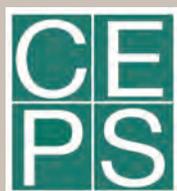


**IRREGULAR MIGRATION,  
TRAFFICKING AND  
SMUGGLING OF HUMAN BEINGS**

**POLICY DILEMMAS IN THE EU**



Edited by  
**Sergio Carrera**  
**Elsbeth Guild**

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**EDITED BY  
SERGIO CARRERA  
AND  
ELSPETH GUILD**

**FOREWORD BY  
MATTHIAS RUETE**

**CENTRE FOR EUROPEAN POLICY STUDIES (CEPS)  
BRUSSELS**

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## FOREWORD

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While the current migration and refugee crisis is the most severe that the world has known since the end of the Second World War (with over 60 million refugees worldwide, according to the UNHCR), it may turn into the norm, because the reasons to migrate keep on multiplying. These reasons range from long-lasting political crises, endemic civil wars, atrocities committed against ethnic or religious groups by extremist organisations to the lack of economic development prospects and climate change. The European Union has a duty to welcome some of these people – namely those who need international protection.

With over a million irregular migrants crossing its external borders in 2015, the European Union has to engage in a deep reflection on the rationale underpinning its policies on irregular migration and migrant smuggling – and their effects. At such a strenuous time, the challenge before us is “to work closely together in a spirit of solidarity” while the “need to secure Europe’s borders” remains an imperative, to recall President Juncker’s words.

Of particular relevance in this framework is the issue of migrant smuggling, or facilitation of irregular entry, stay or transit. Addressing migrant smuggling – located at the intersection of criminal law, which sanctions organised crime, the management of migration and the protection of the fundamental rights of irregular migrants – has become a pressing priority. But the prevention of and fight against migrant smuggling is a complex process, affected by contextual factors, including a high level of economic and social disparity between the EU and several third countries, difficult cooperation with source and transit countries and limited legal migration channels to the EU.

In this framework, the European Commission tabled two agendas prioritising the fight against migrant smuggling. The European Agenda on Security, adopted in April 2015, and the European Agenda on Migration, presented in May 2015, both attach major importance to cooperation against

the smuggling of migrants inside the EU and from third countries. Shortly afterwards, to operationalise these frameworks, the European Commission presented the EU Action Plan against Migrant Smuggling, in May 2015. It foresees a comprehensive, multidisciplinary response against migrant smuggling involving relevant stakeholders and institutions at all levels.

The Action Plan covers all phases and types of migrant smuggling and all migratory routes, including the facilitation of secondary movement, unauthorised residence within the EU and the necessity to enforce return and readmission procedures. It endorses a comprehensive approach ranging from preventive action targeting potential migrants in countries of origin and transit to measures against smuggling rings operating along the migratory routes, while ensuring the full respect of the human rights of migrants. The implementation, involving different actors and organisations at local, regional, national and international levels, as well as EU agencies, is coordinated by the Commission. The Action Plan sets out both short-term and long-term objectives around four main priorities: reinforcing investigation and prosecution of smugglers; improved information gathering, sharing and analysis; better prevention of smuggling and assisting vulnerable migrants and enhancing cooperation with third countries.

The Action Plan underlines the critical need to collect and share information on the *modus operandi*, routes and economic models of smuggling networks in order to understand the business model of criminal networks and design adequate responses. In this framework, full use should be made of the available risk analyses and monitoring of pre-frontier areas. The dissemination of information related to the external borders will be increased with the support of Eurosur, while further research on the phenomena and on the links with other crimes needs to be initiated.

The relevant EU agencies must scale up their work on migrant smuggling. Their resources devoted to migrant smuggling have been increased substantially. Europol's new European Migrant Smuggling Centre should become the EU information hub in the fight against migrant smuggling. The presence of both Europol and Frontex in the hotspots of frontline member states is crucial for gathering and processing information – and for launching investigations leading to prosecutions.

Funded by the European Commission's Seventh Framework Programme for Research, the FIDUCIA project has promoted research on the role of trust-based policies in legal compliance in the field of migration, through the work done by the Centre for European Policy Studies (CEPS)

and a group of academics. The initiative aims to stimulate evidence-based policy-making and to bring fresh thinking to develop more effective policies. The European Commission welcomes the valuable contribution of this initiative to help close the wide gap in our knowledge about the smuggling of migrants, and especially the functioning of smuggling networks.

Facilitation of irregular migration constitutes a serious challenge with respect to three central questions, as reflected in this book.

First, if the choice to criminalise migrant smuggling constitutes an unwavering commitment of the European Union and its member states (deep-rooted in international law by the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, which the European Union approved), the effectiveness of the repression of smuggling networks is unconvincing. At present, the overall number of investigations and prosecutions leading to effective convictions of migrant smugglers across the entire European Union is low, compared to the estimated overall scale of the phenomenon.

At the same time, the demand for smugglers' services by potential migrants and seekers of international protection is on the rise and so are the instances of exploitation and human rights violations reported by migrants. This situation affects the safety and security of migrants and EU citizens alike. It has an effect on business operators in sectors such as the fishing and shipping industries, the air and land transport sectors, civil society and other organisations working in the field of migration and asylum. The reasons are numerous: the nature of the crime itself, the context, the unprecedented demand, the difficulty of following the financial trails and the challenge of cooperating with third-country authorities.

Specific dynamics, such as the use of cash payments or informal banking systems (such as the *hawala* method) and the transnational aspects of smuggling make it hard to investigate criminal proceeds. Nevertheless, proactive financial investigations to identify, seize and recover criminal assets and counter money laundering are crucial – all the more so because smugglers are sometimes involved in other criminal areas, e.g. smuggling of cigarettes, trafficking in drugs and weapons and labour exploitation in order to support their smuggling activity or to boost their profit.

Law enforcement and judicial authorities in all member states must have better capacities to investigate and prosecute financial cases, as smuggling of migrants is a transnational crime, which cannot be effectively addressed without a cross-border police and judicial response. Stronger

cooperation at the EU level and beyond, including with third countries of origin and transit, other strategic partners and international organisations is an essential prerequisite to successfully preventing and countering migrant smuggling. In this respect, the cooperation within the EMPACT (European Multidisciplinary Platform against Criminal Threats), the Operational Action Plan on irregular immigration should be strengthened. Europol, in cooperation with other relevant EU agencies and international bodies, is ready to provide support to member states in financial investigations, money laundering and asset recovery techniques as well as actions against organised criminal groups and individuals. Targeting smugglers' profits should become a priority for the National Assets Recovery Offices and the Camden Assets Recovery Inter-Agency Network.

Second, protecting the fundamental rights of irregular migrants requires differentiating between smugglers and those providing humanitarian assistance to irregular migrants, as this research points out. This is particularly true as civil society – NGOs as well as individuals – are often the ones that cover the basic needs of migrants.

At a time when states are overwhelmed, it is paramount to ensure that those helping receive migrants are given the legal certainty that they will not be prosecuted for their assistance. The Commission will look into this carefully when it will make proposals for the revision of the EU legislation on migrant smuggling. Along the same lines, I would like to stress that the priorities of the Commission in addressing migrant smuggling are exclusively targeted against those profiting from the desperation of migrants – and not against the migrants themselves.

Third, the interrelationship between migrant smuggling and trafficking in human beings is a complex issue to tackle. The risk of falling victim to trafficking after or during the course of the sometimes very long smuggling process is very real. This is particularly true for the most vulnerable groups such as children, especially unaccompanied minors, and women travelling alone or with young children.

Accounts of fatalities among those embarking on these perilous journeys have sadly become a regular feature of the daily news, while testimonies accounting for inhuman and degrading treatment have multiplied. Hence, there is a clear need for targeted information campaigns and the development of a counter-narrative to uncover the deceptions of smugglers. Informing prospective migrants about the dangers of engaging in irregular migration to the EU is important for preventing them from boarding the boats and thus protecting the lives of those who are seeking to

reach Europe at any price. Establishing partnerships with business operators in the sectors most at risk, notably through the development of handbooks for the transport sector, as well as guidelines for border authorities, is equally important for preventing migrant smuggling.

But taking action to prevent or counter migrant smuggling must be seen in connection with the EU's broader efforts to open more legal and safe migration channels, for instance through resettlement or legal migration schemes, with its determined action to save lives at sea and with action to address the root causes of migration in the countries of origin and transit. The Commission is committed to implementing fully the European Agenda on Migration, which envisages strong action on all aspects relevant for a comprehensive and sustainable migration policy.

Matthias Ruete  
Director General  
DG Home Affairs  
European Commission



# ADDRESSING IRREGULAR MIGRATION, FACILITATION AND HUMAN TRAFFICKING: THE EU'S APPROACH

*SERGIO CARRERA AND ELSPETH GUILD*

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Over the last 15 years, the European Union has seen its role and legal competence increasing in the enactment of common legislation and instruments providing for common European standards, procedures and conditions for the treatment of third-country nationals irregularly entering or staying in the Union's territory, as well as those in solidarity with them.

In this book we examine the measures adopted and claims made at the EU level about the nature, importance and possible threat that irregular migration constitutes for the EU. A wide range of EU legislative measures have been adopted, which have obliged member states to take action against irregular migrants and anyone who may be found to assist them. This book examines the issue of irregular migration in the EU. It provides new perspectives and policy directions with the aim of assisting policy-makers who seek to address this complex and politically charged field.

The European Commission launched its plan and priorities for a "New Comprehensive European Agenda on Migration" on 4 March 2015.<sup>1</sup> The Commission has expressed its wish to enhance actions "in fighting irregular immigration and smuggling more robustly". This Agenda was complemented by the EU Action Plan against Migrant Smuggling in May 2015.

This has run in parallel with an incremental use of criminal or penal law-like sanctions in the EU against individuals directly or indirectly involved in the irregular immigration process, including EU citizens,

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<sup>1</sup> See [http://europa.eu/rapid/press-release\\_IP-15-4545\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4545_en.htm).

regularly resident third-country nationals, and 'third parties' engaged in helping and/or providing humanitarian assistance to undocumented people, which has been identified as 'criminalisation' of irregular migration and solidarity. In autumn 2015, during which substantial numbers of refugees in desperate situations left Turkey and travelled through both EU and Schengen states – some of them passing into western Balkan states and back into EU states – the EU's measures against facilitation of irregular migration were instrumentalised by some political leaders to warn their citizens and the citizens of neighbouring states against assisting refugees on the move.

This has presented new challenges to the EU's measures and raised the question of whether they are well adjusted to the needs of our times. Certainly, the plight of refugees in dreadful situations has inspired many people in the region to reach out to assist and help them both on their routes and on arrival at their destinations. Many of these actions could, under the national implementing rules of the EU measures against irregular migration, be treated as crimes, and EU citizens' acts of solidarity with refugees in need could be deemed as civil disobedience in defiance of the law.

This book will examine the state of the law and practice in this highly charged field. First, however, we need to examine the state of our knowledge about irregular migration into the EU. What do the numbers tell us about the scale of the phenomenon in the EU? What do attempts to count irregular immigrants assume wrongly?

One of the most controversial aspects of any discussion of irregular migration is the matter of numbers.<sup>2</sup> One of the most commonly cited studies on irregular migration is that of the EU-funded project CLANDESTINO which examined and estimated the 'irregular' population in 12 member states, suggesting a total of between 5-8 million irregularly present migrants in the EU and 500,000 arriving each year.<sup>3</sup>

This so-called estimate is still produced regularly to justify the need for more measures against irregular migration into the EU. It also fuels calls for further criminalisation of irregular migration to 'deal' with what is presented as a problem because of the size. Three issues are readily apparent regarding the purported figure:

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<sup>2</sup> The question of 'the scale of irregular immigration' in the EU outlined in this introductory chapter is based on Carrera et al. (2015).

<sup>3</sup> Clandestino (2009).

1. There is an assumption that irregularity is a sort of existential category and thus can be counted independently of actions of states to treat specific individuals as irregularly present.
2. The highly fluid nature of the entry and departure of third-country nationals into and out of the EU is ignored in favour of a vision of the EU as a one-way street – into the EU but not out.
3. The evidence of the EU immigration and border authorities themselves on the numbers of persons treated as irregularly present is dismissed as inaccurate in favour of some existential figure to which only the researchers have access and knowledge.

In respect of the first assumption, third-country nationals only irregularly enter or are only irregularly present in the EU in so far as and where state authorities determine that they are so. There is nothing existential about irregularity.

Some simple examples to demonstrate the issue: there is a specific annex to the Schengen Borders Code (SBC) which provides for a variety of persons who enter the EU without passing through immigration control to be regularly present, including pleasure craft arriving at ports and a variety of others. A wide range of EU visa waiver agreements on border traffic with neighbouring countries (mainly those with which there are very highly levels of border crossing) permit nationals of the third state to enter under a simplified regime which takes priority over the Schengen rules, including those regarding length and frequency of stay. Many member states have bilateral agreements with numerous third countries which permit entry and residence for longer periods than the Schengen rules' 90 days, with no formalities at all.

Other examples are equally mundane: for instance the third-country national student in the EU who is permitted to work 20 hours a week during term time and whose employer requests an extra few hours one week will become an 'irregularly' present third-country national for that one week and then, when his or her hours drop back to 20 or below, cease to be irregularly present. The third-country national family member of a citizen who misses the deadline for filing his or her residence permit application by a few days or weeks and files it late has become 'irregularly' present in the member state, but whether this will be detrimental depends on whether the immigration authorities choose to treat that period as 'irregular'. In many member states immigration ministries actually follow general rules of thumb regarding periods of 'irregularity', resulting in their being overlooked.

The point here is that the label of 'irregularity' can never be determined independently of the activities of the immigration and border guards. It is only this exercise of sovereign power which categorises someone as irregularly present (or not).

Frontex (the EU External Borders Agency) recently published a report confirming that over 700 million exits and entries into and out of the EU take place each year (into and out of an EU which is comprised of 507 million residents).<sup>4</sup> Each border guard has approximately 12 seconds to decide on the entry of a person into the EU according to Frontex. The consequence of taking longer is the unacceptable disruption of traffic flows at airports, roads and other entry points in the EU. The decision of the border guard in those 12 seconds that the traveller is 'regular' or 'irregular' is about as profound as the decision of a ticket inspector on the metro. All of the legal definitions contained in the Schengen Borders Code for entry into the EU, including the need to probe the purpose of the visit, the adequacy of the individual's status, his or her background and funds, is a valuable starting point but fairly removed from actual practice. So long as the border guard does not actually challenge the person as seeking to enter irregularly, the person enters regularly irrespective of his or her intentions or motives.

One of the most revealing documents which demonstrates this fact of border control is the information manual produced by the (US) CIA for its intelligence operatives travelling under false identities on how to cross the Schengen external border without being apprehended (made public by WikiLeaks).<sup>5</sup> All persons using this advice will, according to the existential view of border controls, be 'irregularly' present, although they will have been admitted by a border guard according to the Schengen Handbook and undoubtedly will leave before the end of their 90-day Schengen visit. These realities of border crossing and their control by EU border guards make a mockery of certain claims to existential knowledge of how many people are irregularly present in the EU. The idea that such estimates can exist beyond and independent of the actions of immigration and border guards to treat certain persons as irregularly present is the fundamental error.

If one then moves to the available official data from border and immigration authorities regarding irregular entry and residence in the EU, an exceedingly different picture emerges. Let us take simply the latest report

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<sup>4</sup> Frontex (2014).

<sup>5</sup> Wikileaks (2014).

of Frontex – the FRAN Quarterly Q3 2015 on the management of EU external borders (including Denmark, Ireland and the UK).<sup>6</sup> Table 1 indicates that in the third quarter of 2015 at all EU borders 617,412 persons attempted an illegal border crossing between border crossing points. Of this number 308,165 were Syrian nationals (who undoubtedly requested asylum, so their inclusion under irregular entry means that they will be counted twice in the statistics). The next highest numbers by nationality were Afghans (92,216) and Iraqis (23,799). Some 91,065 such entries were by persons whose nationality was not specified (but likely to be from these same countries of origin and without passports). If those persons irregularly entering the EU (mainly by sea) who are highly likely also to apply for asylum were excluded from this first figure, and leaving aside the fact that many people may have been counted twice as they entered, for instance, Greece by sea from Turkey, then left via Macedonia only to re-enter via Hungary and thus be counted at least twice, then the figure would be 102,901, lower than that of Q3 2014 (112,901).

Two things are worth noting about these figures. The first is their claim to accuracy. Frontex claims to know down to the last individual how many persons were detected seeking to cross irregularly the external border of the EU. Of course the border guards may miss some people, but between the individual border guard on the beat and the Frontex statistics, there is a claim of absolute coherence, knowledge and consistency. Frontex prepares statistics which claim a very high degree of accuracy. These are not guesstimates.

Frontex also provides in its FRAN Q3 2015 the number of persons who were treated as irregularly present in the EU in Q3: 265,166. Again the top nationality was Syrian (89,356) followed by Afghan (37,772) and Iraqi (32,342). These are also the most frequent nationalities among persons seeking and receiving international protection in the EU. Although these people have been treated as (temporarily) irregular as they crossed EU internal borders to arrive in the member state where they wished to make their asylum claim, it may be expected that upon arrival they would receive international protection.

The inclusion of *prima facie* in these figures of ‘illegally’ staying people is something of an ethical travesty for the EU. Leaving ethics aside, however, Frontex once again makes a very serious claim to knowledge and accuracy

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<sup>6</sup> Frontex (2015).

and that claim has nothing to do with millions of 'irregulars' - indeed, it is difficult to square with claims of millions.

The problem which the Frontex figures elucidate is one of scale. The fear of irregular (in the language of the EU illegal - a term now specifically condemned by Resolution 2059 (2015) of 22 May 2015 of the Council of Europe's Parliamentary Assembly) migrants is based on guesses which tend to assume an external reality separate from that of the co-constitution of irregularity which requires the active participation of the immigration authorities. In fact, irregularity of entry and residence is exclusively co-constituted by individuals and border and immigration authorities entering into very specific kinds of exchanges which result in the application of the designations. They exist nowhere else - there is no 'reality' out there of irregularly present people beyond those whom the immigration and border authorities themselves have specifically designated one-by-one as irregularly entering or present.

Both those irregularly present and the authorities that have designated them as such are intimately connected - they know one another well, the authorities often know well where those they have categorised as irregularly present are, and those who have been so categorised for the most part are busy making various consecutive applications (such as for asylum) to escape this designation. The possibility of designating third-country nationals as irregularly present is inherent in the power of state legislatures to change immigration laws and rules and to make unlawful the entry and residence of people on grounds which those legislatures choose. The state can also reduce irregularity of entry and residence by adapting laws and regulations to accommodate third-country nationals' preferences (an example of this is, for instance, the reduction of states which are on the EU's mandatory visa list, thus eliminating the possibility that their citizens can be treated as illegal migrants for entering the EU without a visa).

This reality, notwithstanding its apparent inconsistency with popular 'knowledge', is strongly supported by Frontex's figures on return decisions (Tables 12 and 13 FRAN Q3 2015). In Q 3 2015, in the whole of the EU, 73,363 return decisions were taken. This is quite obviously a very different figure from the number which Frontex provided us with of persons irregularly entering the EU (617,412) or irregularly staying (265,166) over the same period. Clearly, the discrepancy is the result of claims for international protection and other claims for residence.

However, one might well take the figure of 73,363 as a much more realistic number of the persons whom the EU border and immigration

authorities really want to get rid of as irregularly present. That figure, however, is actually much lower when we consult the number of effective returns carried out in Q3 2015 – 43,965. Of the initial 73,363 people whom the border and immigration authorities identified as people they no longer want on the territory, in fact, and on closer examination of the specifics of each case, only 43,965 were actually sent away, while the others continue to stay in the EU.

The EU debate on irregularly present third-country nationals urgently needs to become more mature and to be informed by the data which the border and immigration authorities make available. However, the stake in such a change of perspective is enormous – if the realities of irregularly staying third-country nationals in the EU are so minor, how can one justify the huge political, legal and economic investment in ‘resolving’ something which is barely a problem at all?

It is within this context that this book examines issues related to irregular migration and EU law and policy. Special attention is paid to the determinants and challenges that make up policies directed towards irregular migration and human trafficking in the EU with a view to providing academic input for informed policy-making in the next phases of European migration policies. The volume is based on a closed-door Expert Seminar that took place at CEPS on 24-25 March 2015, co-organised with the Directorate General for Migration and Home Affairs (DG HOME) of the European Commission, and which brought together a high-level group of European Commission officials representing relevant DGs and services dealing with migration-related policies (see the Annex for the full programme of the Expert Seminar).

The seminar brought together Commission officials and a multidisciplinary selection of academics who presented their research findings in relation to the following three thematic challenges: first, facilitation of irregular migration; second, humanitarian assistance to irregular migrants; and third, the interrelationship of human trafficking with other forms of irregular migration. The event was structured around these three challenges, which in turn dealt with the following set of sub-questions:

- *Challenge 1: The Criminalisation of Facilitating Irregular Entry and Stay:* Have the 2002/90/EC Directive on the facilitation of unauthorised entry, transit and residence (Facilitation Directive) and Framework Decision implementing it been effective in addressing the smuggling of migrants? What has been the impact of the Employer Sanctions Directive in addressing irregular migration? Are there alternative

ways of managing irregular migration other than through strengthening the penal framework?

- *Challenge 2: Humanitarian assistance to irregular migrants:* What is the impact of the Facilitation Directive on irregular migrants? Should the Facilitation Directive clarify the extent of criminal liability for assisting irregular migrants? What are the priorities of the EU in addressing facilitation of irregular entry and stay? Is criminal law the most effective means to address the phenomenon of facilitating irregular migration?
- *Challenge 3: The interrelationship of trafficking in human beings and with other forms of irregular migration.* What is the interrelationship between trafficking in human beings and other forms of irregular migration? What knowledge gaps need to be filled when exploring the links between human smuggling and trafficking in human beings? Are there alternative ways of addressing human trafficking other than through strengthening the penal framework?

The Expert Seminar fell within the framework of FIDUCIA (New European Crimes and Trust-based Policy), a research project financed by the European Commission, under the Seventh Framework Programme in which CEPS was a partner. The editors would like to express their gratitude to the DG HOME of the Commission for co-organising the Expert Seminar which constituted the basis of this book. They would also like to thank all the participants in the event and the contributors to this volume. Special thanks go to Stefano Maffei, Coordinator of the FIDUCIA project and Lecturer in Law at the University of Parma, and Cristina Marcuzzo (scientific officer responsible for the FIDUCIA project in DG Research and Innovation of the Commission) for their cooperation and support throughout the FIDUCIA project. The editors are very grateful to Mark Provera (Jesuit Refugee Service (JRS) and former Researcher at CEPS) for his most valuable inputs in the organisation of the Expert Seminar and active contribution in the first steps towards the preparation of this book.

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# **PART I.**

## **THE CRIMINALISATION OF FACILITATING IRREGULAR ENTRY AND STAY AND HUMANITARIAN ASSISTANCE**

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# 1. MIGRANT SMUGGLING IN THE EU: WHAT DO THE FACTS TELL US?

## *SERGIO CARRERA AND ELSPETH GUILD*

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On 23 April 2015, the European Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, and the EU Council expressed their determination to come to grips with people smuggling in the Mediterranean. The Commissioner stated in his press release of that date: “Prevention, because we will not stand idle waiting boat after boat, criminal networks to exploit and often condemn to death innocent human beings...If we are to win the fight against the smugglers, Europe needs to be ready to take action in order to seize the boats, destroy them and arrest the smugglers and bring them to justice.”

On 27 May 2015, the Commission announced its Action Plan against Migrant Smuggling 2015–2020, containing concrete actions to prevent and counter migrant smuggling. According to the press release, “actions include setting up a list of suspicious vessels; dedicated platforms to enhance cooperation and exchange of information with financial institutions; and cooperating with internet service providers and social media to ensure internet content used by smugglers to advertise their activities is swiftly detected and removed.”

By a Council Decision of 18 May 2015<sup>1</sup> the Council authorised a military operation in the southern Mediterranean (EUNAVFOR MED, Operation SOPHIA)<sup>2</sup> to counter smugglers of human beings. Its objective has been to mount a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the south-central Mediterranean. It was allocated €11.82 million for the first 12 months. The mission has three phases:

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<sup>1</sup> CFSP 2015/778.

<sup>2</sup> OJ L 122, 19.5.2015, p. 31.

1. In a first phase, support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law; in a second phase, conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, under the conditions provided for by applicable international law, including the United Nations Convention on the Laws of the Sea (UNCLOS) and the Protocol against the Smuggling of Migrants.
2. In accordance with any applicable UN Security Council Resolution or consent by the coastal state concerned, conduct boarding, search, seizure and diversion, on the high seas or in the territorial and internal waters of that state, of vessels suspected of being used for human smuggling or trafficking, under the conditions set out in that Resolution or consent.
3. In a third phase, in accordance with any applicable UN Security Council Resolution or consent by the coastal state concerned, take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that state, under the conditions set out in that Resolution or consent.

On 22 June the military operation was launched, in accordance with the first phase instructions. The second phase started on 7 October after the European External Action Service succeeded in obtaining a UN Security Council resolution on the subject.<sup>3</sup>

All of these actions have sparked controversy. This chapter assesses the political statements and deployment of military operations and other EU security agencies on the ground 'to counter smugglers of human beings' against the results for the third quarter of 2015, as published by Frontex on 20 January 2016.<sup>4</sup>

In the language of Frontex, smugglers are included in a somewhat larger category which is entitled 'facilitators'. This category is determined by EU law – the Facilitation Directive<sup>5</sup> which is currently under examination for

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<sup>3</sup> UN Security Council Resolution 2240(2015). See also [http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index\\_en.htm](http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm)

<sup>4</sup> Frontex (2015).

<sup>5</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

renewal by the Commission. According to Frontex, the vast majority of facilitators are detected 'inland', that is, inside the EU. This is of course a complicated category, as it includes all sorts of persons who may be assisting migrants so long as there is some element of profit. However, there is no clear differentiation between businesses carrying on their usual operations, such as shops and hotels, and facilitators who profit from assisting persons who are irregularly present.

In any event, in Q3 2015, the first period for which we have statistics after the commencement of EUNAVFOR MED, it appears that a total of 3,166 persons were detected as facilitators of irregularly arriving and present third-country nationals. The majority of persons so detected were found inland, that is, after arrival into the EU (1,595), while 956 were detected at land borders and 332 at sea borders. At intra EU member state borders a further 185 persons were detected.

The top five nationalities of the persons detected were: Moroccan (323), Syrian (190), Hungarian (187), Spanish (168) and Albanian (145).

Over the period 17 March through 2 December 2015, EUROPOL, which has been charged with coordinating EU police action against smugglers, issued seven press releases on the subject. Commencing with the 17 March 2015 release, EUROPOL announced that it had launched a Joint Operation Team (JOT Mare) to tackle the organised criminal groups who are facilitating the journeys of migrants by ship across the Mediterranean to the EU.<sup>6</sup> The need for the JOT according to EUROPOL was the recognition by the EU and member states of the need for a more 'balanced strategy' to combat irregular migration with the refocusing of law enforcement resources to disrupt the organised crime groups involved.

The next press release, dated 25 March, announced that with the support of nearly 400 law enforcement officers, 77 individuals suspected of large-scale irregular migrant smuggling from Kosovo had been arrested. The arrests took place in Austria, the Czech Republic, France, Germany, Slovakia and Kosovo.<sup>7</sup>

On 8 October 2015, the next press release announced Operation Bouquet, led by France and Portugal, had resulted in the arrest of six smugglers and 30 migrants (mainly from Hindustan). The released added

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<sup>6</sup> Europol (2015a).

<sup>7</sup> A EUROJUST press release repeats its EUROPOL counterpart with no addition. See also Europol (2015b).

that EUROPOL had been supporting Operation Bouquet since 2013 and EUROJUST had been providing judicial support.<sup>8</sup> There is no indication of how many officers were involved. The only press release on the EUROJUST website about Operation Bouquet relates to an action in December 2013.

On 12 October, EUROPOL issued a press release on the arrest of 89 persons, coordinated by the Spanish national police targeting a Chinese crime group specialising in smuggling people into Spain, onwards to the UK and further afield to Canada and the US.

Next, on 3 November, EUROPOL announced the arrest of 39 suspected migrant smugglers thought to be part of an organised crime network for Pakistani migrants across the Mediterranean; 365 police officers from Spain and Poland were involved, carrying out 60 inspections of restaurants suspected of being run by the gang and 51 house searches. Issues regarding labour standards were raised. Three weeks later, on 24 November, a EUROJUST action with EUROPOL support took place involving Belgium, the Czech Republic, Germany and the UK, involving more than 200 police officers. Eight persons were arrested, 10 houses were searched, six European Arrest Warrants were issued and 24 witnesses or suspects were identified. This gang appears to have been engaged in moving Albanians around Europe.

Finally,<sup>9</sup> on 2 December, EUROPOL announced that it had supported a large-scale joint operation involving police in Austria, Greece, Sweden and the UK which resulted in the arrest of 23 persons. This group appears to have mainly engaged in smuggling Syrians from Turkey to the EU. According to the press release:

The alleged members of the criminal network had set up a 'headquarters' in Greece, where migrants – either located in Turkey or on their way to Greece – would contact them for further assistance with their journeys to Northern Europe. All forms of assistance could be provided ranging from transport and supplying forged travel documents, to housing. The migrants paid the facilitators via money-transfer services or with cash. As well as communicating by mobile phone, the suspects attempted to keep a low profile and elude capture by making use of social media channels and online communication platforms.

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<sup>8</sup> Europol (2015c).

<sup>9</sup> For a full overview of Europol press releases, see [www.europol.europa.eu/category/press-release-category/facilitated-illegal-immigration](http://www.europol.europa.eu/category/press-release-category/facilitated-illegal-immigration)

No indication was given of how many police were involved in this action.

Notwithstanding this activity, according to Frontex, as of 20 January 2016, only 687 persons had been apprehended clandestinely entering the EU in third quarter of 2015. This is down substantially from the third quarter of 2014, when 965 persons were apprehended. Further, according to Frontex, in third quarter of 2015, 283,353 persons were apprehended as irregularly staying in the EU – up substantially from 2014 when in the third quarter the figure was 146,288. In 2015 the top five nationalities of apprehended persons were: Syrian, Afghan, Iraqi, Eritrean and Pakistani. As previously mentioned in the introductory chapter of this book, from the asylum statistics it seems likely that all of the people of these nationalities were in need of international protection. Their apprehension as ‘irregularly staying in the EU’ may have been a short prelude to their application for refugee status. Over the same quarter, 405,131 persons applied for asylum in the EU and the top five nationalities were Syrian, Afghan, Iraqi, Albanian and Pakistani.

What can one conclude from this information about smuggling of people into the EU?

First, the EU is willing to spend very substantial amounts of money on trying to prevent people arriving irregularly in the EU; we have no figures for the EUROPOL and EUROJUST activities, but the EUNAVFOR MED operation will cost €11.82 million for the first 12 months and there is no publicly available information regarding its concrete activities.

Secondly, tackling the smuggling of human beings demands significant police time – hundreds of police are often involved in operations where fairly few people are arrested. The issue of the disruption of criminal operations is always important, but the mechanisms for this kind of disruption need to be examined against the value achieved. The cost of these JOTs must be fairly high not least because police in numerous member states are involved, requiring extensive back-up resources, including assistance in interpretation.

Thirdly, the nationalities of the smugglers is puzzling. According to Frontex they are a very disparate group – Moroccans, Syrians, Hungarians, Spanish and Albanians. There is no obvious language through which they would communicate with one another. It seems likely that they specialise in providing services to people who speak their own languages rather than reaching out to a wider clientele. The nationalities of the people smuggled is also puzzling; in so far as this information is available from the EUROPOL press releases, they are Kosovars, North Indians or Pakistanis (the

Hindustanis) Chinese, Albanians and Syrians. It is unclear what these groups have in common – certainly not a language. This all points to highly segregated and specialised smuggling services, each designed to reach only one specific national group at a time.

Fourthly, the addition of military force to the activities of border guards and police has not resulted in improved knowledge about the issue. There is no transparency at all of the SOPHIA operation – no press releases except about the size and cost of the operation, nothing about its activities. Thus there is no way to assess what it is doing.

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## 2. CROSS-BORDER COTTAGE INDUSTRIES AND FRAGMENTED MIGRATION

*MICHAEL COLLYER*

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Over the past few decades, border control in Europe has focused on the 'external' border. This involves attempts to respond to migration before individual migrants and refugees reach European territory, as is evident in ongoing responses to the 'migration crisis'. It also reflects the contradictory efforts of individual states to export border controls to other member states, as the UK does at the cross channel ports, with related consequences for irregular migrants in Calais.

In this contribution, I consider two significant interpretations of the limited empirical evidence on irregular migration. Both affect the possibility of controlling the external border: first, much facilitation of irregular migration is not conducted through transnational criminal networks but ad hoc 'cross-border cottage industries'; second, a significant proportion of irregular migrants and refugees do not travel directly from their state of origin to some European destination but pass through a whole series of destinations in a 'fragmented migration' that may last many years before an assumed final destination is reached.

The 2002 Facilitation Directive<sup>1</sup> is the main piece of harmonised legislation stipulating measures criminalising the facilitation of irregular migration. Article 1 of the Facilitation Directive distinguishes between the facilitation of irregular entry (Article 1a) and assistance of irregular residence (Article 1b). The main difference between the two is that facilitation of residence specifically mentions 'financial gain' whereas facilitation of entry does not. This has led to widespread concern about the criminalisation of more humanitarian interventions to support migrants in distress, which results in their entering Europe but involves no financial gain, the so-called

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<sup>1</sup> European Council (2002a).

*'délits de solidarité'*.<sup>2</sup> In practical terms this has affected the willingness of small professional shipmasters, particularly fishing trawlers in the Mediterranean, to come to the rescue of migrants in distress. Calls for the clear decriminalisation of their involvement in sea rescue, and even systematic compensation, are now widespread.<sup>3</sup>

The fundamental problem is one of political geography. Beyond European territory, the authority of member states changes and it becomes much more difficult to investigate and prosecute the facilitation of irregular migration. International waters offer some possibility for the use of coercive force, such as the attempts by the Italian navy to push back migrant boats to Libya, which began in 2009. Nevertheless, this was soon abandoned in the face of widespread criticism,<sup>4</sup> and pan-European organisations, such as Frontex, do not have a mandate for the use of force anyway. Frederica Mogherini has publicly committed the EU institutions to the principle of non-refoulement, stating to the UN Security Council, "Let me explicitly assure you that no refugees or migrants intercepted at sea will be sent back against their will. Their rights under Geneva conventions will be fully honoured."<sup>5</sup>

This is a highly significant commitment and abandons the possibility of turning back irregular migrants once they have put to sea, due to the substantial chance that they are refugees. This effectively pushes the EU's external border into the non-EU states bordering the Mediterranean. Since facilitators of irregular migration do not get into the boats with the migrants who pay them, the EU must therefore rely on cooperation with non-EU states to assist in the identification and prosecution of facilitators. The usual difficulties in this process are further exacerbated by the current political vacuum in Libya, which provides a relatively uncontrolled space for facilitation of irregular migration. Initial plans for unilateral European military action against 'traffickers' are now on hold, given the objections of the internationally recognised government of Libya. These difficulties are now well known, although they are exacerbated by a significant detail that appears to be overlooked in initial discussions: although much of the policy focus concerns transnational criminal operations, many facilitators of irregular migration run very small-scale operations.

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<sup>2</sup> FRA (2014).

<sup>3</sup> Carrera & den Hertog (2015).

<sup>4</sup> Human Rights Watch (2009).

<sup>5</sup> Mogherini (2015).

Given the at least partially criminal nature of organisations facilitating irregular migration, any systematic information on the variety in size and scale of their operations is impossible to obtain. It is clear that some organisations are very large-scale and transnationally organised. A recent survey by the United States Institute of Peace highlighted the growing connection between arms and drugs trafficking and the facilitation of irregular migration.<sup>6</sup> These operations are large, extremely well organised and often pose threats of a more traditional security-focused nature, in addition to their role in the movement of migrants and refugees. They are no doubt already the focus of considerable attention from the European military intelligence community.

Yet these large-scale transnational networks are only one model of the facilitation of irregular migration. There is now very substantial research evidence that many migrants and refugees are assisted by what David Spender (2004) referred to more than a decade ago as “cross-border cottage industries”; individuals or small groups who see an opportunity to profit from the presence of irregular migrants by assisting them to cross an individual border or difficult stretch of terrain. These patterns have been identified much more recently in the Mediterranean.<sup>7</sup> This organisational structure is facilitated by the structure of migration patterns into what I have called “fragmented migration” in the context of irregular migration to Morocco.<sup>8</sup> Fragmented migration describes the structure of international migration into a number of stages which are organised and paid for separately and may occur months or even years apart. Such migration may be presented as having a linear logic, an intention to reach a particular end point, that was completely absent at its outset. Subsequent stages often develop out of disappointment or danger encountered at earlier stages.

Fragmented migration has implications for the protection of irregular migrants, but also for policy approaches which set out to counter such migration. In protection terms, the destinations available to an individual migrant or refugee are frequently determined by the financial resources they can mobilise.<sup>9</sup> They may therefore reach intermediary destinations with very limited resources and are much more vulnerable to exploitation in the labour market or in the organisation of onward migration. At each stage they must

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<sup>6</sup> See Shaw & Mangan (2014).

<sup>7</sup> See Global Initiative against Transnational Organised Crime (2014).

<sup>8</sup> See Collyer (2010).

<sup>9</sup> See Van Hear (2014).

negotiate separately for onward passage, sometimes spending many months in intermediary locations. It is during these periods that they come to know the border crossing operations better and are more likely to encounter the much smaller scale 'cottage industry' operations.

In turn, this has implications for ongoing European Union efforts to counter these operations. In the case of transnational organisations or regular involvement in the facilitation of irregular migration, data can be (and no doubt is being) collected, but where an individual or small group provides occasional or ad hoc assistance at particular borders, systematic information is much harder to collect. Any kind of preventative action in Libya is very difficult to imagine without the re-establishment of centralised authority. Even outside Libya, isolated incidents are by definition extremely hard to predict and prevent without large-scale surveillance operations. And even if movement can be prevented, this does not reduce the vulnerability of migrants who have already reached countries neighbouring the EU.

The assumption inherent in many of these policy initiatives at the external border is not that migrant facilitators can be easily identified and prosecuted, but that interrupting their operations will result in such pain and misery for irregular migrants that news will get back to potential migrants and they will stop coming. This is the logic behind the British government's refusal to support large-scale rescue of irregular migrants in the Mediterranean. Yet it once again overlooks the structural reality of fragmented migration. If a significant proportion of those leaving countries of origin have little hope of making it to Europe but only wish to find security or livelihood across the nearest border, communicating the risks at a distant border point with Europe will have little impact on their decision to leave. If, through desperation and access to limited funds, they eventually reach the shores of the Mediterranean, being informed in advance will have little impact, as the risks of moving on may appear more attractive than the difficulties of returning home. Knowledge of difficulties is only an effective deterrent for those who try to come directly from their country of residence and this may only be a minority of irregular migrants and even refugees.

There is no more effective rebuttal to the idea that making the lives of irregular migrants as miserable as possible acts as effective deterrence than the UK's own borders. As a member of the EU, but not a member of the Schengen zone, the UK operates its own external border controls within the territory of other member states. According to an article in *The Guardian* (2013), the government's declared intention is to create a "hostile environment" for irregular migrants once they have entered the country. But

for the last 15 years, the increasingly hostile environment of northern France has done nothing to deter a small but growing number of migrants from camping out in often appalling conditions for months at a time in the hope of getting an opportunity to reach the UK. It is not known how many of the currently 3,000 or so migrants waiting in Calais will make it to the UK and how many will give up and go elsewhere, though it is clear that 15 years of developing ever more sophisticated security technology to stop them has had little effect on the numbers of those who try.

My main argument here is in two parts. First, restricting the facilitation of migration is unlikely to succeed, partly due to the small-scale 'cottage industry' organisation of many facilitators of irregular migration. Second, the structural organisation of long overland journeys into multiple fragmented sections means that policies of 'hostile environment'-style deterrence near the intended destination will have few knock-on effects on departures. Together these suggest that criminalisation and securitisation may have some effects, but they will certainly not eliminate irregular migration. If these more repressive responses will not work, indeed have long been shown not to work, it follows that a more liberal approach may be worth investigating.

More pro-migrant policies may be justified on humanitarian grounds, but they are also likely to have significant impacts on the numbers of migrants attempting hazardous maritime or overland journeys. They may take two approaches: either offering a clear alternative to irregular migration or improving the conditions along the route of these fragmented migrations. Clear examples of the provision of alternatives are refugee resettlement, and the greater flexibility of other visa categories (such as family reunification) for migrants with broader humanitarian reasons for leaving. Resettlement already forms part of the policy response of the EU and even if this has found disappointing support from member states so far, it is a necessary element of any response. It could be usefully supplemented by greater visa liberalisation for nationalities (such as Syrian or Eritrean) that are significantly represented in cross-Mediterranean migrations. Those with family in Europe are likely to be the most determined and the best resourced to come anyway, so family reunification will offer a shortcut and take significant business away from migrant facilitators.

The second more liberal approach is to improve conditions in countries where migrants and refugees spend significant periods of time so that the need to move on will not seem so urgent. The clearest recent example of this

trend is the regularisation in Morocco in 2014.<sup>10</sup> This was small-scale and is still criticised by some migrants' rights groups, but it offers a bold alternative to the 'hostile environment' rhetoric. A second example is the positive impact of regional free movement agreements, such as that of the Economic Organisation of West African States (ECOWAS). This system allows international migrants some security in crossing the nearest border without continual fear of arrest and contrasts markedly to the difficulties migrants face in East Africa. Given the limited success of more securitised approaches to eliminating the facilitation of migration, these examples offer more humanitarian alternatives for cutting the market for migrant facilitators and so improving the human rights of regular and irregular migrants and refugees.

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<sup>10</sup> See Cherti & Collyer (2015).

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### 3. MANAGING MIGRATION THROUGH LEGITIMACY? ALTERNATIVES TO THE CRIMINALISATION OF UNAUTHORISED MIGRATION

*ARJEN LEERKES*

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#### Introduction

It is common practice in the sociology of law to make a distinction between instrumental and normative models of compliance.<sup>1</sup> Whereas the former models explain compliance from self-interested calculation on the part of those who are targeted by a law, the latter models maintain that the law is followed to the extent that relevant actors believe that doing so is right. The lion's share of the policies that governments have developed to limit 'unwanted' migration follows an instrumental logic – either explicitly or implicitly – and focuses on negative sanctions: a central policy assumption is that illegal residence can be reduced by using force and by influencing unauthorised migrants' calculus through increasing the costs of illegal residence, and decreasing its benefits.

While the degree of *de jure* criminalisation is limited – in most Western countries illegal residence as such is not a crime – the *de facto* criminalisation is increasingly widespread: using administrative law, governments on both sides of the Atlantic inflict a considerable measure of pain on those violating migration laws, be it by holding unauthorised migrants in immigration detention centres for considerable periods of time, or by denying those without the right papers access to labour and housing markets, and (most)

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<sup>1</sup> See Tyler (1990).

health care. Hereafter, all policies that contribute to a de jure or de facto criminalisation of unauthorised migrants will be called ‘deterrence policies’.

There are at least three reasons to consider alternative policy strategies that rely less on deterrence. Firstly, regardless of their practical effects, deterrence policies tend to frame unauthorised residence as something criminal or criminal-like. Various scholars have argued that such framings are inappropriate given the – in their view – fundamental non-criminal nature of migration.<sup>2</sup> Secondly, there is no evidence that deterrence policies have been highly effective in reducing unauthorised migration.<sup>3</sup> Thirdly, deterrence policies are known to produce various negative side-effects: while the increased closing off of physical borders in an effort to deter unwanted migration has contributed to a rise in human smuggling and migrant deaths,<sup>4</sup> the closing off of labour and housing markets has exacerbated the marginalisation of unauthorised immigrants who remain in the state’s territory, thereby increasing their risk of falling victim to homelessness, health issues and petty crime.<sup>5</sup>

The predominance of instrumental models of compliance through negative sanctions is probably, at least in part, due to migration rules being highly contested: admission criteria tend to be protectionist, benefiting citizens of prosperous, safe and free countries much more than they do citizens of poor, unsafe and relatively unfree countries – who also did not get the chance to vote on these rules. One could ask: How is compliance on normative grounds even possible in the context of such a fundamental conflict of interests?

In this chapter, I make two points. Firstly, using examples from my research on deportation and Assisted Voluntary Return (AVR), I illustrate that normative models of compliance deserve more policy attention than they are currently being given. Secondly, I show that there tends to be a *tension* between such models and deterrence, suggesting that the former cannot simply be used as an additive to the latter. While instrumental and

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<sup>2</sup> See for example, Zedner (2013).

<sup>3</sup> Espenshade (1994); Massey, Durand & Malone (2002); Cornelius & Salehyan (2007); Leerkes et al. (2012); Leerkes et al. (2013). Some measures, such as the increased militarisation of the US-Mexican border in the context of a persistent demand for cheap labour, may even have increased unauthorised stay by turning temporary migration into permanent settlement (Massey et al., 2002).

<sup>4</sup> Cornelius (2001).

<sup>5</sup> Leerkes et al. (2012).

normative models do not rule each other out, pushing deterrence policies too far tends to undermine compliance on normative grounds.

In normative models of compliance, a distinction is usually made between the normative evaluation of *outcomes* ('distributive justice') and the evaluation of *procedures* ('procedural justice'). Distributive justice means that the content of a rule is considered fair. Procedural justice means that a rule is enforced in ways that are perceived as just. In what follows, I discuss results from Dutch studies on forced return and Assisted Voluntary Return (AVR). I first illustrate how an increase in the perceived distributive justice of migration rules seems to have increased the willingness among receiving *states* to comply with forced return ('states'). I then discuss results from two projects that indicate that various aspects of distributive and procedural justice are also capable of obtaining compliance at the individual level ('migrants').

## States

The chances of deportation procedures resulting in deportation depend, at least partly, on the extent to which source countries are willing to take their nationals back. Their role is particularly decisive in cases where a *laissez passer* needs to be applied for because migrants are unable or unwilling to show a valid ID. Van Kalmthout et al. (2004) conducted a large number of in-depth interviews with immigration detainees, documenting their personal situation in the country of origin and the Netherlands, their stay in immigration detention, and their attitude with regards to staying in, or departing from, the Netherlands. The Dutch government provided the researchers with information on whether the respondents were eventually deported or released because of failed deportation procedure. The dataset was given to me for secondary analysis.

I became interested in the relationship between legitimacy and border control when I learned that deportation procedures involving EU candidate countries were considerably more likely to result in deportation than those involving other countries, especially among detainees who - according to Van Kalmthout's measurements - did not want to go to their country of citizenship, and may have tried to resist deportation. Detainees who originated from (potential) candidate countries of the EU and who did not want to go to their country of citizenship had a 72% chance of being deported, against only 50% of those with similar migration preferences who originated from other countries (see Table 1). Among respondents who were prepared to go to their country of citizenship, these figures were 79% and

73% respectively, indicating that detainees' personal migration preferences hardly mattered among citizens of countries that were (potential) candidate EU members at the time. These results confirm the case study by Ellermann (2005), who has documented the experiences of the German authorities in negotiating and implementing readmission agreements with Romania and Vietnam. In the case of Romania – an EU candidate country at the time – the German authorities were quite effective in implementing the agreement. In the case of Vietnam, both negotiation and implementation of the readmission agreement turned out to be difficult, in spite of significant payments by the German state to Vietnam of about €100 million.

It may be argued that EU member states simply gave (potential) candidate countries a stronger incentive to comply with forced return than they gave to countries like Vietnam. In my view, however, such an economic, 'instrumental' account misses something essential. What the prospect of EU membership will also have achieved is a greater perceived fairness of deportation as a result of the increased openings for *legal* migration and, more generally, because of a sense of partnership. (Romania and several other candidate member states were exempted from Schengen visa requirements in 2001.) Compensatory payments, by contrast, will certainly affect countries' cost-benefit ratios, but they may also symbolically reinforce international inequality, thereby contributing to a greater perceived distributive *unfairness* of migration rules.

*Table 1. Probability of immigration detention resulting in deportation by country of origin and detainees' willingness to return*

	Released	Deported	Total
<i>Wanted to return</i>			
(Potential) candidate member states <sup>a</sup>	3 (21%)	11 (79%)	5 (100%)
Other countries	14 (27%)	37 (73%)	51 (100%)
<i>Did not want to return</i>			
(Potential) candidate member states <sup>a</sup>	7 (28%)	18 (72%)	25 (100%)
Other countries	94 (50%)	94 (50%)	188 (100%)

<sup>a</sup> Includes all countries that became EU member states in 2004 or 2007, and Albania, Bosnia and Herzegovina, Kosovo, Croatia, Macedonia, Montenegro, Serbia and Turkey.

## Migrants

Two studies that I recently directed found suggestive evidence that aspects of (il)legitimacy are similarly important for understanding 'return' attitudes and behaviour among migrants. In the first study, we used a survey

conducted among 461 immigration detainees in the Netherlands, and conducted interviews with detainees as well as detention supervisors.<sup>6</sup> It was investigated whether and, if so, via what mechanisms, immigration detainees' migration preferences changed during their detention.

The survey was part of a monitoring programme by the Custodial Institutions Agency (DJI) on the quality of life in detention centres and prisons, and we had limited influence on the precise wording and number of the items that DJI agreed to include for the study. Eventual changes in migration preferences were measured with the item: "Since I am detained, my willingness to leave the Netherlands has increased" (answer categories were "disagree strongly", "disagree", "do not agree / do not disagree", "agree", "agree strongly"). DJI chose to measure the perceived distributive justice of immigration detention and deportation with the item: "I understand that I am being detained with a view to deportation." Procedural justice was measured using various items on detainees' satisfaction regarding the rules and rights in the detention centre, and their satisfaction regarding the detention supervisors. Detainees' knowledge and satisfaction regarding the availability of return and reintegration support, such as provided by IOM through Assisted Voluntary Return from Detention (AVRD), was measured as well, as were various aspects of the detention experience that may have had a deterrent effect (detention duration, number of detention periods, perceived material and other deprivations during the detention).

It turned out that a minority of 23.6% of the respondents agreed or agreed strongly that the willingness to leave the Netherlands had increased during the detention (56.4% disagreed or disagreed strongly, and 20% were neutral). The two most important predictors of an increased willingness to leave were (1) perceived distributive justice and (2) satisfaction regarding the availability of return and reintegration support. While perceived procedural justice did not have a direct effect on changes in migration preferences, we did find that respondents who were relatively positive about rights and rules were also relatively positive and better informed about return and reintegration support in the detention centre. This suggests that procedural justice had an *indirect* effect on return preferences by increasing detainees' satisfaction regarding return and reintegration support.

We found limited evidence that respondents' willingness to leave the country of the detaining state increased as a result of deterrence.

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<sup>6</sup> See Van Alphen et al. (2013).

Respondents who had been detained repeatedly were indeed more likely to report an increased willingness to leave the Netherlands than those who were being detained for the first time, but respondents who were highly unsatisfied with the detention conditions, or who had been detained for a long period, were *not* more likely to report an increased willingness to leave the country.

A tension between instrumental models (in the form of deterrence) and normative models of compliance could also be observed. Detainees who had been detained for a relatively long duration, or who had been detained repeatedly, scored *lower* on distributive and procedural justice, suggesting that potential deterrent effects of ‘tough’ detention practices were partially, or even totally, annulled by a related decrease in the perceived legitimacy of forced return.

The second study (Leerkes et al., 2014) looked at the factors determining the degree to which rejected asylum seekers make use of AVR. Two findings in particular suggested that aspects of perceived procedural justice co-determine AVR participation. Firstly, a *curvilinear* relationship was found between the duration of the asylum procedure in the first instance and the chances of AVR participation: with other factors held constant, including political and economic conditions in countries of origin and migrants’ family composition in the Netherlands, AVR rates were relatively low among those who had been rejected after quite some time (more than nine months) *and* who had been rejected quickly (after a few days or weeks). Asylum seekers in both categories were also relatively likely to appeal the rejection in the first instance, suggesting that rejections after very short or very long admission procedures have less legitimacy in the eyes of asylum seekers and their lawyers. While a logic of discouragement and coercion would have it that ‘undeserving’ asylum seekers should be rejected as soon as possible so as to prevent them from developing ties to the country of asylum, it overlooks that potential deterrent effects (here: of quick admission decisions) may well be offset by a related *decrease* in the perceived legitimacy of migration rules (here: of status determination procedures).

Secondly, it was found that rejected asylum seekers who had access to what are called native counsellors – IOM employees who originate from relevant migrant groups and speak their language – were relatively likely to make use of AVR. Native counsellors were introduced because IOM felt that potential returnees are more likely to trust persons who are from their own country of origin and whom they can meet with repeatedly in an informal setting. The native counsellors will have increased the legitimacy of IOM and

the perceived procedural justice of migration rules. Legitimacy, especially procedural justice, is known to be closely related to trust.<sup>7</sup>

While a certain degree of deterrence may create an interest on the part of rejected asylum seekers to inquire about AVR possibilities – indeed, the ‘voluntariness’ of AVR can often be questioned on this ground – deterrence creates fear, not trust, thereby potentially undercutting the efficacy of functionaries like the native counsellors. Again, there is a tension between the – de jure or de facto – criminalisation of illegal residence and normative models of compliance.

## Conclusions

In order to be effective, laws are in need of legitimation, and this also goes for migration rules. While philosophers have argued about what richer countries owe inhabitants of poorer countries,<sup>8</sup> I take a more sociological, empirical stance on these matters and try to ask whether and why relevant actors – states, migrants, potential migrants, relevant professionals such as migration lawyers, NGOs, employers – *perceive* migration rules and procedures as just or unjust. Although international migration is increasingly being regulated, there still is surprisingly limited research on the influence of legitimacy in shaping migration patterns. It is clear, however, that migration rules, and the mechanisms to enforce them, do not have full legitimacy in the eyes of actors that co-determine migration patterns, and that this explains a significant part of the difficulties that governments in receiving countries experience in enforcing migration rules.

The purpose of this chapter is to show that this does not imply that governments could not rely more on normative models of compliance than they do at present: increased opportunities for legal migration seem to increase the willingness by states to cooperate with return procedures, and individuals who understand and accept the outcomes of admission or return procedures, and/or who feel they are being treated fairly by trustworthy functionaries, are more likely to comply with migration rules. Of course, it would be wrong to say that no attention is being given to aspects of justice, especially in the European context – immigrants are usually given access to judges and legal representation, the Return Directive stipulates that migrants should first get a chance to return ‘voluntarily’ before they are being

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<sup>7</sup> See, for example, Hough et al. (2010).

<sup>8</sup> See, for example, Blake (2001).

detained with a view to deportation, et cetera. However, no systematic attention is being paid to these issues from the perspective of migration management. There is a tendency among policy-makers and voters to see immigrant rights as civilised, perhaps, but also as detrimental to effective migration control ('Why don't you just kick them out?').

Although it may be impossible and undesirable to offer all source countries of unauthorised migration a perspective on EU membership, the perceived distributive justice of migration rules could probably be increased in other ways, for example by enhancing the opportunities for temporary labour or study migration programmes that are designed to benefit sending countries, receiving countries and immigrants alike. Managing migration through legitimacy also requires the willingness of rich countries to systematically monitor admission and return procedures on perceived procedural justice, and to take the perspectives of non-citizens on these issues seriously.

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## 4. HUMAN SMUGGLING AND IRREGULAR IMMIGRATION IN THE EU: FROM COMPLICITY TO EXPLOITATION?

*ALESSANDRO SPENA*

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### **Introduction**

In the recently launched EU Action Plan against Migrant Smuggling (2015 – 2020),<sup>1</sup> the European Commission announces, among other things, that it “will make, in 2016, proposals to improve the existing EU legal framework to tackle migrant smuggling which defines the offence of facilitation of unauthorized entry and residence, and strengthen the penal framework.”

But how should these proposals be shaped? How, in particular, should the existing penal framework be changed? This depends, to a large extent, on the aims that are deemed to be worth pursuing by addressing human smuggling as a problem.

### **Two possible approaches to human smuggling**

In principle, there are two main reasons why states may be willing to counter human smuggling. The first has to do with its being linked to irregular immigration: although it should be clear that not all smuggled migrants are irregular in the proper sense (many of them being refugees and asylum seekers), smuggling is nonetheless one of the most eye-catching ways (at least for the mass media) by which irregular immigration takes place; fighting it can thus be a way of fighting irregular immigration itself. Smuggled migrants are given an unclear role under this approach: while, on the one hand, they are not necessarily to be criminalised for the mere fact of having been smuggled, on the other hand, it is clear that their rights and

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<sup>1</sup> European Commission (2015).

needs are not what states are fighting for when they adopt this perspective. In a sense, migrants are rather *part of the problem* that is ultimately addressed by fighting smuggling.

The second reason why states may be particularly concerned with human smuggling stems, instead, from the need to protect the migrants themselves from the many risks they may face if smuggled: economic exploitation, deception, degrading treatment along the way, death, and so on.<sup>2</sup> Under this approach,<sup>3</sup> smuggled migrants will probably be perceived, to a certain extent, as victims – either of the smugglers who thrive on their aspiration to go abroad or of the (political, economic, climatic) situations due to which they decide to migrate by entrusting themselves to smugglers.

## **The EU Approach: Smuggling as complicity in irregular migration**

The EU law against human smuggling so far has been strongly dominated by the aim to fight irregular migration.

The key legislative pieces in this field, the Facilitation Framework Decision<sup>4</sup> and the Facilitation Directive,<sup>5</sup> do not even speak of “human smuggling”, but of “facilitation of irregular migration”, which displays from the very beginning the fact that the focus here is not so much on smuggled migrants as objects or victims of a crime as on them as authors of the conduct that is ultimately sought to be prevented, i.e. irregular migration.

Accordingly, Art. 1, Facilitation Directive makes the definition of the “general infringement” of facilitation revolve around the conduct of “assisting” irregular immigrants either to enter (Art. 1(1)(a)) or to stay in (Art. 1(1)(b)) the territory of a member state,<sup>6</sup> which clearly shows that, in the Facilitation Directive’s perspective, human smuggling’s wrongness is seen

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<sup>2</sup> On these risks, see, e.g. UNODC (2010), Ch. IX; De Bruycker, Di Bartolomeo & Fargues (2013), p. 4ff; Global Initiative (2014), p. 7ff.

<sup>3</sup> See e.g. Obokata (2005); Ventrella (2015).

<sup>4</sup> European Council (2002a).

<sup>5</sup> European Council (2002b).

<sup>6</sup> Art. 1(1)(a) also mentions the conduct of transiting across the territory of a member state; but this is clearly a redundant addition, since the fact of “irregularly transiting” is already absorbed either in that of “irregularly entering” or in that of “irregularly staying”: I can’t see how one could irregularly transit across the territory of a member state without irregularly entering or staying therein.

as residing in its being a help to migrants who aspire to irregularly migrate to the EU. This becomes even more clear if we consider that as regards the conduct of *facilitation of entrance*, the definition of the offence does not even require the facilitator to act “for financial gain” (as is required in the case of *facilitation of stay*), which apparently entails that the independent moral content of the facilitator’s conduct is of secondary importance to the definition of what’s wrong with smuggling from the EU’s point of view.

In other words, although irregular migration is not directly criminalised either in the Facilitation Directive or in the Facilitation Framework Decision, it is nonetheless this conduct that is seen as bearing the core wrongness at stake here. Paradoxical as it may seem, in the Facilitation Directive’s approach, smuggling, as a form of facilitation, is only wrongful in an ancillary way, as if it was only a form of *complicity* in the *real* wrong, which is the wrong of irregular migration.

A “complicity approach” to smuggling is the logical consequence of the EU’s general approach to migration during the last few years, which has been basically driven by the need to secure the EU’s external borders as a countermeasure for having opened the internal borders between member states (so-called ‘Fortress Europe’).<sup>7</sup> This has brought it a veritable obsession with the fight against irregular migration: an obsession of which the EU’s way of fighting smuggling is a corollary.

## The rights of the smuggled persons in EU law

EU law, of course, does not completely disregard the rights of smuggled migrants; it could not do so, since many of these rights are either expressly recognised in the EU Charter of the Fundamental Rights or are the object of international obligations for the member states.<sup>8</sup> My point is, however, that EU law does not pay these rights the attention they deserve.

Two examples. According to Art. 1(2), “Any member state *may* decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.” Behind this apparently *in bonam partem* provision, there lies a clue to the fact that humanitarian concerns are not a key worry for EU law against smuggling. The meaning of Art. 1(2) is, indeed, that member states are not

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<sup>7</sup> European Parliament & Council (2006) (“Schengen Borders Code”).

<sup>8</sup> See e.g. Obokata (2005), p. 400ff.

obliged, but merely permitted to grant “facilitators” a humanitarian defence for their conduct, which unavoidably makes helping immigrants more risky for potential helpers, thereby indirectly impinging upon the chances migrants have to be helped when they find themselves in need of humanitarian assistance.<sup>9</sup>

Another telling example is Art. 1(3), second indent, of the Facilitation Framework Decision, which requires member states to punish facilitation of entry (as well as, “to the extent relevant”, the conduct defined in Art. 2(a) Facilitation Directive) more severely if committed “while endangering the lives of the persons who are the subject of the offence.” This shows, again, that insufficient attention is paid to immigrants’ rights: why indeed limit the scope of this aggravated responsibility to the fact that the migrants’ lives are put at risk, hence overlooking the relevance of many other ways in which migrants can be victimised during the smuggling process (exploitation, deception, extortion, maltreatment)?<sup>10</sup>

## The UN approach to migrant smuggling

The UN approach to human smuggling, as it emerges from the UN Protocol against Smuggling (UNPS),<sup>11</sup> is considerably different from that of the EU. Even though it does not formally qualify smuggled migrants as *victims*,<sup>12</sup> the protection of their rights is among the Protocol’s main concerns, as is explicitly stated, for example, in Art. 2: “The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among states Parties to that end, *while protecting the rights of smuggled migrants.*”<sup>13</sup>

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<sup>9</sup> See, e.g. Guild & Carrera (2013), p. 2, where the authors note that underscoring “the role of current EU anti-smuggling and trafficking legislation and the way it has been transposed into national law by EU member states, which often creates a presumption that a captain is committing the offence of smuggling or trafficking if he or she brings unauthorized people into harbours. The consequence is criminal prosecution and confiscation of the individual’s boat.”

<sup>10</sup> See, e.g. Obokata (2005), pp. 400ff.

<sup>11</sup> United Nations (2000a).

<sup>12</sup> But see Rodríguez Ocotrinillo (2014), p. 2.

<sup>13</sup> This does not mean that the Protocol is not itself open to criticism (see, e.g. Gallagher (2001) pp. 996ff). However, there is little doubt that its approach is far more attentive to smuggled migrants’ rights than is the EU legislation.

Accordingly, the general definition of the offence in the UNPS is not framed in terms of “complicity” (“help”, “assistance”) in the immigrants’ conduct (as it is in the Facilitation Directive), but as “the procurement...of the illegal entry of a person into a state Party of which the person is not a national or a permanent resident” (Art. 3(a)). This terminological shift has important conceptual implications: while “assisting” denotes an ancillary action, which entails that the principal action is performed by the person who is assisted (in this case, the irregular immigrant), “procuring” denotes instead a stand-alone action, with a meaning of its own; this difference is confirmed by the fact that while the Facilitation Directive describes the role of the smuggled migrant by using verbs (“assisting someone *to enter*”, “*to transit*”, “*to stay*”), thus revealing that the person is seen as someone actively contributing to the whole deed, the UNPS, on the contrary, uses – at least in Art. 3(a) – a noun (“procuring *the entry* of someone”), thus describing the migrant’s position more as the result of another person’s action than as an action itself.

We can thus say that in the UNPS the smuggler’s conduct is recognised to have a wrongness of its own: a wrongness that is not a mere reflection of irregular migration, but derives directly from its being a commodification of human beings,<sup>14</sup> an exploitation of the migrant’s vulnerability as a source of enrichment, of money-making. And indeed, according to the definition in Art. 3(a), the “procurement of the illegal entry of a person” does not amount to smuggling unless it is committed “in order to obtain, directly or indirectly, a financial or other material benefit”:<sup>15</sup> the smuggler’s aim of getting some material benefit from his conduct is a definitional element of the crime, which heavily contributes to shaping its wrongness in terms of exploitation, while, on the other hand, excludes from the scope of the criminalisation “the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties.”<sup>16</sup>

Particularly telling, moreover, is Art. 5 UNPS, according to which “Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of” smuggling. This reinforces the idea

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<sup>14</sup> UNODC (2004), § 55.

<sup>15</sup> But see also Art. 6(1).

<sup>16</sup> United Nations (2000b) § 88 (but see also § 92: “It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations”).

that, in the UNPS's approach, the smuggled migrant is seen as the "object" of the smuggler's conduct, and not as an agent of the smuggling process. This is why the fact of being smuggled should never be blamed on him.<sup>17</sup>

Also interesting is the fact that, according to Art. 6(3), each state party should consider "as aggravating circumstances" the fact that the smuggling is performed in ways "(a) [t]hat endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) [t]hat entail inhuman or degrading treatment, including for exploitation, of such migrants." The scope of this provision is far wider than that of the similar provision in Art. 1(3) of the Facilitation Framework Decision: while, as we have seen, the latter only gives relevance to the migrants' lives being put at risk, the other goes as far as to give relevance to other aspects of the smuggled migrants' dignity and well-being.

## The way forward

The Action Plan presented by the European Commission seems ready to abandon the "complicity approach" to human smuggling. I have no space here to go deeply into this document, but I want to mention a revealing aspect of how significantly different its general philosophy seems to be from that of the Facilitation Directive and the Facilitation Framework Decision. Smugglers, indeed, are not depicted as mere migrants' facilitators anymore; on the contrary, their relationship with those smuggled begins to be interpreted more properly as one of exploitation ("Smugglers treat migrants as goods, similar to the drugs and firearms that they traffic along the same routes"), in which the migrants' lives and human rights are jeopardised in order to obtain material gains (smugglers "make substantial gains while putting the migrants lives at risk. To maximize their profits, smugglers often squeeze hundreds of migrants onto unseaworthy boats – including small inflatable boats or end-of-life cargo ships – or into trucks. Scores of migrants drown at sea, suffocate in containers or perish in deserts. [...] The human rights of migrants are often gravely violated through abuse and exploitation").

Since the "complicity approach" does not pay sufficient attention to migrants' rights, this change is surely to be welcomed. The question, however, is how should this framework be reconfigured in order to make this change effective, and not merely proclaimed.

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<sup>17</sup> See Rodríguez Ocotrinillo (2014), p. 2.

A good and readily feasible way to start would be to transpose the most significant aspects of the UNPS into the EU legislation. As a consequence:

- a) The “complicity” language should be replaced by a more apt use of the concept of “human smuggling”.
- b) The definition of the crime should thus revolve around the smuggler’s conduct of procuring a foreigner’s irregular entrance into or stay in the EU.
- c) It should also require that the smuggler’s conduct be performed “in order to obtain, directly or indirectly, a financial or other material benefit.” (By the way, this would render it unnecessary to amend Art. 1(2) Facilitation Directive, since humanitarian assistance, as well as familial assistance, would automatically fall outside the scope of a definition thus reframed.)
- d) An aggravated responsibility should be established not only in those cases in which migrants’ lives are put at risk but also when their safety, i.e. physical or mental health, is endangered, as well as in cases in which the smuggler’s conduct is performed in such ways as to “entail inhuman or degrading treatment, including for exploitation, of such migrants.”
- e) Lastly, it should be expressly stated that “migrants shall not become liable to criminal prosecution for the mere fact of having been smuggled.”

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## 5. MANAGING IRREGULAR MIGRANTS WITHIN THE EU

*SARAH SPENCER*

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**A**mong the residents of the European Union we know that there will always be some who have an irregular immigration status, notwithstanding prevention measures and those to enforce returns. In 2010 the European Commission accepted an estimate of this population as between 1.9 and 3.8 million,<sup>1</sup> just 0.4-0.8% of the population of the then EU-27 (in 2008) but concentrated in some of our larger urban areas.

Many irregular migrants thrive without coming to the attention of the authorities; others can find themselves in need of a public service for themselves or their children. In practice, member states, at national, regional and municipal level, find those needs cannot always be ignored because the cost of exclusion – for the public as well as for the individuals concerned – is too high. As a result, across the EU, member states grant some legal entitlements to irregular migrants to access public services, not least to health care and, for children, to education. They have done so, we found in a recent study,<sup>2</sup> in part for humanitarian reasons – but also, significantly, because the social and economic cost of not doing so threatens states’ ability to deliver on other policy priorities.

Levels of entitlement are not high – there remains a significant degree of exclusion. The geography of entitlements, as we showed in a report

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<sup>1</sup> European Commission (2010).

<sup>2</sup> A two-year study carried out under the auspices of an Open Society Fellowship mapping entitlements to health care and education across the EU-28, and conducting interviews across 14 member states with officials and politicians responsible for those decisions. See: [www.compas.ox.ac.uk/research/welfare/service-provision-to-irregular-migrants-in-europe/](http://www.compas.ox.ac.uk/research/welfare/service-provision-to-irregular-migrants-in-europe/).

published in July 2015,<sup>3</sup> is also highly uneven. Nevertheless, there is a normality of a level of inclusion in national laws – and, counter-intuitively perhaps, some notable extensions in entitlements in recent years: legislation to extend access to health care and education in Sweden in 2013; access to HIV treatment granted in the UK in 2012; and protection for the victims of domestic violence in Spain the previous year, are just three examples. Significantly, there is a level of entitlement to services in countries where irregular entry and/or stay is a criminal offence, like Belgium, France, Germany, Sweden and the UK, and in those where it is not.

The trend towards inclusion is particularly evident in relation to children. The personal and social consequences of exclusion are particularly high, and children are not felt to be responsible for the immigration decisions of their parents. In the vast majority of member states (23) these children have a legal entitlement to attend school, in 10 cases through an inclusive measure referring to them explicitly,<sup>4</sup> and thus not merely a general provision from which they are not excluded. In eight member states<sup>5</sup> they have the same entitlement to healthcare as children who are nationals (although, as in other cases, having an entitlement may not always translate into access in practice).

This is not to paint a rosy picture. The other side of the coin is that there are five member states where there is no right to attend school and five where children, like adults, only have access to emergency care (and that is not necessarily free). Exclusion from shelter is a major concern, as is access to food and other essentials for those who are destitute. Yet the level of entitlements granted does mean we need to recognise that, even for national governments, there are competing priorities at play which mean enforcement action against irregular migrants is not the only issue at stake.

## **Inclusion at the local level**

Competing priorities are even more evident at regional and municipal level. While there are local authorities that prioritise exclusion (parts of northern Italy come to mind),<sup>6</sup> it is at the local level that the consequences of exclusion

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<sup>3</sup> Spencer & Hughes (2015).

<sup>4</sup> Belgium, Croatia, Czech Republic, France, Greece, Italy, the Netherlands, Romania, Spain and Sweden.

<sup>5</sup> Estonia, France, Greece, Italy, Portugal, Romania, Spain and Sweden.

<sup>6</sup> See for instance Ambrosini (2013).

are most keenly felt. As a result, there are regional and local authorities across Europe that stretch to the limits what national laws permit: variously providing access to not only healthcare and education but shelter, welfare payments, food banks, language tuition, advice services, official documentation such as birth certificates, and more.

Why do they do so? Officials and politicians cite human rights, humanitarian and ethical reasons, particularly where children are concerned; but they also cite public health, tackling street sleeping, community cohesion, street prostitution and child protection as among the goals that cannot be met if this group of people is excluded.

The efficient management of public services provides further grounds for inclusion – the need for reliable statistics on who is present in the area, for instance, explaining the requirement in Spain that irregular migrants be included in the municipal register. It can also be cheaper to provide a service than to administer exclusions, or to overburden accident and emergency departments with ailments which could more efficiently have been dealt with elsewhere.

Finally, the authorities tell us that the provision of services and the opportunity it provides to build trust with irregular migrants can enable them to address the underlying problem – to help individuals resolve their immigration status or, if appropriate, assist them to return home. If individuals are excluded from services or in fear of detection should they come forward, that opportunity is lost.

City and regional authorities are increasingly frustrated that the minimal level of entitlements that national governments do permit limit their capacity to engage in this way. They feel, as expressed by a Dutch city healthcare worker interviewed for our study, that national governments do not understand the reality of the challenges they face: “These people are here, some in desperate need, dying on the streets or involved in crime. The national government does not have to bother with the problems we have every day”.<sup>7</sup>

There are many challenges to restrictions in national laws that have been taken through the courts, as in Italy<sup>8</sup> and the UK<sup>9</sup>; as well as of

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<sup>7</sup> Interviewed by the author, March 2013.

<sup>8</sup> Documented in Delvino & Spencer (2014).

<sup>9</sup> See a recent report on local authority responses to children and families with “no recourse to public funds” and the tensions that arise with the Home Office in relation to their immigration status: Price & Spencer (2015).

resistance, as in Germany, to measures requiring public officials to hand over personal details of service users. Elsewhere, cities quietly allow access to a service by refraining from checking the immigration status of service users or making provision indirectly through funding of NGOs. In so doing, they also face significant constraints on the extent to which they are allowed to use national – or EU – funds for that purpose. Where cities do not provide or fund access to essential services, civil society organisations can struggle to meet basic needs, or there is no provision at all.

## Cities want to talk

Cities facing these challenges have opened a dialogue with each other – notably in a strand of work under the auspices of the Eurocities Working Group on Migration and Integration,<sup>10</sup> in which their focus had earlier been limited to integration relating to migrants with regular status. They also, however, are keen to talk to the Commission, saying bluntly to the head of DG Home Affairs, at the Integrating Cities Conference in 2013, that there are undocumented migrants who live in our cities:

...but officially to the eyes of the European Commission and the member states, they do not exist. Nevertheless, we, local administrations are obliged to deal with this reality and deliver services for those persons when it is needed...

We think that it is time for an exercise of ‘Realpolitik’ on the issue of undocumented migrants in Europe. We would like to discuss the issue with the European Commission but not only from the narrow perspective of the return directive or from the security point of view.<sup>11</sup>

The EU’s agenda has not, in fact, been entirely control focused. The Directive on Victims’ Rights (2012/29/EU) significantly has a non-discrimination clause relating to the victim’s residence status; while the earlier Returns Directive (2008/115/EC) on standards and procedures for returning irregular third-country nationals includes provisions on access to

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<sup>10</sup> See details of a two-day roundtable in October 2014 held to share experiences on the challenges they face, and to agree a forward work plan, [www.compas.ox.ac.uk/globalexchange/city-responses-to-irregular-migrants/](http://www.compas.ox.ac.uk/globalexchange/city-responses-to-irregular-migrants/).

<sup>11</sup> Eurocities Working Group on Migration and Integration in a statement from the chair, Ramon Sanahuja, to the Director General of Home Affairs of the European Commission Stefano Manservigi on 10 September 2013, at the Integrating Cities Conference of Eurocities in Tampere. Text provided to the author.

emergency health care, treatment of illnesses and school education for those who are in the return procedure or cannot be removed. The Commission went further in welcoming guidance on apprehensions from the EU Fundamental Rights Agency that the police in member states should not seek to apprehend people near hospitals, schools or religious establishments; that medical and teaching staff should not be required to share migrants' personal data with immigration authorities; and that parents with irregular status should be allowed to register the birth of their child without fear of arrest.<sup>12</sup>

Clearly, there is thus some recognition that enforcement cannot be the only agenda if competing policy priorities, and responsibility to protect fundamental rights, are to be met. Yet there appears to be little discussion within the Commission on ways of addressing this challenge within broader policy agendas – in addressing poverty, cohesion or child protection for instance, in its review of the Facilitation Directive, or in relation to data protection safeguards that could ensure access to fundamental rights without the transfer of personal data to the immigration authorities. As UN Rapporteur on the Human Rights of Migrants François Crépeau has advised:

This 'firewall' should apply not only to labour inspectors, but also to other public servants migrants may be in touch with, such as the police, social workers, school personnel and health care professionals, as well as courts, tribunals and national human rights institutions. Migrants should be able to report abuse without fear of repercussions regarding their migration status.<sup>13</sup>

Crucially for city authorities, the Commission also needs to reconsider its strategy and funding on the integration of migrants which remain exclusively tied to those with regular status.

The reality is that there is an imperative for a certain level of inclusion, despite irregular status and despite the need for border controls. That reality needs to be recognised, discussed and catered to. Recognition at an EU level – and steps to include irregular migrants at least within protective measures, as in the Victims Directive, would facilitate dialogue on this – with the aim of finding a balance of measures across Europe that address the needs of all concerned.

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<sup>12</sup> Malström (2012).

<sup>13</sup> UN General Assembly Human Rights Council (2014), para 62.

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## 6. THE EUROPEAN FACILITATION DIRECTIVE AND THE CRIMINALISATION OF HUMANITARIAN ASSISTANCE TO IRREGULAR MIGRANTS: MEASURING THE IMPACT ON THE WHOLE COMMUNITY

*JENNIFER ALLSOPP*

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This chapter addresses the effect on citizens and other individuals who possess a regular immigration status of laws and policies that criminalise the provision of humanitarian aid to third-country nationals with irregular immigration status. Three short case studies will be employed to argue that robust analysis of this under-researched impact of migration control policies is fundamental to formulating trust based-policy in this area. It is also argued that the impact of the criminalisation of migration on the whole community must be measured and taken into account as a key measure of policies which seek to combat irregular migration. The reasons for this are twofold: firstly, because the impact of these policies on communities affects their overall effectiveness; and secondly, because, as elucidated by the FIDUCIA research project, “public trust in justice is critically important for social regulation”.<sup>1</sup>

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<sup>1</sup> See FIDUCIA project website: [www.fiduciaproject.eu/page/21](http://www.fiduciaproject.eu/page/21).

## The Facilitation Directive

One of the main pieces of European legislation which governs assistance to irregular migrants is the Facilitation Directive.<sup>2</sup> Its related instrument is the Framework Decision.<sup>3</sup> The Directive provides a common definition for the “facilitation of illegal immigration” and defines the following as infringements: i) assisting intentionally a non-EU country national to *enter or transit* through the territory of an EU country, in breach of laws; ii) assisting intentionally, and *for financial gain*, a non-EU country national to *reside* in the territory of an EU country, in breach of laws; and iii) instigating, assisting in or attempting to commit the above acts (own italics).

Following the introduction of the Directive, EU member states were required to “adopt effective, proportionate and dissuasive sanctions” for these infringements. For the first infringement, where the aim is to provide humanitarian assistance, EU countries are not obliged to impose sanctions. However the recommendation of humanitarian exemption is not written into EU law.<sup>4</sup> As such, countries have varied in how they have transposed this Directive into national legal frameworks. Currently, facilitating irregular entry is punished in all 28 EU member states. Yet a recent report by the EU Fundamental Rights Agency (FRA)<sup>5</sup> reveals that only a quarter of member states “have national legislation that reflects, at least in some form, the safeguards in Article 1 (2), allowing states not to impose sanctions when irregular entry is facilitated for humanitarian purposes.”<sup>6</sup>

The recent FRA report similarly notes that “more than a quarter of member states fail in their national legislation to exempt non-profit acts or humanitarian assistance from the rules of facilitation of stay”.<sup>7</sup> More debate

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<sup>2</sup> European Council (2002a).

<sup>3</sup> European Council (2002b).

<sup>4</sup> Importantly, when it comes to those seeking asylum, the Framework Decision includes a safeguard for international protection. However, as a recent FRA report shows, this has been variably adopted by states in practice: see Fundamental Rights Agency (2014), p. 16.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., p. 15. Those that do employ safeguards employ different wordings. In Sweden, for example, when assessing punishment, special consideration is given to whether the crime was committed for reasons of “strong human compassion”.

<sup>7</sup> Ibid., p. 16. The FRA has previously called for a rewording of the Facilitation Directive to make exemption for humanitarian grounds compulsory and to protect

is required regarding the significant differences – from a citizen’s perspective – between facilitating irregular entry and transit and facilitating irregular stay.<sup>8</sup> Meanwhile, the lack of a humanitarian exemption requirement has been the subject of ongoing criticism from scholars,<sup>9</sup> European officials,<sup>10</sup> EU institutions such as the FRA<sup>11</sup> and NGO coalitions such as the European Migration Forum and Social Platform.<sup>12</sup>

Despite the growing international interest in the criminalisation of migrants – in particular in the context of the current militaristic measures proposed by the EU to respond to the current Mediterranean refugee crisis – we still have little evidence of how immigration control impacts ‘regular’ members of the polity, including in relation to the Facilitation Directive and its transposition into national law. Most research, rather understandably, tends to focus on the impacts on the migrants who are the direct subject of

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the right to rent to people with irregular immigration status, unless this is done for the sole purpose of preventing removal.

<sup>8</sup> This is raised in the UNHCR’s comments on the Directive, which advise that the ‘for profit’ clause also be added to Article 1(a), alongside the introduction of a mandatory humanitarian clause.

<sup>9</sup> See e.g. Fekete (2009) and Webber (2008).

<sup>10</sup> In his 2010 report the Council of Europe Commissioner for Human Rights raised the criminalisation of persons engaging with foreign nationals with irregular immigration status as a key concern: Council of Europe Commissioner for Human Rights (2010).

<sup>11</sup> Fundamental Rights Agency (2014).

<sup>12</sup> Following their January 2015 conference, the European Migration Forum concluded that there was a need to “revise the Facilitation Directive to exempt humanitarian assistance from criminalisation. The European Migration Forum called for it to explicitly exclude punishment for humanitarian assistance at entry (rescue at sea and assisting refugees to seek safety) as well as the provision of non-profit humanitarian assistance (e.g. food, shelter, medical care, legal advice) to migrants in an irregular situation. It should also make clear, they argued, that renting accommodation to migrants in an irregular situation without the intention to prevent the migrant’s removal should not be considered facilitation of stay, while ensuring that the legal system punishes those persons who rent accommodation under exploitative conditions”. Meanwhile, Social Platform, the largest platform of European rights and value-based NGOs working in the social sector, has called for the Facilitation Directive to be revised as follows: “member states shall not sanction those who provide humanitarian assistance to persons without EU citizenship”. See European Migration Forum (2015).

such policies. Yet what we do know that the way humanitarian actors, and also ordinary citizens, are impacted by this legislation – and related policies which seek to criminalise irregular migration – raises a range of important questions. The following three case studies highlight some of the difficulties and challenges borne by members of the polity who possess a regular immigration status when faced with the criminalisation of humanitarian aid to irregular migrants. The first concerns the threat to national identity and ideas of justice and citizenship; the second concerns the threat to subjective experiences of security; and the third concerns the threat to affective bonds.

*Case study 1 – a threat to national identity*

In 2011 a debate ignited in France surrounding what was known as a ‘crime of solidarity’.<sup>13</sup> The debate concerned the way in which the Facilitation Directive had been transposed into French law without the recommended humanitarian exception clause, or ‘for-profit’ clause,<sup>14</sup> leading to a public debate over citizens’ right to assist those in need. The debate was sparked by the arrest and prosecution of a range of ‘good Samaritans’ who were helping irregular migrants by providing food and shelter, or even charging their phones. A popular film, “Welcome”, which tackled this subject, also helped raise the profile of the debate.

The debate was framed as a clash between French values: the law, advocates claimed, was an attack on the fundamental French principle of *Fraternité* – the right to help others in a brotherly spirit. Approximately 30,000 people signed a petition to this effect. Meanwhile, the then Minister for Immigration argued that it was the obligation *not* to assist irregular migrants that embodied *Fraternité* and – by extension – national duty. In this way, the law brought about a very public tension between universalist and communitarian ideas of ‘national duty’ and what it meant to be a French citizen.<sup>15</sup> As an NGO worker observed at the time: “[I]n general the French

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<sup>13</sup> See Allsopp (2012).

<sup>14</sup> This exemption was justified on the grounds that otherwise the Directive would exempt terrorist networks and spies.

<sup>15</sup> This fact of helping the vulnerable outsider as a citizen virtue is arguably a European value which became very apparent after the Second World War. It is very explicit in the hero status accorded to individuals who helped smuggle Jews to safety during the Holocaust. But in certain member states it appears that history is being forgotten. Raoul Wallenberg was a Swedish diplomat who saved tens of thousands of Jewish lives in Hungary by issuing passports and sheltering Jews in

don't like immigration but this is a different question, a deeper question. It's about citizens; it's not a question of immigrants".

A proposed amendment to the law was rejected in 2009 – the vote was close but strictly along party political lines. But in December 2012 the majority Socialist government finally changed the law to clarify that it only related to acts which brought out a direct or indirect gain (the Directive 'for profit clause') and explicitly *not* to those related to "legal advice, the provision of food, shelter, medical care or any other act with the aim of preserving the dignity and physical integrity of the person".

The French example demonstrates the importance of not overlooking the impact of migration laws and policies on ordinary citizens. There are practical issues at stake but also significant ideological ones, since the parable of the Good Samaritan cuts right to the heart of how we see our national communities.<sup>16</sup> The idea of solidarity is also a founding principle of the European Union. As such, this idea that helping irregular migrants in need as a common citizen's right is an interesting one that merits wider consideration.<sup>17</sup>

#### *Case study 2 – a threat to individual security*

A second way in which members of the community with legal status are affected by laws which seek to criminalise irregular migrants is through their

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buildings, for which he faced arrest and was 'disappeared'. Wallenberg's 'good citizenship' was recognised internationally in a very explicit way by his being granted honorary citizenship of the US (one of just seven people to have been granted this, along with Winston Churchill and Mother Teresa). He was also made an honorary citizen of Canada and Israel.

<sup>16</sup> See Grunwald-Spier (2012) for an interesting analysis of the wide range of reasons which motivate people to assist foreigners in need, even where there is no specific community link. The book includes a section which specifically addresses people's motives for helping asylum seekers around the world today.

<sup>17</sup> The historical and ideological significance of this 'civil disobedience' element to laws which seek to restrict humanitarian aid to 'illegals' is finally starting to be addressed in scholarship. John Park (2013) draws links between the historical burden on ordinary US citizens to report errant slaves and their position *vis-à-vis* today's irregular migrants. "Throughout American history," he writes, "citizens have encountered people who are 'illegal' – that is, people who have no legal right to be in the United States or to freedom of movement because of their immigration status or race. Like Mark Twain's Huckleberry Finn, these citizens face the conflict between sympathy for the unlawful other and the force of the law."

subjective feelings of lack of trust and insecurity. This effect is more broad-ranging in that it doesn't just affect those in direct contact with irregular migrants, but the whole polity. A recent example from the UK provides an example of how subjective insecurity may be heightened in relation to the criminalisation of irregular migrants more generally.

In summer 2013, the UK Home Office launched a range of measures to encourage irregular migrants to "go home or face arrest". This included sending vans around a London borough with this slogan, a photo of handcuffs and the phone number of a "return hotline". The Home Office operation also included spot checks at London underground stations, a poster campaign at care centres and hospitals. An ESRC funded study, "Go Home: mapping the unfolding controversy of Home Office immigration campaigns"<sup>18</sup> was the result of its authors spending 18 months exploring the impact of such publicity campaigns on local communities. It found that the vans increased fear<sup>19</sup> among all members of the community – including people who were concerned about migration. As well as concluding that the criminalisation campaign increased insecurity among the community, the researchers also reported a lack of trust in policy-makers: "[T]he vast majority of people we spoke to thought that the Home Office publicity was a political stunt rather than an effective policy – whatever their political stance on immigration".<sup>20</sup>

The findings of this research echo past research which has shown that even those members of the community who may on paper support crackdowns on irregular migration become insecure and fearful upon observing its implementation in practice, i.e. when it directly affects them, their rights and their everyday lives. This finding – that voters respond differently to immigration control enforcement measures at different stages of the policy cycle – has been documented by the academic Antje Ellermann in Germany.<sup>21</sup> More research is needed to assess these unintended policy

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<sup>18</sup> See project website: <http://mappingimmigrationcontroversy.com/>.

<sup>19</sup> One individual commented. "I saw so many UKBA people they were there, I saw them with large dogs, blocking the entire area. I had a visa and have it now also. But I got really scared because I could see the place blocked...I got so panicked and scared that I went and sat in the wrong train...When I got on the train I started crying."

<sup>20</sup> See <http://mappingimmigrationcontroversy.com/findings/>.

<sup>21</sup> See, e.g. Ellermann (2006).

consequences: the fear and subjective insecurity that come with criminalisation as it affects all members of the community.

This aspect is especially important to the question of humanitarian assistance, since it is hypothesised (although remains to be evidenced fully) that policies that criminalise contact with irregular migrants may lead, to an even greater degree than do more general criminalisation strategies, to widespread feelings of subjective insecurity as well as stigma, mistrust and prejudice towards migrants.<sup>22</sup>

### *Case study 3 – kinship and criminalisation*

The third way in which the transposition of the Facilitation Directive into national legislation may have an important impact on members of the community with citizenship or regular immigration status concerns family members, friends or kin of an irregular migrant in need. Frequently, those who end up providing assistance to irregular migrants are family or friends.<sup>23</sup> This may increasingly be the case as a result of policies that promote intense social exclusion as a disincentive to remain and serve to isolate from society categories of irregular migrants such as refused asylum seekers.<sup>24</sup> As migrants themselves, these ‘assisters’ are individuals who may already be marginalised.<sup>25</sup>

The right to provide assistance and subsistence to family members is not explicit in the Facilitation Directive but is arguably covered in other instruments, e.g. Article 8 of ECHR and Article 7 of the EU Charter of Fundamental Rights on respect for private and family life.<sup>26</sup> Some states, such as Austria, have been explicit in transposing the Directive that assistance provided to family members should not be punished. Similarly,

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<sup>22</sup> See, e.g. Webber (2008). See also Council of Europe Commissioner for Human Rights (2010) on the risk of hate crime and xenophobia.

<sup>23</sup> See, e.g. Ambrosini (2013); Bloch (2013).

<sup>24</sup> See, e.g. Bloch & Schuster (2005); Allsopp & Sigona (2014).

<sup>25</sup> European Council (2002b) provides that sanctions which can be applied to those who help irregular migrants include deportation, confiscation of transport and prohibition on practising the occupation in which the crime was committed. The mention of deportation suggests that the offence is likely to be committed by foreign nationals (see also Council of Europe Commissioner of Human Rights, 2010, *supra*). These suggested sanctions fall short and would benefit from revision along with the main Directive.

<sup>26</sup> Fundamental Rights Agency (2011).

the revised French law has made clear that the penalty does not concern close relatives of the migrant.

Yet if the right to assist family members is often protected, what is more ambiguous is the status accorded to friendships, partners and individuals with other affective bonds. In the UK, it has been reported that former unaccompanied minors with immigration status have been forced to leave government-supported housing because they have unlawfully housed friends who have gone through the asylum system alongside them, but not received legal status and consequently ended up in destitution.<sup>27</sup> The third and final point to consider, then, is how can and should the law protect affective bonds. What is the impact, from a trust- and adherence-based policy-making perspective, of policies which pit family ties and responsibilities against a risk of state criminalisation?

## Conclusions

The case studies detailed above provide but a snapshot of existing evidence concerning the question of how the criminalisation of humanitarian assistance to irregular migrants affects communities at large. It can nevertheless inform the next phases of European migration policies in a number of ways. Firstly, as demonstrated in case studies 1 and 2, it is important to recognise that the criminalisation of migrants – and the criminalisation of humanitarian assistance in particular – restricts the rights of each member of a community and may, in so doing, affect trust in public institutions. One recommendation could be to implement a ‘public trust’ impact assessment when developing immigration laws and policies as a key measure of policies’ effectiveness. Secondly, as shown by case study 3, to avoid penalising subsections of society and undermining trust, laws and policies could make clear the extent of criminal liability for assisting irregular migrants and, specifically, how this varies according to the nature of the assistance and any affective bonds in play.<sup>28</sup>

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<sup>27</sup> On experiences of destitution, see Pinter (2012).

<sup>28</sup> This conclusion echoes that put forward in the FRA (2014) report. Best practice could also be drawn from the revised French legislation.

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## **PART II.**

### **INTERRELATIONSHIP OF TRAFFICKING IN HUMAN BEINGS WITH OTHER FORMS OF IRREGULAR MIGRATION**

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# 7. TRAFFICKING: NOT A NEUTRAL CONCEPT

*RUTVICA ANDRIJASEVIC*

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## **Introduction**

In 2000, at the UN Convention against Transnational Organised Crime, the UN General Assembly adopted a definition of trafficking in persons. By September 2008, it had been signed by 117 states. This adoption set the basis for a common definition of trafficking which was much needed. Prior to the UN definition, there was not one agreed definition, and various governments, agencies and NGOs used different and often-conflicting definitions of trafficking. In this chapter I aim to problematise the notion of trafficking and show that contrary to common perceptions, trafficking is not a neutral term nor does it have the straightforward definition of an objective social phenomena. I argue that the term trafficking is informed by gendered and racialised norms and assumptions and that consequently only particular demographic groups, usually females and/or migrants, are conceived of as trafficked. Finally, by discussing the position of migrant domestic workers in the UK, I illustrate how norms and assumptions about gender and nationality affect the state's legislative framework in unexpected ways so that measures designed to protect victims turn out to have exactly the opposite effect. Paradoxically, instead of empowering and protecting victims, anti-trafficking measures enhance victimisation and situations of 'unfree' labour.

## **Smuggling/trafficking distinction: A matter of gender**

For trafficking to be legally acknowledged, the three-elements chain, namely, the act (or recruitment, transportation), the means to enforce the act (threat, use of force), and the outcome (exploitation) need to be present. The

Convention distinguished trafficking from smuggling, where smuggling stands for facilitation and profiting from consensual albeit 'illegal' movement of persons across borders. As we can see, the two definitions rely on a neat separation between involuntary and non-consensual, i.e. trafficking, and voluntary and consensual, i.e. smuggling, processes of migration. Trafficking stands for an involuntary and non-consensual process where traffickers recruit and transport a person with the purpose of exploiting his/her labour at the destination. Smuggling, on the other hand, is a voluntary and consensual form of migration in which the smuggler's role is restricted to facilitation of irregular border crossing.

The distinction between smuggling and trafficking seems to be an unproblematic and straightforward one. Yet, if we take a second look at this distinction from the perspective of gender, we can observe that the definition of what we understand as smuggling and trafficking is informed by stereotypical images of femininity and masculinity. The fact that women are more likely to be identified as victims of trafficking has to do with gender stereotypes and views that men are primary migrants and breadwinners and women secondary migrants and men's dependents. This view of migration has its origins in what became a dominant model to study migration. This model, based on guest workers' mass labour migration to Germany between the 1950s and mid-1970s, is organised around the idea of distinct stages where the migratory process is initiated by single young men, and followed by older married men who are joined at a later stage by their spouses and children as a way of supplementing household income.

This simplistic idea of migration rests on the classical dualism that identifies men with activity, production and the public sphere, and women with passivity, reproduction and the private sphere. This model heavily influenced migrant women's positions as dependents with derived rights. This means that throughout the 1980s, immigration regulations in several European countries upheld a gendered division of labour by assigning women a 'dependent' status that kept many migrant women out of paid employment. This was done through family reunification schemes, which assumed that the man was the economically motivated migrant actor, the 'breadwinner', and the woman was his dependent and a housewife (Morokvasic, 1984; Bhabha & Shutter, 1994). Hence, it is not only gender relations in migrants' countries of origin that oppress women but also European immigration and labour regulations that position migrant women outside the formal labour market and paid employment.

Today, while formal immigration laws have changed so that in the EU migrant men and women have equal rights to family reunification, gendered coding of the labour markets still impacts differently on migrant women. Migrant women often work in sectors of the economy such as the domestic and caring sectors, where the temporality or informality of employment relationships, the level of income and the type of living arrangements make it difficult to satisfy the requirements of family reunification. The right of women who are EU nationals to reside with a non-EU husband and establish a family in the wife's country of citizenship is still questioned in a way that the right of male EU citizens is not. A review of European legal decisions has shown that in cases when non-EU nationals are refused a residence permit or are under threat of deportation, national courts expect the wife to follow the husband to his country of citizenship, even in cases when the wife is an EU citizen (de Hart, 2007).

Contrary then to the image of European states being liberal and progressive with respect to women's place in society, the above discussion makes visible the extent to which gender stereotypes are embedded in the existing policies. In making the gendered aspects of these policies explicit, we can observe the role of gender norms and assumptions in shaping the conceptualisation of and demarcation between smuggling and trafficking. To say this differently, far from being a neutral definition of objective phenomena, the differentiation between smuggling and trafficking is gendered in that it is determined by historically and culturally codified images of femininity and masculinity.

## **Victims of trafficking: A matter of nationality**

In recent years, the public debate on trafficking has slowly shifted from a nearly exclusive focus on trafficking for sexual exploitation to trafficking for forced labour. While this is a positive development in that the debate nowadays incorporates a much broader spectrum of sectors in which forced labour takes place, what is problematic is the tendency to view trafficking for the sex sector as a separate and distinct form of exploitation that is more related to matters of violence against women than those of labour. Such separation is misleading in that it conceals that the figure of the victim of trafficking is deeply embedded in debates on voluntary versus forced prostitution that led to a racialisation of the two categories.

The process of negotiating the Trafficking Protocol was, in the words of Anne Gallagher (2001), "an unusual affair". If the crime prevention system of the UN is usually of no interest to the international non-governmental

community, on this occasion the Commission on Crime Prevention and Criminal Justice had to deal with unprecedented levels of NGO interventions. The bulk of these were advanced by feminist NGOs and their interventions concentrated on the issue of prostitution. There were two main coalitions to the contention. The first one, the Human Rights Caucus, stood by the position that prostitution is a form of legitimate labour. The second one, the International Human Rights Network, was adamant that prostitution be seen as a violation of women's human rights. The former group maintained that along with work in the agriculture or garment industry, sex work is a form of globalised low-wage labour and insisted that trafficking should not be associated with prostitution *per se* but only with situations which contain elements of labour abuse, such as forced labour, slavery or servitude (Doezema, 2001). The latter group maintained that all prostitution is coerced and the result of male oppression and dominance over women (for an overview of contrasting debates see ATR, 2015).

Consequently, these debates engendered the dualism between forced and voluntary prostitution. In the European context, due to the overlap of debate on trafficking and irregular migration, this differentiation resulted in racialising of the categories of voluntary and forced prostitution. This entails that consensual prostitution is assumed to be performed by Western sex workers capable of self-determination while situations of coerced prostitution, on the contrary, are seen to apply to passive and inexperienced black and migrant women. These considerations are important on two accounts. Firstly, the differentiation between innocent victims and voluntary sex workers brings about different access to rights as states devise schemes aimed at assisting victims of trafficking but not sex workers who find themselves in exploitative working conditions. Moreover, those who fall out of the category of the 'proper' victim are denied legal protection and become vulnerable to deportation (Crowhurst, 2007). Secondly, identifying migrant and black women primarily as victims reinforces stereotypes about migrant women as passive and dependent and contrasts them relative to (white) European women who are identified as autonomous agents. As such, the concept of the trafficking victims is to be understood as the opposite to that of an EU citizen (Andrijasevic, 2010).

### **The effects of stereotypes in law**

In the UK, the discussion on the Modern Slavery Bill to protect overseas domestic workers illustrates well how shortcomings of law might be linked to stereotypical gendered representation. In March 2015, the government

proposed amendments to the existing Bill concerning domestic workers who have been determined to be victims of slavery or trafficking. Current law grants one year discretionary leave to those who have been found to be victims of slavery or trafficking, allows them recourse to public funds, and permits them to take up any job, including but not limited to domestic work. The government's proposed amendment shortens the discretionary leave period to six months, prohibits recourse to public funds, and ties victims to the domestic sector, as they are entitled to work only as an overseas domestic worker (ILPA, 2015). Despite the existing evidence that the right to change employers lessens the abuse experienced by domestic workers and that since the introduction of the tied visa system in 2012, allowing entry only on a six-month non-renewable visa with a named employer, fewer workers have reported abuse due to the fear of being deported and criminalised for escaping their employers (Kalayaan, 2011), the government maintained that the proposed amendment is better suited to protect domestic workers and encourage them to come forward to seek help. Moreover, the government also maintained that were domestic workers able to apply to renew their visa, they could be exploited for longer (Kalayaan, 2015).

As we can see through its existing laws, the government ties migrant domestic workers to the employer. Informed by the idea that domestic work is integral to the functioning of the household and as such not part of the formal labour market, the existing immigration rules effectively bind a migrant domestic worker to the employer. The proposed amendment exacerbates this situation further in that it prohibits victims of abusive employment relationships to work anywhere else but in the domestic sector. Paradoxically, then, while claiming to protect them, the government makes migrant domestic workers invisible and treats them as abject victims whose situation can be improved only through a combination of rescue and prosecution. This logic of the state as an appropriate protector is upheld by stereotypical expectations of women's dependent role in the household and about migrant women as passive victims of forced labour or trafficking. This logic is deeply problematic in that the state is implicated in facilitating exploitation through its immigration controls and practices (Anderson, 2012). Hence, instead of conceiving of the state simply as the key actor in combatting trafficking, a perspective that takes into consideration the intersection of gender and nationality reveals the extent to which the state's anti-trafficking laws are embedded in stereotypical assumptions about migrant women and the ways in which these assumptions are contributing to enhancing migrants' vulnerability to exploitation and facilitating forced labour.

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## 8. THE INTERRELATIONSHIP BETWEEN TRAFFICKING AND IRREGULAR MIGRATION

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On 13 May 2015 the Commission released the European Agenda on Migration. The Agenda expressly states that though migrant smuggling and trafficking are two diverse criminal activities perpetrated by criminal networks, they are also interlinked since persons who start their journeys in a voluntary manner can also be vulnerable to networks of labour or sexual exploitation.<sup>1</sup>

The discussion regarding smuggling and trafficking is not new. Both activities have evolved into lucrative businesses, continuously growing in size and income. In the European Union, following a series of widely publicised incidents and the increase in recorded deaths in the Mediterranean since 2013 and particularly in the last year,<sup>2</sup> human smuggling has risen on the agenda as a critical issue in the management of irregular migration.

Irregular migratory flows are not comprised of clear-cut categories of migrants. Global socio-economic inequality, political instability, environmental hazards, conflict and absence of safety or simply sheer poverty generate migration. The flows include forced migrants, economic migrants, asylum seekers, and vulnerable categories such as unaccompanied minors or single-parent families. Whether moving in search of safety or better economic prospects, a space has emerged that overrides national boundaries, in which various actors become involved in services

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<sup>1</sup> European Commission (2015).

<sup>2</sup> The IOM said the 3,072 deaths made Europe the most dangerous destination for 'irregular' migrants in 2014. See Brian & Laczko (2014).

(recruitment, transport, document procurement, etc.) that fundamentally exploit (and profit from) the desire to migrate in search of a better life. In this space, smuggling and trafficking meet at specific points that relate to the journey (route) and the intermediaries involved. When a shift takes place, it is from smuggling to trafficking.

Smuggling can become trafficking, *en route* or on arrival, depending on the nature of the business model the smugglers have adopted. The UNODC Global Review on Smuggling of Migrants (2010) concluded that smuggling networks function according to the “enterprise” model and sophisticated networks have replaced small-scale businesses in regions where anti-smuggling law enforcement strategies are particularly robust. Yet, along the Greek-Turkish border for example, since 2010 different modus operandi and types of smuggling operations have appeared, depending on nationality of smuggled migrants, their purpose (employment or asylum), cost, etc. By treating smuggling as an organised process to the level of trafficking, we risk missing a significant part of the model, which is more fluid and adaptable and less structured. In fact, by comparing the smuggling and trafficking, one could reach some interesting observations.

Trafficking is an entirely organised criminal activity,<sup>3</sup> often with pyramid-shaped structures. Smuggling, on the other hand, has different shapes and forms. It ranges from a transnationally organised criminal network to an ad-hoc operation in border towns by smugglers seeking to profit from facilitating the passage of a few migrants. From debt bondage, forced labour conditions, usually in the agriculture, construction, and sweatshop industries, to sexual exploitation, smuggled migrants are already vulnerable due to their ‘irregular’ status and can be subjected to trafficking. In both cases the relationship between demand and supply is intrinsic, while remaining ambivalent.

In the case of smuggling, the relationship is essentially based on mutual agreement, with the smuggler providing a service for which he/she will not be paid unless the migrant reaches the final destination. Thus, an element of control, albeit limited, remains in the hands of the migrants. In the case of trafficked person, any potential element of control is an illusion, since the intent is from the beginning to exploit, thus the relationship is entirely unequal.

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<sup>3</sup> For the exact definitions see United Nations (2002a) (‘the Smuggling Protocol’) and United Nations (2002b) (‘the Trafficking Protocol’).

If trafficking is pyramid-shaped, with hierarchies and pre-allocated roles, smuggling is closer to a set of links that attach and disengage depending on the modus operandi and monetary compensation offered. These links are the intermediaries, i.e. the individuals, who are neither bound to the smuggling or the trafficking operations but perform activities for both. Skeldon (2000) pointed to the transition from smuggling to trafficking and the role of the intermediaries, when he attempted to describe both processes as a “continuum of facilitation”, spanning the divide from “completely transparent, fully invoiced and accountable recruitment on the one hand, through to the movement of people through networks entirely controlled by criminal gangs on the other.”<sup>4</sup> In this continuum, a series of facilitators or intermediaries become involved, who are neither part of the trafficking network nor the smuggling ring. They offer diverse services such as housing, mobile phones, document procurement, information on routes, and bribes. They work with both smugglers and traffickers and they contribute to the blurring of the boundaries between one and the other, creating a relationship between the two that can also enable smuggling to transform, eventually, into trafficking.

We can identify these linkages, across various stages, from recruitment to the monetary transaction.

Recruitment is a common first step to both trafficking and smuggling, though again it is dependent on context and migrant aspirations. Irrespective of whether an individual seeks to migrate in search of employment or safety, the recruiter (who can work for smugglers and/or traffickers) tends to generate ‘imperfect information’.<sup>5</sup> Both smugglers and traffickers ‘recruit’ individuals, usually with false promises of employment opportunities, a better life and safety. In the case of trafficked persons, until such time as coercion begins, they can in fact be considered smuggled immigrants, since they are aware of the irregular journey they will undertake but unaware of the deception on the part of the recruiter. Rather, the misinformation is a way of securing consent for the first leg of the journey. Smugglers, research has shown, also transmit incomplete information.

The misinformation usually focuses on the type of vessels and transport means, duration of the journey, dangers and reception conditions and asylum in the country of destination. Transport means vary depending on the route. For example, for migrants and asylum-seekers who attempt to

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<sup>4</sup> Skeldon (2000).

<sup>5</sup> Bilger et al. (2006).

reach the EU via Turkey, routes are limited to either by sea to Greece or by land to Bulgaria. The journey is rarely organised from beginning to end and migrants find smugglers on arrival in Turkey. The duration of migrants' stay depends on two things: their means of travel and the amount to be paid to the smuggler. For those attempting to cross the maritime border, the waiting can last from a few days to months and in some cases years, depending on the number of people a smuggler can take on the boat, payment, weather conditions, etc. With the exception of those who pay for specific vessels, e.g. on average pleasure boats carry seven passengers at a cost of €7,000-12,000 each depending on nationality, age and urgency,<sup>6</sup> most migrants state upon arrival in Greece to NGOs, or during screening, that they had agreed and paid for a very different type of travel or that they refused to board the vessel and were in fact forced by the smugglers.

Further complicating factors are those involved in the transport phase; the truck driver or skipper may or may not be part of an organised 'fixed' network. They may also be freelancers, offering services to those procuring them. They may transport irregular migrants across borders or within a country; recommend another driver or skipper or even a smuggler to continue the journey; transport trafficking victims unaware of the exploitation to follow; or be part of a set smuggling ring that operates along a specific route and undertakes the transport of persons.

Routes and means of transport thus overlap and this is where the intermediaries play a critical role. Smuggling and trafficking, particularly of irregular migrants, tend to follow the same routes: the Eastern Route, the Central European Route, the Eastern Mediterranean Route and the South-eastern Mediterranean Route. The countries of destination are also largely similar for irregular migrants and trafficked persons: Austria, Belgium, France, Germany, Italy, the Netherlands, Spain and the United Kingdom are the main destination countries in Europe of irregular migrants. In most cases, smugglers and traffickers often adopt the same routes and transportation methods in order for clients and victims to travel together. This means that mixed migrant flows include trafficked persons along with smuggled individuals and it is often impossible to distinguish one from the other without individual screening. Even then, distinction can be difficult because trafficked persons who are transported with irregular migrants are often not

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<sup>6</sup> Certain nationalities pay more than others, e.g. Syrians are charged more than Afghans. If the migrant is in a hurry to undertake the journey, often the smuggler will charge more. For further information, see Dimitriadi (2015).

aware they will be trafficked, i.e. they operate under the assumption that they are being smuggled into the country.

Along this continuum of facilitation, perhaps the most critical role is played by those responsible for the monetary transaction. The financial element is crucial in smuggling operations for two reasons. On the one hand, it 'guarantees' the business side of the transaction, whereby both will profit via the arrival of the migrant to the pre-agreed destination. Unless the migrant arrives, the smuggler will not receive his payment. On the other hand, it is the required sum the migrant has to pay that largely determines the journey and its risks. There are different rates regarding departure from different countries, and depending on the destination, and there are different rates for families and for minors but also for nationalities and level of border control. Low risk routes are usually low cost; high risk routes tend to be high cost. Transactions take place via the *hawala* (informal banking) system. Because it is informal and thus untraceable, it is the preferred method of financial transaction of most organised criminal activities, from trafficking to terrorist networking. As cash-intensive businesses, using cash couriers, *hawala* networks incorporate their own intermediaries who recommend the business owner to smugglers and/or traffickers. Due to the nature of the business, *hawala* shops function as banks open to all who require cash transactions. Thus, they are used by migrants, smugglers and traffickers alike, which mean they represent a critical link between smuggling and trafficking.

Smuggling of irregular migrants and trafficking are demand-based businesses. Though legal instruments have been created to distinguish the two and point out the element of consent as critical in differentiating one from the other, there is a growing interrelationship between the two. There is also a continuous evolution of smuggling, which increasingly adopts harsher methods and practices resembling trafficking. Migrants along the Mediterranean route are reporting being forced to embark on unsafe vessels despite their objection, harassment and violence during the journey, criminal gangs controlling border areas, demanding additional payment and exploiting those unable to pay. Routes, modes of transport, money shops, countries of origin and destination increasingly overlap. This is not surprising considering the changing face of migration; no longer linear or clear cut, people now move for multiple reasons and this widens the scope for smuggling and trafficking to meet.

Nonetheless, we still lack a deeper understanding of the business structure of the two activities, their differences and intersections. In order to

propose evidence-based policies we need to understand the different forms of smuggling operations, the diverse regional and local contexts, the adapted business models and the ways intermediaries engage and disengage themselves between smuggling and trafficking. Smuggling of irregular migrants is a particularly fluid activity, constantly adjusting to the geopolitical context, border controls and demands both in countries of origin and destination. Our policies need to provide a flexible framework to meet the challenges of increasing human mobility; this requires closer collaboration between researchers and policy-makers. More important, immigration policies need to go beyond simple categorisation, and devote more attention to regional and local specificities of the phenomenon in order to ensure the protection of individuals and those in need.

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## 9. IRREGULAR MIGRATION, TRAFFICKING IN PERSONS AND PREVENTION OF EXPLOITATION

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**T**rafficking in persons and smuggling of migrants are two distinct crimes that frequently occur in the context of irregular migration. In practice, smuggling of migrants and trafficking overlap at times and there are several cross-cutting themes associated with both. Given their clandestine nature, and the complexities of migration flows, it is difficult to estimate how many irregular migrants use the services of smugglers, how many are trafficked or how many smuggled persons end up being trafficked. It is also unclear to what degree certain smuggling and trafficking organisations overlap and merge their operations with one another. This is a major gap in knowledge and would warrant more research.

Whether smuggled or trafficked, during and after their journey, migrants are often exposed to violations of their fundamental rights, abuse, crime, exploitation and even life-threatening conditions. The vulnerability of smuggled migrants, in particular debt, exposes them to traffickers and exploiters, especially during transit and at the country of destination. Paying back the debt incurred by the 'smuggling service' increases the desperation of migrants and they may end up in situations of forced labour, forced prostitution or labour exploitation.

Trafficking in persons, on the other hand, is by its nature a process rather than a single event, and as such the situation of a single victim may also change over both time and a continuum of different levels of exploitation. What at the beginning is less serious exploitation can later turn into a situation of trafficking. Therefore, over time a smuggled person may become a victim of trafficking, as their circumstances change in the country of destination.

It is, however, very important to point out that victims of trafficking may have different residence statuses. They can be undocumented (irregular) migrants, but EU citizens or third-country nationals with valid residence permits can also end up in situations of trafficking and exploitation.<sup>1</sup> Indeed, according to Eurostat,<sup>2</sup> at the European level as many as 65% of registered victims of trafficking are EU citizens. On the other hand, for example in Finland, most trafficking victims are third-country nationals with valid work permits, as the majority of detected trafficking cases in Finland have been related to labour trafficking.<sup>3</sup>

However, often irregular migrants face the highest risk of exploitation because of their vulnerable, even clandestine status, which is exploited by traffickers and other criminals, including in the clandestine job market. This is because undocumented migrants find it very difficult to contact authorities or seek help from governmental institutions.<sup>4</sup> Identification of victims of trafficking among undocumented and/or smuggled migrants seems to be especially challenging because of the lack of trust between migrants and authorities, and because of the lack of awareness of trafficking in the first place.

However, it must be pointed out that the problem of trafficking and exploitation of migrants cannot be solved only by resorting to the criminal justice system and penal frameworks. Indeed, there are a number of alternative means of addressing human trafficking other than through strengthening the penal framework.

There is considerable potential in utilising different trust-based policies. In the FIDUCIA project, four distinct dimensions of trust were identified: (a) trust between victims and the authorities/social workers; (b) trust between victims and their clients (in particular in sexual exploitation); (c) trust between the clients of victims and the authorities/social workers; and (d) trust between victims and traffickers.<sup>5</sup> The evidence shows an alarming lack of trust particularly between victims and the authorities. This negatively impacts the identification of victims. Police units may misidentify trafficking victims as undocumented migrants and/or offenders and fail to prevent secondary victimisation. Trust-based policies could be adopted to

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<sup>1</sup> For example, FRA (2015).

<sup>2</sup> Eurostat (2014).

<sup>3</sup> Ollus & Jokinen (2013); Jokinen et al. (2011).

<sup>4</sup> Ollus & Jokinen (2013).

<sup>5</sup> FIDUCIA (2015).

disseminate information within migrant communities and networks regarding the rights of migrants and the services offered by NGOs, trade unions and the authorities. By increasing trust between victims and the authorities, victims can be encouraged to seek help and report their cases to the authorities in the first place. This would allow increased detection of cases and would then help the authorities to gather better evidence in order to secure convictions for human trafficking. EU member states should also devise strategies that will reduce the level of corruption and increase the efficiency and fairness of institutions. Past negative experiences, e.g. in the victims' home countries, may hinder the creation of trust in the destination country.

Similarly, EU member states should improve the training of officials and other professionals likely to come into contact with victims and potential victims, e.g. labour inspectors, police and border guards. Rather than focusing only on a person's migration status, the monitoring and enforcement activities should aim at providing information and protecting the fundamental rights of migrants at work and at preventing their abuse and exploitation.<sup>6</sup>

Overall, EU member states should promote tolerance, trust and non-discrimination in order to foster a culture and a normative climate that promotes understanding and appreciation of the positive social and economic contribution of migrant workers to the society of their host country.<sup>7</sup> The member states of the EU should mobilise efforts and public attitudes to combat discriminatory and xenophobic attitudes, and prioritise the protection of migrant workers over immigration controls. Ultimately, criminalisation of migration really just reinforces negative stereotypes against migrants and makes them even more vulnerable to exploitation at the hands of traffickers and exploiters, who can exercise even more control over their victims because of the fear that victims have of arrest and expulsion.

As regards the issue of labour trafficking, EU member states should also focus on the role of businesses in the prevention of trafficking and labour exploitation and on the promotion of the self-regulation of businesses during recruitment as well as in the workplace and in the labour supply chains, in order to combat labour exploitation. EU member states should also ensure that when purchasing goods, works and services, all public sector

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<sup>6</sup> Sorrentino & Jokinen (2014).

<sup>7</sup> Ibid.

organisations, including state-owned, state-controlled or state-supported enterprises, have in place appropriate due-diligence procedures to guarantee respect for human rights and labour rights and to prevent exploitation and trafficking of migrant workers, i.e. by corrupt companies, or unscrupulous recruitment agencies, labour brokers or outsourcing companies.<sup>8</sup>

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<sup>8</sup> Ibid.

# 10. ALTERNATIVE WAYS TO ADDRESS HUMAN TRAFFICKING: TECHNOLOGY AND HUMAN TRAFFICKING

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## **Introduction: Technology and human trafficking**

Trafficking in human beings is a fast-growing transnational crime, affecting all parts of the world.<sup>1</sup> Despite the pervasiveness of the issue of human trafficking, for a long time it remained outside the discourses on technology. This paper takes “technology” to mean machinery, devices, algorithms and methodologies developed from scientific knowledge for specific purposes, including tools or ways of communicating and tracking, such as mobile phones, landline phones, tablets, social networking sites, databases, surveillance devices, etc., as well as deep data analysis tools and methods such as data mining and big data.

Technology is a double-edged sword: today an accumulative number of technologies play a significant role in fighting and facilitating human trafficking. From technologies that enable traffickers to communicate with their victims, e.g., mobile phones and the Internet, to technologies that enable traffickers to recruit their victims, e.g., online job adverts, dating websites and social media, to technologies that help prevent human trafficking, e.g., online awareness raising campaigns, to tools used to combat the crime by law enforcement officials, e.g., drones, financial tracking, infrared or phone-tapping.

With such a vast array of technologies it is necessary to take consider how our understanding of the role that technology has to play in the crime

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<sup>1</sup> Shelley (2010).

of human trafficking and its prevention can fit into European legislation and policy.

The element of technology is absent from the currently in force 2011 EU Directive on Human Trafficking.<sup>2</sup> However, it is acknowledged that the Internet and social networks are reflected on in the EU Strategy towards the Eradication of Trafficking in Human Beings, adopted in 2012. The document highlights that “internet and social networks will be used as a means of effectively raising awareness in a targeted manner”.<sup>3</sup>

Undeniably, the turning point appears to have come with an increasing number of researchers devoting themselves to the relationship between various elements of technology and human trafficking. In 2014 the EU-funded TRACE project began; one of its primary aims is to assess how those fighting the crime are using technology and also how the perpetrators are furthering their crimes by the use of technology. Correspondingly, the ‘datACT’ project has committed itself to looking at the relationship between victims of human trafficking and data protection, an arm of technology. DataACT strives to ensure that victims of trafficking are “perceived in their autonomy and not as powerless victims whose personal data must be collected and stored.”

This paper considers merely two of the many nexuses between human trafficking and technology, and serves as an introduction to the issue for policy-makers. In the second section I argue for increasing awareness of the digital footprint, both in combating human trafficking and protecting victims. The third section introduces the debates around data protection and privacy and human trafficking, and encourages further research and greater focus on this domain.

## **Internet and the digital footprint**

The Internet is the ideal channel through which one can engage in all three stages of human trafficking:

- action (recruitment);
- a means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, or giving

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<sup>2</sup> European Parliament and Council (2011).

<sup>3</sup> European Commission (2012), p. 9.

or receiving payments or benefits to obtain the consent of a person who has control over another person); and

- exploitation.

Research from the TRACE project revealed that:

In Latvia, recruitment most often takes place via social network websites, such as draugiem.lv or facebook.com, where with one click an unknown person becomes 'approved' as a friend. These websites provides a platform for sharing details of our everyday life and the opportunity to display emotion publicly, which makes it easy to observe and approach a potential victim who shows signs of being in a vulnerable emotional state... Although interaction on the Internet may be between people of different generations, trust can be established very quickly.<sup>4</sup>

The Centre for Equal Opportunities and Opposition to Racism highlighted that "the methods used by traffickers to recruit through the Internet include:

- The use of false advertisements for jobs, marriages, lonely hearts, etc.
- The use of online chat rooms."<sup>5</sup>

As for exploitation, this can be done through the posting of pornographic images/videos of victims on various websites.<sup>6</sup> "Sometimes acts of prostitution are filmed without the consent of the victim and distributed. On other occasions victims are trafficked for the sole purpose of porn production".<sup>7</sup> To borrow from Dettmeijer-Vermeulen,<sup>8</sup> "[I]mages of sexual acts with victims circulating on the Internet constitute a new dimension to victimhood."<sup>9</sup>

In view of the role the Internet can play in facilitating human trafficking, research should be undertaken to discover how clients can be made aware of risks of online offers, either for jobs or to satisfy sexual wants.

In a parallel way, the Internet can make a significant contribution to combating human trafficking and prosecuting those responsible. In

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<sup>4</sup> Sapens et al. (2014), p. 31.

<sup>5</sup> Centre for Equal Opportunities and Opposition to Racism (2010), p. 129.

<sup>6</sup> Farley (2007), p. 153.

<sup>7</sup> Covenant Eyes (2011).

<sup>8</sup> The Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children.

<sup>9</sup> Dettmeijer-Vermeulen (2012), p. 301.

particular, the digital footprint can be helpful. In brief, the digital footprint is the trail one leaves behind every time he/she accesses the Internet; unlike a paper trail, the digital footprint is harder to destroy. By studying digital activity of suspects, law enforcement can obtain more than just the Internet service provider address. Indeed, websites, including social networking sites, keep tabs on all activity. All information, including dates, can be traced provided the request for information conforms to the requirements of national legislation. As such, strong recommendations are made for the establishment of a partnership with social networks.

It is therefore recommended in this paper that future EU strategies on human trafficking take into account the possibilities that the Internet can offer to conduct investigations and prosecutions. Moreover, there is a need for law enforcement persons to obtain up-to-date knowledge on how to use social networking sites as a form of intelligence in the fight against trafficking in human beings. Attention must be paid to the role of (popular) social networking sites and their capacity to facilitate trafficking in human beings. Such awareness can help to increase law enforcement's capacity to monitor and track the role of social networking sites in trafficking in human beings.

On the other side of the coin lies the notion that human traffickers can use the digital footprint to prey on their victims. For example, if a victim is using a social networking service whilst in a safe house he/she may not realise that the location from which a *post* or *status* was published is often publicly disclosed by the website. This in turn has significant consequences with regard to the victim's security.

Importantly, the solution is not to take technology out of the hands of the victims. Instead, victims need safe access to technology, whether phones or the Internet, whilst learning how these technologies can be used against them. It is therefore recommended that policy-makers consider the need for staff who can work with victims accordingly.

## **Data protection and privacy**

The system of fighting human trafficking includes collecting information and data. To borrow from Rankin and Kinsella:

To successfully combat THB [trafficking in human beings] it is necessary to enhance data collection to promote trans-border cooperation, develop a capacity to collect, analyse and ultimately share relevant THB information and data. Knowledge can take the

form of either intelligence or data and understanding THB is central to tackling the problem more effectively. Knowledge, from whatever source, is a key requirement in the architecture of that response.<sup>10</sup>

An example of collected data is the United Nations Office on Drugs and Crime (UNODC) online “Human Trafficking Case Law Database”, a publicly available repository of summaries and full court documents of past trafficking cases to refer to in support of current trafficking cases. The type of national data collection is a function of the various national reporting mechanisms, which can include victim data.<sup>11</sup>

However, information on human trafficking cannot be gathered at the expense of the safety and privacy of human trafficking victims. This paper therefore calls for the continued focus on developing frameworks that protect the privacy of such victims.

Globally, there is an array laws on data protection and privacy laws, including Article 8 ECHR, which addresses the right to respect for private and family life. At a European Union level, the Data Protection Directive<sup>12</sup> is a significant piece of legislation. For victims, of particular importance is the Victims Directive,<sup>13</sup> which in Article 21 grants victims the right to protection of privacy by asking member states to ensure:

That competent authorities may take during the criminal proceedings appropriate measures to protect the privacy, including personal characteristics of the victim taken into account in the individual assessment provided for under Article 22, and images of victims and of their family members. Furthermore, member states shall ensure that competent authorities may take all lawful measures to prevent public dissemination of any information that could lead to the identification of a child victim.

The above-cited Article is minimalistic in character, if only because it limits the protection of victim privacy only during criminal proceedings. As such, the protection is inadequate. What happens to victims – and their data – in safe houses and in recovery programmes?

Moreover, EU legislation has only one reference to an obligation of the state with regard to human trafficking and data protection and privacy. The

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<sup>10</sup> Kinsella & Rankin (2011), p. 172.

<sup>11</sup> Wijers (2013), p. 1.

<sup>12</sup> European Parliament & Council (1995).

<sup>13</sup> European Parliament & Council (2012).

Recital to 2011 EU Directive on Human Trafficking states at paragraph 33 that the Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the protection of personal data.

The EU strategy does not mention data protection or privacy, and only talks of the need to improve data collection, analysis and exchange of information to promote and assist in information sharing. Victim protection is missing.

As highlighted by Wijers, there remains little awareness and knowledge amongst staff combating human trafficking and working in victim protection of what data protection laws are or require.<sup>14</sup> This is a concern. Privacy and protection risks attached to the collection of data when it comes to human trafficking are great, for we are dealing with the safety of a particular vulnerable group of individuals. Despite the fact that risks are evident, the current legal and policy approach is limited and further direction ought to be provided to member states. Consideration should also be given to the development of EU soft law materials that promote ethical research and data collection. An example of such material is the UNODC toolkit on “Use of standardized data collection instruments or the United Nations Inter-Agency Project on Human Trafficking, Guide to ethics and human rights in counter trafficking”.<sup>15</sup>

## Major conclusions and follow-up

1. Developments in technology increasingly play a role in the both committing and preventing human trafficking. There is a need for further research and training on how technology methods and tools, such as the Internet and mobile technologies, can be used.
2. The basic standard for data and privacy protection of victims of crime in the European Union member countries is currently determined by the Victims Directive. However, the obligations threshold is not particularly high. There is an urgent need to develop a comprehensive and consistent legal framework and practical procedures on data protection, privacy and protecting human trafficking victims. The matter should be considered in the future EU strategy on human trafficking.

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<sup>14</sup> Wijers (2013).

<sup>15</sup> UNODC (2010).

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# 11. THE EU ANTI-SMUGGLING FRAMEWORK: DIRECT AND INDIRECT EFFECTS ON THE PROVISION OF HUMANITARIAN ASSISTANCE TO IRREGULAR MIGRANTS

*JENNIFER ALLSOPP AND  
MARIA GIOVANNA MANIERI*

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## Introduction

The rise in the number of refugees and migrants attempting to cross Europe's borders in 2015, and the increasing number of fatalities and heightened peril affecting these individuals, have been a catalyst for concerted EU action regarding the phenomenon of migration and for renewed efforts towards the building of a common immigration policy. The issue of facilitating the entry, transit and stay of irregular migrants has been politicised both at the EU's external borders and within member states. While migrants remain in transit in areas such as Calais, Ventimiglia and the Serbian-Croatian border, often seeking out the services of smugglers to cross into neighbouring states to reunite with family members or to fulfil a personal migration goal, humanitarian actors seek to respond to their human rights and needs in an increasingly ambiguous, punitive and militarised environment. Within many EU member states, the backdrop of austerity and cuts to public services has placed local authorities and civil society actors in a difficult position as they seek to respond to the basic needs of newly arrived and established migrants with fewer resources.

A range of common EU legal instruments, primarily the "Facilitators' Package", serve to regulate this area. In the European Commission's 2015

European Agenda on Migration,<sup>1</sup> the “fight against smugglers and traffickers” was identified as a key priority. In particular, the Agenda called for improvements to the current EU legal framework “to tackle migrant smuggling and those who profit from it”. However, in the EU Action Plan against Migrant Smuggling<sup>2</sup> adopted in May 2015, the European Commission notes that appropriate criminal sanctions should be in place while avoiding the risks of criminalising those who provide humanitarian assistance to migrants in distress, thus implicitly acknowledging the inherent tension between the criminalisation of smugglers on the one hand and of those providing humanitarian assistance on the other, through a range of behaviours that cover facilitation of not only irregular entry and transit but also irregular residence and stay.

For the past decade, service providers across several member states have raised concerns that the hardening stance on migrant smuggling at the political level could impact the day-to-day service provision of everyday humanitarian actors. They fear that renewed efforts to combat the smuggling of migrants and refugees could affect irregular migrants’ access to their fundamental rights, including healthcare, education and housing.<sup>3</sup> Several studies have been conducted regarding EU member states’ national transposition and implementation of the Facilitators’ Package,<sup>4</sup> or more generally, on policies and programmes focused on smuggling across the EU and in cooperation with third countries and the characteristics of the

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<sup>1</sup> European Commission, European Agenda on Migration, COM(2015) 240 final, 13.5.2015, pp. 8 and 9.

<sup>2</sup> EU Action Plan against migrant smuggling (2015-2020) (COM(2015) 285).

<sup>3</sup> PICUM (2002), *Book of Solidarity. Providing Assistance to Undocumented Migrants in Belgium, Germany, the Netherlands, and the UK*, Vol. 1, PICUM, Brussels; PICUM (2003); *Book of Solidarity. Providing Assistance to Undocumented Migrants in France, Spain and Italy*, Vol. 2, PICUM, Brussels; and *Book of Solidarity. Providing Assistance to Undocumented Migrants in Sweden, Denmark and Austria*, Vol. 3, PICUM, Brussels.

<sup>4</sup> European Union Agency for Fundamental Rights (FRA), “Criminalisation of Migrants in an Irregular Situation and of persons engaging with them”, FRA, Vienna, 2014; M. Provera, “The Criminalisation of Irregular Migration in the European Union”, CEPS Papers on Liberty and Security in Europe, No. 80, CEPS, Brussels, 2015.

phenomenon.<sup>5</sup> Yet a significant gap exists concerning the actual effects that these laws have on those working at the front line of providing humanitarian assistance, public services and fundamental human rights to irregular migrants, in particular civil society organisations and cities.

This chapter presents the results of a study commissioned by the European Parliament to fill that gap. The study collated desk-based research mapping law and policy frameworks across several EU member states, available data on prosecution and conviction rates, and questionnaires targeting civil society organisers, service providers, cities, national governments and ship owners.<sup>6</sup>

This chapter begins by outlining the humanitarian exception provision envisaged by the Facilitators' Package before considering the impact that it has on individuals and organisations providing access to humanitarian assistance, public services and fundamental rights to irregular migrants on the ground. Several significant shortcomings in current efforts to monitor and measure this impact are also explored.

## **The EU anti-smuggling legal framework and humanitarian assistance to irregular migrants: An inherently ambiguous relationship**

The tension between the criminalisation of people smuggling and those providing humanitarian assistance is a by-product of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (the Facilitation Directive)<sup>7</sup> and the Council

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<sup>5</sup> See European Commission, "A Study on Smuggling of Migrants: Characteristics, Responses and Cooperation with Third Countries", Final Report, September 2015 ([http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/study\\_on\\_smuggling\\_of\\_migrants\\_final\\_report\\_master\\_091115\\_final\\_pdf.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/study_on_smuggling_of_migrants_final_report_master_091115_final_pdf.pdf)).

<sup>6</sup> See [www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf).

<sup>7</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, pp. 17-18.

Framework Decision<sup>8</sup> implementing it - collectively known as the Facilitators' Package.

The EU Action Plan against Migrant Smuggling (2015-20) of May 2015 announced that the European Commission would make proposals in 2016 to improve these two legal instruments. It acknowledged the need to avoid the criminalisation of those providing assistance to irregular migrants in addition to the existential risks that the Facilitators' Package raises for individuals and organisations (or both) providing humanitarian assistance and access to fundamental human rights to migrants and refugees. These actors include civil society organisations, local authorities, citizens and residents, from an individual giving someone a lift in their car to a civil society organisation, religious organisation or local authority providing housing to a destitute migrant in need of shelter.

The Facilitators' Package seeks to compel EU member states to provide criminal sanctions for a broad set of behaviours, including the smuggling of people and the provision of assistance to irregular migrants in a framework characterised by legal ambiguity and uncertainty. Article 1.2 of the Facilitation Directive provides a non-binding option to EU member states to apply an exception to the criminalisation of that facilitation when the latter is "humanitarian" in nature.<sup>9</sup> The implementation of the humanitarian assistance exception is therefore discretionary upon the authorities of EU member states.

The nature and scope of 'what' humanitarian assistance actually involves is not defined by the Directive. Neither are the potential relationships between the facilitator and the irregular migrant, which may often include family, affective or personal relationships. In addition, the Directive places special emphasis on member states adopting criminal sanctions for facilitators of stay who act "for financial gain",<sup>10</sup> which in turn

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<sup>8</sup> Council Framework Decision [2002/946/JHA](#) of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002.

<sup>9</sup> Article 1.2 reads as follows: "2. Any member state may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned."

<sup>10</sup> Article 1.1.b of the Directive stipulates that "any person who, for financial gain, intentionally assists a person who is not a national of a Member state to reside within the territory of a Member state [is] in breach of the laws of the state concerned on the residence of aliens".

puts at greater risk of prosecution and conviction on service providers to irregular migrants and other members of society such as landlords. These legal uncertainties are exacerbated by the omission in the Facilitators' Package of its relationship with relevant international and regional human rights instruments, which stipulate legal obligations for state parties and often call for the provision of assistance to those in need, not least in critical situations such as destitution or persons in distress at sea.

Of particular relevance in this regard is the substantial 'implementation gap' between the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (referred to as the UN Smuggling Protocol) and international and EU legal frameworks on people smuggling. Chiefly, the latter differ from the UN Protocol in three main ways: 1) the extent of the inclusion and definition of an element of "financial gain" in the description of facilitation of irregular entry, transit and stay; 2) the inclusion of an exemption of punishment for those providing humanitarian assistance; and 3) the inclusion of specific safeguards for victims of smuggling.

### **Inconsistencies in punishment and protection: Transposition of the Facilitators' Package into national law**

As a result of the discretionary powers granted to member states in the implementation of the Facilitators' Package, a survey of its transposition into the law of selected member states conducted by Alverti<sup>11</sup> found significant variation how it is framed and implemented in the national law of selected member states. This includes whether facilitation is considered a civil or administrative crime as well as variation in wording and certain conditions for or protections from prosecution. While France, Germany, Italy, the Netherlands, Spain and the UK all punish the facilitation of irregular entry, for example, only legislation in Germany requires an element of financial gain or profit for it to be a punishable offence. This is also the case in Hungary and Greece. As underlined in the previous section, while the UN Smuggling Protocol requires the punishment of facilitation only if done for profit, the Facilitators' Package does not expressly introduce this obligation in the case of facilitation of irregular entry.

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<sup>11</sup> [www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf).

The safeguard introduced in Article 1.2 of the Facilitation Directive, allowing member states not to impose sanctions where irregular entry and transit are facilitated for humanitarian purposes, has only been introduced by a handful of member states including Spain<sup>12</sup> and Greece.<sup>13</sup>

In relation to the facilitation of irregular stay, although Article 1.1.b of the Facilitation Directive provides that member states *may* refrain from punishing facilitation of irregular stay, if this is not done intentionally or for financial gain, the Directive does not impose an obligation on member states to refrain from punishing the facilitation of irregular stay when an element of intention or financial gain is absent. As a consequence, inconsistencies among domestic laws can be identified in relation to both the definition of the specific conduct to be criminalised and the requirement of an element of profit or financial gain for facilitation of irregular stay to be punished.

This results in legal uncertainty and inconsistency and impacts the effectiveness of the legislation.

## **Measuring the impact of the Facilitators' Package: Problems of inconsistent monitoring and data collection**

Moreover, analysis of available statistics coupled with an in-depth analysis of court cases in selected countries involving the criminalisation of facilitation and humanitarian assistance reveals that qualitative and quantitative data on the prosecution and conviction rates of those who have provided humanitarian assistance to irregular migrants is lacking at national and EU level. Domestic court cases in selected EU member states offer anecdotal evidence that criminalisation has covered family members and those assisting migrants and refugees to enter. Meanwhile, domestic developments in Greece and Hungary suggest that these laws are being applied with renewed rigour<sup>14</sup> but with minimal monitoring of direct or indirect impact on humanitarian assistance. In recent years there is some

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<sup>12</sup> Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE-A-2000-544 (Organic Law 4/2000, of 11 January, on rights and freedoms of foreigners in Spain and their social integration). See Article 54(3) listing "very serious infractions": "That established in preceding articles notwithstanding, it shall not be considered an infraction to transport into Spanish territory a foreign national who, having presented without delay a request for asylum, has had this admitted for processing."

<sup>13</sup> See the Immigration Act, Article 88(6).

<sup>14</sup> See, for example, Safdar (2016).

evidence across various member states – including the UK, Germany, France, the Netherlands and Spain – of the use of facilitation-related offences against altruistic individuals assisting others, including family members, members of humanitarian organisations and private individuals acting out of compassion. Given the limited scope and sample size on which these studies are based, it is nevertheless difficult to draw general conclusions on the operation of the exemption from them. Yet these cases are indicative of the wide scope for criminalisation allowed by domestic legal regimes, and potential deficiencies in the Facilitation Directive to prevent such expansion.

Irrespective of the actual number of convictions and prosecutions, the effects of the Facilitators' Package extend beyond formal prosecutions and the number of criminal convictions. It is misleading to regard a criminal conviction as the only index of punitiveness. Being arrested, interrogated, detained and prosecuted for a crime can have punitive effects on those subject to state intervention, even where those interventions do not eventually result in a conviction and the imposition of a sanction. Criminal and immigration statistics are unlikely to provide details on the context of the offence and the specific reasons for the discontinuation of proceedings, including the application of any exemption to liability.

In terms of methodological issues, while some member states collect data on the number of individuals apprehended, prosecuted and convicted for facilitation-related offences, some of them do not make this information publicly available. Others, like Italy, do not provide a breakdown of immigration offences by offence type. There are also discrepancies in terms of the years for which the information is available. As a result, meaningful comparisons across jurisdictions are difficult to draw.

As it currently stands, we know that the Facilitators' Package has been interpreted in a number of ways in the law of member states. Yet there is scarce and patchy evidence – both qualitative and quantitative – on both variations and consistencies in its day-to-day implementation and the impact this has on humanitarian actors.

## **Material and perceived effects of the Facilitators' Package: The view from the grass roots**

The results of a questionnaire of 69 civil society organisations and 13 cities across approximately 20 member states give us some indication of the range of material and direct and perceived effects of the Facilitators' Package on irregular migrants and the individuals and organisations providing

humanitarian assistance to them. The data also reflect a number of additional unintended or indirect consequences.

Some civil society organisations fear sanction and experience intimidation in their work with irregular migrants, with a deterrent effect on their work. Almost all consider their work to be humanitarian in nature: claiming to provide services that help migrants to access their fundamental rights (including to health care, shelter, hygiene and legal assistance) and to live with dignity as fellow human beings.

A fifth of civil society respondents reported that their organisation or a member of their organisation has feared sanction for their work assisting an irregular migrant as a consequence of anti-smuggling legislation – both for work related to the transit of migrants and for supporting them during their stay in a member state. Among these were respondents from Spain, the UK, Cyprus, Germany, Denmark, Austria and Hungary. Actual cases of criminal sanction nevertheless appear rare. Just a handful of respondents to the civil society survey reported direct experience of proceedings, prosecution or sanction for their work supporting irregular migrants. Criminal acts included fundraising for the medical bill of a migrant domestic worker without licence, protesting, and misuse of public funds.

Those assisting irregular migrants perceive significant room for manoeuvre and a degree of arbitrariness in the way the Facilitation Directive is implemented in their member state, and there is also widespread confusion among civil society practitioners concerning how the Facilitation Directive *should* be implemented in their member state. This can lead to misinformation and ‘erring on the side of caution’, thereby compromising migrants’ access to vital services. This is especially true in the context of the significant increase in the number of people migrating to Europe and seeking asylum, where everyday citizens are obliged to volunteer vital services in the absence of sufficient state provision. Previous studies have demonstrated that fear of sanction can have a deterrent effect, contributing to what Basaran (2015) calls, in the context of humanitarian rescue at sea, a “collective indifference”. While there is no evidence of indifference in our survey of shipowners, there is widespread concern that member states are failing to adequately support them. This lack of support has the effect of putting the lives of crew members and migrants at risk, and of harming relations of social trust between shipowners and member states.

A lack of coordination between local and national authorities regarding the implementation of the Facilitation Directive impinges on the key role played by civil society organisations and cities in ensuring irregular

migrants' access to humanitarian assistance and basic services. Recent legal action led by the city of Utrecht demonstrates how cities may employ legal strategies to try to force the state to provide clearer instructions and resources to local authorities for the upholding of irregular migrants' fundamental rights. The city of Utrecht decided to provide shelter to irregular migrants – in breach of national law – when the situation of homeless people squatting just outside of the city became unacceptable. Municipal authorities decided to provide a response to this situation both to meet the need for public order and security but also for humanitarian reasons.

The Facilitators' Package has indirect repercussions not just for irregular migrants and those assisting them, but also for citizens, and for the social trust and social cohesion of the receiving society as a whole. In certain member states, the implementation of the Facilitation Directive is perceived as contributing to the social exclusion of both irregular and regular migrants and undermining social trust. Ship owners report that they feel poorly supported by member states and are ill-placed to help irregular migrants at sea. Our research shows that criminalisation of assistance feeds a general climate of fear and insecurity about irregular immigration. The main concerns of practitioners continue to be how to deliver their assistance tasks and responsibilities without being penalised, and how to avoid social exclusion, maintain social cohesion and cater to the needs of all these populations. Criminalisation also jeopardises the 'citizen's right to assist' those in need of humanitarian aid as a key function of democracy.

## Conclusions

There is no question that Facilitators' Package raises a number of important questions at the level of implementation, and this has led some to claim that it is not fit for purpose. There is, however, a lack of on-the-ground information about the multi-layered effects of the practical implementation of the Facilitation Directive on irregular migrants and those providing assistance to them. The chapter has argued that, irrespective of quantitative evidence (actual numbers of convictions and prosecutions), the most far-reaching effects of the Facilitators' Package may well extend beyond formal prosecutions and criminal convictions. These mainly relate to the direct, perceived and unintended consequences characterising the implementation of the Facilitators' Package for those providing on-the-ground humanitarian assistance and services or other organisations and individuals in society. In conclusion, two key recommendations can be formulated.

Firstly, if the Facilitation Directive is to mandate the criminalisation of certain forms of facilitation of entry, transit and residence, those forms of facilitation should be sufficiently specified in order to minimise the scope for expansive interpretation at the domestic level. In addition, it should be made clear that not-for-profit, humanitarian facilitation of entry, transit and/or residence is not to be subject to criminal or administrative liability. The main interest protected by the offence should be the life, security and physical integrity of the person assisted. As such, obvious candidates for criminalisation are acts that cause serious injuries, endanger life or result in the death of another person, as well as acts committed by organised criminal groups. A major concern should be the effects, for both migrants and those who help them, of criminalisation processes coupled with a lack of regular channels for migrants to reach Europe, in terms of increasing the risks of border crossings and the demand for smugglers.

Secondly, member states should be obliged to put in place adequate systems to monitor and independently evaluate the enforcement of the Facilitators' Package, and allow for quantitative and qualitative assessment of its implementation when it comes to the number of prosecutions and convictions, as well as to their effects. Without comprehensive, robust and comparable evidence on the impact of the Facilitation Directive in domestic jurisdictions, it is difficult to assess the practical effectiveness of the EU law.

The work of humanitarian actors ought to be protected and recognised as a necessary social good to be protected from sanction and intimidation at all times. This norm is already recognised in certain international normative instruments, such as the UN Declaration on Human Rights Defenders of 1999. One civil society survey respondent makes the importance of this work clear: not only do they help migrants to access their fundamental rights; in so doing, they actually help protect them from potential abuse, including from future smuggling or exploitation.

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**Matthias Ruete** is Director General of the Directorate General for Migration and Home Affairs (DG HOME). From 2010 to 2014 he was Director General of DG Mobility and Transport (DG MOVE) and between 2006 and 2010 he was Director General for Energy and Transport (DG TREN). In 2005 Matthias worked as Director in DG Enterprise and Industry. From 2000 to 2004 he was Director in DG Enlargement, coordinating enlargement negotiations, first with Poland, Estonia, Latvia, Lithuania, the Czech Republic, Slovakia, Slovenia, Hungary, Malta and Cyprus, and from 2003 onwards with Bulgaria, Romania and Turkey. From 1998 to 2000 Matthias was Director in DG Transport in the area of international relations, Galileo, trans-European transport and infrastructure networks. His initial post at the European Commission was in DG Social Affairs (Health and Nuclear Safety). He then moved to DG Internal Market (first TV without frontiers, then assistant to the Director General), becoming Head of the

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**Sarah Spencer** CBE is Director of the Global Exchange on Migration and Diversity at COMPAS. Her particular interests are in irregular migrants, integration, human rights and equality issues, and in the policy-making process. She was an Open Society Fellow (2012-14), exploring issues relating to irregular migrants in Europe, and is a Visiting Professor at the Human Rights Centre, University of Essex. Sarah was awarded her doctorate at Erasmus University Rotterdam, has an MPhil from University College London and took her first degree at the University of Nottingham.

# ANNEX. PROGRAMME OF THE EXPERT FIDUCIA SEMINAR

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**Tuesday, 24 March 2015**

**13.00 – 13.30: Registration and Buffet Lunch**

**13.30 – 14.00: WELCOME AND OPENING**

- Sergio Carrera (CEPS)
- Dana Spinant, DG Home, European Commission
- Katarzyna Cuadrat-Grzybowska, DG Home, European Commission

**14.00 – 16.00: CHALLENGE I: The criminalisation of facilitating irregular entry and stay**

The Facilitation Directive and the Employer Sanctions Directive subjects those facilitating irregular entry, stay and employment to criminal measures. This panel addresses the role of such measures in migration management and identifies the issues and challenges arising from their application.

**Chair:** Michele LeVoy, PICUM

- Sarah Spencer, University of Oxford
- Alessandro Spena, Università degli Studi di Palermo
- Arjen Leerkes, Erasmus University Rotterdam
- Michael Collyer, University of Sussex

**Open Discussion**

**16.00 – 16.15: Coffee Break**

**16.15 – 18.15: CHALLENGE II: Humanitarian assistance to irregular migrants**

As social networks play an increasingly prominent role in assisting irregular migrants accessing their fundamental rights, ambiguity exists about the extent of assistance individuals and organisations can lawfully provide. In light of the reconsideration of the Facilitation Directive, this panel examines the effect of these policies and the priorities at the EU level.

**Chair:** Annica Ryngbeck, Social Platform

- Mark Provera, CEPS (FIDUCIA Project partner)
- Ana Aliverti, University of Warwick
- Jennifer Allsopp, University of Oxford

**Open Discussion**

## Wednesday, 25 March 2015

**8.30 – 9.00: Coffee**

**9.00 – 11.00: CHALLENGE III: The interrelationship of trafficking in human beings with other forms of irregular migration**

Identifying victims and prosecuting perpetrators of human trafficking remains an ongoing challenge in the EU. This panel examines the priorities for the EU in addressing trafficking in human beings and explores its interrelationship with other forms of irregular migration.

**Chair:** Sergio Carrera, CEPS

- Anniina Jokinen, European Institute for Crime Prevention and Control, affiliated with the United Nations (FIDUCIA Project partner)
- Rutvica Andrijasevic, University of Bristol
- Julia Muraszekiewicz, Vrije Universiteit Brussel
- Angeliki Dimitriadi, ELIAMEP

### Open Discussion

**11.00 – 11.15: Coffee Break**

**11.15 – 13.15: THE WAY FORWARD: Policy Recommendations for the new EU Migration Agenda**

As the European Commission prepares its EU Agenda on Migration, this panel of academics will suggest recommendations for future EU legislative and policy measures to contribute to the European Commission's work on these three inter-related areas.

**Chair:** Thomas Huddleston, MPG

- Sergio Carrera, CEPS
- Kees Groenendijk, Radboud University Nijmegen
- Elisa Brey, Universidad Complutense de Madrid

**13.15 – 14.00: Light Lunch**

This book examines the treatment of irregular migration, trafficking and smuggling of human beings in EU law and policy. What are the policy dilemmas encountered in efforts to criminalise irregular migration and humanitarian assistance to irregular immigrants? The various contributions in this edited volume examine the principal considerations that make up EU policies directed towards irregular migration and its relationship with trafficking and smuggling of human beings. This book aims to provide academic input to informed policy-making in the next phase of the European Agenda on Migration.

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