

**Smuggling of Asylum-seekers**  
**The Cost of having No Alternative**

**By Vladislava Stoyanova**

**Central European University**

**Department of Legal Studies**

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**Supervisor: Professor Boldizsár Nagy**

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## **Abstract**

The thesis analyses the phenomena of human smuggling from the perspective of asylum-seekers. It addresses the problem of how to view smuggling – as a dangerous crime demanding severe state measures to crack down on it, or as a method of bringing people to safe shores where they can apply for asylum. The latter proposition finds support in the thesis.

States justify measures against human smuggling by claiming that migrants are swindled by profiteers, exposed to exploitation and life dangers. However, if human smuggling is, differentiated from exploitation, then states will not have a basis to argue that enhanced border control is justified by humanitarian considerations for the well-being of the migrants. This is the main reason why the thesis argues for keeping the distinction between, from the one hand, human smuggling, as a method of moving people across international borders characterized by the voluntary participation of the migrants, and, from the other hand, human trafficking, which results in human exploitation and is a human rights violation in itself. Another argument used by states to justify measures against human smuggling, namely that human smuggling is a form of international organized crime with mafia like structures, is also challenged in the thesis.

Through intensified control measures, which include visas, carrier sanctions, Immigration Liaison Officers and Frontex, aiming at sifting out the undesirable immigrants, asylum-seekers falling within this group, people who seek protection are left with no alternative except to resort to smuggling services in order to enter countries of potential asylum. Since states have undertaken obligations in regard to asylum-seekers and since it is internationally recognized that asylum-seekers should not be penalized for having entered the country of asylum in breach of that country's immigration laws, any preemptive qualification of asylum seekers, as "illegal immigrants", economic migrants, "bogus refugees" or criminals would be wrong.

Since in Europe the discourse on human smuggling is predominantly concentrated on the arrival of boats crammed with migrants heading from the African to the European shores, the specific case of smuggling to Spain, Italy and Malta through sea is taken and the existence of “invasion” of “illegal immigrants” is questioned.

The costs paid by asylum-seekers for using smuggling services include criminal charges, detention, lost of credibility, and limitation of procedural rights. All of these might make the successful recognition as a refugee less likely. However, in light of the lack of alternatives to reach countries where asylum-seekers can be safe and claim asylum, there is a willingness to pay the costs.

## Acknowledgements

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## Introduction

Boats crammed with migrants head from Africa towards the coast of Europe.<sup>1</sup> Migrants try the perilous sea crossing to flee war, poverty, human rights violations and in search for a better life and security. Dangerously overcrowded, unseaworthy and without navigation system, most boats reach European shores after many days at sea, with fuel and water running out. Some migrants do not survive the journey.

Migrants pay for the service of being transported. The use of the service of facilitating illegal entry into a country, called human smuggling, could be expensive and very dangerous. However, the migrants do undertake the journey. Some of them do not have another alternative to escape the dangers in their own countries.

For this reason, from a human rights perspective, human smuggling is controversial. On the one hand, migrants are exposed to dangers and vulnerabilities throughout the smuggling process, some of which result in loss of human life. On the other hand, due to the

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<sup>1</sup>Spain Finds Biggest Migrant Boat, BBC News, 30 Sept 2008, *available at* <http://news.bbc.co.uk/2/hi/europe/7644936.stm>; Destination Europe, BBC News, 10 Sept 2007, *available at* <http://news.bbc.co.uk/2/hi/programmes/panorama/6986198.stm>; Erneut rund 500 Flüchtlinge auf Lampedusa gelandet, Deutsche Welle, 10 January 2009, *available at* <http://www.dw-world.de/dw/article/0,,3935363,00.html?maca=de-rss-de-all-1119-rdf>; Satellite Helps Fight Illegal Immigration, BBC News, 25 Jan 2009, *available at*, <http://news.bbc.co.uk/2/hi/europe/7818478.stm>; Mediterranean Sea arrivals: UNHCR calls for access to protection, UNHCR Briefing Notes, 9 Jan 2009, *available at* <http://www.unhcr.org/news/NEWS/4967386e4.html>.

decreasing avenues for legal migration and due to the “walls” that the countries of desired destination build to exclude the possibility for migrants to enter their territory, smuggling could be the only alternative for refugees to escape persecution and human rights violations. Refugees are forced to flee. They might be exposed to dangers throughout the journey and they might have to become indebted in order to pay smugglers. However, they might still view smugglers as their saviors.

The objective of this thesis is to show how states have left asylum-seekers with no alternative except to resort to human smugglers’ services. The present paper addresses the dilemma how to approach smugglers – as profiteers, whose services expose migrants to life dangers, or as ‘white knights’ delivering asylum-seekers to safety. The paper is in search of an answer to the question whether human smuggling is a necessary evil or whether state efforts to “fight” smuggling are to be applauded. The way the thesis answers this question and this dilemma is by supporting the proposition that smuggling is a method of bringing people to safe shores where they can apply for asylum.

The United Nations Convention against Transnational Organized Crime and its supplementing Protocol against the Smuggling of Migrants by Land, Sea and Air were adopted in 2000. Since then there is a growing body of research trying to reveal the complexity of the topic. The book “*Global Human Smuggling Comparative Perspectives*” edited by David Kyle and Rey Koslowski is of paramount importance as an introduction into the topic. Another major publication, from which the thesis draws understanding of basic concepts, is the Andreas Schloenhardt’s book “*Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*”. The contributions of various authors in the book “*Immigration and Criminal Law in the European Union The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and*

*Smuggling of Human Beings*” give perspectives on the criminal law aspects of human smuggling.

The work of Khalid Koser<sup>2</sup> and John Morrison<sup>3</sup> is of high relevance to the subject matter of the present paper since both authors’ approach to human smuggling includes refugee and human rights perspectives. Both of them point out that the majority of asylum-seekers entering Europe are smuggled. They also state that this has evolved as a result of restrictive asylum and immigration policies. Morrison even suggests that there will be no more asylum-seekers entering Europe if smuggling is stopped. Koser’s work is focused on the problem of irregular migration including asylum-seekers as irregular migrants. The present paper relies on his research on the decision-making process of asylum-seekers; the role of social networks in migration; and the smuggling organizational principles. The contribution of John Salt<sup>4</sup> is mainly associated with conceptualizing smuggling as a business, which flourishes because

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<sup>2</sup> Khalid Koser, Refugees, Transnationalism and the State, *Journal of Ethnic and Migration Studies*, Vol.33, No.2, 2007, pp.233-254; Khalid Koser, Why Human Smuggling Pays, *International Migration* vol.46, No.2, 2008, pp.3-26; Khalid Koser, Asylum Policies, Trafficking and Vulnerability, *International Migration*, Vol.38, No.3 Special Issue 1/2000, pp.91-111; Khalid Koser, Strategies, Stories and Smuggling: Inter-regional Asylum Flows and Their Implications for Regional Responses in *New Regionalism and Asylum-seekers Challenges Ahead*, edited by Susan Kneebone and Felicity Rawlings-Sanaei, Berghahn Books New York Oxford (2007), pp.43-55; Khalid Koser, Reconciling Control and Compassion? Human Smuggling and the Right to Asylum in *Refugees and Forced Displacement. International Security, Human Vulnerability and the State*, edited by Edward Newman and Joanne van Selm, United Nations University Press (2003) pp.181-194; Khalid Koser, Negotiating entry into ‘Fortress Europe’: the migration strategies of ‘spontaneous’ asylum seekers in *Exclusion and Inclusion of Refugees in Contemporary Europe*, edited by Phillip Muss, European Research Center on Migration and Ethnic Relations Utrecht University (1997) pp.158-170; Khalid Koser, *International Migration A Very Short Introduction*, Oxford University Press (2007).

<sup>3</sup> John Morrison, *The Cost of Survival. The Trafficking of Refugees to the UK*, The Refugee Council London (1998); John Morrison, *The Trafficking and Smuggling of Refugees: the End Game in European Asylum Policy? New Issues in Refugee Research*, UNHCR Working Paper 39, April 2001; Aninia Nadig and John Morrison, *Human Smuggling and Refugee Protection in the European Union: Myths and Realities in The Refugee Convention at Fifty, A View from the Forced Migration Studies*, edited by Joanne van Selm, Khoti Kamanga, John Morrison, Aninia Nadig, Sanja Spoljar-Vrzina and Loes van Willigen, Lexington Books, 2003, pp.161-171.

<sup>4</sup> John Salt and Jennifer Hogarth, *Migrant Trafficking and Human Smuggling in Europe A review of the evidence with case studies from Hungary, Poland and Ukraine*, IOM, 2000; John Salt and Jeremy Stein, *Migration as a Business: the Case of Trafficking*, *International Migration*, 1997, Vol.35, No.4, pp.467-494; John Salt, *Trafficking and Human Smuggling: A European Perspective*, *International Migration*, Vol.38, No.3 Special Issue 1/2000, pp. 31-56.



there is a demand for it. For further insights the work of Jorgen Carling,<sup>5</sup> Frank Laczko,<sup>6</sup> Aninia Nadig,<sup>7</sup> Ilse van Liempt<sup>8</sup> and Jeroen Doomernik<sup>9</sup> and other prominent scholars has been taken into consideration.

The present paper utilizes the research in the field of human smuggling to draw conclusions regarding the internationally recognized right to seek asylum. “*The Rights of Refugees under International Law*” by James Hathaway and “*The Refugee in International Law*” by Guy Goodwin-Gill are the ultimate sources for the analysis of the right to seek asylum and the rights of asylum-seekers.

The measures against human smuggling are within the context of controlling borders. The argument in the present paper, that the physical borders are not actually the real borders, has its foundation in the ideas of Didier Bigo,<sup>10</sup> Virginie Guiraudon,<sup>11</sup> Annalisa Meloni<sup>12</sup> and

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<sup>5</sup> Jorgen Carling, Unauthorized Migration from Africa to Spain, *International Migration*, Vol.45, No.4, 2007, pp.3-38; Jorgen Carling, Migration Control and Migration Fatalities at the Spanish-African Borders, *International Migration Review*, 41(2) pp.316-343.

<sup>6</sup> Europe A review of the evidence with case studies from Hungary, Poland and Ukraine, IOM, 2000.

<sup>7</sup> Aninia Nadig, Human Smuggling, National Security, and Refugee Protection, *Journal of Refugee Studies* Vol.15, No.1, 2002, pp. 1-25.

<sup>8</sup> Ilse van Liempt, *Navigating Borders. Inside Perspectives on the Process of Human Smuggling into the Netherlands* (2007) Amsterdam University Press.

<sup>9</sup> Ilse van Liempt and Jeroen Doomernik, Migrant’s Agency in the Smuggling Process: the Perspective of Smuggled Migrants in the Netherlands, *International Migration*, Vol.44 (No.4) 2006, pp.165-190.

<sup>10</sup> Didier Bigo, *Frontier Controls in the European Union: Who is in Control in Controlling Frontiers Free Movement into and within the Europe*, edited by Elspeth Guild, Didier Bigo, Ashgate Publishing (2005).

<sup>11</sup> Virginie Guiraudon and Christian Jappke, *Controlling a New Migration World in Controlling a New Migration World*, edited by Virginie Guiraudon and Christian Jappke, London New York (2001); Virginie Guiraudon, Before the EU Border: Remote Control of the “Huddled Masses” in *In Search of Europe’s Borders*, edited by K.Groenendijk, E.Guild and P.Minderhoud, The Hague: Kluwer Law International (2003); Virginie Guiraudon, De-nationalizing Control, Analyzing State Responses to constraints on immigration control in *Controlling a New Migration World* edited by Virginie Guiraudon and Christian Jappke, London New York (2001).

<sup>12</sup> Annalisa Meloni, Legal and Political Significance of Passports and Visas in A.Meloni, *Visa Policy Within the European Union Structure* (Berlin/New York, Springer, 2006).

Ryszard Cholewinski.<sup>13</sup> The work of Elspeth Guild on visas as one of the instruments which has changed our perception on borders is also considered.<sup>14</sup> Erika Feller's work is the source for revealing some of the implications from the imposition of carrier sanctions.<sup>15</sup> Sergio Carrera's contribution is beneficial for analyzing the role of Frontex in border control.<sup>16</sup>

Putting together the various pieces of research into these three spheres – human smuggling, refugee law, and border control, the present paper's contribution is connected with arguments in support of the idea that human smuggling is a benign phenomena and that it is a channel necessary for asylum-seekers to reach safety. Within the frame of this argument, the paper answers to the question, whether from a human rights and refugee protection perspective, it is positive or negative to keep the separation of the concepts of smuggling and trafficking. The thesis explains that when human smuggling is differentiated from trafficking and exploitation, states have no basis to argue that by adopting restrictive immigration policies they actually save lives or save people from exploitation. The thesis refutes arguments proposed by some authors that human smuggling and trafficking should not be separated.

Additional arguments are advanced that visas, carrier sanctions, immigration liaison officers, and Frontex are measures targeted specifically at asylum-seekers. Based on analysis of available statistics, the thesis argues that there is actually no influx of asylum-seekers crossing the Mediterranean Sea. The thesis contributes to the academic analysis of human

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<sup>13</sup> Ryszard Cholewinski, No Right of Entry: The Legal Regime on Crossing the EU Border, *in* *In Search of Europe's Borders* edited by K. Groenendijk, E. Guild, and P. Minderhoud, The Hague: Kluwer (2003)

<sup>14</sup> Elspeth Guild, The Border Abroad: Visas and Border Controls *in* *In Search of Europe's Borders*, edited by K. Groenendijk, E. Guild and P. Minderhoud, The Hague: Kluwer (2003).

<sup>15</sup> Erika Feller, Carrier Sanctions and International Law, *International Journal of Refugee Law*, Vol.1, No.1, 48-66.

<sup>16</sup> Sergio Carrera, The EU Border Management Strategy Frontex and the Challenges of Irregular Immigration in the Canary Islands, CEPS Working Document No. 262/March 2007.

smuggling by suggesting some of the legal costs incurred by asylum-seekers as a result of using smuggling services.

The thesis is divided into four chapters. The first chapter explains the phenomena of human smuggling. The second chapter is devoted to the right to seek asylum. The aim of the third chapter “Controlling Borders” is to show that the “wall” that European Union (EU) has built around its borders makes it practically impossible for an asylum-seeker to enter EU in a legal way. The fourth chapter examines three issues from the perspective of asylum-seekers – migration statistics and their interpretation; the connection between human smuggling and organized crime with mafia like structures; and the costs associated with using smuggling services.

## Chapter 1 Human Smuggling

The first chapter defines human smuggling, addresses the issue of the distinction between human smuggling and human trafficking and how that distinction is relevant to the main argument in the thesis. Then it qualifies the distinction by recognizing that there are borderline cases where smuggling and trafficking can hardly be differentiated. Despite the existence of borderline cases, the position supported in the thesis is that a clear dichotomy between human smuggling and trafficking has to be maintained. The chapter further argues that human smuggling is to be approached not only as a crime, as a business, or as a migration issue, but also as a human rights issue.

### 1.1. Defining Human Smuggling

The Protocol against the Smuggling of Migrants by Land, Sea and Air,<sup>17</sup> which supplements the United Nations Convention against Transnational Organized Crime<sup>18</sup> and whose purpose is to prevent and combat the smuggling of migrants, defines smuggling in the following way:

*Smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.*<sup>19</sup>

Illegal entry within the sense of the Protocol means “crossing borders without complying with the necessary requirements for legal entry into the receiving State.”<sup>20</sup> There

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<sup>17</sup> Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, *entered into force* Jan. 28, 2004. [*hereinafter* The Protocol against Human Smuggling]

<sup>18</sup> United Nations Convention Against Transnational Organized Crime, G.A. Res. A/55/ 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/RES/55/25

<sup>19</sup> The Protocol against Human Smuggling , Art.3(a).

are three main entry strategies employed by smugglers. First, smugglers can provide migrants with forged documents (passport and/or visa). This type of entry although illegal, is an authorized entry since an immigration official sanctions it.

Second, the border can be crossed in a clandestine manner. For example, smugglers can facilitate the crossing of the border at places which are not designated as places for border crossing, in this way migrants avoid authorized posts. Another relevant example illustrating the clandestine entry would be when migrants cross the border hidden in trucks. Andreas Schloenhardt classifies this type of entry strategy as covert arrivals.

The third manner of entry is when the migrants openly present themselves to the authorities of the destination state, once they have reached its territory. The role of the smugglers is to facilitate exit from countries of origin or transit and to transport the migrants to or close to the territory of the destination country. This strategy is used at sea and the objective of the smugglers could be to instigate rescue operation, as a result of which the migrants can be saved by the authorities of the destination country and transported to its territory. In Schloenhardt's classification, the third manner of crossing the border is called overt arrivals or open landings.

The distinction between covert and overt arrivals depends on whether the smuggled person seeks to enter the state clandestinely and undetected (covert arrivals) and only after that he/she wants to claim asylum, or whether he/she seeks to reach the territory of the destination country and then openly claims asylum (overt arrivals).<sup>21</sup> Covert arrivals require

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<sup>20</sup> The Protocol against Human Smuggling , Art.3(b).

<sup>21</sup> Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, Martinus Nijhoff Publishers (2003) at p.93. [*hereinafter* Schloenhardt]

sophisticated means such as high quality forged identity documents or hidden compartments in boats or trucks to circumvent border controls.<sup>22</sup>

There could be a combination between the above described entry strategies. A journey could require crossing of multiple borders and accordingly different strategies could be employed for each exit of and entry into a country. It is also possible that the strategy could change in accordance with the particular circumstances. For example, smugglers could have organized a clandestine disembarkation of migrants on the coast of the destination country; however, the boat could be detected and preemptively intercepted by the local authorities.<sup>23</sup>

In the sense of the Protocol against Human Smuggling, actions of a person who assists a friend or relative in crossing a border illegally but does not take payment for this service are not to be considered as smuggling. However, the approach adopted on the EU level is different. The Council Directive defining the facilitation of unauthorized entry, transit and residence stipulates that:

*Each Member State shall adopt appropriate sanctions on any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.*<sup>24</sup>

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<sup>22</sup> Schloenhardt, at p.94.

<sup>23</sup> Interception occurs when mandated authorities representing a state locate a boat, prevent its onward movement, and either take the passengers and crew onto their own vessel, accompany the vessel to port, or force an alteration in its course. *See* Joanne van Selm and Betsy Cooper, The New “Boat People” Ensuring Safety and Determining Status, Migration Policy Institute, January 2006, at p.5.

<sup>24</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, Art.1(a). Member States are given the discretion to exempt assistance in regard to irregular entry or transit from the imposition of sanctions where the aim of the behaviors is to provide humanitarian assistance. However, states are under no firm obligation to do so and accordingly the exemption depends on their discretion. Art.1(2)

At EU level there is no reference to financial gain, which means that the provision of intentional assistance to migrants in respect to their unauthorized entry is criminalized.<sup>25</sup> In this respect, Ryszard Cholewinski comments that the definition of facilitation of entry is problematic from a human rights perspective because it may potentially criminalize those humanitarian organizations which assist irregular migrants and which have no intention to gain from the provision of such assistance.<sup>26</sup> The reason for the EU not to follow the internationally agreed definition of smuggling in regard to the facilitation of illegal entry is the stated lack of means to prove in court that the act of smuggling was committed for material or financial benefit.<sup>27</sup>

On international and EU level, states have agreed on a definition of human smuggling. Despite some differences between the definitions adopted on the two levels, the main idea is that human smuggling is associated with offering assistance for entering the territory of a state in breach of that state's laws.

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<sup>25</sup> Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (2002/946/JHA) does make a difference between for gain and not for gain smuggling. Art.1.3. provides that “*Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances ...*” However, the difference between for gain and not for gain smuggling is made in regard to the punishment. Member states are under obligation to ensure that when committed for financial gain, smuggling is to be punished “*by custodial sentences with a maximum sentence of not less than eight years*”. This does not mean that states cannot criminalize smuggling when committed not for financial gain.

<sup>26</sup> Ryszard Cholewinski, European Union Policy on Irregular Migration: Human Rights Lost? *in* Irregular Migration and Human Rights: Theoretical, European and International Perspectives, *edited by* Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszak, Martinus Nijhoff Publishers (2004), pp.159-192, at 174.

<sup>27</sup> Johannes van der Klaauw, Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce *in* Irregular Migration and Human Rights: Theoretical, European and International Perspectives, *edited by* Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszak, Martinus Nijhoff Publishers (2004), pp.116-135, at 120.

## 1.2.The Distinction between Human Smuggling and Human Trafficking

Until the mid-1990s the terms people-trafficking and people-smuggling were often used indiscriminately and interchangeably.<sup>28</sup> Following the signing in 2000 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons<sup>29</sup> and the Protocol against Human Smuggling, a clear legal dichotomy was introduced between trafficking and smuggling. Accordingly, two distinct international instruments now deal with trafficking and smuggling.

The Protocol against Trafficking defines human trafficking in the following way:

*Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;*<sup>30</sup>

Some scholars support the distinction between human smuggling and human trafficking.<sup>31</sup> Others question the strict separation between the two phenomena.<sup>32</sup> It has to be

<sup>28</sup> Frank Laczko, Opening Legal Channels for Temporary Migration: A Way to Reduce Human Smuggling?, Introduction to the Journal of International Migration and Integration, 2004, Vol.5, No.3, Special Issue on Organized Migrant Smuggling and State Control: Conceptual and Policy Challenges, pp.343-360, at 345.

<sup>29</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, entered into force Sept. 9, 2003. [hereinafter The Protocol against Trafficking]

<sup>30</sup> The Protocol against Trafficking, Art.3(a); On the EU level similar definition of trafficking is to be found in Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA).

<sup>31</sup> See for example David Kyle and John Dale, Smuggling the State Back in: Agents of Human Smuggling Reconsidered in Global Human Smuggling Comparative Perspectives edited by David Kyle and Rey Koslowski, The John Hopkins University Press Baltimore and London (2001), [hereinafter Global Human Smuggling Comparative Perspectives] at 53; Matthew Gibney and Randall Hansen, Immigration and Asylum From 1900 to the Present Vol.2, ABC CLIO (2005), at 601.



clarified on what basis the distinction is built. It has to be accepted that there are borderline cases and the benefits and limitations of keeping the distinction should also be analyzed.

The dichotomy between human smuggling and human trafficking could be built on the following basis. First, unlike trafficking, smuggling does not entail coercion or deception, indicating that smuggling is a voluntary act on the part of those smuggled.<sup>33</sup> Similarly, Schloenhardt explains that the key factor that renders migrant smuggling different from trafficking is that in the case of migrant smuggling the migratory movement is voluntary.<sup>34</sup> While in case of trafficking the focus is on the exploitation and the majority of literature on trafficking has focused on women and prostitution.<sup>35</sup> Second, the services of smugglers end when those smuggled have reached their destination, while trafficking results in people being exploited. Third, smuggling entails international movements,<sup>36</sup> whereas trafficking can take place both within and across national frontiers.<sup>37</sup> Human smuggling always has a transnational element.<sup>38</sup> Fourth, smuggling entails illegal entry into a given state, and entry can both be

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<sup>32</sup> See for example Catharine Dauvergne, *Making People Illegal What Globalization Means for Migration and Law*, Cambridge University Press (2008); John Salt, *Trafficking and Human Smuggling: A European Perspective*, *International Migration*, Vol.38, No.3 Special Issue 1/2000, pp. 31-56.

<sup>33</sup> Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, Martinus Nijhoff Publishers, 2006, at 21.

<sup>34</sup> Schloenhardt, at 17.

<sup>35</sup> Khalid Koser, *The Smuggling of Asylum-Seekers into Western Europe: Contradictions, Conundrums and Dilemmas in Global Human Smuggling Comparative Perspectives*, at 59.

<sup>36</sup> Although it is generally accepted that crossing of international border is necessary for a movement to be qualified as human smuggling, it has to be mentioned that persons can also be smuggled across internal frontiers (e.g. Columbia) or between divided parts of a country (e.g. Russia – Kaliningrad).

<sup>37</sup> The position of the International Migration Organisation (IMO) is that trafficking can occur within national borders: see *Baseline Research on Smuggling of Migrants in, from and through Central Asia*, IOM, September 2006, at 12; Alice Edwards also acknowledges that not all trafficking has an international dimension. See Alice Edwards, *Trafficking in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, *Denver Journal of International Law and Policy*, 2007, No.36 pp. 9-53, at 13.

<sup>38</sup> Veronika Bulger, Martin Hofman and Michael Jandl, *Human Smuggling as a Transnational Service Industry: Evidence from Austria*, *International Migration*, Vol.44 (No.4) 2006, at 61.

legal and illegal in case of trafficking. Tom Obokata concludes that smuggling can be summarized as an act of facilitating illegal migration.<sup>39</sup> Other authors summarize the distinction by stating that human smuggling can be represented as migrant exporting schemes, while human trafficking could be referred to as slave importing operations.<sup>40</sup>

An issue that needs to be addressed is whether from a human rights and refugee protection perspectives, it is positive or negative to keep the separation of the concepts of smuggling and trafficking. The following paragraphs address this problem.

A disadvantage is that by clearly separating smuggling and trafficking, the victimization of the trafficked persons and their need of protection and assistance are widely accepted, whereas smuggled migrants' human rights, and especially the right to protection of smuggled refugees, receive little attention. In accordance with this logic, individuals who have been subjected to trafficking are referred to as victims, while those who have been smuggled are referred to as "illegal migrants". The definition of smuggling means that those smuggled are willing participants in illegal migration<sup>41</sup> and this may provide justification for states to apply strict enforcement measure such as arrest, detention, and deportation against them.<sup>42</sup>

Another disadvantage becomes evident if the separation is approached from the perspective of the victims of trafficking. As Catharine Dauvergne observes without the distinction we would have to think harder about victimization. More specifically, there are different degrees of victimization which correspond to the many grey areas. Dauvergne

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<sup>39</sup> Tom Obokata, *Smuggling of Human Beings from Human Rights Perspective: Obligations of Non-state and State Actors under International Human Rights Law*, 17 *International Journal of Refugee Law* (2005) at 398.

<sup>40</sup> David Kyle and John Dale, *Smuggling the State Back in: Agents of Human Smuggling Reconsidered in Global Human Smuggling Comparative Perspectives*, at 32.

<sup>41</sup> Ryszard Piotrowicz, *European Initiatives in the Protection of Victims of Trafficking Who Gave Evidence Against their Traffickers*, 14 *International Journal of Refugee Law*, 2000, p.266, footnote 10.

<sup>42</sup> Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 *Human Rights Quarterly* 975 (2001), p.1000.

further states that the distinction better services state interests.<sup>43</sup> However, Dauvergne does not explain what in practice this means and the present paper tries to address this question. It can be argued that the dichotomy services the state interests because if a person is trafficked certain protection are afforded to him,<sup>44</sup> while if a person is defined as having been smuggled he/she could be charged and/or subject to deportation. All cases falling within the grey areas, where there could be consent but still the person is exploited,<sup>45</sup> are immediately defined by the state authorities as smuggling. In particular, the authorities do not bother analyzing whether there has been some degree of exploitation or victimization.

Despite the above mentioned disadvantages, the position of the present paper is that human smuggling and human trafficking should be dealt with as separate phenomena. It is positive to disconnect human smuggling and exploitation of humans. The reason is that states tend to overemphasize the connection between human smuggling, from one side and exploitation, trafficking and organized crime, from another side. This is done in order to legitimize measures against human smuggling, which affects the possibility for persons with a real need for protection to reach countries of asylum.<sup>46</sup> As it will become evident further in this thesis, the description of smuggling as an organized crime and the assumption that migrants are exploited and are simply objects in the process do not reflect the reality. In this sense, James Hathaway criticizes the criminalization of human smuggling, which in his words

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<sup>43</sup> Catharine Dauvergne, *Making People Illegal What Globalization Means for Migration and Law*, Cambridge University Press (2008), at page 91.

<sup>44</sup> The Protocol against Trafficking, Art.6-Art.8.

<sup>45</sup> See the next section of this chapter - 1.3. Qualifications to the Distinction between Human Smuggling and Human Trafficking

<sup>46</sup> Jorgen Carling, *Migration, Human Smuggling and Trafficking from Nigeria to Europe*, IOM Migration Research Series No 23, 2006, at 11.

has historically been a consensual and relatively benign market-based response.<sup>47</sup> While human trafficking is in itself a human rights violation, smuggling is more in violation of particular state sovereign interests (controlling borders; preventing entry into state territory by undesired aliens, including asylum-seekers)<sup>48</sup> than a threat to the general well being.

As to the points made by Dauvergne, the present paper takes the stance that Dauvergne designates problems, which refer to how trafficking is defined. A possible solution could be arguing for a more liberal interpretation of what it means to be trafficked. For example, the definitions in the Protocol against Trafficking and in the Framework Decision on combating trafficking in human beings<sup>49</sup> contain the phrase “abuse of authority or of a position of vulnerability” which could be broadly interpreted.

In respect to the different degree of victimization mentioned by Dauvergne, it should be explained that migrants who pay for smuggling services are indeed victims, regardless of how legally they are referred to. However, they are more victims of the economic despair in their home countries and of the immigration control policies adopted by the developed states, which coerce them to resort to the desperate measure of approaching human smugglers. After all, smuggling is not the cause for migration, it is just a means. Further, it should also be explained that the fact that the smuggling process in itself leads to dangers for the migrants (most notoriously lost of human life during the journey), does not make smuggling trafficking.

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<sup>47</sup> James Hathaway, *The Human Rights Quagmire of Human Trafficking* (2008) 49 *Virginia Journal of International Law* at 6.

<sup>48</sup> See Section 1.4.1. Human Smuggling as a Crime

<sup>49</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA)

### **1.3. Qualifications to the Distinction between Human Smuggling and Human Trafficking**

Despite the arguments in favor of treating human smuggling and human trafficking as different and distinct phenomena, it should be recognized at the same time that the lines between human smuggling and human trafficking in many cases can actually become blurred.<sup>50</sup> The reality is more complex than what the distinct definitions of smuggling and trafficking stipulate. The two definitions found in the Protocol against Human Smuggling and the Protocol against Trafficking are an oversimplification and do not reflect potential dynamics throughout the migration process for the following reasons.

First, as to the voluntary nature of smuggling, the following needs to be taken into account. On the surface, the migrant's choice might be considered voluntary since the individual is a willing party to the transaction. However, in the absence of other channels to escape, compulsion may be caused by such factors as extreme economic despair, political oppression or large-scale violence. Migrants can be lured by promises in the destination country or are misled by disinformation concerning migration law and regulations.<sup>51</sup>

Second, human smuggling can turn into trafficking. The original contract may be of a voluntary nature, but the subsequent process may not be. This means that once the migrant has started his/her journey, that journey may involve exploitation to which the migrant himself/herself has never agreed. It is also possible that after arrival, the immigrant finds

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<sup>50</sup> John Morrison and Beth Crosland, *The Trafficking and Smuggling of Refugees: the End Game in European Asylum Policy?* New Issues in Refugee Research, UNHCR Working Paper 39, April 2001, at 56-59; Alice Edwards, *Trafficking in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, *Denver Journal of International Law and Policy* (2007) No.36 pp. 9-53, at 19; Jacqueline Bhabha and Monette Zard, *Smuggled or Trafficked?*, 25 *Forced Migration Review*, May 2006, pp.6-8.

<sup>51</sup> Bimal Ghosh, *Huddled Masses and Uncertain Shores, Insights into Irregular Migration*, Martinus Nijhoff Publishers, 1998, at 21.

himself/herself in a situation of exploitation.<sup>52</sup> As Hathaway explains “*the criminalization of smuggling may actually increase the risk of human trafficking by driving up the cost of facilitated transborder movement and leaving the poor with no choice but to mortgage their futures in order to pay for safe passage*”.<sup>53</sup>

The borders between human trafficking and human smuggling can become even more blurred when it is taken into account that migrants know in advance that once having paid the sum for the transportation, they will have to work and/or to be exploited for a certain period of time. However, with this awareness they voluntarily subject themselves to smuggling.

In light of all these, John Salt challenges the distinction between trafficking and smuggling. His position is that trafficking and more voluntary forms of undocumented migration are best thought of as a continuum, with room for considerable variation between the extremes. It is frequently difficult to establish whether there were elements of deception and/or coercion, and whether these were sufficient to elevate the situation from one of voluntary undocumented migration, to trafficking.<sup>54</sup>

Salt’s point is valid, however, an important aspect is that states, under the flag of saving people’s lives and preventing exploitation of people, try to curb smuggling by adopting restrictive immigration policies and border surveillance measure, all of which severely affect asylum-seekers. The following paragraph demonstrates the justifications for anti-smuggling measures:

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<sup>52</sup> Alexis Aronowitz, Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets that Drives it and the Organizations that Promote It, *European Journal on Criminal Policy and Research* 9 (2001), pp. 163-195, at 167.

<sup>53</sup> James Hathaway, *The Human Rights Quagmire of Human Trafficking* (2008) 49 *Virginia Journal of International Law* at 6.

<sup>54</sup> John Salt, *Trafficking and Human Smuggling: A European Perspective*, *International Migration*, Vol.38, No.3 Special Issue 1/2000, pp. 31-56, at 33.

*... irregular migration benefits primarily those who smuggle migrants. For those who travel north in search of a better life, the journey to Europe is, more often than not, a source of great tragedy. Untold numbers die in the desert or at sea, due to the indifference, if not the design, of the human smugglers. Desperately poor people are made even poorer as they are swindled or extorted of their assets and those of their extended families. Even if they reach their destination, the migrants face further marginalization and exploitation. Migrant smuggling from Africa to Europe is a crime crying out for justice. ... The system of migrant smuggling, by the pressures of the market if not design, has become nothing more than a mechanism for robbing and murdering some of the poorest people in the world.*<sup>55</sup>

It is not true that smuggling benefits only the smugglers; smuggling is a mutually beneficial transaction. It is true that there could be tragedies and the media makes sure that we are informed about them; however, we are not informed and it is not possible to have precise data about successful smuggling, including smuggling of refugees. It cannot be true that migrants die by the design of smugglers; smugglers are like businessmen,<sup>56</sup> who want to ensure that the service that they provide is of some quality, otherwise there will be no clients. It is true that smugglers demand payment; however migrants are rational beings who can make rational decisions that smuggling is a better alternative than any other prospects. In this sense, Richard Black correctly comments that it seems as if states try to convince us that illegal migration has fundamentally negative consequences for the migrants or asylum-seeks themselves.<sup>57</sup>

States refer to migrants as being exposed to exploitation and life dangers and as passive victims of merciless and unscrupulous profiteers. States answer to human smuggling is strict

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<sup>55</sup> United Nations Office on Drugs and Crime, *Organized Crime and Irregular Migration from Africa to Europe*, July 2006, available at [http://www.unodc.org/pdf/research/Migration\\_Africa.pdf](http://www.unodc.org/pdf/research/Migration_Africa.pdf) at page 1 and 20.

<sup>56</sup> See below Section 14.2. Smuggling as a Business, where the model built by Salt and Stein is discussed. Pursuant to this model, people smuggling should be viewed as a business.

<sup>57</sup> Richard Black, *Breaking the Convention: Researching the "Illegal" Migration of Refugees to Europe*, *Antipode* Volume 35, Issue 1, 2003, pp. 34-54, at page 39.

border control and border surveillance,<sup>58</sup> both of which are even justified by humanitarian considerations for the well-being of the migrants. If human smuggling is, instead, differentiated from exploitation, then states will not have a basis to argue that by adopting restrictive immigration policies they actually save lives and prevent exploitation of human beings. This is the main reason why the present paper argues for keeping the distinction between, from the one hand, human smuggling, as a method of moving people across international borders characterized by the voluntary participation of the migrants, and, from the other hand, human trafficking, which results in human exploitation and is a human rights violation in itself.

This position, however, does not mean that the smuggled migrants, as opposed to people who had been trafficked, are not in need of protection and assistance. In other words, smuggling, as well as trafficking, has to be approached not simply as a crime, as a migration, or as a business, but also as a human rights issue.

#### **1.4. Human Smuggling – Crime, Business, Migration or Human Rights Issue?**

##### **1.4.1. Human Smuggling as a Crime**

Governments view human smuggling as a transnational organized crime.<sup>59</sup> The Protocol against Human Smuggling has been adopted under the umbrella of the UN Convention against Transnational Organized Crime. Governments also view human smuggling as a violation of state authority to control state borders and movement of persons. The legislation

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<sup>58</sup> As defined in the Schengen Borders Code (Articles 2 and 12 of Regulation No 562/2006, border control consists of checks carried out at border crossing points (border checks); border surveillance is surveillance between border crossing points (border surveillance).

<sup>59</sup> Art.3(2) of the UN Convention against Transnational Organized Crime stipulates that an offence is transnational in nature if it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State.



against smuggling is based on the protection of an important state interest, which is the prevention of irregular migration.<sup>60</sup>

Since human smuggling is a crime, a pertinent question to be asked is who the victim is. In the case of trafficking it is clear that the victim is the individual who has been trafficked. However, in the case of smuggling, the smuggled individual not only willingly participates in the process, but he/she could also benefit from it and therefore he/she is not viewed as a victim. Accordingly, the receiving state, which has the sovereign right to control its borders, is identified as the victim.<sup>61</sup> In other words, smuggling is regarded as an encroachment on the public authority of the state.<sup>62</sup>

Art. 6 of the Protocol against Smuggling obliges states to establish human smuggling as a criminal offence. The crime of migrant smuggling is committed when two factors are present. First, the act of migrant smuggling must have been committed intentionally in order to obtain, directly or indirectly, a financial or other material benefit. Second, the *actus reus* element is found in Art. 6(1) and Art.4 of the Protocol.<sup>63</sup> Art. 6 states that the individual (the smuggler) must have been engaged in the actual physical act of smuggling migrants or must have committed for the purposes of enabling the smuggling of migrants one of the following

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<sup>60</sup> C.Gortazar Rotaecche, E.Garcia Coso and A.Obregon Garcia, Trafficking and Smuggling of Human Beings: the Spanish Approach *in* Immigration and Criminal Law in the European Union The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling of Human Beings, *edited by* Elspeth Guild and Paul Minderhoud, Martinus Nijhoff Publishers (2006), pp.271-278, at 277.

<sup>61</sup> Aninia Nadig, Human Smuggling, National Security, and Refugee Protection, *Journal of Refugee Studies*, Vol.15, No.1 (2002), at 8.

<sup>62</sup> Bregje Pieters, Dutch Criminal and Administrative Law concerning Trafficking and Smuggling of Human Beings the Blurred Legal Position of Smuggled and Trafficked Persons: Victims, Instigators or Illegals? *in* Immigration and Criminal Law in the European Union The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling of Human Beings, *edited by* Elspeth Guild and Paul Minderhoud, Martinus Nijhoff Publishers (2006), pp.201-240, at 224.

<sup>63</sup> Claire Brolan, An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refuge Protection Perspective, *International Journal of Refugee Law*, 14 (2002), at 584.

acts - producing fraudulent travel or identity documents, procuring, providing or possessing such documents. Art. 4 provides that the acts indicated in Art.6 must be transnational in nature and must involve an organized criminal group.<sup>64</sup> Attempting to commit the abovementioned offences, participating as an accomplice, organizing or directing other persons to commit them are also to be criminalized.<sup>65</sup>

It is explicitly indicated that migrants are not liable to criminal prosecution under the Protocol for the fact of having been the object of conduct set forth in Art.6.<sup>66</sup> However, it is important to note that the protective value of this provision is likely to be limited as it would not operate to prevent the prosecution of smuggled migration for violation of national immigration laws since Art. 6(4) stipulates that “Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.”<sup>67</sup> Further, the smuggled person could be regarded as complicit with the smuggler and depending on the national legislation, may be criminally liable either as an accomplice or separately for incitement of the crime.<sup>68</sup>

The rationale behind criminalizing human smuggling is that it is associated with transnational organized crime and that it is a form of illegal migration. However, there are problems with each of these justifications, which are to be presented below.

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<sup>64</sup> UN Convention against Transnational Organized Crime Art.2(a) defines organized criminal group: “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;”

<sup>65</sup> Protocol against Smuggling, Art.6(2).

<sup>66</sup> Protocol against Smuggling, Art.5.

<sup>67</sup> Muhammed Tawfiq Ladan, *Migration Trafficking, Human Rights and Refugees under International Law: A Case Study of Africa*, Ahmadu Bello University Press (2004), at 120.

<sup>68</sup> Elspeth Guild, *The Variable Political and Legal Geography of People Smuggling and Trafficking in Europe in Immigration and Criminal Law in the European Union The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling of Human Beings*, edited by Elspeth guild and Paul Minderhoud, Martinus Nijhoff Publishers (2006), pp.408-414, at 408.

In the sense of the UN Convention on Transnational Organized Crime and the Protocol against human smuggling, assisting in the illegal entry or residence of aliens is only criminalized when the crime has features of transnational organized crime. However, contrary to the portrayal of human smuggling as a distinct form of organized crime, the research indicates that the market of human smuggling services is in most cases not dominated by overarching mafia-like criminal structures that have monopolized all smuggling activities from the source to the destination country. Rather, in many regions there exists a complex market for highly differentiated smuggling services offered by multitude of providers from which the potential migrants can choose. Accordingly, the degree to which smuggling is part of or synonymous with large scale organized crime is very debatable.<sup>69</sup>

Under the EU regime human smuggling is viewed within the framework of combating illegal immigration. The EU Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence does not have this pronounced linkage with organized crime. The Directive manifestly expects the punishment of non-organised smuggler as well.<sup>70</sup> While a single act of smuggling a friend does not fall under the UN Protocol. For the EU aims primarily at combating illegal immigration, not as the UN, combating organized crime.<sup>71</sup> As a

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<sup>69</sup> Chapter 4 contains a whole section which exclusively deals with this issue. Chapter 4 indicates various sources to support the claim that it is questionable to what extent human smuggling is a form of organized crime.

<sup>70</sup> Under Art.1.3 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (2002/946/JHA), whose aim is the approximation of the existing national legal provisions, Member states are obliged to punish by custodial sentences the offence of smuggling when it was committed as an activity of a criminal organization.

<sup>71</sup> Bregje Pieters, Dutch Criminal and Administrative Law concerning Trafficking and Smuggling of Human Beings the Blurred Legal Position of Smuggled and Trafficked Persons: Victims, Instigators or Illegals? *in* Immigration and Criminal Law in the European Union The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling of Human Beings, *edited by* Elspeth Guild and Paul Minderhoud, Martinus Nijhoff Publishers (2006), pp.201-240, at 236; Steve Peers, EU Immigration and Asylum Law: Text and Commentary, Leiden : Martinus Nijhoff Publishers (2006), p.833.

result of this approach immigration has been inserted into criminal law. In this way, asylum-seekers who resort to the services of smugglers are portrayed as criminals.

In anticipation of an argument that the sovereign interests of the state are affected (the labor market seems to be the most protected core of sovereignty), when a person is transferred from one state to another, not necessary by way of smugglers but even when he/she crosses the border in a legal way and subsequently becomes an illegally staying foreigner, the following should be mentioned. This touches upon the general and acute problem of illegal migration caused by the huge development gap between the North and the South and the despair faced by many people in their countries. It is not within the scope of the present paper to elaborate on this problem. However, it should be mentioned that the EU has been rightly criticized for not adopting a comprehensive approach to migration, but simply building a wall around itself, which is a manifestation of lack of any solidarity. There is a need for a broader understanding of the implications from smuggling and illegal migration, not the simplistic and policy slogan approach of protection of national labor markets. More specifically, account should be taken of the wealth distribution caused by migrants' remittances, which could be much more empowering and more efficiently used than any kind of assistance by wealthy governments, which makes poor people more dependent.<sup>72</sup> After all, we live in a world where everything is interconnected and if migrants send money home; this is a transfer of wealth, which is anyway needed if we want to make our world a little bit more just. In addition, it is less likely that members of their family will have prospects to join the migrants.

#### **1.4.2. Human Smuggling as a Business**

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<sup>72</sup> James Hathaway, *The Human Rights Quagmire of Human Trafficking* (2008) 49 *Virginia Journal of International Law* pp. 1-59 at 35.

The concept of smuggling and international migration as a business is based on the theory developed by John Salt and Jeremy Stein,<sup>73</sup> who claim that

*Today international migration is better regarded as a diverse international business, with a vast budget, providing hundreds of thousands of jobs world-wide, and managed by a set of individuals and institutions, each of which has an interest in how the business develops.*

A positive result of the model built by Salt and Stein is that since people smuggling is viewed as a business, it can flourish only if there is demand. Accordingly, the measures to “combat” smuggling should be focused on reducing the demand for it. Another positive aspect of the model is that migrants are presented as rational actors. This means that they should not be viewed only as defenseless victims exploited by smugglers, as states try to present them.

However, the Salt and Stein model has been justifiably criticized. Salt and Stein postulate that those involved in the smuggling business and the migrants who use the service are rational profit-making actors. Asylum-seekers are to be subsumed under the ‘profit making’ category since they are pursuing rational goals and they wish to maximize their utilities in the pure economic sense as defined by them. However, the Salt and Stein model does not entirely fit in refugee experiences because refugees have other than purely economical motivations to contact smugglers – fear of being persecuted.

The possibility that smugglers could have ideological motives is also neglected in the model.<sup>74</sup> Further, it fails to account for the overriding significance for most migrants of existing networks of friends, relatives and acquaintances when undertaking their journey. Personal networks, which are based on friendship, family, community membership or co-

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<sup>73</sup> See John Salt and Jeremy Stein, *Migration as a Business: the Case of Trafficking*, *International Migration* (1997) Vol.35, No.4, pp.467-494.

<sup>74</sup> Ilse van Liempt and Jeroen Doomernik, *Migrant’s Agency in the Smuggling Process: the Perspective of Smuggled Migrants in the Netherlands*, *International Migration*, Vol.44 (No.4) 2006, pp. 165-190, at 166.

ethnic relations based on shared origin, have a very important role in facilitating migration, including irregular migration.<sup>75</sup> The last comment is very relevant to the present paper and will be further elaborated on in the fourth chapter. At this point, it should simply be mentioned that friends and relatives networks are relevant since their significance undermines the connection between organized crime and human smuggling, which connection is a justification for taking measures against human smuggling.

### **1.4.3 Human Smuggling only a Migration or also a Human Rights Issue?**

Based on the distinction between smuggling and trafficking and more specifically the association of trafficking with exploitation of people amounting to slavery, trafficking is viewed as a human rights issue, whereas smuggling is viewed as a migration issue.<sup>76</sup> Trafficking is commonly associated with slavery, which is prohibited under international human rights law.<sup>77</sup> Smuggling is a migration issue since it involves strategies for exiting and entering countries and planning routes.

This paper challenges the idea that smuggling is purely a migration issue for the following two reasons. As Khalid Koser points out, smuggling is a human rights issue since the process of smuggling exposes migrants to insecurities.<sup>78</sup> Koser identifies at least three sources of insecurities and vulnerabilities - political, economic and social. The reason for the

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<sup>75</sup> See Emma Herman, *Migration as a Family Business: the Role of Personal Networks in the Mobility Phase of Migration*, *International Migration*, Vol.44 (No.4) 2006, pp.191-222; Khalid Koser, *Negotiating entry into 'Fortress Europe': the migration strategies of 'spontaneous' asylum seekers* in *Exclusion and Inclusion of Refugees in Contemporary Europe*, edited by Phillip Muss, European Research Center on Migration and Ethnic Relations Utrecht University (1997) pp.158-170, at 167.

<sup>76</sup> Khalid Koser, *The Smuggling of Asylum-seekers into Western Europe: Contradictions, Conundrums and Dilemmas* in *Global Human Smuggling Comparative Perspectives*, at 59.

<sup>77</sup> Art.8 of International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>78</sup> Khalid Koser, *The Smuggling of Asylum-seekers into Western Europe: Contradictions, Conundrums and Dilemmas* in *Global Human Smuggling Comparative Perspectives* edited by David Kyle and Rey Koslowski, The John Hopkins University Press Baltimore and London 2001, at 59.

political insecurity is that asylum-seekers who have been smuggled might face a threat of immediate deportation. This is because they might not be allowed to enter the asylum procedure despite the non-penalization of asylum-seekers for illegal entry.<sup>79</sup> A further reason for political insecurity and threat of deportation is that asylum-seekers could have crossed transit countries during the smuggling process, which could justify application of the safe third country concept.<sup>80</sup> The sources of economic vulnerability are associated with the need of paying the smugglers, which might leave asylum-seekers without any money; they might have to stay and work for a certain period of time in transit countries before reaching the desired country of destination. In addition, it has to be taken into account that asylum seekers are usually denied entry into the labor market in the countries of asylum. Even if they find work, they may have to pay debts to the smugglers. Reasons for social insecurity could be that asylum-seekers might end up in countries where they do not have relatives or friends or members of the same nationality or ethnicity. This could happen if the smugglers decide to import the persons to countries where the asylum-seekers have no social network.<sup>81</sup>

Another set of reasons why smuggling is not purely a migration issue, in addition to the arguments of Koser, is that smuggling gives asylum-seekers access to the territories of countries of asylum. Seeking asylum is internationally recognized right enshrined in Art.14 of the Universal Declaration of Human Rights.<sup>82</sup> One of the requirements in Art.1A of the Refugee Convention is that the asylum-seeker has to be outside his/her country of nationality

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<sup>79</sup> See Chapter 4, Section 4.3. The Cost Paid by Asylum-seekers for Using Smuggling Services

<sup>80</sup> For clarification on the safe third country concept see Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, preamble recital 24 and Art.27.

<sup>81</sup> Khalid Koser, *The Smuggling of Asylum-seekers into Western Europe: Contradictions, Conundrums and Dilemmas in Global Human Smuggling Comparative Perspectives*, at 67-69.

<sup>82</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [*hereinafter* UDHR]

in order to be recognized as a refugee, the so called *alienage*.<sup>83</sup> Human smuggling facilitates exit of refugees from countries where their lives and freedoms are threatened. Exit strategies include hiding people if they are in danger or threatened by the country of origin's authorities; organization of flight tickets and travel documents (forging/falsifying documents) and moving people clandestinely across the border.<sup>84</sup> At the same time, refugees need to have contact with the authorities of the potential country of asylum in order to express their need of international protection. Human smuggling facilitates the establishment of this contact by transporting asylum-seekers or by providing them with the necessary documents in order to travel.

### 1.5. Conclusion on Chapter 1

Human smuggling and human trafficking have to be treated as separate concepts not only in a legal sense, but also in the migration policy arguments advanced by states. For this to be achieved it has to be clarified that while human trafficking is in itself a human rights violation, smuggling is more in violation of particular state sovereign interests (controlling borders; preventing entry into state territory by undesired aliens, including asylum-seekers) than a threat to the general well being. If human smuggling is differentiated from exploitation, then states will not have a base for the argument that by adopting restrictive immigration policies they actually save lives and prevent exploitation of human beings.

The rationale of “fighting” human smuggling as a form of transnational organized crime is dubious since the degree to which smuggling is a part of, or synonymous with large scale organized crime, is very debatable. As to the other rationale of taking measures against human

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<sup>83</sup> James Hathaway, *The Law of Refugee Status*, Toronto: Butterworths (1991), 29-33 ; UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), para.88 “It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.”

<sup>84</sup> Khalid Koser, *The Smuggling of Asylum-seekers into Western Europe: Contradictions, Conundrums and Dilemmas in Global Human Smuggling Comparative Perspectives*, at 64.



smuggling connected with combating illegal immigration, it has to be pointed out that states should not forget their obligations concerning people in need of protection. Human smuggling has to be approached from a human rights perspective, in particular from the perspective of the internationally recognized right to seek asylum, since smuggling gives asylum-seekers access to the territories of countries of asylum.

## Chapter 2 The Right to Seek Asylum

In the second chapter it is argued that states have certain human rights obligations towards asylum-seekers and accordingly, they have no unlimited discretion to control immigration. Pursuant to the internationally accepted legal standards, asylum-seekers are not to be penalized for their illegal entry. In the second section of the chapter, it is clarified that asylum-seekers cannot be preemptively qualified as “bogus refugees”, “illegal” or economic migrants.

States have undertaken international obligations in regard to refugees. Whatever measures are taken against human smuggling, the consequences on the right to seek asylum have to be considered so that this right is not devoid of any sense. In this regard, the Protocol against Human Smuggling contains the so-called *Saving clause*,<sup>85</sup> which stipulates that

*Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including*

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<sup>85</sup> Article 19.1.

*international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.*

The EU Directive defining the facilitation of unauthorised entry, transit and residence does not even contain a similarly vague and general provision. The Directive has no reference whatsoever to asylum-seekers. As will become evident from the third chapter of this paper, the measures adopted by states against human smuggling and illegal immigration, not only negatively affect the right to seek asylum, but they specifically target asylum-seekers in order to preclude them from reaching the territories of Western European states. However, refugees are forced to flee and they see human smuggling as an outlet which can bring them to security.

Art.14(1) of the UDHR stipulates that “*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*” The 1951 Convention relating to the Status of Refugees is the cornerstone of the international refugee protection. It contains the refugee definition whose elements are the requirements to be met in order for an individual to qualify as a refugee.<sup>86</sup> Throughout this thesis, the term refugee is, however, used in a broader sense than the definition in the Refugee Convention or in the EU Qualification Directive.<sup>87</sup> This broader sense denotes those people who are in need of protection, temporary or permanent,

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<sup>86</sup> A refugee within the meaning of Art.1A of the 1951 Refugee Convention is a person, who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. Other regional instruments adopt a broader definition: See Convention Governing the Specific Aspects of Refugee Problems in Africa (Art.1(2)), Cartagena Declaration on Refugees adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984.

<sup>87</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted.

because if returned they will be persecuted or face life-threatening danger; or if returned their physical security or vital subsistence needs will be seriously jeopardized. Refugees include victims of generalized violence, conflicts, massive violation of human rights and events seriously disturbing the public order. Refugees are protected from return to a place where they are likely to face persecution or torture.<sup>88</sup> This prohibition is an expression of the principle of *non-refoulement*,<sup>89</sup> which is the most fundamental principle in refugee law.

For the purposes of the present paper, three issues need to be clarified in terms of the right to seek asylum. First, refugees have to leave their country of origin;<sup>90</sup> in the language of the Refugee Convention definition, he/she has to be outside the country of his/her nationality or if he/she has no nationality - outside the country of his/her former habitual residence. Smugglers hide and facilitate the exit of refugees from countries in which they fear persecution. Without smugglers refugees might not be even able to leave their countries.

Second, except for cases of resettlement,<sup>91</sup> asylum-seekers have to reach the frontiers or be in the territory of the country from which asylum is requested; or at least they have to

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<sup>88</sup> Guy Goodwin-Gill, *The Refugee in International Law*, Oxford University Press (1996), p.117.

<sup>89</sup> Art.33 of the Refugee Convention, Art.3 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, Art.3 of Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953.

<sup>90</sup> Internally displaced persons are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border." Internal Displacement Monitoring Center, Guiding Principles on Internal Displacement, Introduction, para.2, *available at* [http://www.internal-displacement.org/8025708F004D404D/\(httpPages\)/CC32D8C34EF93C88802570F800517610?OpenDocument](http://www.internal-displacement.org/8025708F004D404D/(httpPages)/CC32D8C34EF93C88802570F800517610?OpenDocument)

<sup>91</sup> Resettlement is defined as the transfer of refugees from a State in which they have sought asylum to a third State that has previously agreed to admit them as refugees and grant them a form of legal status, with the possibility of acquiring future citizenship. European Council on Refugees and Exile, Resettlement, *available at* <http://www.ecre.org/topics/resettlement>

come under the control of agents of the state, who exercise state jurisdiction.<sup>92</sup> Before these state agents they can express their need to receive protection.

Third, states are not obliged to help refugees reach their territories. States are obliged not to force refugees back to their countries, but they are not obliged to reach out for refugees located beyond their borders.<sup>93</sup> Actually, as Lord Justice Simon Brown in the *Adimi* case recognizes, states are by no means bound to facilitate arrival of refugees, rather they strive increasingly to prevent it.<sup>94</sup>

It is accepted as an axiom that states have the sovereign right to exercise immigration control. Immigration control presupposes two prerogatives – denying or blocking access to state territory, and ensuring the return of those aliens who have succeeded in entering<sup>95</sup> or staying illegally. The justification of the measures against human smuggling is founded on the sovereign right of states to control immigration. As was already indicated, smuggling is viewed as a crime against the state and as a threat to the state's sovereign interests.

However, states have certain human rights obligations, including obligations towards asylum-seekers. This means that it is not only that states have no unlimited discretion to control immigration, but also governments, and in particular those who ascribe to liberal values, ought reasonably to be held to account for the restriction placed on migratory

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<sup>92</sup> Elihu Lauterpacht QC and Daniel Bethlehem QC, *The Scope and Content of the Principle of Non-refoulement in Refugee Protection in International Law*, edited Feller Türk and Nicholson, Cambridge (2003); James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) at 163-170.

<sup>93</sup> James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) at 161.

<sup>94</sup> *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*. [1999] EWHC Admin 765; [2001] Q.B. 667. United Kingdom: High Court (England and Wales). 29 July 1999.

<sup>95</sup> Matthew Gibney and Randall Hansen, *Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom*, New Issues in Refugee Research UNHCR Working Paper No.77, February 2003, at 1, available at <http://www.unhcr.org/3e59de764.html>

freedom.<sup>96</sup> The international human right ‘to seek and to enjoy in other countries asylum from persecution’ outlined in UDHR, as well as the existence of a duty to avoid the return of refugees to their countries of origin (the prohibition of *refoulement*<sup>97</sup>), and perhaps most apparently the explicit prohibition on the imposition of penalties on refugees ‘on account of their illegal entry or presence’, allow no room for the assertion that refugees may be dealt with in a purely discretionary manner.<sup>98</sup>

## 2.1. Non-penalization of Illegal Entry

Art.31(1) of the Refugee Convention stipulates that

*The Contracting States 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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

States have recognized that refugees might have to enter the country of asylum in breach of that country’s immigration laws. In regard to Art.31, the following clarifications are relevant. First, a refugee in flight from risk of being persecuted may invoke Art.31 to avoid penalties for illegal entry or presence, as long as he or she voluntarily reports to asylum state authorities without delay after crossing the frontier. Only refugees who come forward of their own initiative, thereby demonstrating their good faith, are immune from penalization for breach of immigration laws.<sup>99</sup> Second, the voluntary reporting to authorities should occur “without delay”. Without delay is a matter of fact and degree; it depends on the circumstances

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<sup>96</sup> James Hathaway, Three Critical Questions about the Study of Immigration Control *in* Controlling Immigration A Global Perspective *edited by* Wayne Cornelius, Philip Martin and James Hollifield, Stanford University Press (1994), pp.49-51, at 49.

<sup>97</sup> Art.33 Refugee Convention; Art.3 CAT; Art.3 ECHR.

<sup>98</sup> James Hathaway, Three Critical Questions about the Study of Immigration Control *in* Controlling Immigration A Global Perspective *edited by* Wayne Cornelius, Philip Martin and James Hollifield, Stanford University Press (1994), pp.49-51, at 50.

<sup>99</sup> James Hathaway, The Rights of Refugees under International Law, Cambridge University Press (2005) at 390.

of the case, including the availability of advice.<sup>100</sup> “Without delay” is to be interpreted to mean within a reasonable time. Third, refugees are not required to have come directly from their country of origin. Art.31 was intended to apply to persons who briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee, or who have ‘good cause’ for not applying in such countries.<sup>101</sup> As Lord Justice Simon Brown points out in *Adimi* case, merely short term stopover en route to intended sanctuary cannot forfeit the protection of Art.31.<sup>102</sup> In the same sense, Grahl-Madsen writes that “coming directly” is to be interpreted in such a way that it does not impose an obligation solely on countries adjacent to countries of persecution, or – more precisely – that any person who had no factual residence in an intermediary country should be considered coming directly from a country of persecution.<sup>103</sup> Fourth, flight from risk of being persecuted is a ‘good cause’ in itself for illegal entry. Fifth, the protection of Art.31 extends not only to

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<sup>100</sup> Guy Goodwin Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection *in* Refugee Protection in International Law UNHCR’s Global Consultations on International Protection edited by Erika Feller, Volker Turk and Frances Nicholson, Cambridge University Press (2003) pp. 185-252, at 219. In *Adimi* case Lord Justice Simon Brown points out that “... *given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanistically applied or associated with the expression ‘without delay’.*”

<sup>101</sup> “*The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporary or permanently, in another country*” in Guy Goodwin Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection *in* Refugee Protection in International Law UNHCR’s Global Consultations on International Protection edited by Erika Feller, Volker Turk and Frances Nicholson, Cambridge University Press (2003) pp. 185-252, at 218.

<sup>102</sup> See *Adimi* case, Speech of Lord Justice Simon Brown: “*I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing.*”

<sup>103</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law* Vol.II Sijthoff Leiden (1972) at 206-207.

those who are eventually accorded refugee status, but also to asylum-seekers, until and unless they are finally determined not to be in need of protection.<sup>104</sup>

It is very essential also to be clarified that Article 31's protection applies equally to both smuggling practices: to the overt arrivals and to the covert arrivals - those who use false documents and those who enter a country clandestinely.<sup>105</sup> The covert arrivals are more problematic in regard to the protection afforded by Art.31 since asylum-seekers either mislead the authorities by using false documents or tried to avoid them altogether by crossing the border clandestinely at points not designated for border crossing in this way allegedly undermining their good faith and credibility. However, first, Art.31 is applicable to asylum-seekers who are already present without authorization not only to those who enter; second, "without delay" is not subject to literal interpretation, which means that an asylum-seeker can arrive covertly and have good justifications not to claim asylum immediately; third, fear of summary rejection at the border could also constitute good cause for illegal entry into the country, entitling the asylum-seeker to benefit from Art.31.<sup>106</sup>

Except *Adimi* case which has been recognized to constitute the most thorough analysis of Art.31, the present paper takes notice of a more recent case of House of Lords. *R v Asfaw*.<sup>107</sup> further elaborates on the meaning of Art.31. In *R v Asfaw* the main issue is whether an asylum-seeker is entitled to the protection of Art.31 on account of his/her attempt to leave, not to enter, the country illegally using falsified passport. In particular, the asylum-seeker in the case was a woman who left Ethiopia by air travelling on a false Ethiopian passport; she

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<sup>104</sup> James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) at 389.

<sup>105</sup> *Adimi* case Speech of Lord Justice Simon Brown.

<sup>106</sup> James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) at page 393.

<sup>107</sup> *R v Asfaw* (Appellant) (On Appeal from the Court of Appeal Criminal Division) [2008] UKHL 31.

arrived in UK passing through immigration control; then a smuggling agent provided her with a false Italian passport to travel to Washington. However, when she attempted to board the aircraft for USA, the Italian passport was found to be false and she was arrested and charged. Once arrested, she claimed asylum in UK and was subsequently recognized as a refugee. In the meantime she was convicted and had to serve her sentence.

The language of Art.31 refers only to illegal entry and presence. Accordingly, the argument of the respondent in the case was that the offence connected with the usage of false passport was committed in the course of trying to leave the country and not in the course of entering it or as a result of the appellant's illegal presence in UK. However, three out of five of the Lords, relying on the humanitarian purpose of the Refugee Convention and on the difficulties faced by asylum-seekers to actually leave their countries of origin and enter countries of asylum which demands an evolutionary approach to human rights treaty interpretation, did not agree with the respondent.<sup>108</sup> They held that an asylum-seeker is covered by Art.31 and shall not be penalized even if he/she resorts to illegal means of leaving a transit country on his/her way to another country where he/she would like to place an application for asylum. *R v Asfaw* case is demonstrative of a potential for progressive interpretation of Art.31.

The only obligation undertaken by states under Art.31 is not to "impose penalties"; immigration penalties are not in general inapplicable to refugees and asylum-seekers. An asylum-seeker can be charged with an immigration offence (for example illegal entry, illegal presence or usage of falsified documents). However, the proceedings should be suspended

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<sup>108</sup> See the speeches of Lord Bingham, Lord Hope and Lord Carswell.



pending the examination of the asylum request.<sup>109</sup> No conviction should be entered until and unless a determination is made that the individual is not in fact a refugee.<sup>110</sup>

What penalties could states impose on asylum-seekers for their illegal entry or presence? In particular, is the denial or limitation of procedural rights during the refugee status determination procedure, a penalty within the meaning of Art.31? The EU Procedures Directive<sup>111</sup> provides for specific border procedure which applies to those applicants who do not meet the conditions for entry into the territory of Member States. The border procedure may contain exceptions to the guarantees normally enjoyed by applicants.<sup>112</sup> Member states have the discretion to maintain their procedures and rules for deciding cases at the border even if they deviate from the basic guarantees provided in the directive. This means that an asylum-seeker who openly presents himself/herself to the authorities but does not have proper documentation entitling him/her to enter the country legally, could be treated less favorably and could have less procedural rights, which in essence is a penalty inflicted for irregular entry.<sup>113</sup> Accordingly, subjecting asylum-seekers who have been smuggled to a less favorable procedure for determining their application for asylum would be in contravention with Art.31 of the Refugee Convention.

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<sup>109</sup> Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* by Dr. Paul Weis, Cambridge University Press(1995) at 303.

<sup>110</sup> James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) at 407.

<sup>111</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [*hereinafter* EU Procedures Directive]

<sup>112</sup> EU Procedures Directive, See Recital 16 and Art.35.

<sup>113</sup> James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) at 408.

## 2.2. Refugees, “Bogus refugees”, Asylum-seekers, Economic Migrants, “Illegal” or ‘Irregular’ Migrants?

### 2.2.1. The Distinction between Refugees and Asylum-seekers

A very important distinction has to be made between refugees and asylum-seekers. Asylum-seekers only claim to be refugees, but it is not decided yet whether they are refugees and accordingly in need of protection or whether they are not refugees and can be returned back home in safety. Matthew Gibney explains the distinction in the following way. The asylum-seeker makes exactly the same claim for entrance as the refugee: allow me to enter for if you do not I will be persecuted or placed in life-threatening danger. However, unlike refugees in camps and those who gain entry through resettlement programs, the status of an asylum-seeker as an endangered person is not determined.<sup>114</sup>

The term “asylum-seeker” is not to be found in the Refugee Convention. The emergence of the distinction between refugees and asylum-seekers is connected with the distinction between refugees and economic migrants since many economic migrants started using the asylum channel and claimed to be refugees; subsequently, many potential refugees started being referred to as economic migrants. During the 1960s and 1970s, and particularly before the oil crisis in 1973, there were two distinct migration channels into Western Europe, one for labor migrants and another for refugees. Profound economic changes in 1970s, in connection with the oil crisis, focused attention on the question of social welfare; large sections of the labor market were put out of work. Policies restricting labor migration had the consequence of forcing migrants into the asylum channel. One part of the public policy responses was to restrict access to asylum for the so-called ‘economic migrants’.<sup>115</sup> However, these restrictive

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<sup>114</sup> Matthew Gibney, *The Ethics of Politics of Asylum Liberal Democracy and the Response to Refugees*, Cambridge University Press (2004) at 10.

<sup>115</sup> Aninia Nadig and John Morrison, *Human Smuggling and Refugee Protection in the European Union: Myths and Realities in The Refugee Convention at Fifty, A View from the Forced Migration Studies*, edited by Joanne

policies allegedly aimed at preventing economic migrants and preventing the abuse of the asylum channel by economic migrants (the so-called “bogus refugees”<sup>116</sup>), negatively affect people in genuine need of international protection. Aninia Nadig and John Morrison correctly comment that just as closing down the labor migration channel forced economic migrants into the asylum channel, increasing restrictions upon this asylum channel are now forcing asylum-seekers into a new illegal channel.<sup>117</sup>

Since it is not determined or it might never be determined whether asylum-seekers are refugees, states and media are quick to label them “illegal migrants” or “economic migrants”, and since the last two categories of migrants are undesired and even targeted as dangerous, it is easy to justify all the measure for border control and for “combating” human smuggling.

### **2.2.2. The Distinction between Refugees and Economic Migrants**

A rudimentary framework to understand the distinction between refugees and other migrants are the so-called ‘push’ and ‘pull’ factors.<sup>118</sup> Economic migrants, pulled towards countries that offer better opportunities, have a choice whether or not to move, but refugees pushed out of their traditional country do not have a choice.<sup>119</sup>

Economic migrants and refugees can use both legal and illegal ways of migration. In this respect, the United Nations High Commissioner for Refugees [*hereinafter* UNHCR] often

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van Selm, Khoti Kamanga, John Morrison, Aninia Nadig, Sanja Spoljar-Vrzina and Loes van Willigen, Lexington Books, 2003, pp.161-171, at 162-163.

<sup>116</sup> See for example Facilitated Illegal Immigration into the European Union, Europol, March 2008, *available at* [http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Facilitated\\_illegal\\_immigration\\_2008.pdf](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Facilitated_illegal_immigration_2008.pdf)

<sup>117</sup> Aninia Nadig and John Morrison, Human Smuggling and Refugee Protection in the European Union: Myths and Realities *in* The Refugee Convention at Fifty, A View from the Forced Migration Studies, *edited by* Joanne van Selm, Khoti Kamanga, John Morrison, Aninia Nadig, Sanja Spoljar-Vrzina and Loes van Willigen, Lexington Books, 2003, pp.161-171, at 162-163.

<sup>118</sup> See Andreas Demuth, Some Conceptual Thoughts on Migration Research *in* Theoretical and Methodological Issues in Migration Research *edited by* Biko Agozino, Ashgate (2000), pp.21-58, at 34.

<sup>119</sup> Matthew Gibney, The Ethics of Politics of Asylum Liberal Democracy and the Response to Refugees, Cambridge University Press (2004) at.12.

refers to the so called “mixed migration flows”. In practice, this means that, for example, in a boat full of migrants arriving at the coast of Lampedusa through the Mediterranean, there could be both economic migrants, which never claim to be refugees, and asylum-seekers, among whom there could be refugees. As was already clarified, it is accepted that refugees might have to resort to illegal means of entering countries of asylum and that they should not be penalized for that. It is also of paramount importance that it is not in doubt that Art.31 of the Refugee Convention extends not merely to those ultimately accorded refugee status but also to those claiming asylum.<sup>120</sup>

The problem is that economic migrants use the asylum channel to gain access into state territory. This means that they might not be authorized to enter, however upon arrival they claim to be refugees and consequently become asylum-seekers who are under refugee status determination procedure. Since they are asylum-seekers, states are under an obligation not to return them back during the procedure. Once the refugee status determination procedure resulting in a negative decision is over, the immigrants are supposed to leave the country. If they do not leave voluntarily they become illegal. It is recognized that it is legitimate for states to forcefully return illegally staying immigrants.<sup>121</sup> However, a further problem is that states face difficulties deporting illegally staying immigrants. They might not have the necessary travel documents since their countries of nationalities refuse to issue them such; they might be stateless and accordingly there is no other state where they can be sent; they themselves might prevent the deportation by hiding from the authorities; or states might not be able to afford the return flight.

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<sup>120</sup> *Adimi* case Speech of Lord Justice Simon Brown.

<sup>121</sup> See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

As a result of all these, states try to take measures against the abuse of the asylum channel by economic migrants. The overall rationale behind the measures is prevention of departure and arrival of potential asylum-seekers. States go so far as to claim that the arriving migrants cannot be “real” refugees because the “real” refugees actually stay in the region adjacent to the refugee producing states.<sup>122</sup> However, under the flag of “protecting” the asylum channel, states have made it almost impossible for people in need of protection to escape persecution and reach safety.

### **2.2.3. Irregular Migrants<sup>123</sup>**

Irregular migrants include people who enter a country without the proper authority - by entering without passing through border control or entering with fraudulent documents.<sup>124</sup> People who may have entered a country perfectly legally but then remain there in contravention of the laws, for example, by staying after the expiry of their visa or work permit also fall within the category of irregular migrants. The term also includes people moved by migrants’ smugglers or human traffickers.<sup>125</sup> The term covers people who claimed to be

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<sup>122</sup> See for example Facilitated Illegal Immigration into the European Union, Europol March 2008, p.1, available at [http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Facilitated\\_illegal\\_immigration\\_2008.pdf](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Facilitated_illegal_immigration_2008.pdf)

<sup>123</sup> Except illegal and irregular, two other terms are used: ‘undocumented’ and ‘unauthorized’. The term ‘undocumented’ is sometimes used to denote migrants who have not been documented (or recorded), and sometimes to describe migrants without documents (passports or work permits for example). The position of Khalid Koser (International Migration A Very Short Introduction, Oxford University Press (2007), at 55) is that the term “undocumented” is not appropriate, because many irregular migrants are known to the authorities and many do have documents. Similarly he argues that the usage of the term ‘unauthorized’ is very often imprecise, because not all irregular migrants are necessary unauthorized, for example, refugees are irregular migrants. Accordingly, Koser suggests the usage of the term “irregular migrants”.

<sup>124</sup> The position of Jorgen Carling, which is endorsed by the present thesis, is that those who enter by using forged documents are irregular migrants, but their entry is authorized. They enter under the appearance of legality and are, after all, authorized to enter by oblivious immigration officers. Jorgen Carling, Migration Control and Migration Fatalities at the Spanish-African Borders, International Migration Review, 41(2) pp. 316-343, at 321.

<sup>125</sup> Khalid Koser, International Migration A Very Short Introduction, Oxford University Press (2007), at 55.

refugees but were found not to be; however, states cannot deport them and they simply stay in these states.

States refer to migrants who do not follow the regular migration methods as determined by the states' legislation, as "illegal migrants". For the reasons proposed by Koser, the paper uses the term irregular not "illegal migrants". The most powerful criticism of the term "illegal" is that defining people as "illegal" denies their humanity: a human being cannot be illegal. It can easily be forgotten that migrants are people and they have rights whatever their legal status. Another criticism is the connotation of the term "illegal" with criminality. Most irregular migrants are not criminals even though by definition most have breached administrative rules and regulations.<sup>126</sup>

Asylum is increasingly conflated with irregular migration for the following reasons. First, not all asylum-seekers use irregular migration channels, but it seems that an increasing proportion of them do.<sup>127</sup> Accordingly, many asylum-seekers are irregular migrants, but as was already clarified they should not be penalized for that and this should not affect their claims for asylum. Second, many rejected asylum-seekers remain in the country since they cannot be deported back for some practical reasons. Third, not all asylum-seekers are refugees; many are irregular economic migrants, who try to use the refugee channel. Identifying the refugees among these migrants requires state resources. This is one of the reasons why states prefer to prevent the possibility of asylum-seekers to arrive and claim asylum.

States should not qualify asylum-seekers preemptively as 'bogus refugees', as economic or "illegal migrants". Some asylum-seekers use irregular channels to reach the territory of

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<sup>126</sup> Khalid Koser, *International Migration A Very Short Introduction*, Oxford University Press (2007), at 54.

<sup>127</sup> *See for example* John Morrison, *The Trafficking and Smuggling of Refugees: the End Game in European Asylum Policy?* New Issues in Refugee Research, UNHCR Working Paper 39, April 2001.

potential countries of asylum. During the refugee status determination procedure they are not illegal. It should always be considered that asylum-seekers are potential refugees. Before conducting a refugee status determination procedure the state cannot qualify them as “illegal immigrants”. Once an asylum-seeker comes under the control of the state, that state has to conduct a procedure in order to assess if that individual is in need of international protection.<sup>128</sup> After a negative refugee decision, if the former asylum-seeker does not leave the country, he might become illegally staying immigrant.

### **2.3. Conclusion on Chapter 2**

Seeking asylum is an internationally recognized right. In order to exercise the right individuals have to leave their countries of nationality or origin (habitual residence) and reach the countries of destination. In each of these steps human smuggling could have a decisive role. Asylum-seekers are not to be penalized for resorting to illegal means of entering the countries of potential asylum. Therefore, asylum-seekers should not be penalized for using smuggling services.

Both asylum-seekers and economic migrants use illegal ways of entering state territory, which makes the migration flow mixed. However, despite the fact that asylum-seekers are not yet recognized refugees, they should not be qualified as economic migrants, as “bogus refugees” or as “illegal migrants” before the conduction of fair and effective refugee status determination procedure. They should not also be qualified as “criminals” for using the smuggling channel for migration. Once an asylum-seeker comes under the control of the state, that state has to conduct a procedure in order to assess if that individual is in need of international protection. If after the procedure is determined that the immigrant is not in need of protection and if he/she does not have any other grounds to stay in the country, he/she

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<sup>128</sup> Alice Edwards, Human Rights, Refugees, and the Right To Enjoy Asylum, *International Journal of Refugee Law* 17 No.2 2005, at 302; Alice Edwards, *Tampering with Refugee Protection: The Case of Australia*, (2003) 15 *International Journal of Refugee Law*, at 198.

becomes irregular immigrant, who could be subject to deportation or to criminal prosecution for his/her involvement into smuggling contingent on the national legislation of the particular state.

### **Chapter 3 Controlling Borders – Lack of Alternatives to Smuggling**

The aim of the present chapter is to show the “wall” that European Union states have built and how practically for an asylum-seeker it is impossible to enter these states. The first section of the chapter answers to the question what in reality the contemporary borders are and how the way we think about them has to be modified. Then, visas are presented as an instrument for keeping out the “undesirables”, asylum-seekers being among them. The third section of the chapter presents carrier sanctions as an instrument for keeping the “undesirables” inside their country of origin. The fourth section deals with immigration liaison officers as an instrument for ensuring the efficacy of visas. The last section deals with the European border agency – Frontex, as another instrument for border control.

#### **3.1. Deconstruction and Delocalization of the Institution of Border**

The external borders of the EU are defined as “the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders.”<sup>129</sup> However, in the present paper borders

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<sup>129</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [*hereinafter* Schengen Borders Code], Art.2.2. Art.2.1 of the Schengen Borders Code defines internal borders: “Internal borders means the common land borders, including river and lake borders, of the Member States”



are not understood in this limited literal sense.<sup>130</sup> The notions of what and where borders are have been deconstructed.

Further, border control in regard to border crossing of persons is defined as “activity carried out at a border ... in response exclusively to an intention to cross or the act of crossing that border ...”<sup>131</sup> However; similarly to the change in the understanding of borders, the understanding of border control has to be deconstructed. In other words, border control is not only an activity carried out at the border, but it is an activity which starts far before reaching the physical EU borders. Accordingly, border control is also to be used in a broad sense.

The effective border of the EU does not coincide with the geographical line around its territory. Accordingly, the idea that border controls are only linked with the place where the EU borders run has to be abandoned. Didier Bigo asserts that the institution of border has been delocalized; it has become malleable<sup>132</sup> since it is capable to adapt to different groups of individuals and its effect on the lives of individuals varies from group to group. For some, a foreign border may be experienced within a foreign state’s territory whether at the port or the immigration queues of the international airport. For others, the border may be experienced within the persons’ own country at the foreign country’s consulate when applying for a visa.<sup>133</sup>

Controlling who enters the territory of EU states is conducted not at the line, which delineates the state territory, but beyond that line. Lavenex refers to this phenomenon as

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<sup>130</sup> Lord Bingham draws a distinction between “literal” and “metaphorical” borders. *In R (on the application of European Roma Rights Center et al.) v. Immigration Officer at Prague Airport & Anor (UNHCR intervening)* [2004] UKHL 55; [2005] 2 AC 1. Speech of Lord Bingham of Cornhill, at para.26

<sup>131</sup> Schengen Borders Code, Art.2.9.

<sup>132</sup> Didier Bigo, *Frontier Controls in the European Union: Who is in Control in Controlling Frontiers Free Movement into and within the Europe*, ed. Elspeth Guild, Didier Bigo, Ashgate Publishing 2005, at 49-50.

<sup>133</sup> Alison Kesby, *The Shifting and Multiple Border and International Law*, 27 *Oxford Journal of Legal Studies* (Spring 2007), at 113.

“remote control.”<sup>134</sup> Other authors argue that the border control has been “externalized” beyond national borders<sup>135</sup> or that states apply external measures of border control.<sup>136</sup> Measures aimed at preventing third-country nationals from even appearing at the physical border of an EU Member State have also been characterized as deterrence measures<sup>137</sup> and have also been referred to as *non-entree*’ policies.<sup>138</sup>

The reason for this externalization of control is prevention of migration at its source. Accordingly, external measures of border control are preventive measures.<sup>139</sup> They are undertaken by the states to either prevent departure or to prevent arrival at the country of destination. This means that potential migrants should not be able to leave their countries of origin on the first place, or if they managed somehow to leave they should be preemptively intercepted and not allowed to arrive in the destination country.

By preventing migration at the source, and therefore by making sure that would-be asylum-seekers do not reach the territory of receiving countries, governments no longer have to intercept and return migrants heading towards their borders with the risk of violating the

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<sup>134</sup> Sandra Lavenex, *Shifting Up and Out; the Foreign Policy of European Immigration Control*, *West European Politics*, (2006) vol. 29, no. 2, pp. 329–350.

<sup>135</sup> Virginie Guiraudon and Christian Jappke, *Controlling a New Migration World in Controlling a New Migration World*, edited by Virginie Guiraudon and Christian Jappke, London New York 2001, at 13.

<sup>136</sup> Annalisa Meloni, *Legal and Political Significance of Passports and Visas* Berlin/New York (Springer, 2006) at 39-40. External measures are seen as less problematic than ‘internal’ ones. Examples of internal measures are identity checks; residence and work permit requirements employer sanction, inspections, removal, restriction on access to social benefits. These measures are viewed as more costly.

<sup>137</sup> Ryszard Cholewinski, *No Right of Entry: The Legal Regime on Crossing the EU Border in In Search of Europe’s Borders* edited by K. Groenendijk, E. Guild, and P. Minderhoud, The Hague: Kluwer (2003) at page 111.

<sup>138</sup> James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) at 291.

<sup>139</sup> Grete Brochmann, *The Mechanisms of Control in Mechanisms of Immigration Control A Comparative Analysis of European Regulation Policies* edited by Grete Brochmann and Tomas Hammer, Oxford Berg (1999), at 12.

prohibition of *refoulement*; governments will not have to conduct a refugee status determination procedure which requires state resources; governments need no longer expel failed asylum claimants, or since often governments cannot expel the failed asylum-seekers they will not have to deal with that many irregular migrants. Governments simply want to make sure that these asylum-seekers do not reach the physical borders.<sup>140</sup>

Visa requirements, imposition of carrier sanctions, liaison officers and Frontex are methods used by the EU states to “externalize” their borders and the following sections of this chapter will address each of them.

### **3.2. Visas - an Instrument for Keeping out the “Undesirables”, including Asylum-seekers**

Visa means an authorization issued by a Member State which is required with a view to entry for an intended stay in the state or transit through the territory of the state.<sup>141</sup> The visa itself is an expression of sovereignty; it is an instrument to control entry into the States and to keep out “undesirables.”<sup>142</sup> Visa regimes are generally described as ‘external’ measures, which aim at preventing the arrival of migrants.<sup>143</sup> However, since it is complemented with carrier sanctions and liaison officers, the visa is also an external measure which aims at preventing the departure of migrants. Officials of air carriers under the advice of liaison officers would not allow a migrant to board the plane if he/she does not have visa thus preventing his/her departure.

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<sup>140</sup> Sophie Scholten and Paul Minderhoud, *Regulating Immigration Control: Carrier Sanctions in the Netherlands*, *European Journal of Migration and Law* 10 (2008) pp.123–147, at 128.

<sup>141</sup> Council Regulation (EC) No 539/2001 of 15 March 2001 listing the Non-EU Member Countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

<sup>142</sup> Annalisa Meloni, *Legal and Political Significance of Passports and Visas* in Annalisa Meloni, *Visa Policy within the European Union Structure* (Berlin/New York, Springer, 2006) page 24-38.

<sup>143</sup> Annalisa Meloni, *Legal and Political Significance of Passports and Visas* in Annalisa Meloni, *Visa Policy within the European Union Structure* (Berlin/New York, Springer, 2006) page 39-40.

In line with the first section of this chapter “Deconstruction and Delocalization of the Institution of Border”, Elspeth Guild explains that the visa requirement has changed our perceptions on borders.<sup>144</sup> A national of a country in the ‘black list’ first encounters the EU border at the consulate of the EU state when he/she seeks a visa. The first physical contact between the third country national and the EU is at the consulate or embassy. Consequently, from EU perspective the world is divided into two: those persons who are required to obtain visas before leaving their countries of origin if they seek to come to the EU, and all the rest who do not need visa. For the first group of persons the border of the EU starts within their own countries or in a third country where the nearest consulate of an EU state is to be found, which might be hundreds of kilometers away.

The EU has drawn up a common list of non-EU member countries whose nationals must be in possession of a visa when crossing the Member States’ external frontiers with a view to harmonizing Member States’ visa policies.<sup>145</sup> The determination of those third countries whose nationals are subject to the visa requirement and those exempt from it, is governed by a

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<sup>144</sup> Elspeth Guild, *The Border Abroad: Visas and Border Controls* in K. Groenedijk, E. Guild and P. Minderhoud, *In Search of Europe’s Borders*, The Hague: Kluwer (2003) page 88.

<sup>145</sup> The historic description of the EU legislation on visas is as follows. Council Regulation (EC) No 539/2001 of 15 March 2001 listing the Non-EU Member Countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement replaced Regulation (EC) No 574/1999. Under the new Regulation, nationals of Non-EU Member Countries listed in Annex I must be in possession of a visa when crossing the external borders of the Member States. Colombia, the Palestinian Authority and East Timor have been added to this list. Nationals of Non-EU Member Countries on the list in Annex II do not need to be in possession of a visa when crossing the external borders of the Member States. Countries on this list include the Special Administrative Regions of Hong Kong and Macao, as well as Bulgaria and Romania. Regulation (EC) No 2414/2001 amended Regulation (EC) No 539/2001, from which the provisions temporarily requiring Romanian citizens to be in possession of a visa were dropped. Council Regulation (EC) No 453/2003 of 6 March 2003 subsequently amended Regulation (EC) No 539/2001 to include Ecuador on the list of Non-EU Member Countries whose nationals are required to be in possession of a visa. Council Regulation (EC) No 851/2005 of 2 June 2005 amended Regulation (EC) No 539/2001 as regards the reciprocity mechanism. Council Regulation (EC) No 1932/2006 of 21 December 2006 amended Regulation (EC) No 539/2001 by, *inter alia*, imposing the visa requirement for nationals of Bolivia and removing visa requirements for nationals of Antigua and Barbuda, the Bahamas, Barbados, Mauritius, Saint Kitts and Nevis, and the Seychelles. See <http://europa.eu/scadplus/leg/en/lvb/l14007b.htm>

considered case by case assessment of a variety of criteria relating *inter alia* to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity.<sup>146</sup> All African countries are in the black list. All refugee producing and war-torn countries, including Afghanistan, Iraq, Somalia, Sudan and the Palestinian Territories are in the list.<sup>147</sup> Hathaway comments that the effectiveness of visa controls as a means of barring genuine refugees from securing protection is clear.<sup>148</sup>

The conditions for issuing of visa are indicated in the Schengen Border Code,<sup>149</sup> the Common Consular Instructions<sup>150</sup> and in the newly adopted Community Code on Visas.<sup>151</sup> Visa may be issued only if an alien fulfils the conditions of entry: possession of a valid document; possession of documents substantiating the purpose and the conditions of the planned visit; possession of sufficient means of support; absence from the list of persons

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<sup>146</sup> Council Regulation (EC) No 539/2001 of 15 March 2001 listing the Non-EU Member Countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, preamble (5).

<sup>147</sup> Exemptions are possible for persons admitted to a temporary protection regime, but not more generally. *See* Art.8.3. 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 “The Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.”

<sup>148</sup> James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), at 293.

<sup>149</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [*hereinafter* Schengen Borders Code]

<sup>150</sup> Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts (2005/C 326/01)

<sup>151</sup> Regulation of the European Parliament and of the Council establishing a Community Code on Visas (Visa Code), available at <http://register.consilium.europa.eu/pdf/en/09/st03/st03625.en09.pdf>

banned from entry in the Schengen Information System (SIS)<sup>152</sup>; and the individual should not be considered to be a threat to public policy, national security or the international relations of any of the Contracting Parties.

Except for a list of countries whose nationals have to be in possession of visa and a list of countries whose national do not have to be in possession of visa, there is another list of countries whose nationals are required to be in possession of airport transit visas [*hereinafter* ATVs]. In the Common Consular Instructions,<sup>153</sup> ATV is defined as a visa which entitles aliens who are required to have such a visa, to pass through the international transit area of airports without actually entering the national territory of the country concerned during a stop-over or transfer between two sections of an international flight.<sup>154</sup> Nationals of 12 states referred to as sensitive<sup>155</sup> (Afghanistan, Bangladesh, Congo, Eritrea, Ethiopia, Ghana, Iran, Iraq, Sri Lanka, Nigeria, Pakistan and Somalia) need airport transit visa merely to sit on an airport lounge or plane without even crossing passport control in the relevant Member State.<sup>156</sup> ATV holders may not leave the international section of the airport through which they travel in transit. ATVs target specifically countries from which asylum seekers are likely to originate. ATVs are used to prevent asylum applications at airports from individuals in

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<sup>152</sup> The SIS exists firstly for the use of national police, and border control authorities when making checks on persons at external borders or within Schengen states; and secondly for the use of immigration officers when dealing with third-country nationals, in particular when deciding whether to issue visas or residence permits. Steve Peers, *EU Justice and Home Affairs Law*, Oxford University Press, 2<sup>nd</sup> ed. (2006) at 548.

<sup>153</sup> Common consular instructions on visas for the diplomatic missions and consular posts of the contracting parties to the Schengen Convention *OJ C 326, 22.12.2005* (2005/C 326/01).

<sup>154</sup> Common consular instructions on visas for the diplomatic missions and consular posts of the contracting parties to the Schengen Convention *OJ C 326, 22.12.2005* (2005/C 326/01), Art.2.1.1.

<sup>155</sup> Common consular instructions on visas for the diplomatic missions and consular posts of the contracting parties to the Schengen Convention *OJ C 326, 22.12.2005* (2005/C 326/01), ATVs Example 1.

<sup>156</sup> Annex 3, Part 1 of the Common Consular Instructions.

transit towards further destinations, and are often introduced in response to an increase in asylum applications by people travelling a given route.<sup>157</sup>

Asylum-seekers are not exempted from the visa requirement, which means that if they want to flee and to set themselves, for example, on an airplane with the destination to one of the EU Member State, they need to be in possession of visa. Art.13 of the Schengen Border Code contains a safeguard; it stipules that a third-country national who does not fulfill all the entry conditions shall be refused entry to the territories of the Member States, however, this shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection. The problem is that this safeguard can be implemented only if the asylum-seeker somehow managed to reach the border, which might not be the case since he/she might not be allowed to board the aircraft on the first place.

There is no separate type of refugee visa issued for the purposes of seeking asylum; there is only the so-called humanitarian grounds exception. Art.5.4.c of the Schengen Borders Code provides that *“third-country nationals who do not fulfill one or more of the conditions laid down in paragraph 1 may be authorized by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations.”* This means that some Member states might issue a visa although the applicant does not fulfill the conditions, which will enable him/her to travel to the respective country where he/she can have full refugee status determination procedure. The problem with this exception is that it is not clear how the states apply it, how many visas on humanitarian grounds are issued or whether asylum-seekers are familiar with this option. The recently adopted Community Code on Visas does not introduce any light into this issue.<sup>158</sup>

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<sup>157</sup> European Council on Refugees and Exiles (ECRE), *Defending Refugees’ Access to Protection in Europe*, December 2007, p.27, available at <http://www.ecre.org/files/Access.pdf>

<sup>158</sup> Regulation of the European Parliament and of the Council establishing a Community Code on Visas (Visa Code), available at <http://register.consilium.europa.eu/pdf/en/09/st03/st03625.en09.pdf>

The conditions for issuance of visa cannot be fulfilled by many asylum-seekers. Very often asylum-seekers are not in possession of valid documents since there is no effective government to issue them such documents; they cannot approach the authorities since they fear them; or they might have left under extreme conditions and were not able to take them. Further, as Elspeth Guild comments, the criteria for a visa for a short stay, indicated in the Common Consular Instructions, excludes the possibility that an asylum-seeker might qualify because the person must intend to leave the territory before the end of his or her three month stay. This will never be the case for an asylum-seeker.<sup>159</sup> Trough the lack of any discrimination between asylum-seekers and other aliens, governments ignore the very problems which give rise to the need of refugee protection. However, refugees are forced to move; if one avenue is closed they will have to find another one.

### **3.3. Carrier sanctions - an Instrument for Keeping the “Undesirables” inside their Countries of Origin**

This section of the paper examines the role of private carriers<sup>160</sup> in undertaking immigration control functions and the impact of these controls on individuals seeking to enter state territory for the purpose of seeking asylum.

The visa requirement by itself cannot achieve the goal aimed at by the EU – “curbing migration flows” and “combating illegal immigration”.<sup>161</sup> The goal cannot be achieved because persons who do not have a visa could still, in the absence of pre-boarding checks, board an aircraft or a vessel, travel to an EU country and apply for asylum upon entry.

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<sup>159</sup> Elspeth Guild, *The Legal Framework. Who is entitled to move? in Controlling Frontiers Free Movement into and within the Europe*, edited by Elspeth Guild, Didier Bigo, Ashgate Publishing (2005), at 35-36.

<sup>160</sup> Art.2.14 of the Schengen Border Code defines carrier as any natural or legal person whose profession it is to provide transport of persons.

<sup>161</sup> 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, 10.7.2001, p. 45–46, preamble para. 2.*



Accordingly, states have to adopt a mechanism, which precludes the possibility for migrants to board the aircraft. This is realized through the imposition of legal norms, which oblige carriers to conduct pre-boarding checks in order to prevent individuals, who are not in possession of the necessary entry documents required by the destination country, from boarding. If the carriers do not apply the norms sanctions follow. Carrier sanctions are thus an enforcement mechanism for visa requirements.<sup>162</sup>

Article 26 of the Schengen Convention gives the basis for the establishment of norms on carrier responsibility regarding immigration control. If aliens are refused entry, the carrier which brought them to the external border by air, sea or land “shall be obliged to return the alien to the third state<sup>163</sup> from which they were transported, or to the third state which issued the travel document on which they travelled, or to any other third state to which they are certain to be admitted.” The carrier is obliged to “take all necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry....” The states undertake to impose penalties on carriers which transport aliens who do not possess the necessary travel documents by air or sea from a third state.

Council Directive 2001/51,<sup>164</sup> which supplements the provisions of Article 26 of the Schengen Convention, defines certain conditions with respect to carrier sanctions’ implementation. When entry is refused to a third country national in transit, the Directive provides that carriers have the obligation to return him/her. This might happen if “the carrier which was to take him to his/her country of destination refuses to take him on board” or if “the authorities of the State of destination have refused him entry and have sent him back to

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<sup>162</sup> Erika Feller, Carrier Sanctions and International Law, *International Journal of Refugee Law*, Vol.1, No.1, pp.48-66, at p. 50.

<sup>163</sup> Art.1 of the Schengen Convention defines third State as any State other than the Contracting Parties.

<sup>164</sup> 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.

the Member State through which he transited.”<sup>165</sup> Further, if the carrier itself cannot effectuate the return of a third country national, it shall be obliged to “find means of onward transportation immediately and to bear the costs thereof”. If this is not possible, the carrier shall be obliged to “assume the responsibility for the costs of the stay and return.”<sup>166</sup> The Directive stipulates the imposition of financial penalties if carriers do not fulfill their obligations<sup>167</sup> and does not preclude the possibility of states undertaking additional measures against carriers<sup>168</sup> (additional measures could be immobilisation, seizure and confiscation of the means of transport, or temporary suspension or withdrawal of the operating licence).

The Schengen Convention and the Council Directive 2001/51/EC refer to the Member States’ obligations under the Refugee Convention. More specifically, in the preamble of the Directive 2001/51/EC it is stated that the “application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.” In the second paragraph of Article 4, which specifies the financial penalties for carriers, it is indicated that “Paragraph 1 is without prejudice to Member States’ obligations in cases where a third country national seeks international protection.” Similarly, Article 26 of the Schengen Convention stipulates that the measures in regard to carriers are subject to the obligations resulting from the accession to the Refugee Convention.

However, these are just declarations. There is no enforceable asylum exception. Instead, there are some general and vague phrases. The Directive does not explicitly acknowledge that

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<sup>165</sup> Council Directive 2001/51/EC, Art.2

<sup>166</sup> Council Directive 2001/51/EC, Art.3

<sup>167</sup> Council Directive 2001/51/EC, Art.4. The maximum amount of the applicable financial penalties is not less than EUR 5 000 or equivalent national currency. The minimum amount of these penalties is not less than EUR 3 000 or equivalent national currency.

<sup>168</sup> Council Directive 2001/51/EC, Art.5.

a person with a well-founded fear of persecution may have to seek entry without having the required documents for which a carrier should not be penalized.<sup>169</sup> It remains unclear what the reference to the Geneva Convention means in practice.<sup>170</sup> Without any clarity regarding asylum cases, carriers are more than discouraged from transporting potential asylum-seekers.

The original proposal drafted by France included an exemption, according to which penalties are not applied if the third country national is admitted to the territory for asylum purposes.<sup>171</sup> Germany explicitly did not agree with the exemption.<sup>172</sup> Germany substantiated its position by stating that “unlawful transport must be judged separately from the asylum application”. This means that a distinction is to be made between, on the one hand, “an individual who lodges an application for asylum and is then granted a provisional right to remain until a decision has been taken on the application, and on the other hand, possible measures penalizing carriers which fail to comply with their legal obligations.” From these words, one might think that asylum-seekers just appear at the borders of the countries of potential asylum and they do not have to be transported from their countries of origin.

Further, the German position was that if the exemption from penalties in case of lodging an asylum application is accepted, this could “make penalties for carriers ineffective and increase asylum-applications.” This statement makes clear that the idea behind the Directive

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<sup>169</sup> J. van der Klaauw, *Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?*, in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* edited by B. Bogusz, R. Cholewinski, A. Cygan, and E. Szyszczak, Leiden: Martinus Nijhoff (2004), at page 119.

<sup>170</sup> Steve Peers, *EU Justice and Home Affairs Law*, Oxford University press, 2<sup>nd</sup> ed., (2006) at 264.

<sup>171</sup> Initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission [2000] OJ C 269/06 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:269:0008:0009:EN:PDF>

<sup>172</sup> Note by the German delegation on initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals not in possession of the documents necessary for admission (10701/00 FRONT 42 COMIX 589), Council doc 12361/00, 16 Oct 2000, para.4.

was to deter and prevent asylum seekers from using carriers as a method of gaining access to the territory of potential countries of asylum.

When the European Parliament was consulted on the draft Directive, it proposed an amendment which excluded penalties where “a third country national seeks asylum immediately after arriving on the territory of the State of destination”, “the person carried is granted refugee status or leave to remain under a subsidiary form of protection” or “the person is admitted to the asylum determination procedure.”<sup>173</sup> The most important idea is that carriers which transport foreigners who apply for asylum after arrival and whose applications are rejected, must be exempt from penalties. The Parliament rightly justified this position by stating that *“If a carrier is required to assess the motives of an asylum-seeker, this will adversely affect the latter's rights and mean that the carrier wrongly takes on the role which is proper to the State in asylum procedures, for the State alone is responsible for examining requests for asylum.”* If a carrier transports a person who after arrival applies for asylum, the fine should be waived, which means that the fine should never be imposed on the first place. The waiver should be irrespective of the success of the asylum application. The idea of refunding the carrier once a fine has already been imposed, if the transported person applied for asylum or even worse, if the asylum application is successful, is to be rejected. As the Parliament explains the reason is that *“Faced with a would-be asylum-seeker with inadequate documentation, the carrier would err on the side of caution and refuse to carry such a person, leading, in effect, to refoulement.”* The warnings of the Parliament have not been taken into consideration and the final version of the Directive contains simply some general references to the Refugee Convention.

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<sup>173</sup> European Parliament, Final Report A5-0069/2001 on the initiative of the French Republic for adoption of a Council directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission (14074/2000 – C5-0005/2001 – 2000/0822(CNS)), 27 February 2001, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs Rapporteur: Timothy Kirkhope, See Amendment 5.

The national legislation of some of the Member States envisages exemptions to carrier liabilities when asylum-seekers are involved. For example, the German Aufenthaltsgesetz stipulates that when transporting passengers without valid entry documents, carriers are liable to sanction for three years following the passenger's arrival. If the person is granted protection the sanction expires, which means that it is not imposed.<sup>174</sup> Pursuant to the legislation in Finland the penalty shall be revoked if the alien may stay in the country on the grounds that he or she is issued with a residence permit on the basis of refugee status, a need for protection or of temporary protection.<sup>175</sup> According to the Austrian Fremdenpolizeigesetz, the sanction against the carrier has to be annulled if the alien is granted a refugee status or subsidiary protection, which does not allow his removal from the state.<sup>176</sup> It can be concluded that according to the legislation of the abovementioned countries, no relief from penalization is available unless the asylum claim is ultimately determined to be well-founded.<sup>177</sup>

Carrier sanctions have been subjected to severe criticism from researchers<sup>178</sup> and human rights organizations.<sup>179</sup> First, carrier sanctions undermine the institution of asylum and deprive the right to seek asylum<sup>180</sup> from any sense, since the asylum-seekers cannot leave their countries and cannot have access to the territory of potential asylum states. Carriers' position

<sup>174</sup> Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet § 64 (2)

<sup>175</sup> Aliens Act 301/2004(amendments up to 973/2007 included), Chapter 11, Section 182 (653/2004)

<sup>176</sup> Fremdenpolizeigesetz 2005 (Fremdenrechtspaket 2005) BGBl. I Nr. 100/2005 zuletzt geändert durch BGBl. I Nr. 157/2005, Inkrafttretensdatum 01.01.2006, Art. 3 § 112 (2)

<sup>177</sup> In some other jurisdictions like Belgium, France and Luxemburg, carriers are exempted from penalties if an asylum claim is deemed admissible. See James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) at 389.

<sup>178</sup> See for example Erika Feller, *Carrier Sanctions and International Law*, *International Journal of Refugee Law*, Vol.1, No.1, 48-66.

<sup>179</sup> See for example ECRE's Position on Carrier Sanctions, available at [http://www.ecre.org/topics/access\\_to\\_europe/carrier\\_sanctions](http://www.ecre.org/topics/access_to_europe/carrier_sanctions)

<sup>180</sup> Art.14 UDHR

can be characterised as that of ‘gatekeepers’,<sup>181</sup> while the function of the visas is screening. This is the reason why Virginie Guiraudon rightly concludes that carrier sanctions are targeted specifically at asylum-seekers, whereas visa policy seems to concentrate on the poor as prospective migrants.<sup>182</sup>

Second, the control is performed by private actors. Governments have delegated responsibilities concerning immigration to private carriers. Virginie Guiraudon refers to airlines as “sheriff’s deputies” since their officials have to have the same level of expertise as visa and passport control officers have.<sup>183</sup> Carrier employees have to check not only whether their passengers are in possession of the documents required by the destination country for entry, but also whether these documents are falsified.<sup>184</sup> Rey Koslowski notes that document checks by airline employees may have stopped many would-be migrants from ever getting close to an airplane, but human smugglers are changing the equation by providing fraudulent documents to the migrants.<sup>185</sup> The more the document inspection and verification is devolved to nonexpert personnel, the greater the chances that fraudulent documents will not be detected

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<sup>181</sup> Sophie Scholten and Paul Minderhoud, *Regulating Immigration Control: Carrier Sanctions in the Netherlands*, *European Journal of Migration and Law* 10 (2008) pp. 123–147, at 134.

<sup>182</sup> Virginie Guiraudon, *Before the EU Border: Remote Control of the “Huddled Masses”* in *In Search of Europe’s Borders*, edited by K.Groenendijk, E.Guild and P.Minderhoud, The Hague: Kluwer Law International (2003), p.202.

<sup>183</sup> Virginie Guiraudon, *De-nationalizing Control, Analyzing State Responses to Constraints on Immigration Control* in *Controlling a New Migration World* edited by Virginie Guiraudon and Christian Jappke, London New York (2001), at page 40.

<sup>184</sup> Note by the Council of the European Union No.Initiative doc. 10701/00 FRONT 42 COMIX 589 Draft Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission, 29 November 2000. Annex II of the document contains a draft statement to be included in the minutes of the meeting at which the Council adopted the Directive. It is stated that “For the purposes of applying this Directive, the Council has agreed that using an obvious forgery or obvious usurpation is equivalent to the absence of a travel document.”

<sup>185</sup> Rey Koslowski, *The Mobility Money Can Buy: Human Smuggling and Border Control in the European Union* in *The Wall Around the West State Borders and Immigration Controls in North America and Europe* edited by Peter Andreas and Timothy Snyder, Rowman and Littlefield Publishers (2000) at page 212-213.

and the greater the likelihood that migrants using them will be successful in evading migration controls. Fraudulent documents only need to be good enough to board aircraft. Migrants can destroy them and apply for asylum once in the target country.<sup>186</sup>

Due to the validity of the remark made by Koslowski that airlines officials might not be that good at identifying forged documents, states have come up with another instrument to prevent the departure of would-be asylum seekers – the positioning of airline liaison officers. Their functions are addressed in the next section.

### 3.4. Immigration Liaison Officers - Ensuring the Efficacy of Visas

Immigration Liaison Officer [*hereinafter* ILO] is defined as “*a representative of one of the Member States, posted abroad by the immigration service or other competent authorities in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration.*”<sup>187</sup> The term ILO refers to immigration staff posted to Member States’ diplomatic mission, including within the EU, in countries of origin or in transit countries. The term also covers Member States’ immigration representatives posted to international airports abroad, more specifically known as Airline Liaison Officers, who work with airlines.<sup>188</sup> ILOs’ functions include collection of information on illegal immigration and rendering assistance in establishing the identity of third country

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<sup>186</sup> Rey Koslowski, *The Mobility Money Can Buy: Human Smuggling and Border Control in the European Union in The Wall Around the West State Borders and Immigration Controls in North America and Europe* edited by Peter Andreas and Timothy Snyder, Rowman and Littlefield Publishers (2000) at page 212-113.

<sup>187</sup> Council Regulation (EC) No. 377/2004 of 19 February 2004 on the creation of an immigration liaison officer network, Art.1.

<sup>188</sup> Sile Reynolds and Helen Muggeridge, *Remote Controls: How UK Border Controls are Endangering the Lives of Refugees*, Refugee Council, December 2008, at 35.

nationals and in facilitating their return to their country of origin.<sup>189</sup> The purpose of ILOs is to “reduce the number of improperly documented passengers travelling from or through” the country in which they are posted.<sup>190</sup> More specifically, they offer advice to carriers on the acceptability of documents presented for travel and whether or not the airline is likely to be fined if embarkation is allowed.<sup>191</sup> The final decision whether or not to carry a passenger lies with the airlines; however negative advice appears to be almost always followed.<sup>192</sup> These pre-boarding checks are methods of advising and helping the carrier companies.

One cannot help wondering why the Council Regulation 377/2004 on the creation of an ILO network does not make any reference to asylum-seekers, taking into consideration that they are migrants, who use falsified documents in order to flee and accordingly ILOs will inevitably face them. The International Air Transport Association’s Code of Conduct for Immigration Liaison Officers provides that if an ILO receives request for asylum “applicants should be directed to the office of the UNHCR, to the appropriate diplomatic mission(s), or to the appropriate local NGO.”<sup>193</sup> It is far from clear how this can help an asylum-seeker who is trying to leave his country of origin. The UK Refugee Council reports that, in practice, an airline liaison officer will, in most situations, refer any irregular passenger directly to local

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<sup>189</sup> Council Regulation (EC) No. 377/2004 of 19 February 2004, on the creation of an immigration liaison officer network, Art.2 (2)(3).

<sup>190</sup> A Code of Conduct for Immigration Liaison Officers, October 2002, prepared by agreement within the International Air Transport Association Control Authorities Working Group, *available at* [http://www.icao.int/icao/en/atb/fal/fal12/documentation/fal12wp040\\_en.pdf](http://www.icao.int/icao/en/atb/fal/fal12/documentation/fal12wp040_en.pdf)

<sup>191</sup> Sile Reynolds and Helen Muggeridge, Remote Controls: How UK Border Controls are Endangering the Lives of Refugees, Refugee Council, December 2008, at 36.

<sup>192</sup> Sophie Scholten and Paul Minderhoud, Regulating Immigration Control: Carrier Sanctions in the Netherlands, *European Journal of Migration and Law* 10 (2008) pp.123–147, at page 137-138.

<sup>193</sup> A Code of Conduct for Immigration Liaison Officers, October 2002, prepared by agreement within the International Air Transport Association Control Authorities Working Group, *available at* [http://www.icao.int/icao/en/atb/fal/fal12/documentation/fal12wp040\\_en.pdf](http://www.icao.int/icao/en/atb/fal/fal12/documentation/fal12wp040_en.pdf)



officials.<sup>194</sup> These local officials could be the officials of the country of origin or of the transit country. The authorities in the country of origin might be those from which the refugee fears or those who are unwilling or unable to offer him/her protection. Accordingly, the refugee might expose himself/herself to danger by falling “at the hands” of ILO. It could be safer for him/her to resort to services of smugglers, who can ensure the procurement of false documents or transportation avoiding the authorities of any country. Alternatively, if he/she is turned to the authorities of a transit country, he/she might be returned to the country of origin. In other words, the relationship between the ILOs and the authorities of the host country might constitute danger for asylum-seekers and might prompt them to approach smugglers.

### **3.5. The Role of Frontex – Intensified Border Surveillance**

Another method of achieving the externalization of border control except visas, carrier sanctions, and ILO is the enhancement of the security at the external borders. This is effectuated by use of coercive measures and border surveillance technology combined with agreements with countries, which are sources of irregular migration flows.<sup>195</sup> This approach amounts to quasi-militarization of the border.

The establishment and the functions of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) is the epitome of this rationale of dealing with immigration.<sup>196</sup> The capacity of the

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<sup>194</sup> Sile Reynolds and Helen Muggeridge, Remote Controls: How UK Border Controls are Endangering the Lives of Refugees, Refugee Council, December 2008, at 36.

<sup>195</sup> Sergio Carrera, The EU Border Management Strategy Frontex and the Challenges of Irregular Immigration in the Canary Islands, CEPS Working Document No. 262/March 2007, at page 1.

<sup>196</sup> Frontex was established with Council Regulation (EC) 2007/2004/ of 26 October 2004. This regulation was subsequently amended with Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams. Frontex became operation on 3 October 2005. The function of Frontex are enumerated in Art.2 of Regulation (EC) 2007/2004/ of 26 October 2004.

Agency has been growing ever since its establishment.<sup>197</sup> The particular example of joint operation HERA II<sup>198</sup> will be taken for the purposes of explaining in practice the functions of Frontex and commenting on its role in border control.

The aim of HERA II, which lasted from 11 August 2006 till 15 December 2006 (4 months), was surveillance and control of the zone between the African coast and the Canary Islands. This operation sought on the first place to dissuade the cayucos (small, open wooden boats) transporting irregular immigrants to set off from the African coast. If the boats were already found at sea, the goal pursued was to intercept them in the territorial waters of the third country (Mauritania and Senegal). Then the migrants will be returned back to the place of their embarkation by the authorities of the sending countries. Only if the vessels were intercepted outside the 24-mile zone would the migrants be escorted to the territory of the Canary Islands<sup>199</sup> and then be offered the possibility to lodge an asylum application.<sup>200</sup> The whole operation which involved interception and returning of migrants could be possible only due to a bilateral agreement between Spain and the third countries involved - Mauritania and

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<sup>197</sup> Looking at the development of Frontex budget, we can see its constant growth. While in the first year of Frontex existence the budget was 6.2 million EUR, the final sum of the budget in 2006 was 19.2 million EUR. For 2007 Frontex was granted a budget of 22.2 million EUR plus additional 13 million EUR in reserve, which makes 35.2 million EUR. For 2008, the budget was around 40 million EUR. The budget for 2009 is over 80 million EUR, which is subject to amendments. This means that in the course of the year Frontex might be given additional resources. See <http://www.frontex.europa.eu/finance/> Compared to the year 2006, the budget increase would amount to 367%. See also Frontex General Report 2008, available at <http://www.eipa.eu/files/File/Migration/Frontex%20Annual%20Report%202008.pdf> at page 16.

<sup>198</sup> HERA I, which lasted from 17 July 2006 to 31 October 2006, was an operation for deployment of groups of experts from other Member States to support Spanish authorities on the Canary Islands in interviews with migrants. The purpose of the interviews is to gain information about the countries of origin in this way making the return of the migrants possible and to gain information about the facilitators (smugglers) of the migration. See Accomplished Operations Canary Islands – HERA, available at [http://www.frontex.europa.eu/examples\\_of\\_accomplished\\_operati/art5.html](http://www.frontex.europa.eu/examples_of_accomplished_operati/art5.html)

<sup>199</sup> BBC News Stemming the Immigration Wave, 10 Sept 2006, available at <http://news.bbc.co.uk/2/hi/europe/5331896.stm>

<sup>200</sup> Standing Committee of Experts on International Migration, Refugee and Criminal Law (Commissier Meijers), Ref CM06-14 Regarding Proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism, 24 October 2006, available at <http://www.commissie-meijers.nl/commissiemeijers/pagina.asp?pagkey=71645>

Senegal. On each of the vessels deployed in the operation at least one official from these two third countries had to be present on board as they were the only authority to stop and return the cayucos inside Senegalese and Mauritanian territorial waters.<sup>201</sup> The operation included the deployment of ships, helicopters and aircrafts.

The data made official after the operation is as follows – 14 572 immigrants in 246 cayucos or pateras arrived on the Canary Islands.<sup>202</sup> The total of the intercepted and diverted was 3 887 migrants in 57 cayucos or pateras.<sup>203</sup> Frontex concluded that HERA was a success since people were stopped from setting off for a dangerous journey that might have cost their lives and since the number of “illegal migrants” arriving on the Canary Islands was reduced.

However, it is doubtful whether the operation was really a success for the following reasons. First, Sergio Carrera points out that a reference to the statistics of the number of arrivals on the Canary Islands for the months April, May, June and July (total of 13 114) when there was no HERA operation shows that there was no noticeable decrease of the number of arrivals.<sup>204</sup> Second, there is no information as to how many migrants were dissuaded from starting the dangerous sea journey. Third, it is hypocritical to justify the operation by claiming that it aimed at saving people’s lives when in reality EU’s objective was to ensure the immobility of these people. Irrespective of the risks, each individual has the right to make a decision to depart and take the risk. The pertinent international provision in

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<sup>201</sup> News EU Immigration, Frontex Operation Ref 48181, available at <http://ec.europa.eu/avservices/services/showShotlist.do?out=PDF&lg=En&filmRef=48181>

<sup>202</sup> Interesting enough, as Sergio Carrera comments, the evaluation report of HERA II has never been made public. See Sergio Carrera, The EU Border Management Strategy Frontex and the Challenges of Irregular Immigration in the Canary Islands, CEPS Working Document No. 262/March 2007, at page 23.

<sup>203</sup> HERA statistics available at <http://www.frontex.europa.eu/gfx/frontex/files/hera-statistics.pdf>

<sup>204</sup> Monthly data on arrival of pateras and immigration in the Canary Islands in 2006 to be found in Sergio Carrera, The EU Border Management Strategy Frontex and the Challenges of Irregular Immigration in the Canary Islands, CEPS Working Document No. 262/March 2007, at page 23.

this respect is Art. 12 of the International Covenant on Civil and Political Rights<sup>205</sup> – “Everyone shall be free to leave any country, including his own.”

In its reports and press releases Frontex tries to empathize the so called “success stories”. However, if we think critically, we might be confronted with the issue that Frontex reports huge ‘success’ in order to justify its own existence and to justify the huge amount of resources which each year go into its budget.

Despite the ambiguity in regard to Frontex’s effectiveness, HERA II is indicative of one aspect of the Agency’s function whose significance for preventing arrivals and whose detrimental effect on the right to seek asylum are to be recognized.<sup>206</sup> Frontex can conclude working agreements with third countries.<sup>207</sup> These agreements are problematic since the question whether they are in compliance with the international human rights obligations of the Member states remains open. The most straightforward example will be Libya. Frontex is directly negotiating with Libya which is not party to the Refugee Convention and for which human right reports indicate very worrying information how immigrants are treated.<sup>208</sup>

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<sup>205</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>206</sup> There are many other ways in which the functions of Frontex are problematic in regard to human rights and the rights of refugees. *See* Refugee Council and the European Council on Refugees and Exiles (ECRE) jointed response to Select Committee on the European Union Sub-Committee F (Home Affairs): Frontex Inquiry, available at [http://www.ulb.ac.be/assoc/odysseus/CEAS/ECRE\(%20SEPTEMBRE%202007\).pdf](http://www.ulb.ac.be/assoc/odysseus/CEAS/ECRE(%20SEPTEMBRE%202007).pdf) and Transcript of oral evidence submitted by Refugee Council and European Council on Refugees and Exiles, and by the Immigration Law Practitioners’ Association to the House of Lords available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/999/euf051207ev10.pdf>; Andreas Fischer-Lescano, Tillman Lohr and Timo Tohidipur, Border Controls at Sea: Requirements under International Human Rights and Refugee Law, 21 International Journal of Refugee Law (July 2009) pp.256-297.

<sup>207</sup> According to Art.14 of Council Regulation (EC) No 2007/2004 establishing Frontex “The Agency may cooperate with the authorities of third countries competent in matters covered by this Regulation in the framework of working arrangements concluded with these authorities, in accordance with the relevant provisions of the Treaty.”

<sup>208</sup> *See* Sarah Hamood, African Transit Migration through Libya to Europe: The Human Cost, The American University of Cairo Forced Migration and Refugee Studies, January 2006; *See* Libya: Mass Expulsion of Irregular Migrants would be a Violation of Human Rights, Amnesty International 18 January 2008, available at <http://www.amnesty.org/en/for-media/press-releases/libya-mass-expulsion-of-irregular-migrants-would-be-a-violation-of-human-rights>

Accordingly, there are no guarantees what will happen to migrants returned to Libya in a course of a Frontex operation.

So far Frontex has concluded five working agreements. The Management Board has given a mandate to the Executive Director to negotiate working agreements with nine other countries - Turkey, Egypt, Libya, Cape Verde, Senegal, Mauretania, Morocco, Brazil, Bosnia and Herzegovina and Montenegro.<sup>209</sup> As Frontex's executive director Ilkka Laitinen has made it clear "we do not establish a partnership with a country or a government, but [between] the border control authority of that third country and Frontex."<sup>210</sup> Accordingly, these are technical low-level operational agreements which could have paramount impact on the rights of asylum-seekers. Except working agreements, as it is evident from Frontex's report after its technical mission to Libya,<sup>211</sup> cooperation with third countries could have even less defined contours in the form of proposals to participate in certain operations, which would be on *ad hoc* basis.

Even if there is no working agreement concluded by Frontex with a third country, during a joint operation involving interception and return of migrants, Frontex's operation could be conducted within the context of an agreement between a Member state and third countries, which are the source of the migration flow (operation Hera II was based on an agreement between Spain and Mauritania and Senegal).

Why are these agreements so significant for Frontex? There are signs that increased surveillance without such agreements may lead to an increase in illegal immigration as the

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<sup>209</sup> External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union, COWI Final Report January 2009, available at <http://www.statewatch.org/news/2009/may/frontex-eval-report-2009.pdf>

<sup>210</sup> House of Lords European Union Committee 9<sup>th</sup> Report of Session 2007-08, Frontex: the EU External Borders Agency Report with Evidence 5 March 2008, available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/60/60.pdf>

<sup>211</sup> Frontex-Led EU Illegal Immigration Technical Mission to Libya 28 May 5 June 2007, available at <http://www.statewatch.org/news/2007/oct/eu-libya-frontex-report.pdf>, at page 9.

vessels intercepting “illegal immigrants” are unable to turn them back.<sup>212</sup> In particular, the migrants recognise that they have a better chance of surviving their dangerous voyage and run no risk of return. However, in case of a concluded agreement, the migrants will be returned to their point of embarkation. The primary human rights concern that could be derived from these agreements is that asylum-seekers might never be able to reach the borders of the countries where they could lodge an application for asylum.

### **3.6. Conclusion on Chapter 3**

Visas, carrier sanctions, ILOs, and Frontex have the purpose to control who enters the EU and to filter out the “undesirables”. Asylum-seekers fall within the category of the “undesirables” and accordingly are filtered out by the system. The logical consequence is that they try to circumvent the system by appealing to the help of smugglers.

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<sup>212</sup> External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union, COWI Final Report January 2009, available at <http://www.statewatch.org/news/2009/may/frontex-eval-report-2009.pdf>

## Chapter 4 Asylum Perspective on Human Smuggling

The last chapter of the thesis addresses three issues from the perspective of asylum-seekers – migration statistics and their interpretation; the connection between human smuggling and organized crime; and the costs incurred by asylum-seekers for using smuggling services.

### 4.1. Problems with the Numbers –Accessibility and Interpretation

Making statements about the quantitative extent of human smuggling and of irregular migration is problematic since the phenomenon, by its very nature, is secret. Existing estimates are based on the extrapolation of data coming from sources like interceptions, border apprehension figures, asylum applications, or data on regularization.<sup>213</sup> Collecting data regarding the arrival of boats, as is the case with Lampedusa, mainland Spain and Canary Islands, might be easier since many of the arrivals are “open landings”. The sophisticated systems<sup>214</sup> deployed by states to detect boats also make it possible to actually count the number of arriving migrants. However, once having that data, it is important how it is interpreted and whether some important features are revealed.

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<sup>213</sup> Veronika Bulger, Martin Hoffman and Michael Jandl, Human Smuggling as a Transnational Service Industry: Evidence from Austria, *International Migration*, Vol.44 (No.4) 2006, p.62.

<sup>214</sup> The Spanish SIVE is an example of such sophisticated system. SIVE stands for Integrated System of External Vigilance. In 1999, the Spanish government approved a plan for intensified surveillance of the Strait of Gibraltar, where the majority of unauthorized migrants were arriving. The plan centered on the implementation of the SIVE, and had a budget of about 150 million euros for the period 1999 to 2004. This amounted to about 1,800 euros for each migrant that was eventually intercepted during the five-year period in question. The two tasks of SIVE are early detection of approaching boats and apprehension of those who try to enter. The system covers the Strait of Gibraltar, the entire Andalusian coast and the Canary Islands. See Jorgen Carling, *The Merits and Limitations of Spain's High-Tech Border Control*, June 2007, available at <http://www.migrationinformation.org/Feature/display.cfm?id=605>.

The European Commission's Center for Information, Discussion and Exchange on Immigration (CIREFI) is responsible for the collection of standard datasets that cover various indicators of irregular migration.<sup>215</sup> The CIREFI data is treated as confidential and its reports are classified. The associating of illegal immigration with organized crime and even terrorism is used as justification for the confidentiality of the data. However, it is not acceptable to keep this data confidential since the arguments for justifying all the severe resource-demanding border control and border surveillance measures become shaky since these arguments are not buttressed with clear data on irregular migration.

A possible source of information on the issue of irregular migration through the Mediterranean Sea is Frontex. After conduction of joint operations, Frontex issues data on the number of "intercepted" and "diverted migrants", which were trying to reach the shores of EU states.<sup>216</sup> For example, during operation HERA 2007 whose objective was to "tackle the illegal migration flows across the EU maritime borders from Senegal and Mauritania, disembarking in Canary Islands" and which lasted from April 2007 till December 2007 (8 months), 6 890 migrants were intercepted and 3 127 migrants were diverted. Another relevant example would be operation NAUTILUS 2007, which aimed at "combating illegal immigration coming from North Africa countries via the EU maritime borders in the Central Mediterranean area and disembarking in Malta and Lampedusa." The joint operation, which was conducted in 2007 on two stages each one lasting one month, resulted in the interception of 3 173 "illegal migrants." In the Frontex General Report for 2007 it is indicated that the

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<sup>215</sup> CIREFI collects information on legal immigration, illegal immigration and unlawful residence, the entry of aliens through facilitators' networks, the use of false or falsified documents. *See* Council Conclusions of 30 November 1994 on the organization and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi) Official Journal C 274 , 19/09/1996 P. 0050 – 0051.

<sup>216</sup> Frontex Press Kit Volume 2/11, Issue 1, 2007 Sea Border Operations



number of intercepted/apprehended third country nationals in the course of joint operations for 2007 is 27 441 at sea borders (4 522 at land borders and 3 297 at air borders).<sup>217</sup>

The problem with the above data is that no information is made available whether these intercepted third country nationals, who were trying to reach the shores of Spain or Italy via sea, expressed that they were in need of international protection. The result which is achieved is “out of sight, out of right.” As the European Council on Refugees and Exile (ECRE) explains that “out of sight, out of right” means that the *“shifting of border controls further and further away from the EU’s physical borders makes it extremely difficult to monitor what happens at the crucial moment when refugees and people in need of international protection come into contact with the authorities of the would-be asylum country for the first time, and allows people to be pushed back without anybody in Europe ever knowing about them”*.<sup>218</sup> “Out of sight, out of right” strategy implies that no information is available regarding how many of the smuggled migrants are asylum seekers and how many of them are recognized as refugees. Since such information is either not collected or not made public, there is no need to consider asylum-seekers in the measures against human smuggling.<sup>219</sup>

According to the International Centre on Migration Policy Development, some 100.000 to 120.000 irregular migrants cross the Mediterranean each year, with about 35.000 coming

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<sup>217</sup> Frontex General Report for 2007, at 18, available at [http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex\\_general\\_report\\_2007\\_final.pdf](http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex_general_report_2007_final.pdf)

<sup>218</sup> European Council on Refugees and Exile, *Defending Refugees’ Access to Protection in Europe*, December 2007, at 6.

<sup>219</sup> It would be beneficial if the following information is collected and made available – how many of the detected migrants arriving by boats claim to be refugees, how many of them are indeed recognized to be in need of international protection and in general how many of the asylum seekers and how many of the recognized refugees have resorted to the services of human smugglers. Further data that should be collected and made accessible is the nationalities of the intercepted migrants, since in some African countries it is well known that there is conflict, generalized violence and human rights violations and accordingly no one should be sent back to these countries.

from sub-Saharan Africa, 55.000 from the south and east Mediterranean and 30.000 from other (mainly Asian and Middle Eastern) countries. It is also estimated that, over the last decade, a total of at least 10.000 have died trying to cross the Mediterranean and reach Europe's southern shores.<sup>220</sup>

As to the number of deaths, since 1993 the organization UNITED<sup>221</sup> has been monitoring the “deadly results of the building of Fortress Europe by making a list of the migrants, who have died in their attempt of entering the 'Fortress' or as a result of Europe's immigration policies.” The recorded death toll up to 6 May 2008 is 11 105.<sup>222</sup> This number, however, does not include only migrants who have died as a result of drowning, starvation or dehydration at sea, but also death as a result of suicide, lack of medical treatment in detention, accidents during attempt to escape from border police and other causes.

National statistics include datasets on migration. The number of irregular migrant coming to Italy by sea for 2006 has been estimated at 21 400 (including both migrants apprehended upon clandestine landing and migrants rescued at sea and admitted on the national territory), of which 18 096 are the apprehensions in Lampedusa and in waters off Lampedusa.<sup>223</sup> The countries of origin of these 21 400 migrants are Morocco (8 146), Egypt

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<sup>220</sup> International Centre on Migration Policy Development, *Irregular Transit Migration in the Mediterranean - Some Facts, Futures and Insights*, Vienna (2004).

<sup>221</sup> <http://www.unitedagainstracism.org/>

<sup>222</sup> UNITED for Intercultural Action, European Network against Nationalism, Racism, Fascism and in Support of Migrants and Refugees, *List of 11105 documented refugee deaths through Fortress Europe*, Documentation on 06-05-2008 by UNITED, available at [http://unitedagainstracism.org/pdfs/actual\\_listofdeath.pdf](http://unitedagainstracism.org/pdfs/actual_listofdeath.pdf)

<sup>223</sup> Ferruccio Pastore, *Libya's Entry into the Migration Great Game Recent Developments and Critical Issues*, October 2007, Centru Studi di Politica Internazionale, available at <http://www.cespi.it/PDF/Pastore-Libia-great%20game.pdf>; Salvatore Coluccello and Simon Massey, *Out of Africa: The Human Trade Between Libya and Lampedusa*, *Trends in Organized Crime*, Vol.10, Number 4, Dec 2007, pp.77-90, at 80.

(4 200), Eritrea (2 859), Tunisia (2 288), Ghana (530), Nigeria (491), Ethiopia (479), Algeria (473), Bangladesh (361), Sudan (352), Pakistan (183), Côte d'Ivoire (168), Somalia (121).<sup>224</sup>

The number of irregular migrants who arrived in Spain by boats was 13 424 for 2008 and 18 057 for 2007. The arrivals only on the Canary Islands were 9 181 for 2008 and 12 478 for 2007. The arrivals on the Canary Islands for 2006 were 31 678, which is the highest number registered since 2002. The number of arrivals on the Canary Islands for 2008 (9 181) was approximately the same as the numbers for 2002, 2003 and 2004. The numbers for Ceuta and Melilla are as follows – 1 210 for 2008 and 1 553 for 2007.<sup>225</sup>

The number of irregular migrants arriving in Malta by sea for 2006 has been estimated to 1 780 (67 boats), for 2007 - 1 702 (68 boats) and for 2008 – 2 775 (84 boats).<sup>226</sup>

In light of this data, is the existence of an influx of boats with “illegal migrants”, which allegedly justifies strict measures enhancing border control and curbing human smuggling, substantiated? Media<sup>227</sup> and dominant policy discourses convey an apocalyptic image of an increasingly massive exodus of desperate Africans fleeing poverty and war at home trying to enter the elusive European “El Dorado” crammed in long-worn ships barely staying afloat.<sup>228</sup>

The reality is that the majority of irregular immigrants in Europe enter legally and subsequently become irregular since they overstay their visas. As the EU Commission states

<sup>224</sup> Salvatore Coluccello and Simon Massey, Out of Africa: The Human Trade Between Libya and Lampedusa, Trends in Organized Crime, Vol.10, Number 4, Dec 2007, pp.77-90, Table 1 at p.80.

<sup>225</sup> Balance de la Lucha Contra la Immigration Ilegal 2008 Gobierno de Espana Ministerio del Interior, available at [http://www.mir.es/DGRIS/Balances/Balance\\_2008/pdf/bal\\_lucha\\_inmigracion\\_ilegal\\_2008.pdf](http://www.mir.es/DGRIS/Balances/Balance_2008/pdf/bal_lucha_inmigracion_ilegal_2008.pdf)

<sup>226</sup> National Statistics Office Malta, Press Release 19 June 2009, available at [http://www.nso.gov.mt/statdoc/document\\_file.aspx?id=2523](http://www.nso.gov.mt/statdoc/document_file.aspx?id=2523)

<sup>227</sup> Destination Europe [movie], London, BBC 1, 2007, Panorama, broadcasted on BBC 1 on Monday 10th September 2007, available at the library of the Oxford Refugee Studies Center Shelfmark DVD-22.

<sup>228</sup> See Ferruccio Pastore, Paola Monzini, and Giuseppe Sciortino, Schengen's soft underbelly? Irregular Migration and Human Smuggling across the Sea Borders to Italy, International Migration (2006) Vol. 44 Issue 4, pp 95-119.

in its communication “Overstayers present by far the biggest category of illegal immigrants in the EU.”<sup>229</sup> The waves of boats with migrants are misconception. Rutvica Andrijasevic observes that a report from the Italian Ministry of Interior “*indicates that the majority of third-country nationals residing illegally in the country have reached Italy neither via sea nor having crossed its borders undocumented. They have on the contrary entered the country at its land borders with a valid entry clearance and have become undocumented either once their visa expired or after they overstayed their permit of residence. Only 10% of undocumented migrants currently residing in Italy entered the country “illegally: via its sea borders.”*”<sup>230</sup> Similarly, the Organization for Economic Co-operation and Development in International Migration Outlook report indicates that more than 22 000 unauthorized migrants [were] intercepted along the southern Italian coast. However, most unauthorized migrants used other methods to enter, either with a visa (60%) or false documents (25%).<sup>231</sup> Especially demonstrative of the point that the irregular migrants coming from Africa to Europe through the Mediterranean constitute very small percentage is the National Immigration Survey conducted by the Spanish National Statistic Institute. The survey points out that the immigrants who emigrated in dugouts or small boats barely represented 1.0% of the total.<sup>232</sup>

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<sup>229</sup> Preparing the Next Steps in Border Management in the European Union, Commission of the European Communities, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions , Brussels, 13.2.2008 COM (2008) 69 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0069:FIN:EN:PDF> at page 5.

<sup>230</sup> Rutvica Andrijasevic, How to Balance rights and Responsibilities on Asylum at the EU’s Southern Border of Italy and Libya, University of Oxford, Center for Migration, Policy and Society, COMPAS Working Paper No.27, 2006, at 15.

<sup>231</sup> Organization for Economic Co-operation and Development, International Migration Outlook 2008, at p. 252 available at <http://www.oecd.org/dataoecd/57/8/41255813.pdf>

<sup>232</sup> Instituto Nacional de Estadística, National Immigration Survey 2007, Where they came from?, at page 26, available at [http://www.ine.es/prodyser/pubweb/eni07/eni07\\_03.pdf](http://www.ine.es/prodyser/pubweb/eni07/eni07_03.pdf) See also <http://www.ine.es/jaxi/menu.do?type=pcaxis&path=%2Ft20%2Fp319&file=inebase&L=1> for the whole survey.

The above interpretation of the data has prompted some researchers to comment that the attention given to the Mediterranean problem is disproportionate to the number of persons actually crossing the Mediterranean.<sup>233</sup> Others have correctly stated that although the number of “illegal immigrants” arriving in Italy by sea is small, about 10–11% of total illegal migration, disproportionately high numbers of resources are dedicated to countering the maritime trade as a result of the symbolic importance of being seen to defend national borders.<sup>234</sup>

Accordingly, there is no influx of boat people, which are qualified preemptively and accordingly wrongly as “illegal migrants” in this way creating the conception in the minds of the European population that they are criminals. All the anxious attention results in making people afraid that Europe will be overwhelmed with immigrants. Once people are afraid it is very easy to justify policies and measures aimed at stopping “illegal migration” irrespective of the compatibility of these measures with human rights or irrespective of whether they are necessitated by the reality. Not to mention that among these migrants, there are asylum-seekers and refugees and regardless of the numbers states have certain human rights obligations. The rights of asylum-seekers and refugees are not negotiable based on how many they are, on whether they come with other migrants who do not need protection, or on the number of those other migrants.

In support of the last point, statistics from Malta are to be presented. As was already indicated the number of irregular migrants arriving in Malta by sea for 2008 has been estimated to 2 775. Certainly, it cannot be claimed that all of them applied for asylum. However, still it is worth emphasizing in support of the point that those arriving should not be

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<sup>233</sup> Susan Kneebone, Christopher McDowell, Gareth Morrell, *A Mediterranean Solution? Chances of Success*, *International Journal of Refugee Law* (2006), Vol.18, pp. 492- 509, at 495.

<sup>234</sup> Salvatore Coluccello and Simon Massey, *Out of Africa: The Human Trade Between Libya and Lampedusa*, *Trends in Organized Crime*, Vol.10, Number 4, Dec 2007, pp.77-90, at 78.

preemptively regarded as “illegal immigrants”, that more than half of the migrants who have submitted application for asylum in Malta have received some form of international protection – from the 2 697 asylum decisions for 2008, 1 281 are negative and 1 397 individuals have received subsidiary protection, and 19 have received refugee status. The same trend is to be observed for the previous years. The positive decisions were mostly in regard to refugees from Somalia, Eritrea and Sudan.<sup>235</sup>

The following analysis of the available data is also indicative of the “illegal immigrants” sea influx fallacy.<sup>236</sup> The total number of asylum application lodged in EU for 2007 was 222 900. The number of asylum application in Italy was 14 050, which is approximately 6% from EU total; in Spain 7 460, which is approximately 3% of EU total. The 27 EU Member states received on average 2.6 asylum-seekers per 1,000 inhabitants for the period 2003-2007 and an average 0.5 asylum-seekers per 1,000 inhabitants for the year of 2007. The corresponding numbers for Italy are lower than the EU average – 1 asylum-seeker per 1,000 inhabitants during 2003-2007 and 0.2 asylum-seekers per 1,000 inhabitants for the year of 2007. The same trend is valid for Spain.

The overall message conveyed by this section of the paper is that it is easy and tempting to follow the policy slogans and the vague claims that Europe will be flooded with *pateras* carrying “illegal immigrants”. However, the policy having its own objectives is different from the reality. The political objectives of being seen as defending national borders and of “nourishing” xenophobic feelings and fears from immigrants in order to make people believe that they need statesmen to “defend” them by cracking down on immigration are not

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<sup>235</sup> National Statistics Office Malta, Press Release 19 June 2009, available at [http://www.nso.gov.mt/statdoc/document\\_file.aspx?id=2523](http://www.nso.gov.mt/statdoc/document_file.aspx?id=2523)

<sup>236</sup> UNHCR Asylum Levels and Trends in Industrialized Countries 2007, Statistical Overview of Asylum Applications Lodges in Europe and Selected Non-European Countries, 18 March 2008, available at <http://www.unhcr.org/47daae862.html>

buttressed by the available data and its interpretation. If one looks at the numbers and thinks about what they mean, the picture of irregular migration appears different.

#### **4.2. Organized Criminal Groups or Separate Individual Ventures – Agents of Smuggling and Organization Principles**

It is assumed that human smuggling is supported by a concentrated, professional and sophisticated criminal infrastructure. Human smuggling is invariably represented as a migration effectuated through highly organized and elaborate transnational smuggling mafia-like networks.<sup>237</sup> However, this does not correspond to the reality. The work by a number of researchers, which is based on case studies, interviews or court cases, points to the existence of diversity of smuggling operations.<sup>238</sup>

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<sup>237</sup> Europol, Facilitated Illegal Immigration into the European Union, March 2008, *available at* [http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Facilitated\\_illegal\\_immigration\\_2008.pdf](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Facilitated_illegal_immigration_2008.pdf); United Nations Office on Drugs and Crime, Organized Crime and Irregular Migration from Africa to Europe, July 2006, *available at* [http://www.unodc.org/pdf/research/Migration\\_Africa.pdf](http://www.unodc.org/pdf/research/Migration_Africa.pdf); BBC News, Tracking Africa's People Smugglers, 1 August 2009, *available at* <http://news.bbc.co.uk/2/hi/africa/8178587.stm>.

<sup>238</sup> David Kyle and John Dale, Smuggling the State back in: Agents of Human Smuggling Reconsidered in *Global Human Smuggling Comparative Perspectives* edited by David Kyle and Rey Koslowski, The John Hopkins University Press Baltimore and London 2001, at page 47; Michael Collyer, States of Insecurity: Consequences of Saharan Transit Migration, COMPAS Working Papers, No.31, University of Oxford 2006, Center on Migration, Policy and Society, at page 18 and 19; Veronika Bilger, Martin Hofman and Michael Jandl, Human Smuggling as a Transnational Service Industry: Evidence from Austria, *International Migration*, Vol.44 (No.4) 2006, pp. 59-93, at page 64, 76, 78, 85; Khalid Koser, Reconciling Control and Compassion? Human Smuggling and the Right to Asylum in Refugees and Forced Displacement. *International Security, Human Vulnerability and the State*, edited by Edward Newman and Joanne van Selms, United Nations University Press (2003) at page 190; Matthias Neske, Human Smuggling to and through Germany, *International Migration*, Vol.44 (No.4) 2006, pp. 121-164, at page 143-146; Ahmet İçduygu and Sule Toktas, How do Smuggling and Trafficking Operate via Irregular Border Crossing in the Middle East? Evidence from Fieldwork in Turkey, *International Migration*, Vol.40, No.6, December 2002 pp.24-54; Friedrich Heckman, Towards a Better Understanding of Human Smuggling, IMISCOE Policy Brief, No.5, November 2007, *available at* <http://www.imiscoe.org/publications/policybriefs/documents/PB5-Heckman.pdf> ; Ilse van Liempt, Inside Perspectives on the Process of Human Smuggling, IMISCOE Policy Brief, No.3, August 2007, *available at* <http://www.imiscoe.org/publications/policybriefs/documents/PB3-Liempt.pdf> ;

It is worth also noting in connection with the smuggling of migrants to Italy that no cases have been discovered of smugglers having connections on Italian territory to help with arrivals in Sicily. The investigating authorities also exclude the possibility that Sicilian Mafia families, which are deeply rooted in the areas where landings take place, are in any way involved in the business. See Paola Monzini, Ferruccio Pastore, Giuseppe Sciortino, Human smuggling to/trough Italy, Research Project The Human Smuggling and Trafficking in Migrants: Types, Origins and Dynamics in a Comparative and Interdisciplinary Perspective promoted by the European Science Foundation supported by Consiglio Nazionale delle Ricerche at page 51, *available at* [http://www.cespi.it/cnr/Monzini-Sciortino-ing\\_rev\\_.pdf](http://www.cespi.it/cnr/Monzini-Sciortino-ing_rev_.pdf)

In reality, there is a diverse range of smugglers with differing levels of organization, ability and trustworthiness.<sup>239</sup> Based on biographical interviews with smuggled migrants in the Netherlands, Ilse van Liempt asserts that there is diversity within the smuggling process and that smuggling can differ considerably from region to region.<sup>240</sup> The market of human smuggling services is in most cases not dominated by overarching mafia-like criminal structures that have monopolized all smuggling activities from the source to the destination country. Rather, in many regions there exists a complex market for highly differentiated smuggling services offered by a multitude of providers from which the potential migrants can choose.<sup>241</sup> Similarly, Kyle and Dale comment that migrants exporting schemes are often characterized by highly irregular, often short-lived criminality, much of it opportunistic.<sup>242</sup> Smugglers are usually locally based and operate either alone or in small networks.<sup>243</sup>

Friedrich Heckman reports that one of the results of the study “*Human Smuggling and Trafficking in Migrants. Types, Origins and Dynamics in a Comparative and Interdisciplinary Perspective*” conducted in 2001 by the European Science Foundation, is that no evidence was found to support the notion of human smuggling as a well-organized mafia organization.<sup>244</sup>

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<sup>239</sup> Introduction to the book *Global Human Smuggling Comparative Perspectives* edited by David Kyle and Rey Koslowski, The John Hopkins University Press Baltimore and London 2001, at page 2.

<sup>240</sup> Ilse van Liempt, *Inside Perspectives on the Process of Human Smuggling*, IMISCOE Policy Brief, No.3, August 2007, available at <http://www.imiscoe.org/publications/policybriefs/documents/PB3-Liempt.pdf>

<sup>241</sup> Veronika Bulger, Martin Hofman and Michael Jandl, *Human Smuggling as a Transnational Service Industry: Evidence from Austria*, *International Migration*, Vol.44 (No.4) 2006, at 64.

<sup>242</sup> David Kyle and John Dale, *Smuggling the State back in: Agents of Human Smuggling Reconsidered* in *Global Human Smuggling Comparative Perspectives* edited by David Kyle and Rey Koslowski, The John Hopkins University Press Baltimore and London 2001, at page 33.

<sup>243</sup> See Hein de Haas, *The Myth of Invasion Irregular Migration from West Africa to the Maghreb and the European Union*, IMI Research Report October 2007

<sup>244</sup> Friedrich Heckman, *Towards a Better Understanding of Human Smuggling*, IMISCOE Policy Brief, No.5, November 2007, available at <http://www.imiscoe.org/publications/policybriefs/documents/PB5-Heckman.pdf> . The European Science Foundation’s study involved Austria, Germany, Italy and the Netherlands.



Based on empirical evidence from fieldwork in Turkey, Ahmet İçduygu and Sule Toktas assert that small and flexible groups are active in the smuggling business on an opportunistic basis; smuggling is not a business organized on an international level; it is not a business relying on a centralized command structure, at least not as far as Turkey is concerned; rather, smuggling is organized by a loosely cast networks, “*consisting of hundreds of independent smaller units which cooperate along the way.*”<sup>245</sup> Michael Collyer notes, on the basis of research with undocumented migrants in Morocco, that “*Without exception, the assistance provided to sub-Saharan African migrants had been small scale, focused on a single border or short leg of the journey which had to be paid for separately.*”<sup>246</sup>

Although it might be a simplification of the reality, from the diversity of smuggling processes and the differing levels of smuggling organization, at least three types of smuggling agents and organizational principles could be indicated. First, smuggling could be organized as separate individual ventures on an opportunistic basis. One form of these ventures is when illegal entry is facilitated by the social networks of migrants’ relatives, friends or countrymen in the sending, receiving, and transit countries. Another form is when smuggling is carried out by a single operator/agent who provides a specific service needed by a migrant such as transport for crossing a particular border.<sup>247</sup> Migrants travel site by site, making agreements that bind the agents only for a specific portion of the journey.<sup>248</sup> Migrants typically report

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<sup>245</sup> Ahmet İçduygu and Sule Toktas, How do Smuggling and Trafficking Operate via Irregular Border Crossing in the Middle East? Evidence from Fieldwork in Turkey, *International Migration*, Vol.40, No.6, December 2002 pp.24-54.

<sup>246</sup> Michael Collyer, In-Between Places: Trans-Saharan Transit Migrants in Morocco and the Fragmented Journey to Europe, *Antipode*, Vol.39, No.4, September 2007, pp.668-690, at page 678.

<sup>247</sup> Bimal Ghosh, *Huddled Masses and Uncertain Shores*, Insights into Irregular Migration, Martinus Nijhoff Publishers, 1998, at 23.

<sup>248</sup> Ferruccio Pastore, Paola Monzini, and Giuseppe Sciortino, Schengen’s Soft Underbelly? Irregular Migration and Human Smuggling across Land and Sea Borders to Italy, *International Migration*, Vol.44 (No.4) 2006, pp. 95-119, at 111.

paying for one leg of the journey at a time, or paying for transportation across a difficult stretch, or an individual border.<sup>249</sup> It is reported that it is rather small scale, self-employed and independently working smugglers who are perceived as being the most reliable one and therefore the preferred choice of some interviewed migrants. Since by any failure these smugglers are most likely to be affected themselves (they personally accompany their clients in border crossing), they are assessed as taking fewer risks.<sup>250</sup>

These small casual operators could be owners or drivers of taxis, trucks, or small boats which help them carry individuals into destination countries in a clandestine manner against payment. The smuggling activity may not be their main source of income but a supplementary one.<sup>251</sup> Further, smugglers are frequently other migrants with some experience of particular border crossing, making the most of the opportunity of making some money themselves to fund their onward journey.<sup>252</sup>

Except separate individual ventures, smuggling could be organized by small operators as their main economic activity. These operators could conduct their business in an organized manner and as frequently as possible.<sup>253</sup>

Finally, smuggling may be part of an organized commercial activity run by larger operators with international networks, providing a whole range of services such as securing forged travel documents and visas, transportation and assistance in border crossing, and

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<sup>249</sup> Michael Collyer, *States of Insecurity: Consequences of Saharan Transit Migration*, COMPAS Working Papers, No.31, University of Oxford 2006, Center on Migration, Policy and Society, at 18.

<sup>250</sup> Veronika Bilger, Martin Hofman and Michael Jandl, *Human Smuggling as a Transnational Service Industry: Evidence from Austria*, *International Migration*, Vol.44 (No.4) 2006, pp. 59-93, at 85.

<sup>251</sup> Bimal Ghosh, *Huddled Masses and Uncertain Shores, Insights into Irregular Migration*, Martinus Nijhoff Publishers, 1998, at 23.

<sup>252</sup> Michael Collyer, *States of Insecurity: Consequences of Saharan Transit Migration*, COMPAS Working Papers, No.31, University of Oxford 2006, Center on Migration, Policy and Society, at 18.

<sup>253</sup> Bimal Ghosh, *Huddled Masses and Uncertain Shores, Insights into Irregular Migration*, Martinus Nijhoff Publishers, 1998, at 23.

arranging safe places in transit.<sup>254</sup> These networks can organize different stages necessary for a successful entry. Within these larger smuggling networks there is division of labor. The following positions could be identified within the network – organizers (persons with the overall responsibility for the operations), intermediates (persons responsible for the actual implementation of the operation and who is the first responsible contact person for the migrant), recruiters (with advertising services), guides (guiding and accompanying migrants en route in one or more countries and carrying out border crossings). The process can also involve taxi drivers and private house owners.<sup>255</sup>

However, even in these last cases, where there is involvement of different people organized in a network, it could be more appropriate to refer to human smuggling as a ‘networkization’ of relationships than as an activity planned by organizations with mafia like and chain of command structures.<sup>256</sup>

At this point one cannot but wonder how and why the UN Protocol against Smuggling is under the umbrella of UN Convention against Transnational Organized Crime together with the Protocol against Trafficking. Hathaway explains that the minor human rights progress made with the advent of the Trafficking Protocol was secured at the cost of accepting provisions that require the transnational criminalization of (non-abusive) smuggling and the generic intensification of border controls.<sup>257</sup> Taking advantage of the momentum to address

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<sup>254</sup> Bimal Ghosh, *Huddled Masses and Uncertain Shores, Insights into Irregular Migration*, Martinus Nijhoff Publishers, 1998, at 23 and 24.

<sup>255</sup> Veronika Bilger, Martin Hofman and Michael Jandl, *Human Smuggling as a Transnational Service Industry: Evidence from Austria*, *International Migration*, Vol.44 (No.4) 2006, pp. 59-93, at 78.

<sup>256</sup> Matthias Neske, *Human Smuggling to and through Germany*, *International Migration*, Vol.44 (No.4) 2006, pp. 121-164, at 146; Friedrich Heckman, *Towards a Better Understanding of Human Smuggling*, IMISCOE Policy Brief, No.5, November 2007, available at <http://www.imiscoe.org/publications/policybriefs/documents/PB5-Heckman.pdf>

<sup>257</sup> James Hathaway, *The Human Rights Quagmire of Human Trafficking* (2008) 49 *Virginia Journal of International Law* at 14. Hathaway argues that the human rights progress made with the advent of the Trafficking

trafficking, governments successfully managed to promote the simultaneous adoption of the Smuggling Protocol.<sup>258</sup> The protocol makes it a transnational duty to criminalize smuggling and as Hathaway emphasizes, it secured the developed world's goal of enlisting global participation in its migration control project.<sup>259</sup> The developed countries, which are countries of destination, wanted to ensure the vision of human smuggling as organized crime so that on international level countries of origin and/or transit become obliged to take measures against smuggling, in this way actually taking measures against irregular migration.

#### **4.3. The Cost Paid by Asylum-seekers for Using Smuggling Services**

Without pretending to constitute a comprehensive analysis, this section has the purpose of outlining the asylum implications from resorting to human smuggling. The costs paid by asylum-seekers for using smuggling services could be formally divided into human costs and legal costs. The human costs refer, on the first place, to the death toll – Mediterranean Sea has been reported to have turned into a graveyard;<sup>260</sup> significantly less attention is paid to the initial stage of the journey taken by thousands of sub-Saharan Africans, who must first cross

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Protocol is minor because the problem of slavery has not been conceived in holistic terms; with the Trafficking Protocol the energy has been channeled only towards slave trade and no action is envisioned to address the plight of the more than approximately 30 million persons who are already enslaved; the antitrafficking efforts have resulted in a highly selective privileging of a small subset of the slavery problem.

<sup>258</sup> James Hathaway, *The Human Rights Quagmire of Human Trafficking* (2008) 49 *Virginia Journal of International Law* at p.27.

<sup>259</sup> James Hathaway, *The Human Rights Quagmire of Human Trafficking* (2008) 49 *Virginia Journal of International Law* at p.30. The developed countries' goal of enlisting global participation in their migration control project was realized through some of the following obligations stemming from the Protocol against Smuggling – strengthening border control (Art.11.1.); imposition of carrier obligations and sanctions (Art.11.3.); ensuring quality of documents (Art.12.); duty of the states to receive back their smuggled nationals (Art.18).

<sup>260</sup> See *The Deadly Consequences of "Fortress Europe"* May 2009 UNITED, available at <http://unitedagainstracism.org/pages/info24.htm>

the desert in order to reach North Africa on their way to Europe.<sup>261</sup> Migrants who cannot afford to pay for forged documents necessary for air/land travel are exposed to these dangers.

In addition to the natural dangers associated with travelling across the sea and across the desert with bad quality means of transportation, Thomas Spijkerboer adds that intensified border control results in choosing more dangerous migration routes or organizing departure when the weather conditions are particularly bad in order to make interception by the authorities more difficult.<sup>262</sup> In other words, increased border control leads to more deaths.

In addition, migrants are vulnerable during the journeys and might experience extortion from the smugglers.<sup>263</sup> They might have to sell all their property in their country of origin in order to pay for the journey and in case of coercive return to be in a desperate situation. They might be indebted to their smugglers, which might result in exploitation once in the countries of destination.

How is the fact that the asylum-seeker has been smuggled relevant to his/her asylum application? This question concerns the legal costs incurred by asylum-seekers for using smuggling services. The three entry strategies employed by smugglers (usage of forged documents, clandestine manner of border crossing/covert arrivals and open landings/over arrivals) will be analyzed separately.

The usage of forged documents (passport and/or visa) results in asylum-seekers being charged with criminal offence and arrest. Except for all the consequences of being regarded as a criminal and detained while trying to argue an asylum case, another set of possible

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<sup>261</sup> Sara Hamood, EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants? 21 *Journal of Refugee Studies* March 2008, pp.19-42, at page 32.

<sup>262</sup> Thomas Spijkerboer, The Human Cost of Border Control, *European Journal of Migration and Law* 9 (2007) pp.127-139, at page 131 and 134.

<sup>263</sup> Michael Collyer, States of Insecurity: Consequences of Saharan Transit Migration, COMPAS Working Papers, No.31, University of Oxford 2006, Center on Migration, Policy and Society, at 19.

implications is that asylum-seekers are discouraged from openly presenting themselves to the authorities. A proportion of people who have fled their country of origin as refugees are not lodging asylum claims in their country of destination because of their means of arrival.<sup>264</sup>

They should be applying for asylum but they do not.

The clandestine border crossing could be detrimental as to the credibility of the asylum-seeker. The authorities come with the presumption that if the individual was really in need of international protection, he/she should have approached the authorities at the border and not hide from them. The situation might become even more complex if asylum-seekers, in addition to the clandestine entry, fail to present supporting identification or other documents, which is a specific outcome of smuggling (the smugglers take away the documents and/or destroy them). Another possible implication refers to inability of the asylum-seeker to explain how he/she got into the country. Smuggled asylum-seekers can travel in closed compartments without any idea which countries they crossed.

An asylum-seeker might fear open presentation to the border authorities of the destination state since he/she might be pushed back and summary returned to the country from which he/she is coming; it could be questionable whether he/she will be allowed to enter and place an application for asylum. In addition, those who apply at the border might be channeled through a procedure guaranteeing them less procedural rights in comparison with applicants inside the country. Further, those who present themselves at the border can be immediately detained for entering the country illegally. The practice of Malta is notorious for detention of migrants.<sup>265</sup> The practice of Bulgaria is also indicative of the perils faced by

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<sup>264</sup> Khalid Koser, *Reconciling Control and Compassion? Human Smuggling and the Right to Asylum in Refugees and Forced Displacement*. International Security, Human Vulnerability and the State, *edited by* Edward Newman and Joanne van Selms, United Nations University Press (2003) pp.181-194, at page 187.

<sup>265</sup> UN High Commissioner for Refugees, *The Detention of Refugees and Asylum-Seekers by Reason of Their Unauthorised Entry or Presence*, July 2007, available at <http://www.unhcr.org/refworld/docid/4950f39f2.html>

asylum-seekers at the border. Pursuant to the Bulgarian legislation, when a foreigner applies for asylum at the border, the border police must have the foreigner handed over to the Migration Directorate for “accommodation”, which for all practical purposes is detention at the special institutions for foreigners.<sup>266</sup> In practice the basis for the “accommodation” is the issuance of deportation order, which means that an asylum-seeker is already under procedure for deportation before having submitted an application for asylum or having his application reviewed by the State Agency for Refugees.

Despite all these costs in light of the lack of alternatives to reach countries of desired destination where to claim asylum, the availability of smuggling services is necessary.

#### **4.4. Conclusion on Chapter 4**

The fourth chapter reveals the existence of two fallacies. The first one is that there is an influx of “illegal migrants” crossing the Mediterranean Sea and “invading” Spain, Italy and Malta. The reality is that the majority of irregular immigrants in Europe enter legally and subsequently become irregular since they overstay their visas. As the UNHCR statistics demonstrate, if a comparison is made between the number of asylum applications placed in Spain and Italy and the number of asylum application in other Member states, the claim that Spain and Italy are flooded with asylum-seekers becomes unsubstantiated.

Another fallacy revealed is the inclusion of human smuggling under the category of organized crime without considering the diversity of service providers. It is true that smuggling could be conducted by large operators organized in international network with division of labor. However, it would be wrong to think about human smuggling only in this sense. Smuggling is also organized by self-employed and independently working smugglers, who work on opportunistic basis or by small operators whose main activity is the facilitation

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<sup>266</sup> Valeria Ilareva, Bulgaria’s Treatment of Asylum-seekers, Forced Migration Review Issue 29, September 2007, p.60-61, available at <http://www.fmreview.org/FMRpdfs/FMR29/FMR29.pdf> ; Human Rights in Bulgaria in 2008, Annual Report of the Bulgarian Helsinki Committee, p.34. available at [http://www.bghelsinki.org/upload/resources/Humanrights2008\\_en.pdf](http://www.bghelsinki.org/upload/resources/Humanrights2008_en.pdf).

of illegal entry. There is no data indicating how much of the market is covered by large networks. The research seems to point to preponderance of small operators. In addition, when we think about smuggling, we should also think about separate individual ventures, migrants trying to organize different legs of the journey with the help of different facilitators, and migrants staying in transit until being able to afford the next leg of their journey. The role of family and ethnic networks for the facilitation of the travelling and illegal entry should also be taken into account.

Lastly, the costs paid by asylum-seekers for using smuggling services include not only physical dangers but also criminal charges, detention, lost of credibility and limitation of procedural rights, which might make the successful recognition as a refugee less likely. However, in light of the lack of alternatives to reach countries of desired destination where to claim asylum, there is a willingness to pay the costs.



## Conclusion

Human smuggling, defined as facilitating the entry into the territory of a state in breach of that state's laws, is a method of bringing asylum-seekers to safe shores where they can apply for protection. Human smuggling is a benign market response to the strict immigration control imposed by the developed states, which aim at guaranteeing the immobility of undesired migrants. Asylum-seekers are included within the category of the "undesirable", despite the international obligations undertaken in regard to them.

The western European states refer to smuggled migrants as individuals who are exposed to exploitation and life dangers and as passive victims of merciless and unscrupulous profiteers. States' respond to human smuggling is strict border control and border surveillance, both of which are allegedly justified by humanitarian considerations for the well-being of the migrants. However, if human smuggling is, instead, differentiated from exploitation, then states will not have a basis to argue that by adopting restrictive immigration policies they actually save lives and prevent exploitation of human beings. This is the main reason why the thesis argues for keeping the distinction between, from the one hand, human smuggling as a method of moving people across international borders characterized by the voluntary participation of the migrants, and, from the other hand, human trafficking which results in human exploitation and is a human rights violation in itself. Migrants demand the service of being smuggled. Smuggling is more in violation of particular state sovereign interests (controlling borders; preventing entry into state territory by undesired aliens, including asylum-seekers) than a threat to the well-being of the migrants.

The Western European states claim that human smuggling is a form of organized crime, which has to be cracked down on. However, it is wrong to refer to human smuggling only as an activity conducted by well-organized mafia structures. Rather there is a diversity of service providers, which include individual smugglers who work on opportunistic basis without

smuggling being their main activity; small operators whose main activity is the facilitation of illegal entry; and larger operators organized in international networks with division of labor. There is no data indicating how much of the market is covered by large networks. The research seems to point to preponderance of small operators.

Human smuggling infringes upon the sovereign right of states to determine who enters their territory, which is another justification for taking measures against it. However, states have undertaken international obligations in respect to asylum-seekers and refugees. These obligations limit states' discretion to control immigration. The international human right '*to seek and to enjoy in other countries asylum from persecution*' outlined in UDHR, as well as the existence of a duty not to return asylum-seekers and refugees to countries where they might be persecuted (the prohibition of *refoulement*), and the explicit prohibition on the imposition of penalties on refugees 'on account of their illegal entry or presence', does not allow treating refugees in a discretionary manner. It is internationally recognized (Art.31 of the Refugee Convention) that refugees might have to enter the country of asylum in breach of that country's immigration laws. Art.31 protection applies to all smuggling practices – usage of false documents, clandestine manner of crossing the border, and the so called “open landings” when the migrants openly present themselves to the authorities once they have reached the state territory. Accordingly, asylum-seekers should not be penalized for using smuggling services.

It is not only asylum-seekers who resort to human smuggling as a channel for irregular migration. Economic migrants also use human smugglers to gain entry into the territories of states of desired destinations. Upon arrival they also might claim to be refugees. Therefore, states face the challenge of identifying those migrants with protection needs. Most importantly, the fact that asylum-seekers have used irregular channel for migration - human smuggling, together with other irregular migrants, should not be a basis for preemptively

qualifying asylum-seekers as “bogus refugees”, “illegal migrants” or as criminals. Once an asylum-seeker comes under the control of the state, that state has to conduct a procedure in order to assess if that individual is in need of international protection. If after the procedure is determined that the immigrant is not in need of protection and if he/she does not have any other grounds to stay in the country, he/she becomes irregular immigrant, who could be subject to deportation or to criminal prosecution for his/her involvement into smuggling contingent on the national legislation of the particular state.

Human smuggling is a response to the enhanced control of who enters the states of desired destination. It is a response to the lack of alternatives of reaching the territory of the developed states. Border control, which is not to be viewed in a traditional sense but in the sense of measures starting far beyond the physical borders, constitutes a filter for sifting out the “undesirable” immigrants. Border control in this new sense has the objective to prevent the departure and the arrival of those immigrants, in this way ensuring that they remain in their countries of origin or transit. Visas, carrier sanctions, ILOs and Frontex as methods of effectuating the control, are specifically targeted at asylum-seekers who fall into the category of the “undesirables”. All refugee producing countries are in the “black list” of countries whose nationals need to be in a possession of a visa to enter the EU. At the same time, the conditions for issuance of visa cannot be fulfilled by many asylum-seekers. Visas by themselves, however, cannot achieve the desired effect of ensuring that undesirable migrants do not leave their countries of origin or transit. Carriers under the danger of sanctions conduct pre-boarding checks and do not allow the boarding and the transportation of an individual, who does not have the required documents (passport and visa). During the drafting of the EU legislation dealing with carrier sanctions, a proposal for including an asylum exemption was made. According to the exemption, penalties are not to be applied if the third country national is admitted to the territory for asylum purposes. The exemption, however, was thought to

result in ineffectiveness of carrier penalties and in increase of the asylum-applications. In this way, it is apparent that the purpose of the carrier sanctions' legislation was to target asylum-seekers in order to prevent their arrivals. The efficacy of visas and of the involvement of carriers in immigration control is further ensured by the position of ILOs, who offer advice to carriers on the acceptability and validity of documents presented for travel. The EU border agency Frontex is another mechanism ensuring the non-arrival of migrants. Frontex intercepts migrants and based on agreements with the countries of origin or transit, returns them back without identification of those who might be in need of protection.

The intensified control makes the service of smuggling even more necessary. People in need of protection have to exit their countries of origin, move to a transit country, and reach the territory of potential countries of asylum. Smugglers participate in each of these steps and eventually bring people to safe shores. In this sense, the "fight" against human smuggling is in tension with human rights.

In Europe the discourse on human smuggling is predominantly concentrated on the arrival of boats crammed with migrants heading from the African to the European shores. Those arrivals are represented as an influx of boats with "illegal migrants". However, this influx is a fallacy. The reality is that the majority of irregular immigrants in Europe enter legally and subsequently become irregular since they overstay their visas. The reality is that Spain and Italy are not flooded with asylum-seekers, which is evident if a comparison on the number of asylum applications is made between these two Mediterranean countries and the other EU countries. These revelations make the necessity for severe sea border control and surveillance, both of which divert the smugglers to use more dangerous routes, questionable. It is easy and tempting to follow the policy slogans and the vague claims that Europe will be flooded with *pateras* carrying "illegal immigrants". However, the policy having its own objectives is different from the reality. The political objectives of being seen as defending

national borders and of “nourishing” xenophobic feelings and fears from immigrants, in order to make people believe that they need statesmen to “defend” them by cracking down on immigration, are not buttressed by the available data and its interpretation.

Lastly, the costs paid by asylum-seekers for using smuggling services include not only physical dangers, but also criminal charges, detention, lost of credibility and limitation of procedural rights, which might make the successful recognition as a refugee less likely. However, in light of the lack of alternatives to reach countries where they can claim asylum, there is a willingness to pay the costs.

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