blancas*" was used more frequently in the nineties, when, after the fall of the Berlin Wall, many women came from Eastern Europe to prostitute themselves or were forced into prostitution. At present, the media use expressions such as "network for the traffic of women forced to prostitute themselves", "network which prostituted Nigerian women", "network which exploited Bolivians in night clubs" or similar terms. In all the other cases, when prostitution is not involved, the media talk of "illegal immigration networks", "people smuggling mafias", "mafias trafficking with persons", "organizations for the traffic of immigrants", or other similar expressions and there does not seem to be a preference for one or another of the terms. When it is a question of organised groups who prepare the arrival of the immigrants in Spain, kidnap them, extort money from them and/or force them to work for a pittance or retain these wages, these are called "gangs" or "networks" involved in extortion and exploitation of immigrants, rather than the trafficking ("*trata*") of workers. The literal translation of the word "smuggling" into Spanish, i.e. "*contrabando*" is seldom used in the context of immigration. This media treatment is in consonance with Spanish legislation and the language used by the police and the Civil Guard in the information they give out.

The news about these organised groups take up a substantial part of the news on immigration appearing in the media. In 2003, 13 % of the news on immigration published in the written media, or broadcast on radio and TV dealt with successful police operations in the fight against organised groups involved in smuggling or trafficking (10 %) or successes related to these (3 %). In 2002, this percentage was 10 % and in 2001 it was 9 %. On the whole, the news related to illegal immigration took up 20 % of the total in 2001, 27 % in 2002 and 31 % in 2003, with a clear progression showing that everything related to the irregular aspects of immigration is gaining ground with regard to the matter as a whole.[22]

In the media there is a continual trickle of information on networks trafficking with immigrants being discovered, the swindling of immigrants by person who promise them work permits, the arrest of the skippers of *pateras*, immigrants drowned in the Straits of Gibraltar or in the vicinity of Fuerteventura, immigrants who kidnap and extort other immigrants, or entrepreneurs arrested for exploiting immigrants. Among these were two pieces of news which stood out due to their impact and their shocking effect on Spanish public opinion: one referred to the surprise felt by the Administration and society with regard to the huge number of immigrants who presented themselves for the regularization process of 2000 (244,000 persons), and the death in Lorca (Murcia) of 12 illegal immigrants on January 3, 2001 when a van on which they were travelling to a farm was run over by a train. Both pieces of news brought home to Spanish society that there were many more immigrants in the country than they had imagined.

As a result of the Lorca accident, the media showed that the use of irregular immigrants was generalised practice in agriculture on the Mediterranean coast. These immigrants were hired daily in the main squares of the villages, a practice which brought back memories of aspects of work in the agriculture which had disappeared from the Spanish countryside decades before. After the accident, through the Ministry of Employment, the Government announced an inspection campaign to combat the underground economy, and this political gesture led to fear among the farmers of Murcia, who were then submitted to the scrutiny of the media. In a few days, news appeared about frightened farmers who were afraid to continue to hire undocumented immigrants, the only workers available. Headlines were published such as "Lorca Farmers are Forced to Use Systematic Fraud" or "The Lack of Labour Means 20,000 hectares are not harvested in Murcia".[23] The arrest of the farming entrepreneur who had hired the Ecuadorian victims of the accident led to the solidarity of the farmers in the area who threatened protests. In response to this economic and social demand, coming from about 4,000 small and medium sized farm owners, and

22 *Inmigración y racismo* (press journal), IMSERSO, Madrid, 2001, 2002 and 2003.

23 *El País*, January 7 and 15, 2001.

the wave of sympathy for the Ecuadorians all around the country as a result of the accident, the Government approved a special regularization plan for them and legalised the situation of 24,352 Ecuadorians.

2.3 Police Efforts against the Trafficking of Persons

In Spain, the entity in charge of centralising the fight against the trafficking of persons is the Unit for Combating the Networks of Immigration and Forgery of Documents (UCRIF), belonging to the Aliens Brigade of the National Police Corps created in 2001.[24] The Unit has two groups, Brigade for Combating the Networks, and the Brigade for Combating the Forgery of Documents. There are a total of 15 UCRIF throughout Spain, in the areas with higher densities of immigration (Madrid, Ceuta and Melilla, the Canary Islands the Balearic Islands, Seville and the Mediterranean coast), altogether there are about 300 policemen involved.

The work of the Brigade for Combating the Networks mainly involves cases of exploitation of female immigrants forced to prostitution since the other big field of action, the exploitation of irregular workers, entails fewer denunciations and the offence is less serious under Spanish criminal legislation (sentences of 5 to 10 years for sexual exploitation and from 4 to 8 years for exploitation at work). In addition, the Labour Inspection of the Ministry of Employment is also responsible for detecting the cases involving the employment of irregular workers, although, as was mentioned above, there is no systematic policy in this regard. The number of labour inspectors is clearly insufficient in Spain (780 inspectors and 860 sub-inspectors) and their work mainly has to do with Social Security fraud or the prevention of risks at work. In the event of the exploitation of irregular immigrant workers, inspection is carried out based on a denunciation which usually comes from the Trade Unions or competing companies, but almost never from the workers affected, who are afraid of expulsion. Also the Brigade for Combating the Networks acts only after receiving a denounciation, that is to say, it does not search the areas where the prostitution is concentrated, the open air on the streets and in the parks, or clubs which are perfectly identifiable from the exterior. The Brigade only acts in the event that there is a grounded suspicion that there are women being prostituted who are victims of coercion and it acts with a previous judicial authorisation.

---

24 Moreover, the Civil Guard has its own instrument for combating illegal immigration, the Teams for Combating Clandestine Immigration, which have been created very recently (2003) and there are few results yet. In any case, considering the division of functions and territory between the National Police and the Civil Guard, the results of the former are always greater in this area. Thus, in 1999 the National Police dismantled 244 networks and the Civil Guard 9, and in 2000, the respective figures were 317 and 52. *El País*, January, 28, 2001.

In Spain, prostitution is in a legal limbo. It is not punished, but it is not fully accepted as a job. However, procuring is penalized. Until now, the employment inspectors and the judges have tended not to consider prostitution (or working as a night club girl) as a job, and this prevented them from applying to the club owners the sanctions for employing aliens without work permits. However, in recent years, this has begun to change and some Decisions of the Supreme Court have recognised working as a night club girl as a job and club owners have been condemned for hiring alien workers without work permits. In 2002, the National Association of Spanish Night Clubs (ANELA), the entrepreneurial association for the sector, applied to the Employment Ministry for a quota of night club girls for several hundred jobs, arguing that they intended "that once and for all, there would be transparency which would prevent the mafias interfering" and these vacancies would be filled by women "who were totally legal workers". The Association of Progressive Women – one of the more well-known feminist organisations – called the initiative "barbaric" and the Employment Ministry rejected the petition as it considered that this employment "was not classified as a job".[25]

According to the calculations of the Brigade for Combating the Networks, about 350,000 women work as prostitutes in Spain, and almost 90 % of these are aliens, the majority of whom are irregular. These calculations are somewhat less than those of ANELA which gives 400,000 women and an annual turnover of € 18,000 million, which means that Spanish males spend an average of € 1,200 euros annually in this activity. In fact, these figures are surprisingly high and doubts should be cast on them, in spite of the fact that Spaniards are the Europeans who most often frequent prostitutes according to a recent survey.[26] If these figures were true, they would imply that around one quarter of foreign women living in Spain, be it legally or illegally, prostitute themselves.

Despite these huge numbers, there are not many denunciations made to the police by women coerced into prostituting themselves. The majority of the victims do not know the Spanish legislation and are afraid that the denunciation might lead to them being expelled from the country. Furthermore, they generally come from countries where police corruption is rife and they imagine that the club owners have contacts in the police, which in fact is not usual in Spain. The women are also trapped by the debt incurred with the networks which have brought them to Spain, and Nigerian women and other sub-Saharians are terrorised by the threat of voodoo rites, which might annihilate them or their families in their countries of origin. The employment and financial conditions of these women differ greatly depending on their origins. Those from Latin

25 *ABC*, February 14, 2002, *El Mundo*, November 26, 2002.

26 6.7 % of males had sexual relationships with prostitutes at some time during the last twelve months according to the survey on Health and Sexual Habits, Instituto Nacional de Estadística, 2004.

America take approximately one year and a half to pay the debt incurred, which is increased 10 % every two weeks as regards the travelling expenses and 10 % daily as regards the "travel fund", the money which must be shown at the border to demonstrate that they can live for three months as tourists, and which they must return immediately. In addition, they must pay for the use of the room and the food, which are added to the debt. Frequently the club owners do not allow them to go out alone and invite salesmen to visit them at the club in order to sell them what they need, such as clothes, at a price which is generally more expensive than in the shops. In the case of women who come from Eastern Europe, in addition to the cost of the journey, they are obliged to pay the procurers a minimum of € 600 monthly. However, the worst conditions are undoubtedly those which affect sub-Saharian women, who hand over all the money received to the procurer, whom they consider to be their protector, and they incur debts of about € 42,000 which are much higher than those of other women, and take many years to pay this debt. In the case of these women, exiting prostitution is more difficult because they lack the qualifications to obtain a job in Spain and cannot even obtain work in domestic service as they do not know how to work the technical equipment which is found in any Spanish home. Therefore, they are the least likely to denounce their situation.

The women in these situations have sometimes arrived in Spain having been deceived about the work they were to do and in other cases, they knew they would prostitute themselves but they did not know the specific conditions. According to calculations made by the Brigade for Combating the Networks, the great majority of women who are freed when the police dismantle one of these networks return again to prostitution.[27]

The legal protection of women who denounce procurers is contained in article 59 of the Aliens Act, which offers a renewable one year residence permit to the victims of the networks involved in the trafficking of persons. These women become protected witnesses and are assigned a number for the judicial proceedings so that their real names do not appear. However, sometimes the women who report the procurers cannot benefit from this offer as they have no identifying documents as the procurers or the networks keep their passports. In these cases, these women must obtain documentation at their respective embassies or consulates, which is not always easy, so that the denunciation of the procurer can lead to a residence permit. Furthermore, in some cases the training given to the police who attend to these reports at the Police Stations is inadequate and the women may find their rights are diminished due to the fact that the police officers attending them do not know the rules to be applied in each case, something that does not occur when the report is presented directly to the Unit for Combating the Networks.

27 Interview with Carlos Botrán, Head Commissar of the Brigade for Combating the Networks, April 2004.

During the one year period of the residence permit, the social assistance given to these women so that they can find work and have meanwhile shelter and suppport is carried out exclusively by NGO's financed with public and private funds. Among these stands out the Proyecto Esperanza (Hope Project), for women involved in prostitution. There is no State program to assist women victims of trafficking, nor are there any statistical sources which enable the evaluation of the scope of the services of assistance for women who denounce the procurers. The Proyecto Esperanza, which belongs to a Catholic religious order, offers the women shelter and food, legal assistance, psychological and medical assistance, Spanish classes and job training. Proyecto Esperanza attends yearly to 26 women in its shelters and provides support for another 40 or 50 women who have found jobs, but still need legal, employment or psychological assistance. In total, from the commencement of the Project in 1999, this NGO has attended to 229 women, of whom 70 % had reported to the police. The first job opportunity for these women is domestic service and then hotels, bars and restaurants and only about 15 % choose the return to their countries, which is carried out through the programme for voluntary return of the International Office of Migrations. 14 % of the women taken care of by the Proyecto Esperanza acknowledged that they arrived in Spain knowing that they were to prostitute themselves, but very few have gone back to prostitution. As regards the support work done by the NGO's, the sub-Saharian women are in a worse situation than those coming from other origins, as they face specific difficulties to live in shelters. Specific support tailored made for their needs is required.[28]

In 2003, 230 women became protected witnesses under article 59 of the Aliens Act. In this same period, the police freed 1,527 alien women who were victims of the prostitution networks. Practically all the women who report and collaborate with the police in the dismantling of the networks manage to regulate their situations definitively at the end of the year of the first residence permit. Only in the event that the women continued to prostitute themselves at the end of this year, was the permit not renewed.

As a whole, the activity of the Unit for Combating the Networks of Immigration and Forgery of Documents (UCRIF) had the following results in 2003:[29]

– 59 networks dismantled and 163 persons arrested for the illegal traffic of immigrants (the majority of those arrested were Moroccans, Rumanians and Colombians);

28 Interview with Aurelia Agredano, Coordinator of the Proyecto Esperanza, June 2004.

29 Data provided by the Brigade for Combating the Networks.

- 194 networks dismantled and 242 persons arrested for the exploitation of undocumented immigrants at work (the majority of those arrested were Spaniards);[30]
- 192 networks dismantled and 761 persons arrested for the sexual exploitation of undocumented immigrants;
- 59 networks dismantled, 388 persons arrested for forging documents and 8,526 documents confiscated;
- 69 networks dismantled and 221 persons arrested for swindling aliens, false job offers or false promises of documentation.

In total, 573 networks dismantled and 1,775 persons arrested. Among those arrested, there is an outstanding number of Spaniards (603 persons) who are usually the final links in the networks, that is to say, those involved in the exploitation at work and the sexual exploitation of the victims, followed by the Moroccans (189), Colombians (124) and Ecuadorians (118). These data show a substantial progression with regard to previous years – in 2000 the total number of networks dismantled by the police was 317, with 1,010 persons arrested – although it is impossible to know whether this increase is due to a greater presence of networks or to improved police efficiency.

3. Concluding Remarks

Immigration is still a relatively new phenomenon in Spain and its rapid growth in the last six years has led to puzzlement and confusion in Spanish society and the political elite. Unlike other European countries, in Spain there have been no debates on the ways to integrate immigrants or on their effect on the welfare system or on public security. The picture coming from public opinion studies on immigration is not very clear either: opinion polls data give contradictory information, such as a mainly positive opinion regarding the economic effect of immigration together with a growing fear of the labour competition of immigrants and of the criminality associated with the presence of aliens, a negative evaluation of the legislation on aliens, considered to be too tolerant and the opinion of the majority that the number of immigrants is now excessive.[31] Finally, local studies among the Spanish population in the areas where immigrants live show feelings of rejection towards immigrants, and this is especially important if we take into account the fact that immigration in Spain is very

30 The employment inspection services have been transferred to the Autonomous Communities and they do not issue common statistics, which makes it very difficult to know the number of inspections carried out and the sanctions imposed related to the exploitation of undocumented alien workers.

31 Barometer of May 2004, Centro de Investigaciones Sociológicas, www.cis.es.

concentrated in Madrid, Baleares, the Canary Islands and several areas on the Mediterranean coast (Barcelona, Alicante, Murcia, Almería).[32]

Undoubtedly there is an occupational gap in the Spanish work market which is being covered by immigrants to such an extent that some sectors, such as irrigation agriculture or construction could not survive without foreign labour. Just as the entrepreneurs in these sectors benefit, so do those in small retailing, hotels, catering, and small services, and hundred of thousands of middle class families who benefit from the supply of female immigrants in domestic service and the care of children and the elderly. All these groups constitute a social basis to support the growth of immigration. In this regard, the governmental policy of the Popular Party (1996-2004) adopted an ambiguous stance:

– to reject the possibility of further regularizations as from 2002 – which meant that all those arriving since then have had no way to legalise;
– to hinder the processing of permits or their renewal – which forced into illegality many previously documented immigrants;
– to declare the combating of illegal immigration as a priority, to intensify border surveillance in the Straits of Gibraltar;
– to combat the networks of trafficking and smuggling and, at the same time, to avoid expelling the irregular immigrants already residing on Spanish territory. These immigrants were attracted to Spain by important factors, such as access to free public health services, the real possibility to work in certain sectors despite not having a work permit and a popular culture of tolerance with illegality. Moreover, due to financial, legal and administrative reasons, it was impossible to return many of the irregular immigrants detected at the borders, and this cast doubts about the efficacy of the efforts to combat illegal entry.

The fight against trafficking and smuggling in Spain must be understood within this framework of contradictions and in the context of symbolic, declarative or rhetorical politics. The regulations in this area have been approved through a superficial consensus and the administrative, police and judicial practice has not led to public debate either. The media frequently confuses trafficking and smuggling, and the news tends to assimilate the networks which help the irregular immigrants to arrive with those involved in exploiting them at work and sexually, while implicitly accepting the idea that the irregular immigrant, as such, is condemned to sub-human working conditions, which is not always true. Moreover, there is no systematic policy regarding searching for irregular immigrants or for the detection of cases of sexual exploitation or exploitation at work of

32 Carlos Agulo, *The Alien Population in Spain*, Instituto Nacional de Estadística, 2003.

undocumented aliens nor is this claimed by any social or political force,[33] and it remains to be seen whether the severe sentences which affect the skippers of the boats will lead to a reduction in the numbers of these boats arriving.[34] At the present time, its main effect has been a transfer of the routes from the Gibraltar Straits to those with less surveillance but longer and involving more risk, such as the Canary Islands or Granada and Almería, and the substitution of the Moroccan steersmen by sub-Saharians who are often not skilled enough to steer these little boats. In short, the more severe regulations have made the voyage more dangerous for the steersman and the passengers, by increasing the risk of death during the crossing.[35] In the country, the Brigade for Combating the Networks is mainly involved in pursuing cases of sexual exploitation through coercion, an area where the irregular situation of these immigrants takes a secondary place to the abuse of their human rights.

33 The Town Hall of Madrid, controlled by the Popular Party, has launched in 2004 a campaign against visible prostitution in several streets of the city centre, but its objective is basically one of urban planning – to besten the image of the center of the town – although it is presented as a programme against sexual exploitation.

34 With the data available on finishing this paper, it seems that the number of boats intercepted during 2004 is slightly smaller than during 2003. From January 1 to August 31, 2004, 10,042 immigrants were intercepted trying to arrive in *pateras*, 980 less than during the same period of 2003, which implies that, at least, the continual increase of previous years has stopped (Secretaría de Estado de Inmigración, October 2004).

35 Perhaps in order to prevent this unwanted effect and also to speed up the repatriation process for the immigrants intercepted in the coast line and to prevent the saturation of the immigrant reception centres, the police authorities are sometimes forgetting about prosecuting the skippers of the *pateras,* as has been reported in the media. For example, about 1,500 immigrants arriving in boats were intercepted on the coast of Granada during the first seven months of 2004, but only two skippers were arrested. (*El País*, August 30, 2004). During the first eight months of 2004 the number of skippers of *pateras* arrested in the Spanish coastline dropped in 16 % (from 145 to 122), while the number of immigrants intercepted was reduced in 8 % (Secretaría de Estado de Inmigración y Emigración, October 2004).

*Dora Kostakopoulou**

TRAFFICKING AND SMUGGLING IN HUMAN BEINGS: THE BRITISH PERSPECTIVE

1. Introduction

Irregular migration, trafficking and smuggling in human beings represent major challenges for policy makers at national, European Union and international levels. However, these phenomena are often viewed as external and objective challenges facing states. Little attention is paid to the relation between the growth of 'the migration industry', on the one hand, and law-enforcement and restrictive approaches to international migration, on the other. This is because states' interest in deterring irregular migration is taken for granted and the overriding policy objective remains the enhancement of the 'governmentality' of migration control by tightening external border controls and increasing internal surveillance.

The *White Paper, Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (7 February 2002), which culminated in the *Nationality, Immigration and Asylum Bill 2002* and the *Nationality, Immigration and Asylum Act 2002*, is a good case in point. Although this legislative initiative represented a unique opportunity for designing a comprehensive and credible asylum and migration policy, in reality, it reflected the governmental priorities of migration control and deterrence of asylum seekers. While it accepted the economic reality of labour shortages and the need for the UK economy to remain competitive, it perpetuated the political rhetoric of restrictionism that limits the number of economically least desirable migrants to the UK, thereby reinforcing the widespread perception of migration as a problem. More importantly, although the White Paper highlighted the Government's intention to tackle 'illegal' entry, irregular employment and human smuggling and trafficking, it failed to unravel the links between the growth of the latter phenomena and the existing regulation

* Reader in Law, School of Law, University of Manchester.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *345-369.*
 ISBN 90 04 15064 1.

of all forms of migration. After all, irregular migration is, by definition, a by-product of the laws made to control migration and of labour market exigencies.[1] In this respect, the design and implementation of any effective policy response to trafficking and smuggling in human beings must entail a reflexive assessment of existing restrictive policies of migration control.

At the international level, the United Nations Protocol to *Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking in Persons Protocol)[2] has been accompanied by a few 'soft law' instruments. These include the UN General Assembly *Resolution on Trafficking in Women and Girls* (11 October 2002), the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* of the United Nations High Commissioner for Human Rights and the *Resolution on Traffic in Women and Girls* adopted by the UN Commission on Human Rights (16 April 2002).[3] These instruments do not only call upon states to criminalise all forms of trafficking and to penalise traffickers, but they also highlight the abuse of human rights that trafficking entails and prompt governments to 'protect the vulnerable'.[4]

In the European Union, co-ordinated action in this field is both desirable and necessary.[5] However, progress has been hindered, thus far, by two factors; namely, the prevailing one-dimensional approach which prioritises law enforcement action in line with the dominant discourse of the securitisation of migration and, in procedural terms, the intergovernmental character of co-operation in post-Maastricht Europe. The latter explains the relative absence of binding legislative output in the post-Maastricht era, even though the remit of Third Pillar co-operation included 'combating unauthorised immigration' (K3(1)(c) TEU) and 'police co-operation for the purposes of preventing and combating serious forms of international crime' (K3(9)). Whereas the European Parliament

1 As the JCWI observed, it failed 'to consider the reasons why these problems have become widespread in recent years'; <http://www.jcwi.org.uk/whitepaper/jcwiresponse.html> visited on 15/03/02.

2 A/AC.254/4 Rev. 9; (2001) 40 International Legal Materials 377. The UN committee had been assigned the task of formulating a convention against transnational organised crime by the UN General Assembly in 1998; General Assembly Resolution 53/111 of 9 December 1998.

3 The Recommended Principles were adopted in July 2002; E/2002/68/Add.1

4 Principle No 2 of the Recommended Principles states: 'states have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons'. But in so doing, they must respect the human rights of the trafficked persons and to address their needs with sensitivity (see Principle No 1). Compare also S. Drew, 'Human Trafficking: A Modern From of Slavery', (2002) 4 *European Human Rights Law Review* 481.

5 The absence of both common definitions and sanctions in the Member States' criminal legislation has been acknowledged to be a serious obstacle.

adopted resolutions in mid-1990s,[6] the Council adopted only a Joint Action on *Combating trafficking in human beings and sexual exploitation in children* on 24 February 1997.[7] Following the Amsterdam Treaty, which partially Communitarised the Third Pillar of the Treaty on European Union, and the European Council meetings at Tempere and Seville (October 1999 and June 2002 respectively), the Commission proposed a *Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union*,[8] and two *Council Framework Decisions on Combating Trafficking in Human Beings and on Combating the Sexual Exploitation of Children and Child Pornography respectively*.[9] The latter led to the adoption of the Council Framework Decision on combating trafficking in human beings on 19 July 2002.[10] The Framework Decision requires the MS to ensure that the offences entailed by Articles 1 and 2 are punishable by 'effective, proportionate and dissuasive penalties', and has recommended the maximum penalty of eight years' imprisonment. The Framework Decision will be incorporated into UK law by August 2004. The Framework Decision *on the facilitation of unauthorised entry, transit and residence*, which was agreed for adoption on 16 September 2002, has also been adopted.[11] However, the Council Directive *on the Short-term Residence Permit issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities* has not been adopted yet.[12] The draft directive provides for the grant of temporary residence permits to those victims of trafficking who assist the authorities in the process of prosecuting traffickers.[13] When prosecution ends, it is envisaged that victims will be returned to the countries of their origin, unless they are entitled to some form of international protection. If one compares the European Union policy framework with that of the United Nations, it becomes apparent that the EU has failed to combine

6 European Parliament Resolution on trafficking in human beings, 18 January 1996 and Resolution on victims of violence who are minors, 19 September 1996.

7 Joint Action of 24 February 1997, 97/154/JHA.

8 14 June 2002, OJ C 142/23.

9 COM(2000) 854 final/2.

10 2002/629/JHA, OJ L 203/1. It is noteworthy, here, that under 34(1)(b), framework decisions are binding on the MS as to the result to be achieved but leave to the national authorities the choice of form and methods. They do not have direct effect.

11 Council Directive 2002/90/EC of 28 November 2002, *Defining the Facilitation of Unauthorised Entry, Transit and Residence.*

12 COM(2002) 71 Final, 11 February 2002. See also V. Mitsilegas, 'Defining Organised Crime in the European Union: the Limits of European Criminal Law in an Area of Freedom, Security and Justice' (2001) *European Law Review* 565.

13 The grant of the six month residence permit will also be accompanied by access to the labour market, to education and vocational training.

approximation of national criminal laws and the strengthening of criminal sanctions against traffickers with a comprehensive approach that gives priority to the human rights of the trafficked person(s). Insufficient attention has been given to the vulnerability of victims and the Member States' responsibility to aid their physical and psychological recovery, to provide accommodation, counselling, employment, training opportunities and, more importantly, to guarantee the security of their residence.

In contrast to international and European developments, UK law and policy in this field are relatively underdeveloped. The UK seeks to come to grips with trafficking in human beings.[14] The main aim of this chapter is to critically examine past and present legislative responses to smuggling and trafficking in human beings in the UK and to assess the role of the courts in either establishing or weakening their legitimacy. Whereas hardly anybody would disagree with the need to devise policies that deal effectively with people trafficking and smuggling, it seems to me that there exists considerable divergence in thinking through the conditions of possibility for such policies and in devising appropriate preventative measures at all levels.[15] An essential ingredient for the latter is an examination of the framing of smuggling and trafficking in human beings and their correlation with under-enforced migration laws. Both these issues have important implications for the design of effective policy responses to trafficking. It is true that restrictive migration regimes have played into the hands of well organised criminal groups,[16] have led to the criminalisation of irregular entrants and, in certain respects, tend to reinforce traffickers' control over the trafficked individuals.[17] But if trafficking in human beings is, simply, seen as a form of 'immigration crime' to be tackled by law-enforcement measures, then not only the human rights and gender dimensions are disregarded, but such an approach

14 It is certainly the case that the UN and the EU have taken the lead in the area of criminalisation of trafficking and will be catalysts for juridicopolitical developments in the UK and elsewhere.

15 Addressing the underlying causes of trafficking requires a multi-dimensional approach which pays attention to the structural issues of global inequality, the feminisation of poverty, the lack of educational and professional opportunities and the institutionalised gender discrimination in many parts of the world. My discussion, here, does address the issue of prevention.

16 It is suspected that international criminal organisations have found people trafficking to be more profitable than drugs trafficking, but evidence is far from conclusive; see A. Schloenhardt, 'Organised Crime and the Business of Migrant Trafficking: An Economic Analysis' (1999) 32 *Crime, Law and Social Change* 203.

17 B. Jordan and F. Duvell, *Irregular Migration: The Dilemmas of Transnational Mobility* (Cheltenham: Edward Elgar, 2002); V. Ruggiero, 'Trafficking in Human Beings' (1999) 25 *International Journal of the Sociology of Law* 231.

is likely to have limited chances of success.[18] In discussing the British legislative framework, I will pay attention to the framing of smuggling and trafficking and its correlation with existing policies of migration control.

2. Definitions

People smuggling may be defined as the facilitation of unauthorised entry, transit or residence either clandestinely or through deception. Generally speaking, this involves the consent of the smuggled person. Trafficking in people, on the other hand, may be defined as the recruitment, transportation or transfer of people for the purposes of exploitation by means of deception, force or intimidation. The exploitation may take the form of servitude, labour or sexual exploitation. The UN Protocol to *Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* has established a comprehensive and widely accepted definition of trafficking, as follows:

> Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, or abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments of benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of the victim of trafficking in persons to the intended exploitation set forth in paragraph a of this article shall be irrelevant where any of the means set forth in subparagraph a have been used.[19]

Accordingly, the differentiae specificae of trafficking in human beings are: a) the threat (or use) of force or other forms of coercion, abduction or other forms of abuse of power, such as deception and fraud, b) for the purposes of labour or sexual exploitation, and c) the lasting exercise of control over the trafficked for the purposes of exploitation. Whereas in smuggling it is presumed that the entrants have voluntarily participated in the process, notwithstanding their vulnerability to exploitation, physical risks and so on, they are free from the smugglers' control when they reach the country of destination.[20] Having said this,

18 J. Salt, 'Trafficking and Human Smuggling: A European Perspective' (2001) 31 *International Migration* (Special Issue).

19 Article 3, supra note 1.

20 A. Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organisations that Promote it' (2001) 9 *European Journal on Criminal Policy and Research* 163.

however, it is true to say that consent is irrelevant if the persons involved are children. In addition, there are cases where persons may think that they are smuggled, although, in reality, they are being trafficked. In general, 'deception', 'coercion' and 'continuing exploitation' for profit play a major role in trafficking, and may take various forms. Deception, for example, often takes the form of providing offers of employment in legitimate industries or in the entertainment industry, offers of marriage and false information about the conditions under which the women will undertake prostitution. Trafficking in human beings remains the most dehumanising form of forced migration; the victims, especially women and children, are often transported and held against their will, have their documents confiscated, are physically, emotionally and sexually abused, live in fear and total dependence, and are treated as mere commodities. Traffickers can control their victims by exercising physical or emotional violence, perpetuating drug and alcohol dependency, threatening the victims and their families and by forms of debt bondage. Women and children are exploited for their labour,[21] in the sex industry and the production of pornography, and for organ donation or harvesting. In this respect, 'protecting the vulnerable' must not be made subservient to the state's sovereign interest in migration control. Rather, it is a human rights issue.

3. The British Legislative and Administrative Framework

3.1 'Ilegal Entry and the Enforcement of Migration Controls

Breaches of migration control are criminal offences under the Immigration Act 1971. Section 24 created the offence of illegal entry and other generic offences committed before or after entry by persons who do not have the right of abode in the UK. Lack of authorisation of entry by the state places people into the domain of illegality. This reflects not only the modern anxiety about human mobility, but also states' desire to confirm their sovereign power of migration control. People will be treated as illegal entrants if they bypass immigration control, by either arriving on a deserted beach or, clandestinely, in the back of lorries or entering without having their passports stamped by an immigration officer, or enter in breach of a deportation order or deceive an immigration officer as to their identity or nationality. According to s. 33(1) of the Immigration Act 1971 (7), illegal entrant is a person who a) unlawfully enters or seeks to enter in breach of a deportation order or of the immigration laws, or b) entering or seeking to enter by means which include deception by another person. This

21 In the UK, there are opportunities for exploitation in the agricultural, construction, catering and domestic sectors. Trafficked victims are coming from South East Asia, West Africa and Central and Eastern Europe; <http://www.crimeeduction.gov.uk/toolkits/tp020404.htm>.

definition of illegal entrant includes a person who has entered under paragraph a or b mentioned above.

A person who knowingly enters the UK in breach of a deportation order or without leave commits a criminal offence under section 24(1)(a) of the 1971 Immigration Act.[22] The offence cannot be committed by a British citizen. Section 24(1)(aa) of the 1971 Act, inserted by s 4 of the 1996 Act, makes it an offence to obtain or to seek to obtain leave to enter or remain by means which include deception. It is note worthy here that before the 1996 Act the idea of illegal entry extending to people who had submitted to immigration control was created in the courts. In the 1970s the judiciary shared the Government's determination to clamp down of irregular migration by shifting its attention to those who had gained entry by deception. Accordingly, the Courts sanctioned the widening of the meaning of deception by the Home Office. In *Zamir*, the House of Lords ruled that deception can be practised by the entrant's silence in the face of questioning by an immigration officer.[23] Zamir had applied to join his father in the UK when he was 15 years old. He was granted entry clearance three years later when he had already married. Zamir did not disclose this information on arrival and was given indefinite leave to stay. Two years later his wife applied to join him, the marriage was revealed and the Home Office detained him pending his removal. Zamir submitted that he was under a duty to answer questions but not to volunteer information. Since the officer had not asked him whether he was married, he was under no duty to tell him. The House of Lords disagreed, stating that '... an alien seeking entry to the UK owes a positive duty of candour on all material facts which denote a change of circumstances since the issue of the entry clearance'.[24] The ruling gave the green light to the expeditious removal of persons whose 'innocent silence' was discovered afterwards and the ensuing tightening of immigration control. Three years later the House of Lords reviewed its ruling of *Zamir* and retracted the 'duty of candour' requirement in *Khawaja and Khera*.[25] Lord Scarman stated emphatically that everyone within the jurisdiction of the UK was entitled to equal protection of the law. More specifically, the House of Lords ruled that it is for the Home Office to prove, on the balance of probabilities, that false representations were made to the immigration authorities and that leave to enter was granted on the basis of that false information. Khera who had applied as a child to come with his mother to join his father, but had married in India while the application was under consideration, and was not asked by the immigration officers whether he was married, it was

22 Only one prosecution had been brought under s 24 for illegal entry until July 1999; *see R v Uxbridge Magistrates' Court and another, ex parte Adimi* [1999] 4 All ER 520, at p.534.

23 [1980] AC 930.

24 *Ibid*.

25 [1984] AC 74.

accepted that he had not deceived the immigration authorities. In contrast, Mr Khawaja was held to be an illegal entrant. The decision breathed new life in the political struggle over migration law and politics in the courts, as the judiciary became more willing to adopt a civil libertarian perspective and to circumscribe administrative discretion in immigration law.

It is note-worthy here that a person can be an illegal entrant without having committed a criminal offence, if (s)he obtains leave by producing false documents, without knowing them to be false.[26] The penalty for entry without leave or in breach of a deportation order is a fine of £5000 or imprisonment up to six months. Suspected offenders can be arrested without warrant. The offence of obtaining or seeking to obtain leave to enter or remain by deception is triable summarily in a magistrates' court and carries a fine of £5000 or up to six months imprisonment. If people are convicted of overstaying or working in breach of the conditions of leave, they may be fined a maximum of £5000, be imprisoned for up to six months and be recommended for deportation. However, it is uncommon for such acts to be prosecuted, as it is more convenient for the Home Office to activate its administrative removal powers. If the Home Office believes that people are illegal entrants, it can immediately commence the process of their return to the country of origin and detain them pending removal.[27] Since appeal against removal can only be made from overseas,[28] the only formal route for contesting removal is to apply to the High Court for judicial review of the administrative decision to treat a person as an illegal entrant or the removal directions.[29] Although it is for the Home Office to prove that either illegal entry or overstaying or breach of the conditions of leave is a precedent fact for the expulsion, it is rare for the courts to reject the reasons underpinning the Home Office's decision and to overrule it.

From the point of view of the executive, administrative removal has two main advantages. First, it is a flexible and speedy procedure. Secondly, it is relatively untrammelled in comparison with prosecution and deportation procedures. Governments, by and large, afford fewer procedural rights to persons subject to administrative removal than to criminal defendants and to persons subject to deportation. The latter had previously a full right of appeal on the merits of the decision to deport.[30] Persons are removed on the basis of an administrative

26 *R v Immigration Officer ex parte Chan* [1992] 1 WLR 541.

27 IA 1971, Sch 2 para 16(2). This power may be exercised by the Secretary of State for the Home Department and by an immigration officer.

28 The absence of in country appeal leads people to challenge removal on human rights grounds under section 65 of the Immigration and Asylum Act 1999.

29 E. Guild and R. Cholewinski, 'United Kingdom', in B. Nascibene (ed.), *Expulsion and Detention of Aliens in the European Union Countries* (Giuffre Editore: 2001) at p. 525.

30 See Immigration Act 1971, s 15, as amended by Immigration Act 1988 s 5.

act rather than a trial, and, unlike criminal liability, 'deportability' need not be proved beyond reasonable doubt. It may be interesting to note here that the number of persons against whom administrative removal action has been initiated increased from 720 in 2000 to 5,610 in 2001 and 9,450 in 2002.[31]

In addition, knowledge of a breach of migration law is not a necessary condition for administrative removal. As Macdonald and Blake have noted, the *Asylum and Immigration Act 1996* put 'illegal entry by deception on statutory footing for the first time, thereby sweeping away most of the case law on the subject'.[32] The new statutory definition made it clear that third party deception may render a person an illegal entrant, even if that person is entirely ignorant and innocent of that deception. Persons may be illegal entrants unknowingly, if, for example, they entered the UK on a false passport without knowing it to be false of or if they used documents obtained by the fraud or deception of a third party.[33] Drawing a distinction between the act of arriving in the UK with false documents in order to escape a persecuting regime and seeking to rely on them in order to secure entry, Lord Slynn ruled in *R v Naille and Kanesarajah* that the doctrine of illegal entry could not apply to a person who presented himself to an immigration officer requesting political asylum. Hence, an asylum seeker, who travels to the UK on a forged passport, but (s)he discloses its falseness during the journey or on arrival in the UK, is not an 'illegal entrant'.[34] But a claim for asylum does not negate an illegal entry.[35]

Generally speaking, administrative removal applies to persons who have been refused entry, to overstayers and to 'illegal entrants'. It is important to note that before 2 October 2000 overstayers were subject to deportation. Under the IAA 1999, the following people may be removed from the UK:

a) anyone who has failed to observe the conditions attached to their leave. The latter include prohibition on employment or occupation, restriction on employment or occupation, registration with the police and self-sufficiency

---

31 Table 7.1, section 7 *in Control of Immigration: Statistics United Kingdom 2002*, 27 November 2003, at p. 93.

32 '...The use of a false document, the falsity of which is unknown to the entrant will now be dealt with as "means which include deception by another"'; I. Macdonald, *Immigration Law and Practice*, 5th edition (London: Butterworths, 2001), at p. 750.

33 See *Khan v SSHD* [1977] 3 All ER 538; Chan v *SSHD* [1992] Imm AR 233, CA. In *Khan*, the husband used the passport of his second wife to help to admit his illiterate third wife. Admittedly, the ruling in Khan sits uncomfortable with *Khawaja*, where it was held that mere non-disclosure of material facts will not amount to deception, as the entrant has no positive duty to reveal facts if a relevant question is not asked; *R v Secretary of the Home Department, ex parte Khawaja* [1984] AC 74.

34 *R v Naillie* [1993] 2 All ER 782, [1993] AC 674.

35 See *Bugdacay v SSHD* [1987] 1 All ER 940.

(i.e., to maintain and accommodate themselves without recourse to public funds. The latter has been in operation since 1 November 1996);
b) those who have overstayed their leave in the UK;
c) anyone who has obtained leave to remain by deception;
d) the family members of anyone belonging in any of the above three categories.

In addition, 'illegal entrants' may be removed from the UK.

Administrative removal is circumscribed by the Immigration Rules 1994,[36] which require the Home Secretary to take into account relevant factors listed in paragraph 364, such as compassionate circumstances, age, strength of connections with the UK, domestic circumstances, previous criminal record and the nature of any offence of which the person has been convicted, compassionate circumstances and any representations received on the person's behalf in ordering deportation.[37] The Home Office has also issued guidelines on deportation and removal of people from the UK where the deportee or person to be removed has married someone settled in the UK and in cases involving children or affecting the parent-child relationship. In considering whether to remove a person, the Home Office is thus required to apply the same guidelines on compassionate factors affecting spouses and children, where relevant, as in deportation cases.[38] It is also true to say that the above mentioned factors are not exhaustive. Other considerations might apply, such as, for example, the interests of a particular community in keeping a talented performance artist in Britain.[39] Directions for removal of a person given under s 10 of the 1999 Act invalidate any leave to enter or remain in the UK. However, according to HC 395, para 395D, no one shall be removed under section 10 if his removal would be contrary to the United Kingdom's obligations under the Convention and Protocol relating to the Status of Refugees or under the Human Rights Convention.

3.2 Criminal Sanctions on Illegal Entry and the Protection owed to Refugees

In the 1980s, the anti-immigration discourse shifted towards refugees: refugees were portrayed as 'bogus asylum seekers', 'economic migrants' and 'abusers of the asylum system'. The imposition of visa requirements on people coming from countries from which many were likely to flee and the 'privatisation' of immigration control via carriers' liability legislation were strategies designed to clamp

36 HC 395 (1995).

37 I. Macdonald, *Immigration Law and Practice*, 5th edition (London: Butterworths, 2001) at p. 759.

38 DP 3/96, DP 4/96, DP 5/96 -Butterworths Immigration Law Service D67-81 and 83-87.

39 Bakhtaur Singh; House of Lords

down on refugees. As deterrence and restriction became the cornerstones of British asylum law and policy, the courts began to display a willingness to intervene in defence of the rights of asylum seekers in the 1990s. As a consequence, struggles developed between the courts and the government over the terms of asylum policy. Two cases feature prominently in this ongoing struggle; namely, *Naillie* (1993) and *Ex p Adimi* and others (1999). In *Naillie* the governmental criminalisation of asylum seeking through criminal prosecution for illegal entry was at stake, whereas in *Adimi* illegal entry was connected to the use of false documentation.

In *Naillie*, the House of Lords ruled that an asylum seeker who disembarks from a ship or aircraft at a port in the United Kingdom without a valid passport or other document satisfactorily establishing his identity and nationality is not on disembarkation an illegal entrant for the purposes of the Immigration Act 1971. Accordingly, anyone helping him come to the UK could not commit an offence of assisting illegal entry. Naillie and Kanesarajah were separately charged with facilitated the illegal entry of others into the UK under the s 25(1) of the Immigration Act 1971. Naillie had arranged for two Somali women and six Somali children to book a flight from Kenya to the UK using forged Tanzanian passports. En route to the UK, the aircrew took possession of the women's passports because the crew became ware that they were asylum seekers, and on arrival to the UK, the Somalis were given temporary admittance as asylum seekers. Naillie, who accompanied the Somali women but disembarked separately, was arrested and charged with assisting illegal entry to the UK. Kanesarajah, on the other hand, took his wife's passport with him to Sri-Lanka, where it was altered with his knowledge to enable another woman and her child and two strangers to use it to deceive the Sri Lankan authorities into allowing them to leave Sri Lanka. During the flight to the UK, Kanesarajah retrieved his wife's passport, leaving the woman and two strangers with no passports. On disembarkation in the UK and before going through immigration control, the woman and the strangers sought political asylum and were given temporary admittance as asylum seekers. Kanesarajah was arrested in possession of the forged passport and documents relating to the Sri Lankans and charged with facilitating their illegal entry into the United Kingdom. At the trial both Naillie and Kanesarajah maintained that it had not been established that the persons they had accompanied were illegal entrants under the 1971 Act when they had disembarked in the UK. Their submissions were rejected and they were convicted. They were sentenced to 15 months' imprisonment, and appealed against their conviction. The Court of Appeal distinguished between entry and disembarkation, and held that an asylum seeker who disembarked without a right of entry had not in fact 'entered' the country merely by disembarking from this mode of transport which brought him to the UK. Since the asylum seekers in question had not entered clandestinely or by means of deception by proffering forged documents to immigration officers as being genuine were not illegal entrants for

the purposes of s25(1) of the 1971 Act. As the Court held, 'if the contention put forward by the Crown is correct almost all asylum seekers or political refugees would inevitably be illegal entrants from the moment they disembarked from ship or aircraft'.[40] Accordingly, Naillie and Kanesarajah's appeals were allowed and the convictions were quashed. The House of Lords reiterated the distinction between entry and arrival, and held that mere disembarkation without a passport was not enough to make asylum seekers illegal entrants. As Lord Slynn stated 'a person arriving by air at Heathrow does not enter the UK when he disembarks'. Since the asylum seekers in question proceeded to request asylum without any attempt to deceive immigration officers, they did not seek to enter in breach of migration laws and therefore were not illegal entrants. In response to the judgement, the Government made it an offence to assist the entry of another person whom the suspect 'knows or as reasonable cause for believing to be an asylum claimant' under the Asylum and Immigration Act 1996.

The *Adimi* case highlighted the discrepancy between UK's obligations under article 31(1) of the 1951 Geneva Convention and the practice of prosecuting asylum seekers travelling in the UK on false documents under the Forgery and Counterfeiting Act 1981.[41] Owing to strict visa controls and carrier sanctions, asylum seekers found it difficult to travel to countries of refuge without false documents. Since 1994 the practice of stopping asylum seekers at airports and charging them for possessing false documents under the Forgery and Counterfeiting Act 1981 became widespread. Before the decision of the Divisional Court in *Adimi*, no consideration to the immunity provided by Article 31 of the 1951 Convention had been given by the Police and the Crown Prosecution Service. More specifically, Article 31 states that 'The Contracting Parties shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

Adimi, an Algerian national, fled Algeria in fear of persecution by the GIA on 1 October 1997. On 27 November 1997 Adimi arrived at Heathrow by air from France with a false Italian passport and identity card. The Immigration Officer discovered the false documents and Adimi was refused leave to enter. He then claimed asylum, but, that notwithstanding, he was arrested and charged. Initially he was charged under s5(1) of the Forgery and Counterfeiting Act 1981, but later those charges were replaced by charges under s 5(2) of the Act, which carries a maximum sentence of two years. Adimi applied for judicial review of the decision of the Crown Prosecution Service to prosecute him for possession of false documents under s 5(2) of the Forgery and Counterfeiting Act 1981,

40 *R v Naillie and R v Kanesarajah* [1993] 1 All ER, p 75 at 83.

41 *R v Uxbridge Magistrates' Court, ex parte Adimi*, supra note 22.

the refusal of the Uxbridge Magistrates' Court to grant temporary stay of that prosecution pending the Secretary of State's determination of Mr Adimi's claim for asylum, and the continuation of the prosecution by the CPS. The other two applicants, Sorani and Kaziu, were Albanians who had entered the UK in transit to Canada, and had been apprehended boarding the onward flight with false passports.

Drawing on Article 31(1) of the 1951 Geneva Convention, which states that states should not impose penalties on asylum seekers who enter or are present in their territory without authorisation, 'provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence', the Divisional Court found the practice of prosecuting asylum seekers unlawful. As Newman J suggested in the course of argument, 'where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by Article 31'.[42] And Brown LJ stated: 'That Art 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt....'.[43] Consequently, the Court concluded that 'it must be hoped that these challenges will mark a turning point in the Crown's approach to the prosecution of refugees for travelling on false passports. Article 31 must henceforth be honoured'. After all, 'the Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum'.[44]

However, Article 31 has certain limitations: it applies to those who have come directly from the country of persecution, present themselves to the authorities without delay and show good cause for their illegal entry or presence. As regards the former provision of 'coming directly', the Court held that a short-term stopover en route to the intended country of sanctuary cannot forfeit the protection of Article 31(1). In response to the *Adimi* ruling, section 31 of the Immigration and Asylum Act 1999 provides for a statutory defence to (- but not a bar to prosecutions for) criminal charges relating to travel in false documents if refugees: a) have presented themselves without delay to UK immigration

42 [1999] 4 All ER p. 527.

43 *Ibid*.

44 *Ibid*, at p. 537.

authorities;[45] b) show 'good cause' for their illegal entry;[46] c) have made a claim for asylum as soon as was 'reasonably practicable' after arrival in the UK'. By section 31(2) the defence is limited to refugees who come directly to the United Kingdom from the country of feared persecution and can only apply to those who 'stopped' in another country en route to the UK if they can show that they 'could not reasonably have expected to be given protection under the Refugee Convention in that other country'. The 1999 Act also allowed erroneously prosecuted and imprisoned asylum seekers to apply to the Criminal Cases Review Commission. Obtaining the quashing of the conviction and making a claim for compensation from the Justice and Victims Unit of the Home Office are possible steps for remedying the injustice suffered by this group of people.[47] Notwithstanding this, the subsequent discussion shows that 'mainstreaming a rights-based approach to asylum in law and administration is an onerous task'.[48]

3.3 Offences

The *Immigration Act 1971* remains the principal legal basis for migration offences as amended by the *Immigration Act 1988*, the *Asylum and Immigration Appeals Act 1993*, the *Asylum and Immigration Act 1996* and, most recently, the *Immigration and Asylum Act 1999* and the *Nationality, Immigration and Asylum Act 2002*. The *1996 Asylum and Immigration Act* (1 October 1996) broadened the range and definition of immigration offences, strengthened the powers of arrest and search, and increased the penalties for most migration offences. More recently, the 2002 Act strengthened the provisions concerning smuggling in people by increasing the maximum penalty for assisting illegal entry from 10 to 14 years and created a new offence of trafficking in prostitution, which carries the same penalty. It has also extended the powers of arrest and search by enabling police and immigration officers to enter business premises, in some

45 A short-term stopover in another country will not forfeit the protection of Article 31; see Simon Brown LJ in *Adim*i, *ibid*. Under s 31(2) of the 1999 Act, the defence can apply to those who stopped in another country en route to the UK if they can show that they 'could not reasonably have expected to be given protection under the Refugee Convention in that other country'.

46 'Good cause' can be shown by a genuine refugee showing that he was reasonably travelling on false papers.

47 F. Lindsley, 'Compensation and Prosecution – asylum seekers travelling on false documents after ex parte Adimi' (2003) 17(2) *Immigration, Asylum and Nationality Law* 114.

48 C. Harvey, *Seeking Asylum in the UK* (London: Butterworths, 2000) at p. 185. As Fiona Lindsley has noted, prosecutions of asylum seekers travelling on false documents began again in October 2000, as the immigration service appeared to confine the scope of Article 31 protection to asylum seekers who have been in the UK for less than 24 hours; see note 47, at p. 117.

cases without a warrant, to search for irregular entrants, overstayers and persons who have breached the conditions of their leave, and made it easier for employers to comply with the law on irregular employment.

More specifically, s25(1) of the 1971 Act (as amended by s5 of the Asylum and Immigration Act 1996), makes it an offence punishable by fine up to the statutory maximum and imprisonment for any person to be 'knowingly concerned in making or carrying out arrangements for securing or facilitating a) the entry into the UK of anyone whom he knows or has reasonable cause for believing to be an illegal entrant; b) the entry into the UK of anyone whom he knows or has reasonable cause for believing to be an asylum claimant; or c) the obtaining by anyone of leave to remain in the United Kingdom by means which he knows or has reasonable cause for believing to include deception...'. These are arrestable offences within the meaning of the Police and Criminal Evidence Act 1984, section 24(1)(b).

3.3.1 Assisting Illegal Entry

The smuggling of migrants is an offence under Section 25(1)(a) of the 1971 Immigration Act.[49] The maximum penalty for this offence is ten years imprisonment and a fine, which has been increased from £ 2000 to £ 5000 for offences committed on or after 1 October 1992. Assisting illegal entry is an arrestable offence; immigration officers can arrest without warrant any person suspected of committing or attempting to commit it. A person will be liable to prosecution if (s)he helps a person who they know or believe to be intending to enter in breach of migration laws. In *Panesar*, a sentence of three years for this offence was reduced to two years on appeal, as the appellant had entered the country with his brother in law in the boot of his car and presented a passport on his behalf in a false name.[50] In *Singh and Saini*,[51] the CA drew distinction between those who act for profit and those who commit an offence in order to help relatives of members of their own community. The appellant had pleaded guilty to the offence of facilitating the entry of an illegal entrant. Each defendant was sentenced to three years' imprisonment, which was reduced to two years on appeal, and the recommendation for deportation made against Singh was set aside. And as already noted, in *Naillie* it was held that a necessary precondition for the offence is that the persons assisted are in fact illegal entrants. But discovery of migrants before entry in circumstances indicating the intention to enter illegally can activate the offence under section 25(1)(a) of the Immigration Act 1971.

---

49 The numbering has been amended by *the 1996 Asylum and Immigration Act*, s 5.

50 (1988) 10 Cr App R (s) 457.

51 (1979) 1 Cr App R (S).

On 14 May 1999 Eyck was convicted at the Crown Court at Canterbury of an offence contrary to s25(1)(a) and was sentenced to four years' imprisonment. Eyck had brought a van onto a British-registered ferry from Calais to Dover and eighteen Afghan nationals had been found in the rear of the van whilst it was parked on the car deck of the ferry. Eyck had denied all knowledge of the persons in the van, and appealed against his conviction arguing that the offence under s25(1)(a) remains incomplete unless and until either entry had been achieved or the assisted person had become an illegal entrant as defined in the 1971 Act. Drawing on s11(1) of the 1971 Act and the decision of the House of Lords in *Naillie*, Eyck contended that he had facilitated the arrival of the 15 persons in the van. At the preliminary hearing the judge ruled that 'in this case the circumstances of the Afghans' discovery in the van on the ferry, at a time when conventional passengers are required to vacate their vehicles suggest very strongly that they were preparing to enter clandestinely... So in conclusion I consider that the 15 Afghans found in Mr Eyck's van could properly be described as illegal entrants who by definition did enter the UK, however, briefly. It follows as a matter of law that the defendant could be guilty of the offence charged or of any attempt to commit the offence charged'.[52] The Court of Appeal observed that 'carrying out arrangements for facilitating the entry' would be a sufficient ingredient for the offence irrespective of whether or not entry had taken place. And drawing on *R v Adams*,[53] where it was ruled that for an offence under s25(1) it is sufficient that the person assisted by the defendant is shown by the evidence to come within the definition of illegal entrant, the Court of Appeal dismissed the Eyck's appeal.

It may be interesting to note here that, according to the Government's immigration statistics, the number of persons found guilty of this offence at Magistrates' courts were 33 in 2000, 47 in 2001 and 62 in 2002. At Crown Court, the corresponding numbers have been 108 in 2000, 94 in 2001 and 142 in 2002.[54]

3.3.2 Assisting Asylum Claimants (s 25(1)(b) of the 1971 Act)

Section 5(1) of the Asylum and Immigration Act 1996 amended section 25(1) of the 1971 Act, thereby creating the new arrestable offence of being knowingly concerned in making or carrying out arrangements for securing or facilitating the entry into the UK of anyone whom he or she knows or has reasonable cause for believing to be an asylum claimant. The penalties for this offence, which was introduced in order to reverse the House of Lords' judgement in *Naillie*,[55] are the same as for assisting illegal entry. The ambit of the offence does not

52 *R v Eyck*, [2000] All ER 569 at 573.

53 [1996] Crim L R 593.

54 See note 31, above, Table 7.5, p. 97.

55 See *supra* note 23.

extend to assisting people after they have claimed asylum on entry, or to people acting 'otherwise than for gain, or in the course of their employment by a bona fide organisation whose purpose is to assist refugees'.[56] Nor is the offence committed in cases of assisting a person who has been detained under para 16 of Schedule 2 to the Act, or has been granted temporary admission under para 21 of that Schedule. Nor can the remit of the offence include advice given abroad concerning the criteria and procedures for claiming asylum in the UK, since the 'provision of such advice would be too remote from the immigration control in the UK to fall within the scope of the new offence'.[57] Finally, Macdonald and Blake insist that a distinction needs to be drawn between assisting and facilitating a person to leave a country of prosecution, to arrive in the UK and to enter the UK.

According to the Government, the rationale behind the offence of assisting asylum claimants was tackle 'illegal racketeering activity' and to penalise those who profit by facilitating the entry of asylum-seekers clandestinely or with false documents. A necessary condition for the offence is that the defendant had reasonable cause to believe or actual knowledge that the person whose entry he assists or facilitates intends to make a claim for asylum within the meaning of the 1993 Act. According to s 1 of the 1993 Act, a claim for asylum is a claim in respect of which it would be contrary to the UK's obligations under the Refugee Convention (– and the Human Rights Convention under the 2002 Act) to remove the claimant from, or require the claimant to leave, the UK.

In 1999 Hadakoglu drove a van onto a British registered ferry with 12 asylum seekers on board. He maintained that he did not know anything about the presence of 12 persons in his van, but he was convicted of being knowingly concerned in making or carrying out arrangements for securing or facilitating the entry into the UK of 12 persons whom he knew or had reasonable cause for believing to be asylum claimants, contrary to s 25(1)(b) of the 1971 Act. Hadakoglu was sentenced to three years' imprisonment for that offence. He appealed contending that entry was a necessary element of the offence for which he had been convicted. But his appeal was unsuccessful, since he knew at the time of driving his van onto the ferry that it contained persons who were intending to claim asylum. The Court of Appeal also proceeded to dismiss his appeal.[58]

Immigration statistics indicate that in the period 2000-2002 only 2 persons were found guilty of this offence in 2001 at Magistrates' Courts, whereas

56 See N. Blake and I.A. Macdonald, *Immigration Law and Practice in the United Kingdom* (London: Butterworths, 2000) at p. 89: no offence is thus committed by those 'who assist asylum seekers who have arrived at the airport and are detained pending examination or consideration of their asylum claim or who are granted temporary admission'.

57 Letter from Immigration and Nationality Directorate to ILPA, 2 August 1996.

58 *R v Hadakoglu* [2000] 3 All ER 569.

at Crown Court, the corresponding numbers were 3 in 2000, 7 in 2001 and 5 in 2002.[59]

3.3.3 Assisting Persons to Obtain Leave to Remain by Deception

Section 5(1) of the Immigration and Asylum Act 1996 created also the arrestable offence of making or carrying out arrangements for securing or facilitating a person in 'obtaining leave to remain in the UK by means which he or she knows or has reasonable cause for believing to include deception (s 25(1)(c) of the 1971 Act).

The person making or carrying out the arrangements must believe or have reasonable cause to believe that those means include deception. The offence is aimed at agents who provide false documents and could extend to those helping people enter into sham marriages. The latter face the same penalties as those who assist illegal entry. A police officer may arrest any person suspected to have committed an immigration offence without warrant, and the person may be charged to appear before a Magistrates' court.

It may be noted here that 2 persons were found guilty of this offence in 2000, 1 in 2001 and 1 in 2002 at Magistrates' Courts. At Crown Court, the corresponding numbers have been 5 in 2000, 2 in 2001 and 5 in 2002.

3.3.4 Harbouring Illegal Entrants or Persons in Breach of Conditions of Entry (s 25 (2) of the 1971 Act).

Section 25(2) of the Immigration Act 1971 creates separate offences for harbouring anyone whom the person knows or has reasonable cause for believing that he or she is an illegal entrant or an overstayer or in breach of a condition not to work or to register with the police. This offence carries a penalty of up to six months' imprisonment or a fine of £ 5000. Harbouring refers to looking after or accommodating anybody falling within the categories identified above.[60] But mere presence when the illegal entrant was given shelter and engagement in conversation with him/her does not constitute harbouring.[61]

Both assisting illegal entry and harbouring illegal entrants or persons in breach of the conditions of entry have been subject to an extensive time limit for prosecutions by virtue of s. 28(1) of the 1971 Immigration Act. Information can be laid within three years of the commission of the offence, as long as it is laid within two months from the date on which evidence on which a prosecution could be based became available to a police officer. This section further provided that for trial purposes on offence may be deemed to have been committed at any place where the alleged offender may be (s 28(3)).

59 See note 54 above.

60 Harbouring means giving shelter; *R v Mistry, R v Asare* [1980] Crim LR 177).

61 *Darch v Weight* [1984] 1 WLR 659.

According to immigration statistics, one person was found guilty of this offence in 2000, another one in 2001 and two persons in 2002, at Magistrates' Courts.[62]

3.3.5 Trafficking in Human Beings

Trafficking has been traditionally dealt under sections 22 and 24 of the *Sexual Offences Act 1956*. Under section 22(1), it is an offence for a person to a) procure a woman to become, in any part of the world, a common prostitute; or b) to procure a woman to leave the UK, intending her to become an inmate of or frequent a brothel elsewhere; or c) to procure a woman to leave her usual place of abode in the UK, intending her to become an inmate or frequent a brothel in any part of the world for the purposes of prostitution. And section 24(1) makes it an offence for a person to detain a woman against her will on any premises with the intention that she shall have unlawful sexual intercourse with men or with a particular man, or to detain a woman against her will in a brothel. These offences carry the maximum sentence of two years. In addition, the 1956 Act contains also the offences of abduction and of exercising control over a prostitute,[63] which now carries a penalty of 14 years imprisonment. Furthermore, prosecutions against traffickers could be brought under the *Offences Against a Person Act 1861* and under 'unlawful imprisonment'. Finally, the *Criminal Justice Act 1988* and the *Proceeds of Crime Act 1995* may be utilised in the process of investigating traffickers' financial affairs and the seizure of their assets.

3.3.6 The 2002 Nationality, Asylum and Immigration Act

On 7 November 2002 the Nationality, Immigration and Asylum Act 2002 (NIAA) received Royal Assent. Section 143 of the Nationality, Immigration and Asylum Act 2002 amended section 25(1) of the 1971 Act by giving a broader definition to assisting unauthorised entry and by increasing the maximum penalty to 14 years. More specifically, section 25 of the Immigration Act 1971 has now been substituted by the broader offence of assisting unlawful immigration to Member State, and the offences helping asylum-seeker to enter the UK and assisting entry to UK in breach of deportation or exclusion order. Section 5 of the Asylum and Immigration Act 1996 has been repealed.

3.3.7 Assisting Unlawful Immigration to Member State (section 25)

Part 7, chapter 41 of the 2002 Act substitutes section 25(1)(a) of the 1971 Act. A person commits this offence if (s)he assists assisting another person, who is not a citizen of the European Union, to breach the immigration laws of any EU Member State (including the UK) with regard to entry, transit across the state or to remain there. Financial gain is not a necessary ingredient for this offence

62 See note 54 above.

63 S 30 and 31 of the SOA 1956.

which extends the UK's extraterritorial jurisdiction pursuant to Article 27 of the Schengen Convention. This subsection applies to a British citizen, a British Overseas territories citizen, a British National (Overseas), a British Overseas Citizens, a person who is a British subject under the *British Nationality Act 1981* (c. 61) and a British protected person within the meaning of the Act. It covers any act done either in the UK or outside the UK by a person belonging in one of the above categories or by a body incorporated under the law of a part of the United Kingdom. The maximum sentence, on conviction in indictment, is 14 years' imprisonment and/or a fine. On summary conviction, the sentence is imprisonment for a term not exceeding six months and/or a fine not exceeding the statutory maximum.

3.3.8 Helping an Asylum Seeker to Enter the UK (section 25A)

Any person who knowingly and for gain facilitates the arrival in the UK of an individual, and knows or has reasonable cause to believe that the individual is an asylum seeker commits an offence. Section 25A widens the 'assisting asylum claimants' offence under section 25(1)(b) of the 1971 Act since the offence is made out when the defendant seeks to facilitate 'arrival in the UK'; that is, he believes he is assisting a person who intends to make a claim for asylum on arrival at the port of entry. A person has a defence under subsection 3 of the new section 25 A, if (s)he is acting on behalf of an organisation which aims to assist asylum seekers and does not charge for its services. It may be interesting to note here that for many 'this clause seems to be treating asylum seekers in much the same way as the 17th century they treated ships coming from countries where they had the plague as something so dangerous that it was not safe even to allow one of them near our shore'.[64]

3.3.9 Assisting Entry to the UK in Breach of Deportation or Exclusion Order (section 25B).

A person commits this offence if he knowingly facilitates a breach of a deportation order in force against an individual who is a citizen of the European Union, and knows or has reasonable cause for believing that the act facilitates a breach of the deportation order. The maximum sentence for this offence, on conviction in the Crown Court, is 14 years' imprisonment and/or a fine.

The offence of trafficking for the purposes of prostitution was introduced under section 145 of the Nationality, Immigration and Asylum Act 2002. A person commits this offence if he arranges or facilitates the arrival, travel within the UK or departure from the UK of an individual and for purposes of gain he exercises control, direction or influence over the prostitute's movements in a way which shows that he is aiding, abetting or compelling the prostitution or believes that another person will do so. On conviction on indictment, the offence will

64 Hansard, Column 262, 23 July 2002 (220723-18).

carry a maximum sentence of 14 years,[65] a fine or both. On summary conviction, a person guilty of an offence will be liable to imprisonment for a term not exceeding six months and/or a fine not exceeding the statutory maximum. The 2002 Act also created a range of other general offences, such as forgery relating to Asylum Registration Card, failure to comply with a notice requesting information in respect of suspected immigration offences and possession of an immigration stamp without a reasonable excuse. These offences carry on conviction in the Crown Court a two years imprisonment and a fine.

New Offences concerning trafficking for sexual exploitation are also included in the new Sexual Offences Bill. These include a new offence on Commercial Sexual Exploitation of a child. The Government has also introduced legislation against the trafficking of people for the purposes of labour exploitation. The Asylum and Immigration (Treatment of Claimants, etc.) Bill 5 2003/2004, which was presented on 27 November 2003,[66] made it an offence the trafficking of people for the purposes of slavery and forced labour, human organ transplantation and labour exploitation. On conviction on indictment, the offence carries 14 years imprisonment, a fine or both. It is interesting to note here that these provisions neither prevent the subsequent deportation of the exploited, nor do they take into account the structural features of the international labour market. Sand by making it an offence, punishable by imprisonment, for any non-British or EEA national arriving at a UK port not to have a passport or to have a forged passport, the Bill seems to contradict Article 31 of the Geneva Convention and the Adimi judgement.

4. Assessment

The *White Paper, Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (7 February 2002), which culminated in the *Nationality, Immigration and Asylum Bill 2002* and the *Nationality, Immigration and Asylum Act 2002*, was a unique opportunity for designing a comprehensive and credible asylum and migration policy. But this opportunity was not seized. Instead, the White Paper reflected the governmental priorities of migration control and deterrence of asylum seekers, and sought to address 'organised immigration crime' by proposing stricter law-enforcement measures. These focused on the follow-

65 This penalty exceeds the 8 years specified in the EU Framework Decision; see *supra* note 9.

66 This had been envisaged by *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, Home Office, February 2002, CM 5387. Para 5.30 stated 'the Government will strengthen the means of tackling the problem of trafficking for the purposes of labour exploitation by making it a specific criminal offence'; p. 84. For a critique of the Asylum and Immigration (Treatment of Claimants, etc. Bill) see ILPA Briefing 'Clause 20 – Removal and non-Cooperation Offence', 2003.

ing five areas: combating illegal working; strengthening the law; dealing appropriately with the victims of trafficking; tackling the criminals: intelligence and enforcement operations; EU co-operation and prevention in source and transit countries. In so doing, the White Paper distinguished between 'people smuggling', defined as the facilitation of illegal entry with the consent of the person concerned, and 'people trafficking', which is defined as transporting people in order to exploit them, using deception, intimidation or coercion.[67] According to the White Paper, 'exploitation may take the form of bonded labour or servitude which violates their human and legal rights. It may be commercial sexual exploitation. It is often accompanied by violence, or threats of violence against the victim and their family'. It is noteworthy, here, that whereas smuggled persons are viewed as 'illegal entrants or 'customers, the trafficked are seen as victims.[68] Such a distinction overlooks the fact that those living clandestinely are exposed to various forms of insecurity and are often deprived of fundamental rights and their human dignity. This point is conceded by the White Paper: 'it is clear that people who are in this country illegally are vulnerable to exploitation both by the traffickers that use deception or intimidation to transport them and by a few unscrupulous employers or gang masters who take advantage of their status by making them work in poor or dangerous conditions, often for unacceptably low wages. People in this situation can be too afraid to challenge their treatment yet powerless to escape their exploiters. Because of their status, many illegal migrants are socially excluded and have few opportunities to make a positive contribution to the community'.[69] But the White Paper's response to this centres on 'targeting employers as well as individuals who are knowingly working illegally, recognising, of course, that some of these people are victims. Where workers have no right to be in the UK, they can expect to be removed'.[70] Accordingly, emphasis is put on employer sanctions, strengthened enforcement operations, strengthening the law and creating new offences relating to the administration of the 1971 Act.

In the same vein, although the White Paper acknowledged the need for measures to deal compassionately and appropriately with the victims of trafficking, including the provision of initial counselling and support for their reintegration in their home countries, it failed to propose any concrete measures in this field. Reference was only made to developing 'a best practice 'toolkit' to help

67 Chapter 5, para. 5.2., pp. 75-76.

68 Home Office Research estimated that somewhere between 150 and 1500 women are trafficked into the UK for the purpose of sexual exploitation annually; 'Stopping Traffic: exploring the extent of and response to trafficking in women for sexual exploitation in the UK', Liz Kelly and Linda Regan (Police Research Series Paper 125) May 2000.

69 *Secure Borders, Safe Haven,* para 5.5, p. 77.

70 *Ibid*, para 5.16, p. 80.

those who deal with 'illegal immigrants and trafficking victims to distinguish victims in genuine need and to deal with them appropriately'.[71]

The toolkit on 'Trafficking of People' addresses issues, such as the provision of emergency support to the victims of exploitation, identification of their health needs, addressing the special needs of child victims, the provision of safe and appropriate accommodation, the provision of assistance with rehabilitation/reintegration, safe return and re-settlement in the country of origin. But it also acknowledges that in the UK 'there is very little in the way of specialist service provision for trafficked victims'.[72] The toolkit also makes reference to victims' involvement as prosecution witnesses and to the risks that this might entail for both themselves and their families. In this respect, regular risk assessments, the provision of secure accommodation, secure transport to and from hearings, a witness protection programme and support during court proceedings may militate against some of these risks. It is true that Home Office Circular 12/97 provides scope for a temporary regularisation of the migration status for trafficked victims. If a victim has provided material assistance to a police investigation of a serious crime and is required as a witness on criminal proceedings, the police can apply to the Immigration Service for regularisation of stay.

In contrast to the underdeveloped nature of a victim-centred approach to human trafficking, the Government has developed a mature and comprehensive approach to intelligence and enforcement operations against trafficking, even though such an unbalanced law-enforcement policy may entail the risk of imposing further penalties on the victims of traffickers. In 2000, the Government set up Project Reflex, a multi-agency task force chaired by the National Crime Squad (NCS), in order to co-ordinate multi-agency efforts and operations against people smuggling and trafficking. The project brings together all the agencies involved in combating trafficking, such as NCS, the National Criminal Intelligence Service, the Immigration Service, the Foreign and Commonwealth Office, the Intelligence and Security Agencies, and key police forces including the Metropolitan Police, Kent and the British Transport Police. Under Reflex, a central tasking forum has been established which has successfully participated in Operation Franc, targeting a major network smuggling Turkish nationals, Operation Zephaniah, a racket arranging the entry of North-Indians in the UK, and Operation Mullet, involving the provision of forged documentation for unauthorised entry. Operation Zephaniah led to the arrest of two truck drivers in Essen, Germany, with 21 stowaways at the back of their truck, and of a third person in Gateshead, England. Since its inception in March 2003, Operation MAXIM has mapped the extent and structure of organised networks in London. Operating under the auspices of Reflex, operation MAXIM generated 46 arrests during the first phase. In the second phase, MAXIM became a co-

71 *Ibid*, para 5.35, p. 85.

72 Needs of Victims; http://www.crimereduction.gov.uk/toolkits/tp0604.htm.

ordinated programme involving the joint agency proactive team based at Electric House in Croydon, a Joint Intelligence Cell and the Immigration and Nationality Directorate Intelligence Service at Putney. Phase 2 yielded 102 arrests out of which 23 people were charged and 21 people were removed from the UK.[73] On 17 June 2004 detectives from Operation Maxim arrested 20 people on suspicion to facilitate illegal entry and leave to remain in the UK and money laundering during dawn raids at 12 addresses across London. This operation was codenamed Taming.[74] Other operations under MAXIM include: CHIFFCHAFF, which led to three arrests for deception offences and possession of a forged passport; PHALAROPE which led to one arrest for possession of a forged passport and the person awaits deportation; KITTIWAKE which resulted in five arrests and the principal was sentenced to 30 days imprisonment; FULMAR which resulted in 13 arrests for a variety of offences; BERWICKSWAN which led to one arrest for forgery and illegal entry and the person concerned was sentenced to 7 months imprisonment; and GADWALL, REDPOLL, SCAUP, WRYNECK, SANDMARTIN, ROSEATE, WIDGEON and DIVER which led to 16 arrests for forged passports and other forgery offences. Under the latter operations, six persons have been charged and await trial. The UK is also developing a network of Immigration Liaison Officers, working with other governments to encourage and support action to disrupt the activities of criminal gangs and create a joint intelligence structure.

On 9 February 2004, the Home Secretary announced the creation of a new UK-wide organised crime agency in order to track down those who control drug trafficking, people smuggling, and engage in fraud and money laundering. The single organised agency will bring together the responsibilities of the National Criminal Intelligence Service, the National Crime Squad, Home Office competences for organised immigration crime, and the investigation and intelligence responsibilities of HM Customs and Excise. It will be centrally funded, and will report to Ministers within a month. A policy paper on the Government's strategy for tackling organised crime and the arrangements for the new agency is expected to be published soon.[75]

What is particularly interesting in all these policy initiatives and developments is that 'immigration crime' is portrayed as an external and new 'phenomenon' facing the state. Little consideration is given to the possibility that the growth of the 'migration industry' may be a direct consequence of the restrictive and law-enforcement migration regime. It is true that barriers to the international movement of people create an economic niche for individuals and groups

73 Organised immigration Crime, Report 11, 12 February 2004 <http://www.mpa.gov.uk/committees/ppr/ 2004/040212/11.htm>.

74 'Operation Maxim co-ordinated raids on 12 addresses', Metropolitan Police Service, 17 June 2004, Bulletin 2004/0076.

75 <http://www.ind.homeoffice.goc.uk/news.asp?NewsID=363>.

dedicated to overcome them for profit. Massey et al have argued that 'given the profits to be made by meeting the demand for immigrant entry, police efforts only serve to create a black market in international movement, and stricter immigration policies are met with resistance from humanitarian groups'.[76] On this very issue, the JCWI has observed that '[this problem] has emerged out of the failure of those countries receiving migrants and refugees to develop policies and strategies for the proper management of all forms of migration.' In this respect, the question of 'whether a better system to tackle fraud and other forms of illegality can be put in place depends wholly and exclusively on whether open and comprehensive policies for the better management of migration operate'.[77] Law-enforcement approaches to trafficking in human beings are likely to be fruitless, if policy formulation in this field does not identify clearly both the causal mechanisms and intervening variables, such as the existing restrictive migration regime, and accords effective and genuine protection to the victims of trafficking.

76 D.S. Massey et al, 'Theories of International Migration', *International Migration Review*, at p. 251.

77 See *supra* note 49.

*Andrew Geddes**

THE POLITICS OF IRREGULAR MIGRATION, HUMAN TRAFFICKING AND PEOPLE SMUGGLING IN THE UNITED KINGDOM

1. Introduction

What factors underlie the social and political debate about irregular migration, people smuggling and human trafficking in the UK? Irregular migration flows rose to prominence in the UK towards the end of the 1990 with notorious and tragic incidents as migrants died either trying to enter the UK or while working in the UK. The chapter's main argument is that responses to irregular migration draw from a repertoire of contentious immigration politics. This insight has been developed with regards to responses to post-colonial immigration (Hansen, 2000) and asylum (Gibney, 2003). My aim is to explore the ways in which longer-term patterning of migration politics and policy have continued to shape the ways in which migration to the UK is understood. The chapter analyses the salience of irregular migration flows, the links made to people smuggling and human trafficking networks particularly through media coverage of irregular migration, and then develops its argument about the longer-term historical patterning of responses to irregular migration, such as the ways in which irregular migration is related to the longer-term race relations framework that has structured UK migration policy and politics since the 1960s. It is, however, argued that more recent events such as the securitarian discourse and action that accompanied the post-9/11 responses to migration has also reinforced interpretations of irregular migration as a security threat, which distracts somewhat from the strong economic imperative both for those that move and those that employ them.

The capacity for irregular migration to ascend the political and public agenda was made clear in February 2004 when the bodies of 20 Chinese workers were discovered in Morecambe Bay in north-west England. Apparently most had been smuggled into the UK by Chinese 'snakehead' gangs and had then found

* Professor of Politics at the University of Sheffield.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *371-385.*
 ISBN 90 04 15064 1.

work as cockle-pickers, an economic activity where labour market regulation was apparently lax to non-existent. There have been other tragic incidents too. In June 2000, 58 people from China suffocated to death in the back of a truck as an attempt was made to smuggle them into the UK. In August 2003 an 8-year prison sentence was imposed by a Belgian court on an Albanian reported to have smuggled 12,000 people into the UK from Belgium. The Belgian judge attacked the UK for 'its poor (immigration) laws that attract illegal workers and offer them no protection' (*The Guardian*, August 13, 2003). In February 2004 an Albanian man was sentenced to 10 years in jail for kidnapping women and forcing them to work in the sex industry and reimburse an £ 8,000 'travel bill' (Coward, 2003: 24). In May 2004, a gang of people smugglers were convicted for charging a reported £ 8,000 to an estimated 400 people for a 'club class' smuggling service into the UK (*The Times*, May 29, 2004). It has been reported that prominent roles in people smuggling networks are played by Albanian gangs moving people from Albania to Italy, across Europe and then into the UK from Zeebrugge in Belgium while similar Chinese operations have been identified working through Rotterdam as the final point of departure for the UK (Home Affairs Select Committee, 2001). The House of Commons Home Affairs Select Committee also reported that estimates of the scale of the global irregular migration and human trafficking business ranged from $ 12 billion (estimate by the International Organisation for Migration) and $ 30 billion (United States estimate) (Home Affairs Select Committee, 2001). The irregular branch of the international migration industry also displays an inventiveness that can make it more difficult to control their activities. The effects have been particularly evident in some British towns where there is a reliance on seasonal and short-term labour. In Kings Lynn in Norfolk, *The Times* reported in July 2003 that the Chinese population had risen from 300 to 5,000 Chinese. Many were irregular migrants, living in terrible conditions and receiving extremely low levels of pay for the (often arduous) work that they did. Much of this short-term and seasonal work in the UK has been controlled by around 5,000 'gangmasters' (most of them running legitimate business operation) reportedly supplying up to 75,000 workers. Trafficked migrants are then portrayed as helpless victims of what Shadow Home Secretary David Davis called '… the modern day slave trade. Lured to Britain with little knowledge of English, illegal immigrants are forced to work 12 hours a day, six days a week, for derisory amounts of money. Health and safety regulations don't apply. They are kept outside the confines of society and beyond the reach of the law. By doing nothing, the government is giving tacit consent' (*Mail on Sunday*, February 15, 2004). The day before, *The Sun* reported on the 'wicked gangmasters' that 'exploit vulnerable men and women'. Private members legislation introduced by Labour backbench MP, Jim Sheridan, in 2004 with government backing sought to regulate the activities of these gangmasters by ensuring that they are registered, that they abide by health and safety rules and that they pay at least the minimum wage to their employees.

This article analyses the heightened salience of two forms of irregular migration to the UK, people smuggling and human trafficking. The precise meaning of these two terms is not always clear because of the presumptions made, for example, about the degree of compulsion. The Home Office has contended that the difference between the two is that smuggling involves surreptitious attempts to evade border controls while trafficking has an exploitative element, linked, for example, to the sex industry (Home Office, 2002: 75-76). The study of irregular migration also presents a methodological challenge because it is by definition a submerged phenomenon. For obvious reasons, the numbers of irregular migrants present in the UK are not known. Even though numbers of people apprehended are usually numbered in thousands rather than hundreds of thousands, estimates of the irregular population do run into the hundreds of thousands (Home Office, 2002: 78). The Control of Immigration Statistics produced by the UK government provides information on the number of persons removed from the UK (including failed asylum applications). In 1992, 21,160 persons were removed from the UK. By 2002 this number had risen to 65,460. The number of persons removed as a result of enforcement action rose during the same period from 6,210 to 14,205 (Home Office, 2003). Whether these figures signify larger scale irregular migration, better enforcement or a combination of the two is an open question. Moreover, the total number of irregular migrants can only be deduced by making some link between the numbers of people detected and a deduced total population of irregular migrants (Salt, 2003). In the absence of precise and reliable information, it becomes relevant to explore the ways in which irregular migration as a particular form of international population mobility has been understood and processed as a social and political issue in the UK. There are important elements of ambiguity because, first, numbers of irregular migrants are not known, second, there could be no such thing as irregular migration if there was not regular migration, and, thus, what we define as international migration and the categories into which international migrants are placed at any point in time can be arbitrary and driven by institutional processes in receiving states (Dobson et al., 1999).

The intention is not to plunge this whole discussion into a miasma of terminological inexactitude as we probe the various meanings given to international migration as good or bad, as an asset or threat, as wanted or unwanted. Rather, the argument is that the absence of precise knowledge about the scale, extent and effects of migration is a fairly standard feature of migration policy (and one reason why policies may fail). An outcome of incomplete knowledge is that already established frames of reference for viewing migration are applied to new migratory phenomena. Thus, while irregular migration can appear novel the response to it draw from relatively long-standing concerns about immigration that have developed over 40 years or so.

The perception of a migration crisis (of which irregular migration forms a part, along with asylum-seeking) has important implications for what Goffman

(1963) called 'virtual social identities'. When applied to immigrants in the UK we see a polarisation between 'wanted' and 'unwanted' migrants dependent on their perceived economic contribution. Since the 1990s, British debates about migration have become centred on economic costs and benefits. Migration to the UK has become less focused don the legacies of colonial ties and more about the competitiveness of 'UK plc'.

The remainder of this chapter develop this argument about the longer-term patterning of the social and responses to irregular migration, people smuggling and human trafficking in two ways. The next section explores four underlying issues: the 'race related' framing of immigration and immigration-related diversity in the UK; the sovereign authority and capacity of the British state to regulate population movement; the impact of deregulated and liberalised economy on irregularity; and the implications of irregularity for population control and societal security. A section that analyses how discussions of irregular migration draw from an established repertoire of social and political contention in this area, albeit with a contemporary twist, follows this. The established repertoire includes the elision and confusion of migration categories and the ways in which state policies can actually help create irregular migration; fears of floods and invasions by 'unwanted' migrants and associated fears that the state is losing or is out of control of migration; the depiction of migration and migrants as causes of increased support for the extreme right; the existence of labour market pull factors that provide economic spaces for regular and irregular migrants; the symbolic power but limited effect of an international human rights regime and discourse; and the problems of policy implementation. The contemporary twist is provided by the links made between irregular migration and the 'war on terror' and the ways in which migration has become a component of bilateral relations between the UK and other states, particularly those structured by EU competencies.

2. Key Themes in UK Debates about Irregular Migration, Human Trafficking and People Smuggling

This section of the article explores four themes that provide the social and political setting within which discussions of irregular migrations, human trafficking and people smuggling occur. Taken together these facilitate understanding of the ways in which international migration in its many forms interacts with key elements of the British polity.

2.1 Race Related Framing

The 'immigration problem' as it has developed since the late 1950s has been strongly associated with social and political constructions of race and racial difference. A clear link has been established between the regulation of migration

– particularly those by groups deemed racially distinct such as migrants from south Asia, Africa and the Caribbean – and the maintenance of good social relations and public order. The ideas of race as a social and political construct have been central to the racialisation of policies both to regulate access to the state territory and integrate immigrant newcomers. Failure to effectively regulate access to the territory is then seen to threaten race relations. The maintenance of good social order as a result of this racialised understanding of immigration depends on the tight control of movement by those deemed racially distinct.

2.2 The Sovereign Authority and Capacity of the British State

It is useful to distinguish between sovereign authority and capacity in order to differentiate the formal attribution of power and the locations at which this power is exercised from the capacity of the state to exert, administer and implement this power in relation to the many and various forms of international migration (Evans, Rueschemeyer and Scokpol, 1985). International migration is comprises a highly diverse and complex set of phenomena made visible by states and their borders (Zolberg, 1989). The sovereign authority of the British state exercised by the Immigration and Nationality Department establishes those categories of migration such as high skilled labour from abroad that are wanted and, particularly since the late 1990s, to be encouraged compared with those such as asylum that are unwelcome and to be deterred (McLaughlan and Salt, 2002; Salt and Clarke, 2004; Düvell and Jordan, 2003). A distinct element of UK responses to international migration is that they have relied heavily on the imposition of controls at air and land points of entry to the UK, i.e., at the external frontiers of the British state. One result of this is that the UK does not 'fit' with the Schengen model elaborated since the 1980s. The UK opted out of those provisions of the Treaty of Amsterdam referring to free movement, immigration and asylum (Geddes, 2000).

An idea about sovereign authority exercised at the borders of the state has long been a key theme in British politics. The organisation of the British political system is also important. Freeman (1994) and Joppke (1999) both identify the power of the executive, a largely subservient legislature and relatively weak courts. The discourse and practice of 'control' has never been too far from the surface because 'losing control' strikes at the legitimacy of the British state and the elected government. The Labour government since 1997 has concerned to be tough on those forms of migration defined by its policies as unwanted, although there has been a significant opening to new labour migration (particularly by the highly skilled). Labour market shortages, population change, and the potential benefits of migration have informed a reorientation of UK migration policy since the late 1990s. In 2002, 245,000 people entered the UK for purposes of work. Immigration accounted for 60 per cent of UK population growth. The UK was more open at the turn of the twenty first century to labour migration

than at any time since the late 1950s and early 1960s. Since the late 1990s, arguments about needs and resources have been recast in such a way that a new openness to labour migration has been generated. Recruitment efforts have been particularly concentrated on the recruitment of skilled workers, even though there are clear signs that there are labour market gaps at lower skill levels too without the same channels for access.

The concentration of power within the core executive could be contrasted with liberal state-society-market market relations. This has been an important and prevailing theme in analyses of British politics that stress the tension between the free economy and the strong state (Gamble, 1994). The debate about the introduction of identity cards in the UK has been suggested as one way to tackle irregular migration is another example of this (Home Office, 2004). Movement towards a regulatory state centred on ostensible liberalisation and deregulation since the late 1970s have induced new forms of state 'colonization' as the range of social and economic activities subject to public power expands (Moran, 2003: 6).

The emphasis on external frontier controls with minimal internal checks has made it hard to track migrants once they are in the UK. There are four main ways to become an irregular migrant: clandestine entry, forged documents, overstaying, or as a result of judicial or administrative decisions that can retrospectively produce irregularity. There is, however, no government record of foreign nationals in Britain. Those who arrive as students or on work permits are logged in, but there is no mechanism to tell the government if they have overstayed and there are no exit controls. This can lead to doubts been cast on the veracity of migration statistics, although, despite 'several weaknesses', the National Audit Office viewed the figures as 'in most respects reliable' (National Audit Office, 2004: 3).

There are clear market incentives for the illegal branches of the migration business to smuggle people into the UK and then seek to deploy irregular migrants in economic sectors such as agriculture where there can be seasonal demands for low skilled workers. Narrow channels for lower skilled labour migration (for short-term, temporary or seasonal work) could incentivise irregularity, as well as offering profitable opportunities for those that can deliver cheap foreign labour. State attempts to restrict migration can often be counter productive with new controls producing new evasions and, in the case of irregular migration flows, people smuggling and human trafficking operating as a lucrative but elicit branch of the migration business. The result is that the liberalised and deregulated UK economy creates space for regular and irregular migration. Essentially, the British state knows that irregular migration exists but is not able to quantify its scale or extent. Or as Home Secretary David Blunkett put it when asked about the numbers of irregular immigrants in the UK in an interview on the BBC's Breakfast with Frost on September 21, 2003 programme replied: 'I haven't a clue'.

If irregular migration was widely viewed as a benign or beneficial phenomena then this would probably not be seen as a problem; but because it is often construed as a threat then 'not having a clue' creates a knowledge, control and security nexus; or to be more precise lack of knowledge combined with perceived control deficits produce a heightened emphasis on societal security and population control. For example, Blunkett's 'I haven't a clue' remark was used as a part of a justification for ID cards as a measure to tackle irregular migration. The links between knowledge, control and security are underpinned by the fact that states have difficulty understanding and predicting migration flows and projecting future levels of population and labour market change. In an area as sensitive as immigration, states have to give the impression of being in control, but migration is driven at least as much by migration networks and market dynamics that operate across states as it is by formal state interventions. Uncertainties about scale and extent are compounded by the economic, social and/or cultural threats that some sections of society see migration as bringing. The epistemological challenge for policy-makers is that while they know that irregular flows exist, they do not know the scale or extent and know that enforcement can be very costly. The political risk here for UK governments is that through a perceived lack of enforcement they are seen as making the UK a 'soft touch' because of weak external frontier controls or lax internal enforcement. The knowledge gaps concerning the extent of irregularity can also create a political vacuum with space for a rich repertoire of anti-immigration rhetoric and action that centre on perceived threats include to welfare, to the labour market, and to understandings of national culture and identity.

3. The Historical Patterning of the Response

Although irregular migration, human trafficking and people smuggling bring with them some novelty and clearly present new legal, social and political challenges, the ways in which they have been processed as social and political concerns in the UK draws heavily from a repertoire of contentious migration politics that can be traced as far back as the late 1950s. The social and political settings within which meanings of population movement are produced sustains migrants' identities that are virtual in the sense that they are not based on full information about an individual but rather on observable characteristics such as the perception of economic costs/benefits, skin colour, religion or membership of a particular national group. They are social in the sense that they are defined in social settings (Goffman, 1963). These virtual social identities of irregular migrants are the means by which people make sense of irregular migration. These processes are one stage removed from actual experience or knowledge of irregular migrants because, despite overblown rhetoric of floods and invasions, numbers of migrants remain relatively small as a percentage of the UK population of whom most people do not have direct experience.

This chapter now analyses four prevalent themes in recent discussion of irregular migration, human trafficking and people smuggling. It then moves on to explore the contemporary twist given to these debates.

3.1 The Elision of Migrant Categories

The history of British migration policy since the 1960s could be understood as the progressive shrinking of channels for regular immigration. But, 'immigration' is, of course, a broad term that covers many and diverse forms of movement. The categories established by states can be imperfect vessels for the complex and diverse forms of international human mobility that states encounter. The salient issue in the UK since the mid-1990s has been asylum and the powerful image of the 'bogus asylum seeker'. Much of this debate was informed by the view propagated by government and much of the print media that many asylum-seekers were not genuine in the sense that they were seeking refuge from persecution, but were really either economic migrants in disguise or, worse still, had been attracted by welfare state benefits (Kaye, 1999). This view was articulated by the former Deputy Prime Minister (1995-97) Michael Heseltine in a *Daily Mail* article on January 1, 2001:

> I came to three stark conclusions. The first is that a very large number of those seeking asylum are cheats, quite deliberately making bogus claims and false allegations in order to get into this country. They wish to jump the queue made up of those quite properly applying for immigrant status, and others genuinely fleeing from brutal tyrannies. The second was that the demands on scarce housing and medical care made by dishonest 'economic migrants' was likely to stretch the patience of voters and I could well understand why. The third was that the problem of phoney asylum-seekers was likely to grow as the impression spread that this country was a soft touch. Above all, I could see no reason why my most vulnerable constituents – honest and hard-working people who had paid their taxes all their lives – should be pushed to the back of the queue for housing and hospital treatment by dubious asylum-seekers.

At the same time, a MORI survey for Readers' Digest in October 2000 found that people in the UK thought asylum seekers receive £ 113 a week in benefit payments. This was about three times the actual figure of £ 36 in cash and vouchers for a person aged 25 or more (plus the cost of accommodation). Home Office research has also cast doubt on the welfare state pull factor that has been seen as a major draw for asylum-seekers and informed policy developments since the 1990s that have rendered more tenuous the links between asylum-seekers and the community of legitimate receivers of welfare state benefits (Robinson and Segrott, 2002; Bommes and Geddes, 2001).

Legislation introduced by Conservative and Labour governments in 1993, 1996, 1999 and 2002 rendered increasingly tenuous the relationship between asylum-seekers and the welfare state and sought to limit access both to British society (withdrawal of labour market access) as well as entitlement to welfare state benefits (Geddes, 2000). Yet, as the numbers of asylum-seekers falls then the debate has shifted to irregular migration. For example, the anti-immigration *Sunday Express* on the 22nd February 2004 alleged that the government was soft-pedalling on illegal immigration in order to keep the asylum figures down. In 2003, Keith Best of the Immigration Advisory Service also made the link between falls in asylum and irregular migration when he contended that 'The figures will have come down substantially, but the trouble is that it is almost certainly going to be at the expense of greater illegal immigration'. He went on to claim that 'The benefit for [Home Secretary] David Blunkett is that nobody can say for sure that his legislation has led to this side effect because illegal immigration cannot be quantified'. This returns us to the epistemological problem mentioned earlier. There is no hard and fast evidence to suggest that falling numbers of asylum seekers is matched by increased numbers of irregular migrants, but it is the inability to quantify irregular migration that can create a vacuum that can be filled by voices drawing from a repertoire of threats and dangers posed by migration.

A related point here is that state policies can actually contribute to the perception of a migration crisis in the sense that a desire to be 'tough' or not to be seen as a 'soft touch' can prompt attempts to be more restrictive that actually fuel new evasions such as those offered by the traffickers and smugglers. This idea that efforts to get tough can actually lead to precisely the opposite effect is not a new theme. For example, in the early 1960s attempts to regulate immigration from New Commonwealth and Pakistan actually led to increased 'beat the controls' migration (Layton-Henry, 1992). This was a point also recognised in the contemporary context by the House of Commons Home Affairs Select Committee which reported in 2003 that migrants could be forced to seek irregular migration routes and fall into the hands of smugglers and traffickers as a result of tougher asylum laws (Home Affairs Select Committee, 2003).

Being a soft touch also impels fears that somehow the state is losing control of migration. As Brubaker (1994) has argued, economically developed states still retain a formidable capacity to exclude and much of the global demand for migration remains unrealised. The most recent manifestation of this was the accession of ten new EU Member States and predictions of large-scale migration from these countries to the UK. For example, the fervently anti-immigration *Daily Express* asserted that enlargement would bring with it a 'massive gypsy invasion', as well as potentially millions of migrants from central and east European countries supposedly flying Easyjet at £ 2 a journey. Without lurching to these rhetorical excesses, this 'losing control' theme has also been picked up by mainstream politicians. In the wake of the Morecambe Bay tragedy, the

shadow Home Secretary, David Davis, commented in an article in the *Mail on Sunday* of February 15, 2004 that: 'By doing nothing, the government is giving tacit consent' to the smugglers and traffickers. Losing control becomes a key theme. In this kind of construction the 'losing control' argument is not particularly redolent of Sassen's (1998) argument that as a result of 'globalisation' states are finding themselves subject to the increased reach of international laws and institutions. In fact, the UK variant is primarily a domestic argument about the reach of government – about the sovereign authority and capacity of the British state – and a failure to enforce controls.

3.2 The Extreme Right

Supposed failings to exert the authority and capacity of the British state undermine the legitimacy of elected government and opens the way for populist and extremist organisations: 'If we don't clamp down on illegals then the Nazi's flourish' is the typical reasoning. Former Labour cabinet minister and current European Commissioner, Peter Mandelson, argued in *The Times* on June 11, 2002 that Labour needed to be tough on traditional right issues such as illegal immigration and thus stop what has happened to other centre-left parties. This was also seen as informing some Machiavellian manoeuvres by the British government. In June 2002 the UK, with Spain and Italy, proposed that EU development aid be linked to efforts by recipient countries to deal with irregular migration flows. The plan was rejected following opposition from, among others, the French and Swedish governments, but *The Independent* on June 22, 2002 suggested another motive with the move being an attempt to play to the domestic gallery because the UK government wanted to be seen as tough on irregular migration even though it was clear that the proposed EU measures would fail.

3.3 Economic Pull Factors

It is well known that migrants tend to be concentrated within particular economic sectors. Some of these sectors may be difficult to regulate. Research suggests that labour market enforcement can be lax because the immigration authorities are over-stretched (Düvell and Jordan, 2002, 2003). For example, the Reflex Immigration taskforce set up in May 2000 has focused on organised crime and involves the security services, immigration authorities and the police force. Between July and September 2003, 520 illegals found working, of whom 350 were deported (Home Affairs Select Committee, 2003). Between 1998 and 2002, there were 22 prosecutions for employing an illegal immigrant. This could suggest that quite a few were getting away. To illustrate this point *The Times* ran a story on July 25, 2003 which reported that policemen found a picture of smiling irregular migrants employed as contract cleaners sat on the (Conservative, thus

pre-1997) Home Secretary's desk. Düvell and Jordan (2003) report implementation problems with the Immigration Service Enforcement Directorate not ranking undocumented work as a priority, but rather seeing the removal of failed asylum seekers as their main concern.

3.4 The National Setting and Limits of Post-Nationalism

The discourse of universal personhood and international human rights appears to have limited reach (Soysal, 1994). It appears almost a badge of honour for Labour Home Secretaries to offend the 'chattering classes' characterised as inhabiting the salons of North London. Yet, a 2004 Amnesty International report stated that only Ireland and Luxembourg of EU were upholding their international human rights obligations: 'It is not enough for the EU to preach human rights abroad. Europe must look at itself first. Otherwise the EU's human rights credibility in its international relations will always be called into question'. This kind of report can, however, provoke a robust response from populist tabloid press. The Sun's columnist, Richard Littlejohn (December 5, 2003), seemed to have rather a different take on the human rights issue when he argued that Blunkett is a prisoner of the 'human rights lobby, the men in wigs and the Guardianistas who run every government department'. This was a theme picked up by Melanie Philips in the *Daily Mail* on July 7, 2003 when she wrote that the governments' 'own Human Rights Act has made immigration policy impossible'. There was also an aggressive reaction in much of the UK press to a UN report criticising the press coverage of immigration: 'left wing politicians smearing honest journalists and slandering the British people by claiming that they are motivated by gross racial prejudice … dishonest liberals are to blame', as the *Mail on Sunday* (January 19, 2003) put it. International human rights are the preserve of out of touch liberals, a veritable fifth column in the national debate, it would seem.

4. The Contemporary Twist

Links have been made between irregular migration and the war on terror. According to a *Daily Mail* report in December 2003, the Italian secret service had warned that Al Qaeda was 'masterminding the illegal immigration racket to raise millions of pounds for its terrorist operations'. The Italian interior minister Pisanu was quoted as saying that 'illegal immigration is a filter for drug trafficking, arms and terrorism'. Concerns about irregular migration have also fed into a debate about the creation of a national identity card. Currently, only the UK, Ireland Denmark do not have national ID cards, although there is little evidence that they make a difference regarding irregular migration. The debate about security and irregular migration has, though, been a theme eagerly picked up by the anti-immigration press. A leading exponent of immigration as threat has been

the Daily Express, which reported on December 20, 2003 that a Europol report linked enlargement and illegal immigration and posing illegal immigration as a greater risk than the drugs trade. The *Daily Express* has also led on its front page with stories about the 'gypsy invasion' that will result from EU enlargement and the risks of disease-ridden migrants from central and eastern Europe entering the UK. In January 2003 the House of Commons Home Affairs Select Committee called for a unified border police force coupled with greater internal regulation to tackle illegal work (Home Affairs Select Committee, 2003)

Another overlap occurs because the response to human trafficking and people smuggling cannot be understood as a national concern because it is also part of the structured relations between the UK, its EU partners and non-EU countries. As is well known, sovereign states have rarely led free and easy lives (Waltz, 1979). Illegal immigration was cast as a Foreign and Commonwealth Office priority in a December 2003 66-page strategy document. The Foreign Secretary, Jack Straw, proclaimed that 'Foreign affairs are no longer really foreign' (Foreign and Commonwealth Office, 2003: 5). The UK and France have, for example, co-operated on measures to reduce the numbers of asylum seekers entering the UK. In June 2002 the British and Italian Prime Ministers Tony Blair and Giuliano Amato published a joint article in *The Observer* with a particular emphasis on the western Balkans and Albania as being at the heart of human trafficking and people smuggling networks. Blair and Amato called for more effective returns policies, intensified co-operation, tougher penalties and better intelligence. Prior to the June 2002 Seville EU summit there were plans from the UK, Spain and Italy to link development aid to measures tackling illegal immigration, although as has already been mentioned, this has also been linked to the UK government playing to the domestic gallery in a bid to appear tough on immigration. The UK had an ambivalent relationship to European structures that can be linked to the issue of sovereignty. The exercise of controls at the external frontiers of the British has been seen as incompatible with some of the measures developing in Schengenland. Yet, as is well known, European integration in the area of migration does not necessarily weaken member states as they 'lose' sovereign authority (Freeman, 1998, Geddes, 2003). Instead, Europe can be the venue for the pursuit of new ways of regulating those forms of migration that European states have defined as unwanted. The UK has been to the fore in developing measures on asylum and irregular migration that seek to off-load the problem of 'unwanted' immigration beyond the borders of the EU by placing responsibility on sending states and on countries close to these sending states. For example, in a letter to the Greek Prime Minister Costas Simitis in the run-up to the June 2003 Thessaloniki EU summit Blair argued for the processing of asylum claims outside the EU in camps located outside the EU (Romania and Albania were suggested as possible locations). Both the European Commission and the United Nations High Commission for Refugees expressed doubts about this proposal because it was seen as undermining the principle of state responsi-

bility, which has been one of the cornerstones of the post-war refugee protection system (see, for example, European Commission, 2003).

5. Conclusion

The aim of this chapter has been to identify the ways in which the social and political patterning of debates about irregular migration, people smuggling and human trafficking in the UK draw from a relatively well-established repertoire of contentious migration politics, albeit with a contemporary twist. While there are clear elements of novelty and new legal, political and social challenges, there is also much that is not particularly new about this debate. The contentious politics of irregular migration draw in many ways from longer-standing patters of migration politics and the race related ways of understanding these issue sin the UK. These provide the backdrop for the resuscitation of many themes that have been long-standing components of the debate about migration in the UK and have now been applied to irregular migration and the networks that sustain it. New twists have been added to the debate by the making of links between irregular migration and the 'war on terror' and by the ways in which irregular migrations have become part of the structured relations between Britain, its EU partners and other non-EU countries. Finally, it was argued that there is now a starker distinction in UK migration policy between 'wanted' and 'unwanted' migration flows with a debate recast in terms of the perceived costs and benefits of migration in relation to the competitiveness of 'UK plc'. This has led to a renewed openness to (mainly skilled) labour migration. Irregular migration and the networks that sustain it demonstrate a flaw in this approach because of apparent continued demand for migrant labour at lower skills levels. This prompts the formation of virtual social identities for irregular migrants with a tendency for them to be portrayed as a threat in some way to the UK and as the helpless victims of ruthless traffickers and smugglers.

References

Amnesty International (2004) *Human Rights Begin at Home: Amnesty International's Assessment of EU Human Rights Policy. Recommendations to the EU Irish Presidency* (Brussels: Amnesty International).

Bommes, M. & A. Geddes (2000), *Immigration and Welfare: Challenging the Borders of the Welfare State* (London: Routledge).

Brubaker, R. (1994) 'Commentary: are immigration controls really failing?', in W. Cornelius, P. Martin & J. Hollifield (eds.) *Controlling Immigration: A Global Perspective* (Stanford (CA.): Stanford University Press).

Castles, S. (2003) 'Why migration policies fail', *Ethnic and Racial Studies*, 27 (2), 205-27.

Coward, R. (2003) 'Slaves in Soho', *The Guardian*, March 23, 2003.

Dobson, J., K. Koser, G. McLaughlan & J. Salt (2001) *International Migration and the United Kingdom: Recent Patterns and Trends* (Home Office Research Development and Statistics Directorate, Home Office: London).

Düvell, F. & B. Jordan (2002) *Irregular Migration: Dilemmas of Transnational Mobility* (London: Edward Elgar).

Düvell, F. & B. Jordan (2003) 'Immigration control and the management of economic migration in the UK: organisational culture, implementation, enforcement and identity process in public services, *Journal of Ethnic and Migration Studies*, 29: 2, 299-336.

Evans, P., D. Rueschemeyer & T. Skocpol (1985) *Bringing the State Back In* (Cambridge: Cambridge University Press).

Foreign and Commonwealth Office (2003) *UK International Priorities: A Strategy for the FCO, Cm 6052* (London: HMSO).

Freeman, G. (1994) 'Britain: the deviant case', in W. Cornelius, P. Martin & J. Hollifield (eds.) *Controlling Immigration: A Global Perspective* (Stanford (CA.): Stanford University Press).

Freeman, G. (1998) 'The decline of sovereignty? Politics and immigration restriction in liberal states', in C. Joppke (ed.) *Challenging the Nation State: Immigration in Western Europe and the United States* (Oxford: Oxford University Press).

Gamble, A. (1994) *The Free Economy and the Strong State: The Politics of Thatcherism, second edition* (London: Macmillan).

Geddes, A. (2000) 'Denying access: asylum seekers and welfare state benefits in the UK, in M. Bommes & A. Geddes (eds.), *Immigration and Welfare: Challenging the Borders of the Welfare State* (London: Routledge).

Geddes, A. (2003) *The Politics of Migration and Immigration in Europe* (London: Sage).

Gibney, M. (2003) *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press).

Goffman, E. (1963) *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs (NJ): Prentice Hall).

Hansen, R. (2000) *Immigration and Citizenship in Post-War Britain*, Oxford: Oxford University Press.

Home Affairs Select Committee (2001) *First Report: Border Controls*, HC163-I, (London: Her Majesty's Stationery Office).

Home Affairs Select Committee (2003) *Fourth Report: Asylum Removals*, HC654, (HMSO: London).

Home Office (2002) *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (London: HMSO).

Home Office (2003) *Control of Immigration Statistics United Kingdom 2002*, Cm 6053, (HMSO: London).

Home Office (2004) *Legislation on Identity Cards: A Consultation*, Cm 6178, (HMSO: London).

Joppke, C. (1999) *Immigration and the Nation State: The United States, Germany and Great Britain* (Oxford: Oxford University Press).

Kaye, R. (1999) 'Redefining the refugee: The UK media portrayal of asylum-seekers', in K. Koser & H. Lutz, *The New Migration in Europe: Social Constructions and Social Realities* (London: Macmillan).

Layton-Henry, Z. (1992) *The Politics of Immigration* (Oxford: Blackwell).

McLaughlan, G. & J. Salt (2002) *Migration Policies towards Highly Skilled Foreign Workers* (London: Home Office).

Moran, M. (2003) *The British Regulatory State: High Modernism and Hyper Innovation* (Oxford: Oxford University Press).

National Audit Office (2004) *Asylum and Migration: A Review of Home Office Statistics, Report by the Comptroller and Auditor General*, HC 625, (London: National Audit Office).

Robinson, V. & J. Segrott (2002) *Understanding the Decision-Making of Asylum-Seekers*, Home Office Research Study 243, (London: Home Office Research Development and Statistics Directorate).

Salt, J. (2003) *Current Trends in International Migration in Europe* CDMG (2003) 39, (Strasbourg: Council of Europe).

Salt, J. & J. Clarke (2004) *Labour Migration Flows in Europe: Patterns and Trends. Final Report to the Council of Europe European Population Committee* (CAHP), (University College London: Migration Research Unit).

Sassen, S. (1998) 'The de facto transnationalizing of immigration policy', in C. Joppke (ed.) *Challenge to the Nation State: Immigration in Western Europe and the United States* (Oxford: Oxford University Press).

Soysal, Y. (1994) *Limits of Citizenship: Migrants and Post-National Membership in Europe* (Chicago: University of Chicago Press).

Waltz, K. (1979) *Theory of International Politics* (New York: McGraw-Hill).

Zolberg, A. (1989) 'The next waves: migration theory for a changing world', *International Migration Review*, 23: 3, 403-430.

*Tom Obokata**

EU ACTION AGAINST TRAFFICKING OF HUMAN BEINGS: PAST, PRESENT AND THE FUTURE

1. Introduction

This book so far has focused on national responses to trafficking of human beings, with particular reference to immigration and criminal control and their socio-legal implications. The purpose of this Chapter is to provide an in-depth analysis of the European Union (EU) in relation to trafficking of human beings. All States examined in this book are Members of the EU, and any action adopted at the EU level has political and legal ramifications in these States. It begins by illustrating the past action against trafficking under the Treaty on European Union (TEU). In accordance with the Title VI (Provisions on Co-operation in the Fields of Justice and Home Affairs), an overall strategy of the EU has been the promotion of functional co-operation among law enforcement and judicial authorities of Member States.

It then continues with the present action against trafficking under the TEU as revised by the Treaty of Amsterdam. In particular, this Chapter focuses on two key instruments: the *Council Framework Decision on combating trafficking in human beings*[1] (Framework Decision on Trafficking) and *Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration for trafficking in human beings who cooperate with the competent authorities*[2] (Directive on Short-Term Residence Permits). These instruments are important as they seek to promote a unified EU approach to trafficking through approximation national laws of Member States.

* Lecturer in Law at the Department of Law, University of Dundee, Scotland.

1 OJ L 203/1 (1/8/02).

2 Doc. 14994/03, MIGR 101. In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom, as well as Articles 1 and 2 of the Protocol on the position of Demark, these States will not be bound by the Directive.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *387-406.*
 ISBN 90 04 15064 1.

An illustration of past and present actions against trafficking will be followed by a critical analysis. Although the EU has made important contributions to the fight against the practice, there are some areas of concerns. This Chapter identifies the uncertain legal nature of initiatives adopted by the EU, promotion of divergence rather than approximation, and restrictive immigration laws and policies as examples of problems which may limit the effectiveness of the EU action against trafficking. It is submitted that the EU and Member States must take a holistic approach to trafficking, and the last section explores some issues which need to be dealt with in this regard, such as the causes and the consequences of the phenomenon.

2. Past EU Action against Trafficking

Trafficking of human beings was mainly dealt with under Title VI of the TEU. In line with this Title, several measures in relation trafficking were adopted. One example is the *Convention on the Establishment of the European Police Office* (Europol Convention).[3] Europol was envisaged to have an important role to play in relation to trafficking of human beings as stipulated by Article 1(2), which provided that the initial role of Europol was to prevent and combat, among others, "illegal immigrant smuggling and trade in human beings".[4] In order to

3 OJ C 316/2 (27/11/95). Its predecessor was known as the European Drug Unit (EDU) which was established in 1993. The mandate of the EDU was extended to deal with trafficking of human beings before coming into force of the Europol Convention. See for instance, *Joint Action of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning Europol Drug Unit*, 95/73/JHA, OJ L 62/1 (20/3/95). Article 2(2) of this Joint Action states that "Unit shall act as non-operational team for the exchange and analysis of information and intelligence" in relation to, among others, crime involving clandestine immigration network". The Joint Action, however, required that crime affect more than two Member States. This Joint Action was replaced by *Joint Action of 16 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union extending the mandate given to the European Drugs Unit*, 96/748/JHA, OJ L 342/4 (31/12/96), and the term "traffic in human beings" was added under the EDU's mandate. The EDU ceased to exist on 30 June 1999, and Europol began its activities on 1 July 1999, in accordance with the provisions of the Europol Convention.

4 *Ibid*. Some amendments were made to this original Convention. Of particular relevance was the *Council Decision of 3 December 1998 Supplementing the Definition of the Form of Crime 'Traffic in Human Beings in the Annex to the Europol Convention*, OJ C 26/21 (30/1/1999). Under Article 1, traffic in human beings is defined as "subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue, especially with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children. These forms of exploitation also include the production, sale or distribution of child-pornography material".

achieve this objective, Europol was mandated to enhance effective co-operation between competent authorities of Member States.[5]

Another key measure adopted was the Joint Action of 29 November 1996, establishing an incentive and exchange programme for persons responsible for combating trade in human beings and the sexual exploitation of children, also known as the STOP Programme.[6] The STOP Programme ran from 1996 to 2000. The main aim was to establish a framework whereby public and law enforcement officials, civil servants, and members of the judiciary could hold meetings/seminars, undergo training, exchange/disseminate information and conduct studies and research on trafficking of human beings.[7] In accordance with Article 11, the Commission was charged with monitoring the implementation of programmes financed by the STOP Programme.[8]

In addition, the *Joint Action of 24 February 1997, concerning action to combat trafficking in human beings and sexual exploitation of children*[9] is pertinent. This Joint Action required Member States to review their relevant national laws and make trafficking of human beings for sexual exploitation a criminal offence.[10] It also called for the enhancement of enforcement actions, including investigation and technical assistance.[11] In addition, police and judicial co-operation and co-ordination within and among Member States, and protection to victims of trafficking and sexual exploitation were regarded as important.[12] Any action taken by Member States was to be assessed by the end of 1999.[13]

---

5 *Ibid*. For recent activities, see Europol, *Annual Report 2001*.

6 96/700/JHA, OJ L 322/7 (12/12/1996).

7 *Ibid.*

8 *Ibid*. For examples of initiatives taken under the STOP Programme, see *Report on the Activity of the STOP Programme (Financial Year 2000)*. The STOP Programme was replaced by STOP II (*Council Decision of 28 June 2001 establishing a second phase of the programme of incentives, exchanges, training and cooperation for persons responsible for combating trade in human beings and the sexual exploitation of children*), 2001/514/JHA, OJ L 186/7 (7/7/01). At the end of 2002, STOP II was once again replaced by *AGIS* (framework programme on police and judicial co-operation in criminal matters) which will last until the end of 2007. Council Decision 2002/630/JHA, OJ L 203/5 (1/8/02).

9 97/154/JHA, OJ L 63/2 (4/3/97). Trafficking of human being was defined as "any behaviour which facilitates the entry into, through, residence in or exit from the territory of Member States for the purpose set out in point B(b) and (d) (sexual exploitation)".

10 Title II, *ibid.*

11 Title III, *ibid*.

12 *Ibid.*

13 This Joint Action was repealed with the adoption of the Framework Decision on Trafficking in Human Beings in July 2002. See below for detail.

Finally, the *Daphne Initiative* (1997-1999) touches upon some aspects of trafficking. It was established in 1997 by the European Parliament in response to growing instances of violence against children, young persons and women.[14] This Initiative was not adopted under the Justice and Home Affairs provision unlike the STOP Programme, and activities covered under the Daphne Initiative must be related to training and exchange, support for pilot projects and the European network, studies and research, dissemination of information, and co-operation between NGOs and the public authorities.[15] In examining the development of policies and programmes under the TEU, it becomes clear that the main approach of the EU towards trafficking has been to promote functional co-operation among law enforcement and judicial agencies in Member States.

3. Current EU Action against Trafficking

The entry into force of the *Treaty of Amsterdam* marks the significant development in relation to trafficking of human beings, as it introduced a provision for the approximation of national laws amongst Member States, while retaining the element of police and judicial co-operation. This is to be achieved through the adoption, by the Council, of framework decisions in accordance with Article 34 of the TEU as revised by the Treaty of Amsterdam, and the Framework Decision on Trafficking was adopted in 2002.

In adopting this Framework Decision, the EU has recognised that merely seeking functional co-operation among Member States is not sufficient to deal with trafficking of human beings, as asymmetries in legislative frameworks among Member States made it difficult to deal effectively with the act. [16] The main purpose of the Framework Decision, therefore, is to fill these legislative gaps between Member States, and more specifically to promote a common EU approach on trafficking. There are three key elements in this Framework Decision. The first is the adoption of a common definition of trafficking of human beings. Article 1 provides the following definition of trafficking:

14 European Commission, *The Daphne Initiative 1997-1999: Overview and External Evaluator's Report of the 1998 Initiative* (2001), p. 6.

15 For details of activities funded by this initiative, visit the Daphne Database at <http://europa. eu.int/comm/justice_home/project/daphne/index.cfm>.

16 COM(2000) 854 final/2 (hereinafter Proposal for the Framework Decision). The adoption of this Proposal was previously envisaged in the *Communication from the Commission to the Council and the European Parliament on Scoreboard to Review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union*, COM(2000) 167 final/2 (13/4/00).

> [t]he recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:
>
> (a) use is made of coercion, force or threat, including abduction, or
> (b) use is made of deceit or fraud, or
> (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
> (d) payments or benefits are given or received to achieve the consent of a person having control over another person
>
> for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or
> for the purpose of the exploitation of prostitution of others or other forms of sexual exploitation, including in pornography.[17]

Another key element of the Framework Decision is a uniform threshold for minimum penalties to be imposed. Under Article 3(2), Member States are required to set a minimum of eight years' imprisonment when:

> (a) the offence has deliberately or by gross negligence endangered the life of the victim;
> (b) the offence has been committed against a victim who is particularly vulnerable. A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;
> (c) the offence has been committed by use of serious violence or has caused particularly serious harm to the victims;
> (d) the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein.[18]

If trafficking does not meet any of these criteria, the penalties can be lower than eight years' imprisonment.

---

17 Framework Decision on Trafficking, *supra.*

18 *Ibid.* It may be inferred that a criminal organisation as defined by the Joint Action 98/733/JHA, OJ L 351/1 (29/12/98), refers to organised criminal groups because of repeated references to them.

The last key element of the Framework Decision on Trafficking is the protection and assistance to victims. Differences in national laws and regulations have created situations where some of those trafficked are protected more than others, depending on where they are trafficked into. The EU attempts to rectify this situation by including a provision on protection and assistance under the Framework Decision regardless of their immigration status. However, assistance and protection are likely to be limited to those who co-operate with the authorities of Member States to investigate, prosecute and punish traffickers. Article 7(1) stipulates that in relation to investigation and prosecution, Member States shall not depend on "report or accusation" made by victims. This implies the necessity for the presence of victims to give evidence and testify in order to make investigation and prosecution more effective. This argument is strengthened by the fact that a reference is made to the *Framework Decision 2001/220/JHA on standing of victims in criminal proceedings*[19] which describes in detail the types of measures to be taken to facilitate criminal proceedings.[20]

Another key initiative recently adopted is the Directive on Short-Term Residence Permits. Unlike the Framework Decision on Trafficking, which was adopted under the Justice and Home Affairs provisions of the TEU, Article 63(3)(b) of the EC Treaty, which allows the Council to adopt measures in relation to illegal immigration and residence,[21] is used as a legal basis. There are two key principles which are pertinent to this Directive. The first is the principle of subsidiarity. In accordance with Article 5 of the EC Treaty, the European Community shall take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".[22] In referring to this principle in the Proposal, the Commission once again recognised the need to level out the discrepancies which exist among Member States on rules concerning short-term residence permits.[23] The second principle is proportionality. The Commission explains that a directive was chosen as the legal instrument because it allows a certain degree of flexibility on the part of Member States

19 OJ L82/1 (22/3/2001) (hereinafter Framework Decision on Victims' Standing). See below for more information.

20 See below for more information.

21 In accordance with Article 249 of the EC Treaty, a directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice and form and methods.

22 *Ibid*.

23 *Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities*, COM (2002) 71 final (11/2/02), p. 8 (hereinafter the Proposal for Short-Term Residence Permits).

in choosing most appropriate forms and methods of implementation, while laying down the general principles applicable to all Member States.[24]

The main aim of this Directive is to strengthen the fight against trafficking and illegal migration by providing temporary residence permits and encouraging third country nationals to co-operate with law enforcement authorities of Member States.[25] It is worth noting in this regard that the residence permits can be granted not only to those trafficked, but also those smuggled.[26] Several features of the Directive are worth expanding. To begin with, it obliges Member States to give a reflection period that would allow victims to decide whether or not they wish to co-operate with the authorities.[27] While the reflection period was initially envisaged to last 30 days,[28] it was eventually agreed not to set a specific time limit.[29] During this period, any expulsion order cannot be enforced against those victims, and Member States are obliged to ensure that they have access to subsistence and emergency medical treatment.[30] Once victims decide to co-operate, then Member States are to grant a short-term residence permit of at least six months, which is subject to renewal.[31] There are a wide variety of services these victims can benefit from, once they are granted the permits. In addition to services provided during the reflection period, victims may be entitled to employment, vocational training, education, and rehabilitation.[32]

What is evident in examining the current EU approach to trafficking is the gradual move towards a uniform European legal order in criminal matters. It seems reasonable to argue that this reflects the challenges posed by the changing nature of criminal conduct. To be specific, transnational criminality and the involvement of organised criminal groups have increasingly become evident. Nevertheless, the success of the EU action depends on a number of factors, and the following section provides a critical evaluation of the past and present action illustrated above.

4. Analysis of the EU Action against Trafficking

Many commentators are in agreement that the inclusion of the Justice and Home Affairs provisions in the TEU was a significant step forward as they have

24 *Ibid.*

25 *Ibid*, p. 5.

26 Article 1of Directive on Short-Term Residence Permits*, supra.*

27 Article 6, *ibid*.

28 Proposal for Short-Term Residence Permits, *supra*, p. 5.

29 Article 6 of the Directive on Short-Term Residence Permits, *supra.*

30 Articles 6 and 7, *ibid.*

31 Article 8(3), *ibid.*

32 Articles 11 and 12, *ibid*.

established a basic framework for co-operation in this area.[33] The adoption of these provisions was also important in relation to trafficking of human beings. Polices and programmes in relation to the act were virtually non-existent before the coming into force of the TEU. However, the Justice and Home Affairs provisions have enhanced the capability of the EU and Member States to deal with the act.[34] The Treaty of Amsterdam is also significant, as it has made it possible for the EU and Member States to seek a unified approach to the phenomenon. Nevertheless, the effectiveness of the EU action against trafficking can be called into question, and this section illustrates the major areas of concern.

4.1 Legal Nature of Relevant Instruments

In relation to the EU actions against trafficking under the TEU, although the conventions adopted under Article K.3(2)(c) were legally binding, the legal nature of other instruments was not clear. It was argued, for example, that joint positions did not have significant legal effects.[35] It was noted in this respect that a "joint position in the context of the third pillar has to be understood as a joint declaration or recommendation without a legally binding effect on Member States".[36] The legal effects of the joint actions were also unclear, as they were not defined clearly under the TEU.

This created a situation where Member States did not implement the joint positions or actions. As shown above, the Joint Action of 1997, among others, required Member States to take measures to protect victims of trafficking and to report back to the Council at the end of 1999. Before the entry into force of this Joint Action, Belgium was the only Member State to have laws and polices

33 See for example, O'Keeffe, D., 'Can the Leopard Change its Spots? Visas, Immigration and Asylum-- Following Amsterdam', in O'Keeffe and Twomey (eds.) *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing)(1999); and Barrett, G., 'Cooperation in Justice and Home Affairs in the European Union – An Overview and Critique', in Barrett (ed.), *Justice Cooperation in the European Union: The Creation of a European Legal Space* (Dublin: Institute of European Affairs)(1997).

34 One commentator notes that trafficking is an area under justice and home affairs which has produced some success. Turnbull, P., 'The Fusion of Immigration and Crime in the European Union: Problems of Cooperation and the Fight against the Trafficking in Women, in Williams (ed.), *Illegal Migration and Commercial Sex: The New Slave Trade* (London: Frank Cass)(1999), p. 203.

35 Barrett, *supra*, p. 24, citing O'Keeffe p. 914

36 Müller-Graff, P.C., 'The Legal Bases of the Third Pillar and Its Position in the Framework of the European Union', 31 *CML Rev.*493 (1994), p. 509. Meyring, however, argues that not having legal effect (Joint Positions) "does not exclude any legal obligation arising under general international law. Meyring, B., 'Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality', 22 *E.L.Rev* (1997) 221, p.232.

on the protection of victims of trafficking. [37] Between the entry into force of the Joint Action and the reporting deadline at the end of 1999, only a few took initiatives in relation to the protection of victims of trafficking.[38] This demonstrates that most Member States did not follow this Joint Action. The failure of this particular Joint Action was also explicitly recognised by the Commission.[39]

In a similar vein, the legal nature of framework decisions is not entirely clear. While Article 34 of that treaty provides that the framework decisions are binding on Member States, it also stipulates that they do not have direct effect, meaning that they are not enforceable before national courts of Member States. All of this leaves a possibility of non-implementation, and this seems to be the case for the Framework Decision on Trafficking. An offence of trafficking as defined in the Framework Decision is not established or defined in Greece and Portugal.[40] In relation to new Member States,[41] all of them have not implemented the Framework Decision on Trafficking as of this writing.[42]

A question can be raised as to how the accountability for non-compliance may be addressed under these circumstances. It has been argued that while framework

37 Ministerial Circular Concerning the Granting of Residence Permits and Work Permits (Work Cards) to Foreigners Who Are Victims of Trafficking in Human Beings (of 7 July 1994) and Instructions to the Foreigners Department (Office des Etrangers),the Prosecuting Authorities, the Police and the Social Law Inspection Service and Social Inspection Services Concerning Assistance to Victims of Human Trafficking (of 13 January 1997). Council of Europe, *Trafficking in Human Beings: Compilation of the Main Legal Instruments and Analytical Reports Dealing with Trafficking in Human Beings at International, Regional and National Levels (Volume II: National Texts)*, EG (2000) 2 rev. 1., (Strasbourg: Council of Europe)(2001), pp. 24-28. See also the Stability Pact Legislationline at <http://www.legislationline.org>.

38 Austria established the Intervention Centre for Victims of Trafficking in Women in 1997. Italy adopted Legislative Decree No. 286/98 on Immigration and Aliens – Article 18 Referring to the Granting of Temporary Residence Permits (25 July 1998) and Presidential Decree No. 394/99 on Rules of Implementation of the Consolidation Act (31 August 1999) (allocation of funds for assistance and social integration). Portugal enacted the Act 244/98 stipulating the possibility of exempting those who co-operate with authorities from visa requirement for residence permit and Act 93/99 (14 July 1999) which covers witness protection of victims of trafficking. It should be noted, however, that there are general criminal and other laws in Member States, although not directly related to trafficking, which can be used to provide assistance to victims of crimes in general. Some of them such as sexual offences, can be applied to the cases of trafficking. Council of Europe, *ibid*.

39 Proposal for the Framework Decision, *supra*.

40 Author's analysis of national laws and policies of 15 Member States.

41 They are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

42 Legislationline, *supra*.

decisions lack direct effect, Article 34 does not exclude a possibility of implementing measures of those framework decisions having direct effect.[43] Another commentator also notes that the principle of "indirect effect", a notion that national measures giving effect to international obligations must be interpreted in light of the parent obligations, may be applicable to framework decisions.[44] Nevertheless, a certain degree of uncertainty on the legal effect of framework decisions still remains due to a lack of jurisprudence developed by the European Court of Justice,[45] and this leaves the question of accountability unanswered.

4.2 Approximation or Divergence?

An important feature of the Justice and Home Affairs provisions of the TEU as revised by the Treaty of Amsterdam is the approximation of national laws as noted above. In addition to this, an effort to approximate criminal justice procedures of Member States has increasingly become evident within the context of the EU. This can be seen in the Framework Decisions on the Victims' Standing,[46] the European Arrest Warrant,[47] Money Laundering[48] and Execution of Orders Freezing Property or Evidence,[49] and Joint Investigation Team.[50] Further, the establishment of the European Public Prosecutor and mutual recognition of judicial decisions are currently under consideration in the context of the European Constitution.[51]

In reality, however, seeking approximation of national laws and criminal procedures is a difficult task, because the principle of State sovereignty still domi-

---

43 Craig, P. and G. de Burca, *EU Law: Text, Cases and Materials* (Oxford: Oxford University Press)(2003), p. 179.

44 Peers, S., *EU Justice and Home Affairs Law* (Harlow: Pearson Education Limited)(2000), p. 49.

45 Under 35 of the TEU as revised by the Treaty of Amsterdam, the ECJ has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions.

46 *Supra.*

47 *Council Framework Decision 2002/584/JHA, European arrest warrant and the surrender procedures between Member States*, OJ L 190/1 (18/7/02).

48 *Council Framework Decision, 2001/500/JHA, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime*, OJ L 182/1 (5/7/01).

49 *Council Framework Decision, 2003/557/JHA, on the execution in the European Union of orders freezing property or evidence*, OJ L 196/44 (2/8/03).

50 *Council Framework Decision, 2002/465/JHA, on joint investigation teams*, OJ L 162/1 (20/6/02).

51 *Provisional Consolidated Version of the Draft Treaty Establishing a Constitution for Europe*, CIG 86/04 (25/6/04).

nates and Member States are reluctant to move forward in this direction. During the drafting stage of the Framework Decision on Trafficking, for instance, Austria, Denmark and Germany have taken a position that no Member State is subject to any obligation which can affect the coherence of the national penal system in each Member State, until the principle of harmonisation/approximation has been fully developed in the areas of justice and home affair.[52]

The difficulty in achieving approximation is also reflected in the actual Framework Decision on Trafficking. Article 3(2)(b) on aggravating circumstances stipulates that a victim is considered to be vulnerable "at least when (…) the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of exploitation". This type of language allows Member States to determine the severity of punishment depending on the types of subsequent exploitation involved. It is worth noting in this respect that the penalties for trafficking currently range from 6 moths to 20 years' imprisonment among Member States.[53]

The same is true for the Directive on Short-Term Residence Permits. It leaves discretion on the part of Member States to decide the length of a reflection period and of short-term residence permits as noted earlier. They are also under no obligation to grant the permits to those smuggled. Article 3 stipulates that while Member States "shall" apply the Directive to the victim of trafficking, they "may" extend its scope to victims of smuggling.[54] All of these inevitably create variations in the manners in which Member States treat trafficked and smuggled people. It should be noted further that Denmark, Ireland and the United Kingdom opted out of this Directive, making it impossible to seek a unified approach.

Moreover, the approximation of the criminal justice procedures of Member States is not an easy task either. A good example supporting this conclusion is the *Corpus Juris* project, which relates to regulating financial fraud within the framework of the EU. This initiative was set in motion in the mid 1990s when the group of experts was asked to deal with the issue.[55] The *Corpus Juris* was envisaged to establish common offences relating to fraud, procedural and evidential rules, and the European Public Prosecutor.[56] Despite the fact that creation of *Corpus Juris* was said to be feasible and necessary, the project is still "no more

52 Doc. 14216/01 DROIPEN 97 MIGR 90 (3/12/01), p. 13. See also Docs. 8599/1/01(Rev. Cor.1) DROIPEN 43 MIGR 41 (23/5/01), and 8599/1/01(Rev.1) DROIPEN 43 MIGR 41 (21/5/01).

53 Author's analysis of national laws and policies of Member States.

54 Article 3, of the Directive on Residence Permits, *supra*.

55 Delmas-Marty, M., and J.R. Spencer (eds), *European Criminal Procedures* (Cambridge: CUP) (2002), p. 62.

56 *Ibid.*

than a green paper".[57] It is also worth noting that only 8 Member States have met the implementation deadline (31 December 2003) of the European Arrest Warrant.[58] Whether or not it is desirable to seek harmonisation of criminal laws and procedures of Member States is open to discussion. The practical implications of all of this, however, are that some traffickers can receive lesser sentences depending on where they are tried, and that certain victims may receive more protection than others depending on where they arrive at.

4.3 Restrictive Immigration Control

It has been shown throughout this book that the action against trafficking is found at the intersections of criminal and immigration laws at the national level. The same is true at the EU level. The EU has been considering or adopted such measures as visa requirements,[59] carrier sanctions,[60] fingerprinting,[61] expulsion,[62]

57 COM (2001) 715 (11/12/2001), *Green Paper on Criminal Law Protection of the Financial Interests of the Community and the Establishment of the European Public Prosecutor*. It must be noted, however, that the creation of the European Public Prosecutor may become possible with the adoption of the European Constitution. *supra*.

58 They are Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden and the United Kingdom. Apap, J., and S. Carrera, *European Arrest Warrant: A Good Testing Ground for Mutual Recognition in the Enlarged EU?* (Brussels: CEPS)(2004), p. 4.

59 See, among others, *Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas*, OJ L 164/1 (14/7/95), *Joint Action of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements* 96/197/JHA, OJ L 63/8 (13/3/96), and *Council Regulation (EC) No 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States,* OJ L 72/2 (18/3/99).

60 *Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985,* OJ L 187/45 (10/7/2001). For information on Schengen Acquis, see infra, note 104.

61 *Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention*, OJ L 316/1 (15/12/2000), *Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention*, OJ L 62/1 (5/3/2002).

62 *Council recommendation of 22 December 1995 on concerted action and cooperation in carrying out expulsion measures,* OJ C 5/3 (10/1/96), and *Council Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals,* OJ C 274/18 (19/9/96).

action against illegal employment of third nationals,[63] establishment of airline liaison officers,[64] ARGO,[65] ODYSSEUS,[66] and the Schengen *Acquis*.[67] The creation of the European Border Guard has also been put on the political agenda

63 *Council recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control*, OJ C 5/1 (10/1/1996), *Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals*, OJ C 304/1 (14/10/1996), *Council Decision of 16 December 1996 on monitoring the implementation of instruments adopted by the Council concerning illegal immigration, readmission, the unlawful employment of third country nationals and cooperation in the implementation of expulsion orders (96/749/JHA)*, OJ L 342/5 (31/12/1996), and *Communication from the Commission on Undeclared Work*, COM (1998) 219 final.

64 *Joint Position of 25 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on pre-frontier assistance and training programme. 96/622/JHA*, OJ L 281/1 (31/10/1996), *the Schengen acquis – Decision of the Executive Committee of 16 December 1998 on coordinated deployment of document advisers* (SCH/Com-ex (98) 59 rev.), OJ L 239/308 (22/9/2000), and *the Schengen acquis – Decision of the Executive Committee of 28 April 1999 on liaison officers* (SCH/Com-ex (99) 7 rev. 2, OJ L 239/411 (22/9/2000).

65 *2002/463/EC: Council Decision of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme)*, OJ L 161/11 (19/6/2002).

66 *98/244/JHA: Joint Action of 19 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus programme)*, OJ L 99/2 (31/3/1998). Under ODYSSEUS, more than half of the programmes implemented in 1999 (75) related directly or indirectly to trafficking of human beings. *Third Report of the Commission to the European Parliament and the Council on the implementation of GROTIUS, STOP and OISIN Programmes, and Second Report of the Commission to the European Parliament and the Council on implementation of ODYSSEUS and FALCONE Programmes* (1999).

67 *Schengen Acquis* was incorporated into the EU legal framework after the entry into force of the Treaty of Amsterdam. See Protocol No. 2, integrating Schengen acquis into the framework of the European Union. The original version, the *Agreement between the governments of the States of Benelux economic union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common border* (June 1985) was adopted as the *Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the States of Benelux economic union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common border*(June 1990). OJ L 239/19 (22/9/2000). For more detail on Schengen Acquis, see, among others, General Secretariat of the Council. *Schengen Acquis Integrated into the European Union* (Brussels: General Secretariat of the Council) (1999).

for discussion at the moment.[68] After the terrorist attack on the United States on September 11th, 2001, the EU has been promoting an even tougher approach on immigration control in the name of the fight against terrorism.[69]

Although strict immigration laws and policies may cut the flow of illegal migrants, they simultaneously raise a series of concerns. Many people escape their States of origin due to such reasons as persecution and therefore qualify as refugees under the Convention Relating to the Status of Refugees 1951.[70] Although the EU has developed various policies and programmes in order to protect these people,[71] these measures have long been criticised on the ground that they simultaneously undermine the promotion and protection of their human rights.[72] This poses a problem not only for those trafficked who qualify as refugees but also for those who are not refugees but suffer from human rights abuses in the States of origin.

---

68 *Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Migration.* COM (2001) 672 final (15/11/2001).

69 *Written Statement Submitted by Centre Europe – Tiers Monde (CETIM)*, E/CN.4/2002/NGO/90, para. 6.

70 189 UNTS 150, as amended by the Protocol Relating to the Status of Refugees 1967, 606 UNTS 267.

71 See, for example, *Joint Action of 26 April 1999 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing projects and measures to provide practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum seekers, including emergency assistance to persons who have fled as a result of recent events in Kosovo (1999/290/JHA),* OJ L 114/2 (1/5/99); *Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC)*, OJ L 252/12 (6/10/00); and *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, OJ L 212/12 (7/8/01).

72 For general discussions, see Boccardi, I., *Europe and Refugees: Towards and EU Asylum Policy* (The Hague: Kluwer Law International)(2002); Byrne and Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Hague, Kluwer Law International)(2002); Hailbronner, K., *Immigration and Asylum Law and Policy of the European Union* (The Hague, Kluwer Law International)(2002); Van Krieken, P.J. (ed.), *The Asylum Acquis Handbook: The Foundation for a Common European Asylum Policy* (The Hague: T.M.C. Asser Press)(2000); Mole, N., *Asylum and the European Convention on Human Rights* (3rd ed.)(Strasbourg, Council of Europe)(2000); Böcker, A., *Asylum Migration to the European Union: Patterns of Origin and Destination* (Luxembourg: OOPEC)(1998); and Hughes and Liebaut (eds.), *Detention of Asylum Seekers in Europe: Analysis and Perspective* (Dordrecht: Martinus Nijhoff Publishers)(1998);

The restrictive immigration policies and programmes contribute to the growth of the trafficking business in practice. They limit opportunities for legal migration to the territories of Member States, and therefore force people to rely on the services provided by traffickers. It should be noted further that not all of those trafficked enter and stay illegally in the EU territory as noted elsewhere in this book. Therefore, the current emphasis on illegal migration does not necessarily lead to the reduction of the instances of trafficking of human beings.

4.3.1 Failure to Protect Victims of Trafficking

An analysis of the EU action also reveals that the protection of victims of trafficking still is not a priority for the EU and Member States. Protection of victims is beneficial from a criminal justice viewpoint, in that it allows law enforcement agencies to obtain evidence to prosecute and punish traffickers. However, it is important more from a human rights perspective. It helps victims restore their violated human rights and prepares them to re-integrate into their own societies or resettle into new ones. If victims can see that Member States are serious about promotion and protection of their human rights, this makes it easy for them to build a sense of trust towards the authorities, and will facilitate co-operation in the long run.

While the Commission and the European Parliament has consistently expressed the view that the protection of the human rights of those trafficked should be an integral part of the EU policy on trafficking,[73] the human rights protection has not been taken seriously. The Framework Decision on trafficking is a case in point. It is important to note that the Framework Decision on Victim's Standing is applicable to trafficking victims, as it is specifically referred to under the Framework Decision on Trafficking as noted above. It sets out a list of measures to be taken by Member States to protect those who participate in criminal proceedings against traffickers, such as legal aid, witness protection and compensation.[74] Providing protection to those who are willing to co-operate may be a reasonable and justified step from the point of view of Member States.

Nevertheless, the Framework Decision on the Victims' Standing does not oblige Member States to provide wider support outside of these proceedings.[75] A problem arises when these criminal proceedings are terminated (e.g. due to a

73 See, for instance, Resolutions on Trafficking in Human Beings adopted by the European Parliament, OJ C 176/73 (14/7/86), OJ C 120/352 (14/4/89), and OJ C 268/141 (16/9/1993) and OJ C 32/88 (5/2/96); and *Communication from the Commission to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation*, COM(96) 567 final and *Communication from the Commission to the Council and the European Parliament – For further actions in the fight against trafficking in women*, COM(98) 726 final.

74 *Ibid.*

75 *Ibid.*

lack of sufficient evidence) or completed (i.e. traffickers are convicted or acquitted). Under these circumstances, Member States can withdraw all the support once victims have no further value from the criminal justice viewpoint. Further, those who do not co-operate with law enforcement authorities are most likely to face enforcement actions, resulting in deportation to their States of origin even when they are exploited and victimised to a great extent during the course of their journey.

The same is true for the Directive on Short-Term Residence Permits. The unwillingness of States to protect victims can be illustrated from the drafting history of the Directive. Member States including France, Greece, Ireland, and the Netherlands were reluctant to extend the scope of application of the Directive to those smuggled.[76] The result, as shown above, is that Member States may not apply Directive to smuggled people. Further, Greece and Spain were not even willing to grant a reflection period to even those trafficked.[77]

Measures to be taken for those who hold the permits are also reflective of unwillingness to protect victims of trafficking. In relation to access to work, training and education, an early draft stipulated that "Member States shall authorise the holders of a short-term residence permit to have access to the labour market, vocational training and education".[78] However, Austria, Finland, the Netherlands, Greece and Germany have entered reservations on this article.[79] The wording of this provision in the Directive was eventually changed to:

> 1. Member States shall define the rules under which holders of the residence permit shall be authorised to have access to the labour market, vocational training and education.
> Such access shall be limited to the duration of the residence permit.[80]

It is evident that the access to work and education is no longer an automatic right for the holders of the residence permits and Member States exercise enormous discretion in this regard. A similar position was taken by several States in relation to provision of programme for third country nationals.[81] All of this

76 Doc. 11698/03 MIGR 69 (28/8/03), p. 6. Belgium later also adopted a similar position. See Doc. 12958/03 MIGR 79 (10/10/03), p. 4.

77 Doc. 12228/03, MIGR 77 (12/9/03), p. 7.

78 Draft Article 12, Doc. 116898/03, *supra*, p. 11.

79 *Ibid.* France and Belgium also suggested that the access to these should be limited to the period of validity of the residence permit. Sweden went further to suggest deletion of this provision.

80 Article 11 of the Directive on Residence Permits, *supra*.

81 Doc. 13875/03 MIGR 88 (24/10/03), p. 12. Austria, Germany, Greece, and the Netherlands did not want to make provision of social programmes compulsory. The result was that while Member States are obliged to grant access to existing pro-

means that protection of victims is not a priority for the EU and Member States in reality. Therefore, there is a danger of victims being used merely as a tool to achieve the EU's main objective: enhancement of law enforcement against trafficking.

5. The Future of EU Action against Trafficking – A Need for a Holistic Approach

The EU action against trafficking represents a criminal justice response to the act, in that its main aim is crime and immigration control. While this is an important part of an overall strategy for suppression, the criminal justice response alone is not sufficient. The EU and Member States must take a holistic approach in the future. Such an approach would deal with wider issues pertinent to the act. To begin with, the EU and Member States should address the causes and consequences of trafficking. Although States of origin may inevitably be held responsible for the flow of migrants, States of destination, including Member States of the EU, are also responsible. The demand for trafficked people is a good example. Traffickers transport people to the territories of Member States, because there is a strong demand for cheap and/or forced labour.[82] What is needed, then, is formulation of labour and immigration laws and policies which allows migrant workers to work and reside legally. This can gradually reduce the incentive for traffickers to get involved. This is a reasonable option, given that there is a growing demand for labour in the territories of the EU.[83]

In relation to the consequences of trafficking, in addition to forced labour and slavery, one of the endemic problems facing migrants in the territories of the EU Member States is racism and/or xenophobia. Racism promoted by citizens and public officials has adverse effects on migrants' rights and freedoms,[84] and this clearly leads to serious violations of their human rights. Therefore, Member States must take steps to eliminate racism and xenophobia. Moreover, law enforcement practices raise a set of human rights concerns. Instances of vio-

grammes to third country nationals, they are under no obligation to create specific programmes for them. Article 12, *ibid*.

82 IOM, *Trafficking in Unaccompanied Minors for Sexual Exploitation in the European Union* (Brussels: IOM)(2001), pp. 10-12.

83 Drew, S., 'Human Trafficking: A Modern Form of Slavery?', 4 *European Human Rights Law Review* 481 (2002), p. 490.

84 *Written Statement Submitted by Society for Threatened Peoples*, E/CN.4/2003/NGO/253.

lence and torture,[85] poor prison conditions,[86] and absence of due process rights[87] have been reported, and Member States of the EU must address these violations of human rights.

In addition, the establishing a good working relationship with States of origin to control the supply side of the trafficking business will be beneficial in the long run. Although States of origin may bear the primary responsibility to address issues such as poverty, a lack of employment, and humanitarian crises, they often lack the means to do so. The EU is in a good position to assist them technically and financially. It is worth noting in this respect that the EU has been at the forefront in providing economic, social and political assistance to developing States. This can be illustrated by the *Tacis Programme* (Technical Assistance Commonwealth of Independent States). It was originally established under the Council Regulation No. 1279/96 of 25 June 1996,[88] and renewed by the Council Regulation No. 99/2000[89] with an estimated budget of 3,138 million Euro for 6 years (2000-2006).[90] It covers a wide range of issues such as economic development, environmental protection, rural economy, and nuclear safety, and therefore is not specifically directed towards trafficking of human beings. Nevertheless, the phenomenon has been identified as a priority area, and some anti-trafficking measures are being implemented in Belarus, Moldova and Russia under the *Tacis Programme*.[91]

In facilitating a holistic approach, the EU and its Member States must carefully evaluate and deal with the impact of enlargement in relation to trafficking of human beings.[92] Joining the EU means that new Members will eventually

85 See for instance, *Reports of the Special Rapporteur on Torture*, E/CN.4/2003/68/Add.1 and E/CN.4/2004/56/Add.1.

86 *Report of the Special Rapporteur on Migrant Workers: Visit to Spain*, E/CN.4/2004/76/Add.2, paras. 45-48

87 *Reports of the Special Rapporteur on Migrant Workers*, E/CN.4/2004/76/Add.1, paras. 91and 96 (Greece), E/CN.4/2003/85/Add.1, paras. 244-246 (United Kingdom); and *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Mission to France*, E/CN.4/2004/9/Add.1, para. 54.

88 OJ L 165/1 (4/7/96).

89 OJ L 12/1 (18/1/00). This programme is managed by the Directorate-General of External Relations.

90 *Report from the Commission: The Tacis Programme Annual Report 1999*, COM (2000) 835 final.

91 See website of the Directorate General External Relations of the European Commission for more detail. <http://europa.eu.int/comm/external_relations/index.htm>.

92 For a detailed analysis of enlargement and its impacts on the EU immigration and asylum policies, see Phuong, C., 'Enlarging 'Fortress Europe': EU Accession, Asylum, and Immigration in Candidate Countries', *ICLQ* 641 (2002).

become destinations for trafficked people.[93] At one level, trafficking of nationals from these States will gradually disappear as the principle of the free movement of people will be applied to them.[94] Nevertheless, it is likely that traffickers will shift their focus to trafficking of non-EU nationals. Facilitating entry into new Member States is said to be easy because traffickers actively use bribes and violence as a means to advance their illegal business, [95] and States in transition, including some new Member States, are particularly vulnerable to such practices.[96] The task of the EU and the current Member States, then, is to assist these States to deal adequately with corruption and strengthen law enforcement capabilities. In view of these, it is concluded that the future success of the EU action against trafficking depends on its flexibility to adopt a broader approach. However, given the unwillingness of Member States to promote active co-operation and co-ordination in the area of freedom, security and justice, the future success remains uncertain.

6. Conclusion

This chapter has examined the EU action against trafficking of human beings. It began with an examination of the policies and programmes adopted under the TEU. It then analysed the current initiatives under the TEU as revised by the Treaty of Amsterdam. In addition, some of the issues which need to be dealt with for the future, such as the causes and consequences of trafficking, were also highlighted. The main conclusion reached is that although the EU and Member States have made some important contributions to the fight against trafficking, they need to move beyond promoting a criminal justice response and adopt a holistic approach.

One way to do this in the context of the EU is to make use of the first and second pillars. The proposed EU Constitution is worth noting in this respect.

93 See country reports included in the U.S. Department of State, *Trafficking in Persons Report 2004*.

94 It should be noted, however, that the freedom of movement will not be granted until sometime after the accession. Phuong, *supra*, p. 648.

95 Savona, E.U., *Corruption and Organised Crime in States in Transition: Joint Project between the Commission of the European Communities and the Council of Europe, Final Recommendation and Guidelines for Action* (Strasbourg: Council of Europe) (1998), p. 5

96 On this point, see Tenth United Nations Congress on Prevention of Crime and the Treatment of Offenders (Vienna, 10-17 April 2000). *International Cooperation in Combating Transnational Crime: New Challenges in the Twenty First Century: Background Paper for the Workshop on Combating Corruption* (Prepared by the United Nations Interregional Crime and Justice Research Institute). A/CONF.187/9 (31/12/1999), para, 10, and Center for the Study of Democracy (CSD). *Coalition Building in Transition Countries* (Sofia, Bulgaria: CSD)(2001), p. 4.

When adopted, the EU will have exclusive or shared competence in a wide variety of relevant areas,[97] making it possible for the EU and Member States to adopt an integrated approach to the act. It is also important to note that the EU will be able to promote and enhance the area of freedom, security and justice by adopting legally binding instruments such as European laws (with direct effect) and European framework laws in relation to common immigration and asylum policies (including the fight against trafficking of human beings) and police and judicial co-operations.[98]

In addition, the Commission established a consultative group known as the 'Expert Group on Trafficking in Human Beings,' in line with a recommendation proposed in the *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, which followed the European Conference on Preventing and Combating Trafficking in Human Beings held in September 2002.[99] In August 2003, the Commission appointed the Expert Group consisting of representatives of the governments, international organisations, NGOs and scholars who have experience and expertise on the subject matter.[100] The main function of this Expert Group is to advise the Commission on the development of EU actions against trafficking.[101] Since it will represent a wide variety of interests coming from different actors, the Expert Group can serve as a vehicle to promote an integrated approach to deal with trafficking of human beings. If the EU and Member States can achieve these together with their partners, they may be able to curtail this evil of the contemporary world sooner rather than later.

97 Articles I-9-17 of the Draft European Constitution, *supra*. Under Article I-12, the EU would have exclusive competence over custom union, competition rules for internal market, monetary policy, conservation of marine biological resources under the common fisheries policy and common commercial policy It has shared competence over, among others, area of freedom, security, justice, transport and trans-European network, and economic, social and territorial cohesion in accordance with Article I-13.

98 Articles III-166-178, *ibid.*

99 *Commission Decision of 25 March 2003 on Setting up a Consultative Group Known as the 'Expert Group on Trafficking in Human Beings' (2003/209/EC)*, OJ L 79/25 (26/3/03). See also Call for proposal regarding the Commission Decision of 25 March 2003 setting up a consultative group, to be known as the "Experts Group on Trafficking in Human Beings", OJ C 92/12 (17/4/03).

100 Article 3, *Ibid*. For the composition of the Expert Group, see *New Composition of the Expert Group on Trafficking in Human Beings*, OJ C 205/3 (30/8/03).

101 Article 2, *Ibid.* In May 2004, the Expert Group issued its first opinion on the Directive on Short-Term Residence Permits. See *Opinion on Reflection Period and Residence Permit for Victims of Trafficking in Human Beings* (B-1049).

*Elspeth Guild**

CONCLUSIONS: THE VARIABLE POLITICAL AND LEGAL GEOGRAPHY OF PEOPLE SMUGGLING AND TRAFFICKING IN EUROPE

This book began with a question about the intersection of administrative and criminal law as regards the treatment of foreigners. By looking at the field of trafficking and smuggling of people, we sought to understand how, in six EU Member States and at the EU level itself, the casting of the act of crossing borders as a criminal activity is taking place and how it is perceived. Among the central questions have been: what kind of offence is this and who is the victim and what is the nature of the debate around the offence both in the society and in the legal field.

The concepts of smuggling and trafficking of persons can, however, only be understood within a context of borders and border controls. Both these activities (smuggling and trafficking of persons) depend on the existence of an international border. Further, passage over that border (or the attempt to do so) must be a rationed resource in order for either activity to make any sense economically. People normally do not pay for activities which they enjoy freely. In order to make people pay for an activity it must otherwise be unavailable to them. Where borders are not controlled or controlled very lightly the activities of smuggling and trafficking can only rarely occur. Of course the criminal offences of forced labour etc. can and do still exist but they are not tied to the international border but rather to the immigration status of the individual who is on one or other side of the border.

Nationality and immigration status render the individual vulnerable to exploitation on the territory of a foreign country. If the individual is not a national of the state or does not have an immigration status which permits him or her to work on the territory then should he or she do so, the economic activ-

* Professor of European Migration Law at the Radboud University, Nijmegen and partner at the London law firm Kingsley Napley.

Elspeth Guild and Paul Minderhoud (eds.), Immigration and Criminal Law ... *407-414.*
 ISBN 90 04 15064 1.

ity will be irregular (if not illegal) and the individual carrying it out at risk of exploitation on account of this fact. The border, though, is not central to that equation. The border becomes central when the act of crossing a border without the permission of state authorities is made an administrative or criminal offence. The more elaborated the offence is – and in some of the Member States considered here there appear to be dozens of offences around border crossing – the more the point of entry becomes the focus of state surveillance.

This fact then raises a number of curious issues. As is apparent from all the chapters, the Member States considered have advanced much legislation over the past few years to criminalise the crossing of borders. These offences have become more and more complex, extending beyond the border of the state into activities carried out in other states (for instance preparation for smuggling) and also including the protection of the borders of other states – for instance laws which make the act of smuggling or trafficking persons into other Member States than the one where the law has been passed also criminal offences in that state. This emphasis on the border as the place where a crime takes place sits unhappily with the abolition among some of the Member States (all considered in this study with the exception of the UK) of border controls amongst themselves. Thus the border of sovereignty remains the place where a crime takes place even where that border is not subject to control.

In all the Member States considered the crimes of smuggling and trafficking raise difficult questions both about perpetrators and victims. Where the victim is the state, as in the case of smuggling, its protection is by way of criminal prosecutions. The smuggled person will always be complicit with the smuggler and depending on the Member State may be criminally liable either as an accomplice or separately for incitement of the crime (whether or not the crime took place). However, smuggled persons are those most closely connected with the asylum process for the simple reason that refugees are likely to seek the services of smugglers in order to get out of their country of origin and into another country. Thus the smuggled person may not be the victim of the smuggler but may well be the victim of the state of origin (I will return to this shortly below). In any event, offences against the state require careful justification if they are to be politically and socially legitimate.

Trafficked persons are by and large defined in the legislation of the states considered here as victims of the crime of trafficking which includes an element of coercion and threat of violence. The criminalisation of acts which harm other persons, ie where there is a human victim, require a clear definition of the victim. If the criminal offence is to be credible it must have as its objective the protection of the victim. As is apparent in all of the chapters, protection of victims of trafficking lags far behind the enthusiasm of the Member States to criminalise traffickers. Indeed, as is apparent in a number of chapters, victims will have better rights within the criminal justice system as victims of an offence than they can hope to have either before or after the end of the criminal procedure when they

are categorised as irregularly present foreigners. Once the victim is no longer useful in the criminal procedure he or she is usually given only a short period of time before expulsion back to the country of origin. This is certainly far from protection of the victim particularly when the individual risks being trafficked again somewhere else by the accomplices of the trafficker resident in the country of origin.

Four fields of legal and social concern have proved particularly important and arise in all of the chapters:

1. Differentiating the smuggler in persons from the smuggled person: the relationship between the smuggler and smuggled person is one of complicity. Both parties seek the same end – the crossing of a border where both consider there is a high likelihood that if the smuggled person presented him or herself to the authorities that crossing would be prevented. Into this relationship money or compensation of some kind generally appears though not always as a number of the chapters indicate such as the UK. Of course where nationality differentiates the two – ie the smuggler has the nationality of the state into which the smuggled person is seeking to enter - the two are more easily separated as categories. But the fact that both parties have the same objective and interest means that the smuggled person will not, by virtue of being smuggled alone, be classified as a victim. In this case it is the state which is the victim. Here there is something of a conundrum, by passing laws which create the offence of people smuggling, the state creates itself as a victim of those who commit the offence.
2. Differentiating between smuggling of persons and trafficking of persons: in many of the Member States considered here, the idea of trafficking has traditionally been linked with prostitution. As in the case of France, this relationship stretches back to the beginning of the 20th century. As prostitution has been decriminalised in most Member States, the figure of the prostitute as a foreigner compelled to work in degrading conditions has replaced the more generalised figure of the prostitute as always subject to physical or emotional threat and coerced. The border becomes an important factor in the enforcement of physical or emotional threat, if the individual does not continue the activity he or she will be revealed to the authorities and expelled from the state. In this framework, the individual is a victim in criminal law but as can be seen from a number of chapters, a most unwilling victim. The unwillingness of the individual to be a victim appears in many cases to be an unwillingness to come to the attention of the state authorities at all. Victim status presupposes visibility which will result in expulsion, sooner or later in most Member States. While some states have provisions for the issue of a residence permit for a limited time while the individual is useful to the criminal justice authorities as a victim, this status tends to be highly precarious and to end when the criminal proceedings end. Thus the

victim, in the end, may fear more becoming a victim of the state's expulsion procedures than remaining the victim of a trafficker.

3. Differentiating between punishing smuggling and trafficking on the one hand and protecting persons who fear persecution or torture in their countries of origin: in many Member States the commitment of the state to counter smuggling and trafficking of persons through the criminal law finds itself in conflict with the state's duty to protect persons fleeing persecution and torture in their home state. As is recognised again and again, those persons with the greatest incentive to use smugglers and traffickers are those who are most at risk of persecution and torture in their country of origin. As visas and border controls are increasing directed at preventing exactly this group from arriving in EU states, so their recourse to smugglers and traffickers to cross the border increases. The criminal justice system then finds itself caught between the national laws which criminalise border crossing of the kind which fulfils the definition of smuggling or trafficking, and the Member States' obligation under Article 31(1) Geneva Convention not to penalise refugees for the manner in which they entered the state.
4. Differentiating between smugglers and traffickers on the one hand and legitimate transport businesses on the other: the introduction first of administrative sanctions and then criminal sanctions on transporters who carry persons into the state who are deemed to be irregular (carriers' sanctions) has raised a series of problems for states. While they seek to punish those who are carrying out irregular border crossings for profit nonetheless they seek to promote cross border economic activity and encourage businesses to engage in cross border activities.

In all of the chapters it is surprising just how often the law is changed on the criminal offences of trafficking and smuggling. Even those states which only recently created criminal offences in this field seem almost immediately dissatisfied with them and change them again. This, of course, causes chaos in the courts as cases come from trial or on appeal in respect of offences which have been changed or amended before the hearing takes place. Appeal court judgments strike down provisions of laws which have already been deleted and amended. Prosecutors, defence lawyers and judges struggle to stay on top of a constantly changing landscape and to provide some legal certainty against a background of frenetic legislative activity.

In light of the above general comments, I will now turn to each chapter briefly and draw out the issues which struck me as particularly important to a comparative overview of the issues.

In the case of *France*, Vernier and Guiraudon demonstrate that although there is a long history of criminalisation of trafficking in prostitutes, only in 2003 did this country adopt new laws against trafficking. In doing so two main fields

of political concern were addressed, on the one hand prostitution and the other begging which has been associated in the press with the Roma. The problem of determining who is the victim has been important in the French debate. While the state must be the victim of smuggling, the creation of an offence of trafficking which is not dependent on the testimony of the victim raises questions about who the victim really is. The reluctance of some supposed victims to cooperate with the police and testify against their traffickers has led to a differentiation between the bogus or bad victims as opposed to the real and thus good victims. Smuggled and trafficked persons are defined first and foremost in this category and only subsidiarily as the hodlers of internationally guaranteed human rights. Thus for instance children who are smuggled are primarily assigned the status of offender not that of child under the UN Convention on the Rights of the Child and treated accordingly. The treatment of the field in France is the result of a political choice to move the question of irregular migration from a social setting and to insert it into a criminal one. The rise of the extreme right in France has had the effect of pushing the debate on smuggling and trafficking into the sphere of criminal law as the other political parties seek to address what they see as a weakness which the extreme right may exploit.

In *Germany*, Ziegler, Cyrus and Vogel present quite a different picture of the development of criminal laws regarding smuggling and trafficking. The first aspect which stands out is the time frame: Germany adopted criminal laws in this field from 1992. As in France, the concept of trafficking has been very much caught up with prostitution. However, as the 1990s progressed, more and more legislation provided an increasingly detailed series of offences which the individual could commit. As in the case of the UK, each time the prosecutor ran into difficulties obtaining a conviction, for instance on the basis of lack of knowledge of the intent of the individual or asylum, this was cast as a legal loophole and closed with further legislation. As regards smuggling where the state is the victim, the duty to protect persons from persecution, ie asylum, is cast as a problem to be managed. There seems to be an approach which suggests that so long as the refugee has a right to cross the border to seek protection, there is a loophole in the state's ability to protect its sovereignty. The justification is crime control not protection of victims. This causes friction within the institutions responsible for criminal justice. What is surprising is how quickly the figure of the smuggler has been transformed in Germany from a positive one – someone helping people flee persecution - to a negative one. This is particularly noteworthy when all the evidence available in respect of irregular migration to Germany indicates that it is the result of legal admission and overstaying. Smuggling and trafficking are the exception, numerically.

In *Italy*, McCreight and Puggioni show how uneasily the laws on trafficking and smuggling sit with a history of tolerated irregularity and regularisations of foreign nationals. The laws are relatively recent, dating from 1998 but amended again in 2002 and in 2004. While the first law lacked sufficient clarity, the second

builds on the idea of EU criminal cooperation and the fight against smuggling and trafficking as Italy's part in that new field. It is interesting to note that in Italy, as opposed to the other Member States considered here, the courts have categorised smuggling and trafficking as offences against the poor. They have then been reluctant to penalise people for poverty. However, as Puggioni points out, there has been a change in the political framing of the issue where irregularity has been presented as the problem in respect of which administrative detention is the solution (pending removal/expulsion). There appear to be three key stages to Italian political and legal development – first toleration on the basis that the foreigners are in transit through Italy to somewhere else (ie Germany); secondly, intolerance on the basis that irregularity is made a criminal offence and thus it is combated through the criminal justice system and thirdly, invasion – the South in particular Lampedusa is subject to invasion by foreigners and the response must be military. In all three stages, the foreigner as a person fleeing persecution is absent from the equation notwithstanding Italy's obligations under the 1951 Geneva Convention.

In the *Netherlands*, Pieters and Staring draw a rather different picture. Measures against trafficking have had a long history, dating back to the early 20th century with the trafficking of women for prostitution abroad being the main focus. As regards the modern developments, again the law is changed with regularity through the 1990s and 2000. The most recent changes have been introduced in 2004, by which time action against smuggling and trafficking in persons has become one of the seven priorities of the police. While smuggling is considered a crime of complicity, trafficking has remained an offence of coercion and violence. However, separating voluntary acts from serious abuse has been problematic both for the legislator and the courts. A rich case law indicates both the emphasis which the law enforcement agencies have placed on pursuing individuals on the basis of the offences and the resistance of those who are prosecuted. As in all the other states considered here, the actual protection given to victims seems rather negligible – between 1998 and 2003 634 applications for residence permits on the basis of being a victim of trafficking were submitted but only 79 were granted. From the mid 2000s the linkage of asylum with smuggling and trafficking gains an important place in the debate as asylum seekers become the focus of increasing political disapproval. However, by 2004 a watershed of sorts is reached where two acts of political violence, the killing of a politician (Fortuyn) and a film maker (van Gogh), raise generalised fears about social cohesion. This has contributed to an atmosphere where coercive measures which are presented as providing protection to society (as opposed to those fleeing persecution) are popular.

In *Spain*, Gortazar, Coso, Garcia and Enriquez show that the debate on trafficking and smuggling both legally and politically has been dominated by the EU and the need to adapt to the EU norms. However, this debate has not brought with it coherence and consistency but rather a patchwork of fairly

unworkable measures. Here, legal measures were only adopted in 2000 making smuggling and trafficking in human beings an administrative offence. In 2003 they are additionally made criminal offences providing for the priority of the later in respect of the former. However, the continuing existence of the administrative sanctions which include a system of expulsion within 48 hours, provides the administration easy mechanisms with which to expel foreigners and thus acts as a disincentive to criminal proceedings (which may be a good thing considering the breadth of the potential criminals – see below). As in respect of the other countries examined, a key problem is identifying the victim of the crimes: to what extent are these crimes against individuals and to what extent against the state. While the Madrid bombings in 2004 created an environment of fear regarding foreigners, this has not prevented the continuation of a migration system which is heavily dependent on regularisations to sort out administrative logjams. While the media coverage has focused heavily on little boats arriving on the Spanish beaches or the Canary Islands as the source of irregular migrants in fact most arrive lawfully and then overstay their entry permits and visas. The engagement of local authorities particularly in the Canary Islands is noteworthy – they assist irregularly arriving migrants to reach the mainland by purchasing air tickets for them so they can continue their journey to the Spanish mainland. Under the provisions of the relevant law, it would appear that these authorities, together with NGO's and international organisations which assist, such as the Red Cross, come within the field of potential criminals in respect of smuggling and trafficking.

In the *UK*, Kostakopoulou and Geddes describe a system of sanctions in respect of smuggling and trafficking which date from the 1971 law but which have been the subject of rapid amendment and change in 1993, 1996, 1999, 2002 and 2004. The intersection with asylum seems particular unfortunate – the 1996 changes made it an offence to assist someone to arrive in the UK to seek asylum. While there has been some resistance by the courts to such extensive criminalisation of border crossing, continuous legislative pressure has gradually eroded a case law which privileged the right to protection over coercion and criminalisation. This transformation occurred within a framework of increasing political hostility towards irregular migration which included the categorisation of asylum seekers as primarily a subset of irregular migrants. This development is based in four policy concerns of the UK authorities – the race related framing of migration, that is to say the (much contested) proposition that firm immigration control promotes good race relations; the UK's emphasis on sovereign authority regarding borders and their control; the impact of deregulation and liberalisation of the economy which has diminished state control mechanisms over employment; the framing of irregularity as a challenge for population control and societal security. This framework of issues dates back to the 1950s in UK policy and has remained quite stable notwithstanding the changes of issues. The linkage of irregularity with asylum has been very strong in the UK, so much so

that it has led to separate offences which explicitly target those assisting asylum seekers. Unlike the other countries considered here, the UK has had the power to opt out of the EU directive on the rights of victims of trafficking and it has done so. Where the commitment of the other Member States to protecting victims of trafficking has seemed rather negligible, the UK's commitment has been nonexistent.

Finally, the *EU* has intersected with national law in various ways. Obokata reviews the measures which have been adopted at the EU level, starting with the EUROPOL Convention in 1995 which sets smuggling and trafficking in human beings among the areas of concern to this organisation which co-ordinates cross border policing and criminal investigation in the EU. From this starting point, the EU has adopted a variety of measures, all in the Third Pillar (ie not directly legally binding) which include a series of Joint Actions beginning in 1996 and a number of funding instruments to assist operations at the national level. Since the changes to the competences of the First and Third Pillars relating to immigration and asylum which took place with the entry into force of the Amsterdam Treaty in 1999, a Framework Decision on trafficking in persons took effect in 2002 though its corollary, a directive on residence permits for trafficking victims was only adopted in 2004. The temporal relationship alone indicates the lag between concern to penalise smuggling and trafficking and the will to protect victims. This disjuncture is also clearly reflected at the national level in all the Member States considered. The EU level reflects the same incoherence which is encountered at the national level between the duty to protect asylum seekers and consider their claims and the criminalisation of the crossing of borders.

The current emphasis in Europe on criminalising smuggling and trafficking of foreigners is unlikely to dissipate. Notwithstanding the fairly poor figures on successful criminal convictions of these crimes (in Germany there were 164 convictions in 1998 out of 993 investigations) the symbolic importance of casting the irregular crossing of borders as a crime seems to be an important policy feature. As the 2004 enlargement transformed once again the borders of the EU, understanding where and how the EU borders operate has become even more complex. As both the crimes of smuggling and trafficking are bound by national law yet include as an important feature events which happen on the other side of the national border they are transnational. They constitute, then, an activity in respect of which transnational police cooperation has an undisputed position (as is highlighted by Italy's action in the field). As increasing resources are focused in this area of transnational police cooperation at the EU level, it seems likely that investigations into smuggling and trafficking on persons may well prove a testing ground. The protection of the victim, both as the victim of the trafficker and the victim of persecution or torture in his or her country of origin, sadly, does not appear to be the driving force behind the intensification of EU action in the field.

LIST OF CONTRIBUTORS

Emiliano García Coso (PhD), is "Jean Monnet" Professor of European Union Law at the University Pontificia Comillas (ICADE) of Madrid (Spain) and Professor of European Immigration Law at the Institute of Migrations at the same University. His recent publications include a chapter (about the European Immigration Policy) in a Colombian Book on Globazation and Security , different publications in the field of recents reforms of Spanish Immigration Law, and his current reseach (jointly Professor Gortazar) analizes the obstacles of free movement of EC workers. He has different research projects financed by the Spanish Ministry of Education on Sports rules and its legal problems at European and Spanish level. He is also lawyer at the Spanish Bar.

Carmen González Enríquez is Professor of Political Science in the Universidad Nacional de Educación a Distancia (UNED) in Madrid, where she has conducted several reasearches on several aspects related to immigration (public opinion, political parties' decisions in this field, the illegal immigration and the relations between Spain and Morocco, political participation of immigrants, among others). She is co-author of *Spain and Immigration* (Fundación La Caixa, Social Studies, 2002), author of the POLITIS Spanish report on civic participation of immigrants (www.uni-oldenburg.de/politis-europe), author of 'The coexistence with immigrants in the Barcelona province', in *La Factoria*, no. 18, (Barcelona), editor of *Ethnic Minorities and National Conflicts in Eastern Europe* (I.U. Gutiérrez Mellado, 2004), and co-editor of *The Politics of Memory* (Oxford University Press, 2001).

Norbert Cyrus is research fellow of a European research project on active civic participation of immigrants ('Building Europe with New Citizens? An Inquiry into the Civic Participation of Naturalised Citizens and Foreign Residents in 25 Countries') at the Interdisciplinary Centre for Education and Communication in Migration Processes (IBKM) of the University of Oldenburg. Recent publications include *Trafficking and labour exploitation in Germany*, report for the International Labour Office, Geneva: ILO 2005;

Active civic participation of immigrants in Germany, report for the EU-research project POLITIS, Oldenburg: IBKM 2005 (www.uni-oldenburg.de/politis-europe); and (with Dita Vogel), 'Implementing migration control in labour markets – routines and discretion in Germany', in: *Journal for Ethnic and Migration Studies* (JEMS) Vol. 29 (3) 2003, 225-255.

Andrew Geddes is Professor of Politics at the University of Sheffield. Recent publications include *Immigration and European Integration: Towards Fortress Europe?* (2000) and *The Politics of Migration and Immigration in Europe* (2003).

Cristina Gortázar Rotaeche is Professor of Public International Law at the University Pontificia Comillas of Madrid, and Lecturer in Asylum and Refugee Law. Since 2002 she is holder of a Jean Monnet Chair on European Law. She is the Spanish National expert in the Odysseus Network (Academic Network for Legal Studies on Immigration and Asylum in Europe). She has published several books and articles on immigration and asylum law related issues; among others, *Derecho de Asilo y – no rechazo – del Refugiado* (Rights of Asylum and non refoulement, UPCO/Dykinson, 1997). Currently she is Vice-Rector for Extension at the University Pontificia Comillas of Madrid.

Elspeth Guild is Professor of European Migration at the Radboud University, Nijmegen and partner at the London law firm Kingsley Napley. She has published widely on the field of immigration and asylum law in the EU. Recently she untertook a study on trafficking and smuggling of human beings for the International Labour Office which has just be published: *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement*, with Beate Andrees and Mariska van der Linden, International Labour Office, Geneva 2005. Among her recent publications is: E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International 2004.

Virginie Guiraudon is currently Marie Curie Chair Professor in Social and Political Sciences at the European University Institute in Florence, Italy, on leave from her research fellow position at the National Center for Scientific Research (CNRS) in France. She holds a Ph.D. in Government from Harvard University where she focused on explaining the evolution of the rights granted to foreigners in France, Germany and the Netherlands since 1974. She is the author of *Les politiques d'immigration en Europe* (l'Harmattan, 2000) and co-editor of *Controlling a New Migration World* (Routledge, 2001). Her current research focuses on migration, asylum and anti-discrimination policies at EU-level and their effects on European Union Member States and third states.

Dora Kostakopoulou is Reader in Law, School of Law, University of Manchester. Her principal research interests lie in European Public Law, European Integration, in the intersection of the European Union Law and Political

Theory, European Citizenship and Migration Law and Policy. She is the author of *Between Past and Future: Citizenship, Identity and Immigration in the European Union* (2001) She has published articles in journals, such as *Columbia Journal of European Law*, *Journal of Common Market Studies*, *Journal of European Public Policy*, *Journal of Ethnic and Migration Studies*, *European Journal of Migration and Law*, *Oxford Journal of Legal Studies, Political Studies*, *Journal of Political Philosophy* and *Modern Law Review*. Her work on citizenship is supported by a 'Thank Offering to Britain' Fellowship awarded by the British Academy (2003-2004). She has also been awarded an Innovation Award by the Arts and Humanities Research Board in order to work on the future governance of citizenship (2004-2005).

Tom Obokata is Lecturer in Law at the Department of Law, University of Dundee, Scotland. He is currently serving as an expert for a joint European Union/Council of Europe project on trafficking of human beings in South Eastern Europe. Some of his recent publications include 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2005) 17 *International Journal of Refugee Law* 394; 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54 *International & Comparative Law Quarterly* 445; and 'EU Council Framework Decision on Combating Trafficking in Human Beings: A Critical Appraisal' (2003) 40 *Common Market Law Review* 917. He is also finishing a research monograph entitled *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*.

Antonio Obregón Garcia is Professor of Criminal Law at the Universidad Pontificia Comillas of Madrid (ICADE) and Dean of its Faculty of Law. He has written extensively on various aspects of Criminal Law and Economic Crime (including criminal offences regarding illegal immigration) and, recently, on the criminal status of undocumented ("illegal") foreigners.

Bregje Pieters is Lecturer in Criminal Law at the Radboud University of Nijmegen. She is currently working on a dissertation, which is expected to be finished in 2006. The working title of her thesis is 'Regulation of migration by means of criminal law: proportionate, necessary and effective?'. The thesis entails a research on how Dutch criminal law is used to enforce illegal immigration and if the enforcement is right in the sense that it is proportionate, necessary and effective. One of the focuses of the thesis is how European law influences the Dutch regulation in criminal law of migration. Publication: B.Pieters, Mensensmokkel: volgt Nederland de VN of de EU, *Delikt en Delinkwent* 2003, 2, p. 178-191.

Raffaela Puggioni holds a Ph.D. in International Relations from the University of Kent, where she looked at questions of political identity, reception, and the difference that the local makes in establishing the modalities of the encounter with refugees. She has done extensive works on Kurdish refu-

gees in Italy, and on Italian refugee camps. Her publications include 'Refugees, Self-Help Strategies, and Institutional Invisibility: Evaluating Kurdish Experience in Rome', *Journal of Refugee Studies* 18 (3), 2005; and 'Life Inside the Camp: In-between Exception and Resistance', in: Jef Huysmans, Andrew Dobson and Raia Prokhovnik (eds.), *The Politics of Protection*, Routledge, 2005.

Richard Staring studied cultural anthropology and is currently appointed at the Criminology Department of the Erasmus University Rotterdam, the Netherlands. He has published on poverty, crime, irregular migration and illegal immigrants. His dissertation on the migration process of undocumented illegal Turkish immigrants based on ethnographic research was published in 2001 (*Guided Journeys*, Amsterdam: Het Spinhuis, published in Dutch). He is editor of *Focaal – European Journal of Anthropology* (Berghahn Publishers) and member of the Centre for Information and Research on Organized Crime (www.ciroc.nl).

Matilde Ventrella McCreight is a doctoral candidate in European Union law at the School of Law, University of Birmingham, U.K. The contributor's project concerns a European trans-national judicial approach to combat smuggling of migrants and trafficking in human beings. The contributor holds a Law Degree from the University of Bari, Italy and a Master Degree form the University of Dundee, U.K.

Johanne Vernier is a doctoral candidate in Criminal Law at the Ecole doctorale de droit comparé, University of Panthéon-Sorbonne (Paris I), France, and a member of the association Gisti (association providing support and information to migrants). Her researches focus on current interactions between criminal policies on immigration, prostitution and trafficking in human beings with a view to pimping, in France. She is the author of several articles in French analysing the consequences of the recent French legislation regarding prostitution and trafficking in human beings.

Dita Vogel is international coordinator of a European research project on active civic participation of immigrants ("Building Europe with New Citizens? An Inquiry into the Civic Participation of Naturalised Citizens and Foreign Residents in 25 Countries") at the Interdisciplinary Centre for Education and Communication in Migration Processes (IBKM) of the University of Oldenburg, together with Rudolf Leiprecht. Recent publications include *Einwanderungsland Niederlande – Politik und Kultur*, IKO-Verlag 2003 (editor), and with Norbert Cyrus, Implementing migration control in labour markets – routines and discretion in Germany, in: *Journal for Ethnic and Migration Studies* (JEMS) Vol. 29 (2003/3), 225-255.

Katja S. Ziegler is Lecturer in Law, Fellow and Deputy Director of the Institute of European and Comparative Law in the University of Oxford. Her research is in public international law, EU law and comparative public law. Recent Publications include the monograph *Fluchtverursachung als völkerrechtli-*

ches Delikt. Die völkerrechtliche Verantwortlichkeit des Herkunftsstaates für die Verursachung von Fluchtbewegungen [Causing Refugee Flows as a Delict under Public International Law. State Responsibility of the State of Origin for the Causation of Refugee Flows], Duncker & Humblot, Berlin 2002; 'Grundfreiheiten und soziale Dimensionen des Binnenmarktes – die Verfassung als Impuls?' [Market Freedoms and Social Dimensions of the Common Market – Impulses from the EU-Constitution?], in: Hatje & Terhechte (eds.), *Das Binnenmarktziel in der europäischen Verfassung*, Europarecht 2004 (Special Issue), p. 13-39; 'Integration und Ausgrenzung im Lichte der Migrationspolitik der Europäischen Union – die "Festung Europa"?' [Integration and Exclusion in the Light of the Migration Policy of the European Union – "Fortress Europe"?], in: Sahlfeld et al. (eds.), *Integration und Recht*, München 2003, p. 127-179.

INDEX

Immigration and Asylum Law and Policy in Europe

1. E. Guild and P. Minderhoud (eds.): *Security of Residence and Expulsion*. 2000
ISBN 90-411-1458-0

2. E. Guild: *Immigration Law in the European Community*. 2001
ISBN 90-411-1593-5

3. B. Melis: *Negotiating Europe's Immigration Frontiers*. 2001
ISBN 90-411-1614-1

4. R. Byrne, G. Noll and J. Vedsted-Hansen (eds.): *New Asylum Countries?* Migration Control and Refugee Protection in an Enlarged European Union. 2002
ISBN 90-411-1753-9

5. K. Groenendijk, E. Guild and P. Minderhoud (eds.): *In Search of Europe's Borders*. 2003
ISBN 90-411-1977-9

6. J. Niessen and I. Chopin (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe.* 2004
ISBN 90-04-13686-X

7. B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds.): *Irregular Migration and Human Rights: Theoretical, European and International Perspectives.* 2004
ISBN 90-04-14011-5

8. H. Battjes: *European Asylum Law and International Law*. 2006
ISBN 90-04-15087-0

9. Elspeth Guild and Paul Minderhoud (eds.): *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings*. 2006
ISBN 90-04-15064-1

Martinus Nijhoff Publishers – Leiden • Boston