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The trafficking and smuggling of refugees

the end game in European asylum policy?

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Contents

TABLE ONE: An index of abbreviations used in this report:

(an explanation of the function of some of these organisations and networks is provided in **Table Two** of this report)

ALO	- Airline Liaison Officer
Budapest Process	- Inter-governmental meetings facilitated by ICMPD
CEDAW	- UN Convention on the Elimination of Discrimination Against Women
CIREA	- Information, Research and Exchange Centre on Asylum (*from the French*)
CIREFI	- Information, Research and Exchange Centre on Internal Frontiers (*from the French*)
CIS	- Commonwealth of Independent States
ECOSOC	- Economic and Social Council of the United Nations
ECRE	- European Council on Refugees and Exiles
HLWG	- High Level Working Group on Migration and Asylum
ICMPD	- International Centre for Migration Policy Development
ICVA	- International Council of Voluntary Agencies
IGC	- Inter-governmental Consultations on Asylum and Migration
IGO	- Inter-governmental Organisation
ILO	- International Labour Organisation
IMO	- International Maritime Organisation
IOM	- International Organization for Migration
IPEC	- International Programme on the Elimination of Child Labour, International Labour Organisation
IDPs	- Internally Displaced Persons
SFOR	- Stabilisation Force (NATO in Bosnia and Herzegovina)
KFOR	- NATO-led force in Kosovo.
NATO	- North Atlantic Treaty Organisation
NGO	- Non-governmental Organisation
OCHA	- Office of the Co-ordinator for Humanitarian Affairs (United Nations)
ODHIR	- Office for Democratic Institutions and Human Rights (OSCE)
OSCE	- Organisation for Security and Co-operation in Europe
SIS	- Schengen Information System
Stability Pact	- Stability Pact for South Eastern Europe
UDHR	- Universal Declaration of Human Rights
UNHCR	- United Nations High Commissioner for Refugees
HCHR	- United Nations High Commissioner for Human Rights

Vienna Process	- Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime

1 EXECUTIVE SUMMARY

This report analyses the response of European governments to the increasing problems of human trafficking and smuggling, and concludes that much of existing policy-making is part of the problem and not the solution. Refugees are now forced to use illegal means if they want to access Europe at all. The direction of current policy risks not so much solving the problem of trafficking but rather ending the right of asylum in Europe, one of the most fundamental of all human rights. Any comprehensive approach that tackles trafficking and smuggling successfully requires legal and safe migration opportunities for all refugees, as well as necessary enforcement measures. Europe is in urgent need for political and moral leadership on this issue and it is hoped that the recommendations contained in the final chapter of this report might stimulate some reflection.

Trafficking in people and the smuggling of migrants have both become major topics of international governmental attention. As facets of transnational organised crime they strike at the very heart of national sovereignty, which was described during a recent G-8 meeting as the 'dark side' of globalisation. European Governments, increasingly interested in controlling irregular migration to their continent, have witnessed the growing sophistication of trafficking and smuggling networks, partly in response to their own border enforcement measures. Irregular migration is now an issue of pre-border, border and post-border control, as well as a major focus of international attempts to fight organised crime syndicates.

Lost amongst these pressing agendas is the very future of European asylum policy itself. There are very few legal possibilities for refugees to enter the European Union and so the majority are required to attempt ever more clandestine forms of entry. Yet, despite reassurances about the right of 'justifiable access' given by the Finish Presidency of the European Union in Tampere, the overwhelming tendency in Governmental policy-making is towards keeping refugees in the region neighbouring their country of persecution. Comprehensive approaches towards specific refugee-generating countries do stress the need for eliminating the 'root causes' of instability and oppression; but they are much less comprehensive when discussing the durable solutions available to refugees. There are no systematic proposals for the resettlement of refugees to the European Union. Rather the effects of blanket enforcement measures, such as common visa policies, readmission treaties, carrier sanctions and airline liaison officers, act to deny refugees the possibility of illegal exit from the regions of their persecution. As international policy currently stands, if European governments were ever successful in stopping organised illegal migration at source or in transit countries, they would have ended European asylum policy as we know it.

The criminals that exploit and abuse the human rights of migrants through human trafficking deserve the full approbation of international law and criminal justice. The broader international human rights lobby have clearly demonstrated the particular vulnerability of women and children to trafficking for the purposes of sexual exploitation or bonded labour. Such exploitation is

growing within European itself, with the trafficking of many young women from Eastern Europe and the CIS westwards. The division that has emerged between 'smuggling' and 'trafficking', although extremely difficult to enforce, makes important safeguards to protect the victims of trafficking. Yet, there has been much less human rights interest in migrants that enter into smuggling or trafficking to escape persecution, or how the trafficking process itself might be grounds for asylum. Again the emphasis is on closing down criminal activities but without providing alternative means of migration for those with no choice other than to flee.

The right of asylum in Europe, whilst symbolically and historical important, is often dismissed as a fringe issue in contemporary European *realpolitik*. European host societies are perceived to have no appetite for the quarter of a million asylum claims received each year (in the European Union alone), especially when only a minority of asylum claimants go on to be recognised as Convention refugees. But when specific nationalities are taken in isolation, the statistics are often reversed and it can be the majority of such irregular migrants that are in need of international protection. Therefore, country specific policies that deny these refugees the opportunity of leaving the country of their persecution, or a transit country in which they are still unsafe, undermine the whole spirit of international refugee protection and might be accurately called *presumptive refoulement*. The onus is on Governments to explain why the right of asylum, a fundamental human right enshrined by the United Nations, is increasingly being denied by the effects of European Governmental policy. Given financial and humanitarian migratory risks that must be endured to reach the European Union, is this the end of asylum as an accessible form of refugee protection?

This report argues that the right to asylum cannot be dismissed easily on political and humanitarian grounds and recognises that the current status quo is practically and ethically bankrupt from all positions. It explores the European responses to trafficking and smuggling from the perspectives of border enforcement, organised crime and human rights and then analyses a series of comprehensive proposals for reforming refugee and other migration to Europe. A pragmatic assessment of 'regional solutions' leads to a critique of the compatibility of the competing European agendas. recommendations are made to European Governments, UNHCR and other refugee agencies in Chapter 7 of this report.

2 INTRODUCTION

2.1 Background

It is common practice for a growing number of reports on human trafficking and smuggling to attempt to quantify the size and nature of the problem. The most often cited figure, in reports and media articles, is that originally made in 1994, describing a global business worth between US $ 5- US $ 7 billion annually to the 'gangster syndicates' involved.[1] The calculation behind this estimate is an extrapolation from an estimate for Western Europe of anything between $ 100 million to $ 1.1 billion in 1993, and is derived from an analysis of European asylum statistics, the number of smugglers arrested and average fees of between $ 2,000 to $ 5,000 per migrant.[2] Although the methodology requires very careful scrutiny[3], such fees are known to be modest compared to those cited in reports by US and Canadian officials relating to Chinese[4] and Sri Lankan[5] smuggling networks, respectively. There is now an international political consensus that trafficking in/smuggling of human beings has become a significant facet of transnational organised crime. The growth of such activities has been called 'the dark side of globalisation'[6] and the scale of judicial penalties imposed on those guilty of human trafficking offences are, in many countries, already on a par with other great international criminal practices such as drugs and firearms smuggling, money laundering and terrorist activity.[7]

Whilst there is nothing new historically about human trafficking and smuggling in Europe, it has recently become the subject of much international attention. The last five years of the twentieth century have seen a substantial amount of rhetoric on the issue by European political leaders and the involvement of over 30 intergovernmental fora in Europe alone (the most significant of which are listed in **Table Two**). The hinterland and borders of the European Union are known to be permeated by several trafficking and smuggling routes that have grown according to factors such as 'geographical position, distance between countries of departure and destination, political

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[1] Jonas Widgren (1994) *Multinational Co-operation to Combat Trafficking in Migrants and the role of international organisations,* International Response to Trafficking in Migrants and Safeguarding of Migrant Rights, *International Organisation for Migration (IOM)* Seminar on International Responses to Trafficking in Migrants and Safeguarding of Migrant Rights, Geneva, 26-28 October 1994.
[2] *Ibid.*
[3] See John Salt and Jennifer Hogarth (2000) *Migrant Trafficking in Europe: A Literature Review and Bibliography*, IOM, forthcoming.
[4] According to Bimal Ghosh (1998) an estimated 100,000 Chinese were smuggled into the USA during 1994, each paying between US$25,000 to US$35,000 and so generating for these operations alone some US$ 3 billion; in *Huddled Masses and Uncertain Shores: Insights into Irregular Migration,* Martinus Nijhoff Publishers: The Hague.
[5] In 1996, the average fee for Tamils from Sri Lanka to Toronto was generally between Can$24,000 to Can$26,000; in '*Sri Lanka: Alien Smuggling'*, Question and Answer Series, *Canadian Immigration and Refugee Board*, Ottawa, May 1996.
[6] *Communiqué* of the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime, Moscow, 19-20 October 1999.
[7] *Analytical study on serious crime*, Report by the Secretariat, *Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, General Assembly [AC.254/22], 30 November 1999.ttc

situation and law enforcement efforts in different areas, as well as corruption'.[8] The Eastern States of Europe and the CIS represent key transit areas for the majority of irregular movements from all over the world into Central and Western Europe, and now themselves also constitute the fastest growing region for trafficked people. In 1997, an estimated 175,000 women and girls were trafficked from states in the east of the OSCE region primarily to states in central or western Europe.[9] As they approach the Schengen frontier, most of the routes lead to and through specific central European countries. The Secretariat of the Budapest Group defines these as:

- Albania and 'the Balkan route' being the most notorious route used by criminal organisations.
- Poland has become a key transit country for the 'Eastern route' (which starts in Belarus and then on to Moscow, and is mainly used by African and Asian migrants) and 'Southern route' (used by Balkan residents and Romanians).
- Hungary as the most significant transit country into Austria and the European Union for irregular migrants transiting via Croatia and Slovenia;
- The Czech and Slovak Republics are transit points for many migrants from the Middle East and Far East and the former Soviet Union, many travelling through the Ukraine.
- Turkey, Bulgaria and Romania are all significant transit countries leading on into Western Europe via countries such as Albania, Hungary or the Czech Republic.
- The Mediterranean 'blue route' crosses the Mediterranean bringing people from Africa and Asia through North Africa to Europe via Greece, Italy, Spain (and more recently) Portugal.
- The 'Northern or Baltic' routes are operated on a smaller scale and involve transit through Moscow and then the Baltic States and then across to Scandinavia and further into Western Europe. [10]

Although the European Union is the destination for many trafficking and smuggling routes in Europe, it is not exclusively so. There is a growing amount of trafficking in women to the Balkans region itself[11] as well as smuggling networks that lead on from the United Kingdom, Germany, the Netherlands and France to destinations in North America.[12] The EU Accession States (Poland, Czech Republic and Hungary) are all now major destinations in their own right for asylum seekers from many parts of the world.[13]

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[8] Secretariat of the Budapest Group (1999) *The Relationship between organised crime and trafficking in aliens*, ICMPD, Vienna.
[9] OSCE (1999), *Proposed Action Plan 2000 for activities to combat trafficking in human beings*, Office for Democratic Institutions and Human Rights, Warsaw, November 1999.
[10] Secretariat of the Budapest Group (1999) *op. cit.*
[11] IOM (1999)
[12] See for example, Richard Dunstan (1998) United Kingdom: Breaches of Article 31 of the 1951 Refugee Convention, *International Journal of Refugee Law*, 10(1/2).
[13] See for example, Berensci et al. (1995) *Refugees and Migrants: Hungary at a Crossroads*, Hungarian Academy of Sciences, Budapest.

The year 2000 has become the year of the anti-trafficking 'Action Plan' with implementation of political statements all taking place under the auspices of the *European Union, OSCE* and the *G8 Group*. The *United Nations* itself is likely to vote on a draft Convention on Transnational Organised Crime at the millennium General Assembly leading to a global action programme in 2002. Governmental activity is complemented by an increasing amount of activity by Inter-governmental Organisations (IGOs) and Non-governmental Organisations (NGOs); for example the UN High Commissioner for Human Rights (HCHR), UNICEF, the International Organisation for Migration (IOM), Anti-Slavery International, all have their own anti-trafficking programmes. The vast majority, but not all, of these agencies will stress the terrible consequences of human trafficking in countries of transit and in country of destination. Less attention has been given to explaining why refugees engage with smugglers and traffickers in the first place.

The aims of this report are two-fold:

- To map out existing policy and implementation activity against trafficking and smuggling in Europe and show how this relates to refugee protection
- To offer some strategic recommendations to Governments and refugee agencies for the development of a more comprehensive approach to migration, organised crime and border enforcement that embraces human rights and refugee protection.

2.2 Definitions of trafficking and smuggling

There is no one internationally accepted definition of trafficking and/or smuggling. In fact, a good degree of confusion has arisen as more organisations and agencies have become involved in the issue. The international conventions between 1904 and 1933 all offered specific definitions of 'white slave traffic', 'traffic in women and children', 'slavery' and 'forced labour'. In 1949, 'trafficking in persons' was defined for the first time within a Convention of the United Nations but mainly in relation to prostitution (this is discussed more fully in Chapter Five of this report).

Recently, the link to migration has emerged more clearly within international and regional fora. According to the *International Organisation for Migration* (*IOM*), trafficking occurs when:

- "A migrant is illicitly engaged (recruited, kidnapped, sold etc) and/or moved, either within or across international borders;
- Intermediaries (traffickers) during any part of this process obtain economic or other profit by means of deception, coercion and/or other forms of exploitation under conditions that violate the fundamental human rights of migrants."[14]

According to the *Budapest Group*:

[14] International Organisation for Migration (1999) *The role of legal systems in the combat against human trafficking*, Statement of the International Organisation for Migration (IOM) in the International Seminar on Trafficking and Sexual Exploitation of Women, Porto, 6-7 December 1999.

> " In accordance with the definitions of *Europol* and *Interpol*, the concepts of trafficking in and smuggling of persons are distinguished from each other …Shortly, trafficking in persons comprises of, in addition to facilitation of the border crossing, a form of exploitation and, thus, profit, gained from the business are double. Either border crossing or stay is illegal. Smuggling includes only the facilitation of border crossing. It is without exception illegal. Both trafficking in and smuggling of persons are organised by clandestine criminal groups, which are also involved in other types of organised criminality. The structures of these groups vary greatly from loose amateur groups to international structured organisations."[15]

Although both of the above definitions stress the migratory aspects of trafficking and smuggling, there are key differences. Firstly, the *IOM* definition draws no practical distinction between 'trafficking' and 'smuggling':

> "The *IOM* retains a definition of trafficking that encompasses both [definitions] stating the two elements, smuggling and trafficking, are very often so intertwined that in practice, for example in the apprehension at borders, the distinction may be rather theoretical."[16]

A second difference, is that the *IOM* incorporates movement 'within international borders' whilst the *Budapest Group* requires both trafficking and smuggling to include the 'facilitation of a border crossing'. Finally on the issue of 'legality', there is a difference of emphasis. The *Budapest Group* definition takes an absolute position on the illegality of smuggling, "it is without exception illegal", making no distinction between the actions of the facilitators and the migrants themselves. No reference is made to the 'legality' of a refugee who can 'show good cause' for illegal entry in order to claim asylum, as defined in international law under Article 31 of the *UN Convention Relating to the Status of Refugees*.

The emerging difference between 'trafficking' and 'smuggling' in some international definitions is best demonstrated by the work of the *Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime* in Vienna during 1999. The exact wording of this distinction is still emerging in the respective draft Protocols but by the end of 1999 stood as:

> " Trafficking in persons means the recruitment, transportation, transfer, harbouring or receipt of persons, either by the threat or use of abduction, force, fraud, deception or

[15] Secretariat of the Budapest Group (1999), *The Relationship between organised crime and trafficking in aliens*, International Centre for Immigration Policy and Development (ICMPD), Vienna, June 1999.
[16] International Organisation for Migration (1999) *The role of legal systems in the combat against human trafficking*, Statement of the International Organisation for Migration (IOM) in the International Seminar on Trafficking and Sexual Exploitation of Women, Porto, 6-7 December 1999.

> coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having the control over another person."[17]
>
> "Smuggling of migrants shall mean the intentional procurement for profit for illegal entry of a person into and/or illegal residence in a State of which the person is not a national or a permanent resident."[18]

These are the two definitions that shall be used in this report as they best reflect the consensus of the international community.[19] It is clear that the 'smuggling' definition is closest to describing the migration stories of many refugees[20], but, as this report shall argue, some refugees will inevitably be involved in trafficking or it is the persecution involved in the process of trafficking itself that might provide grounds for asylum. The wording of the two UN Draft Protocols suggests that those migrants caught up in trafficking are much more likely to be treated as victims by the international community than those engaging the service of a smuggler. Nevertheless, amongst the other provisions in the *Draft Protocol against the Smuggling of Migrant*s that will be analysed later in this report, is that which protects the migrant themselves from punishment under the Convention.

The term 'aliens' will be avoided in this report as will reference to 'illegal' migrants. This is not to deny that some migrants break the domestic immigration laws of the countries of transit and final destination, but rather that if covered by Article 31 of the 1951 Convention Relating to the Status of Refugees then there exists a justification for such an illegal act under international law. 'Illegal exit' might also be an offence for refugees leaving their country of persecution, but this need not (indeed should not) be used against them upon arrival in their country of asylum. The concept of 'clandestine' migration, as used by UK and some other authorities, will be interpreted as including the majority of migrants who have been smuggled or trafficked.[21]

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[17] Article 2, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 23 November 1999, UN General Assembly, [AC/254/4/Add.3/Rev.4].

[18] Article 2, *Revised draft Protocol against Smuggling in Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, 23 November 1999, UN General Assembly, [AC.254/4/Add.1/Rev.3].

[19] Many other authors do not make it clear when referring to 'trafficking in humans' whether they mean the generic activity or whether they are referring to 'trafficking' as opposed to 'smuggling'. This report has attempted to interpret other usage and use both 'trafficking' and 'smuggling' in their specific sense (this does not apply to direct quotations).

[20] See, for example: Khalid Koser (1996) 'European migration report: recent asylum migration in Europe' *New Community* 22(1); Khalid Koser (1997) 'Negotiating entry into Fortress Europe: the migration strategies of 'spontaneous' asylum' in Muus P [ed.] *Exclusion and Inclusion of refugees in contemporary Europe*, European Research Centre on Migration and Ethnic Relations, Utrecht University; John Morrison (1998) *The Cost of Survival*, British Refugee Council: London.

[21] This is not to say that all trafficked or smuggled migrants are clandestine, or that all clandestine migrants are trafficked and smuggled. Some smuggling routes will use 'deceptive entry' through regular migration channels and some 'clandestine entry' will not be organised sufficiently to be labelled 'smuggling' or 'trafficking'.

It is worth noting that there are other definitions of trafficking that take the focus away from organised crime or illegal migration, and stress the economic dimensions of the activity, such as:

> "Trafficking in migrants [can be seen] as an international business, involving the trading and systematic movement of people as its 'commodities' by various means and potentially variety of agents, institutions and intermediaries."[22]

Although unlikely to appear in international law, such definitions of trafficking do have great conceptual advantages when it comes to thinking about the niche that trafficking fills within the globalised economy and some of the 'supply' and 'demand' arguments that might be forwarded in order to understand constructive methods of intervention.

This report shall also make more limited reference to a often neglected third category of irregular migrants, that of 'stowaways'. The international definition of a 'stowaway' remains that set out in 1957 by international convention (albeit unratified), but used subsequently by the *International Maritime Organisation* (IMO) to describe clandestine migrants who:

> " … at any port or place in the vicinity thereof, secretes himself [or herself] aboard a ship without the consent of the ship owner or the Master or any other person in charge of the ship and who is on board after the ship after the ship has left that port or place."[23]

Although stowaways are omitted from most discussions about migrant trafficking and smuggling, because of the 'unwitting' involvement of the carrier, they remain relevant from the perspective of refugee protection. Stowing away, by land as well as sea, to escape their country of persecution or to transit other countries is one of the options open to some migrants, sometimes as an alternative to more expensive (but perhaps less dangerous) facilitated exit. Stowing-away, in common with trafficking and smuggling is a form of irregular (most often clandestine) migration, but the line between all three forms remains a grey one. A carrier's defence against the smuggling of migrants, by lorry for example, is that he or she was unaware of their existence on board and so that they were in fact stowaways. It is common, sometimes essential, for stowaways on deep-sea ships to surrender themselves to the ship's crew during the voyage. At which point they become either 'known stowaways' or possibly 'smuggled migrants' (in order to avoid possible carrier liability charges at the point of disembarkation). An analysis of the evidence that does exist about the journeys that refugees take in order to reach Europe suggests that many people undertake complex migrations that might well involve various modalities of legal and illegal migration at different stages.[24] The categorisation of migrants in terms of a single method of exit and arrival, be it trafficking, smuggling or stowing-away, is an over-simplistic

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[22] Salt and Stein (1997) 'Migration as a Business: The Case of Trafficking', *International Migration*, Vol.34(4).

[23] The *International Convention Relating to Stowaways*, Brussels, 10 October 1957. More than forty years later the Convention lacks the ten ratifications required to enter into international law. But this remains the standard definition.

[24] See for example see Koser or Morrison (1998) *op. cit*.

approach unable to tell us much about the reality of forced migration and choices that refugees make.

All forms of migrant, regardless of the method of entry into another country, have under international law the right to claim asylum and the country receiving this application, the obligation of *non-refoulement*. This report will outline how the border enforcement and anti-trafficking agendas in Europe have undermined this fundamental right in practice to such an extent that its whole existence as a fundamental principle of human rights law can no longer be taken for granted. The term *presumptive refoulement* has been coined for this report to describe the effect of those border enforcement and anti-trafficking measures that deny refugees the right of ever leaving their country of origin in the first instance and so maintain their exposure to persecution without giving an option to flee.

TABLE TWO: **The main networks and fora of activity by European States and inter-governmental organisations in the areas of illegal migration and trafficking and the input of refugee agencies.**

Name of Forum/Network and purpose	Participating European states and inter-governmental organisations	Participation by UNHCR and other refugee agencies
Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime Initiated by UN General Assembly resolution 53/111 of 9 December 1998 for the purpose of elaborating an international convention against organised crime. The Ad Hoc committee meets in Vienna and there were six sessions during 1999. It is likely that the *UN Convention against Transnational Organized Crime* will have separate *Protocols* relating to Human Trafficking and Smuggling respectively, reinforcing a distinction between the 'victims' of trafficking and greater criminal responsibility of those migrants that engage the help of smugglers.	The active participation of 34 European states amongst many other UN members: Albania, Austria, Belarus, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Holy See, Hungary, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, FYR Macedonia, Turkey, Ukraine, United Kingdom. The European Commission is now also an active party in the negotiations. (Non-European Members: all other participating UN members). Observers include ICMPD, IMO, IOM and OSCE.	UNHCR has attended most sessions and has raised concerns about the implications for refugees. HCHR has made public interventions on issues of human rights including asylum. No refugee NGOs have attended the process despite its possible dramatic impact on asylum in Europe.
Budapest Process The *Conference of Ministers on the Prevention of Illegal Migration* was held in Prague in October 1997 within the framework of the Budapest Process. It set recommendations for ongoing ministerial and administrator co-operation on issues such as the harmonization of legislation to combat smuggling/trafficking; pre-entry and entry control, readmission agreements and technical and financial assistance to Central and Eastern European States. The Secretariat is hosted by the International Centre for Migration and Policy Development (ICMPD) in Vienna - established in 1993 at the joint initiative of the Swiss and Austrian Governments and now holding diplomatic status.	The participation of 34 states and several IGOs: Albania, Austria, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, European Commission, Europol, Council of Europe, United Nations Centre for International Crime Prevention, Interpol, International Organization for Migration (IOM), Inter-governmental Consultations (IGC) and the International Centre for Migration Policy Development (ICMPD); (Australia, Canada and Tunisia have observer status).	UNHCR attends some meetings. No refugee NGOs attend.

CIREA The *Centre d'Information, Recherche et Echange sur l'Asile* (CIREA) is a confidential European Union forum for exchanging issues on asylum policy between member states. The focus is more on specific countries of origin than the modalities of migration such as trafficking or smuggling that are covered by *CIREFI*.	All 15 EU member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.	UNHCR attends and contributes. Not open to refugee NGOs.
CIREFI A confidential European Union working group where non-personal data about illegal entry, estimated number of trafficked migrants and the number of apprehended traffickers is exchanged. Within the framework of CIREFI, information on events is collected regarding illegal immigration, including details on traffickers, number of trafficked persons, their itineraries and the fraudulent documents used. CIREFI also operates an 'early warning system' between border enforcement agencies of all member states.	All 15 EU member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom	No participation by UNHCR or any refugee NGO. No access to data collected or conclusions drawn.
Council of Europe The Parliamentary Assembly of the Council of Europe have long taken an interest in trafficking and have made several recommendations concerned trafficking in women and children; such as Recommendation 1065 in 1987. In 1993, together with Recommendation 1211, the Council of Europe published a report on clandestine migration concerning traffickers and the employers of illegal migrants. The Committee on Legal Affairs and Human Rights retains a long-standing interest in trafficking as does the Committee on Migration, Refugees and Demography. More recently, interest in human trafficking as a crime has been channelled through the European Committee on Crime Problems (CDPC).	The Council of Europe currently has 41 member states: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.	UNHCR, ICRC, Amnesty International and ECRE have observer status.
EURODAC The draft *EURODAC Convention* and its *Protocol* will fall under the auspices of the European Commission under the provisions of the Amsterdam Treaty. Under the draft Convention, the fingerprints of all asylum seekers, over the age of 14 years old, will be taken and sent to a Central Unit set up by the European Commission. The Protocol extends fingerprinting to 'certain other aliens' who are apprehended	All 15 EU member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.	No formal representation by any refugee agency; although UNHCR and ECRE have had some involvement.

in an 'irregular' border crossing or are found 'illegally present' in European Union members states.		
European Parliament and Commission The European Parliament has commissioned two reports on trafficking - the Servo report and the Soerenson report. The latter provides an up to date review of European Commission activity, including their two Communications on trafficking in women for the purpose of sexual exploitation and their funding of two multi-disciplinary approach programmes involving NGO participation – the STOP programme concerning the sexual exploitation of children and the more recent DAPHNE programme which aims at the prevention of violence against children, young people and women.	All 15 EU member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom	Involvement of UNHCR. Many human rights NGOs have been involved.
EUROPOL Set up as the *European Drugs Unit* (EDU) in 1993 and acquired a mandate from The Council of the European Union to increase police co-operation on trafficking in human beings from December 1996. Since October 1998, *Europol* has been able to obtain, collate and analyse information; to notify the competent authorities of Member States without delay of any information and connections detected among criminal offences; to aid investigation within Member States and to maintain a biographical computerised system for collecting information.	All 15 EU member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom	No participation by any refugee agency.
Group of the Eight Industrialised Nations (G8) The origins of the present Group of Eight (G8) 'leading industrialised democracies' lie in the Economic Summit convened by President Giscard d'Estaing at Rambouillet in November 1975 between Germany, France, USA, Japan and the UK. Italy, Canada and the President of the European Commission joined between 1976-77 and Russia became a full member in 1998. Over the past three years, the G8 countries have co-operated increasing on issues of transnational crime, in particular drug smuggling and human trafficking.	The active involvement of five European countries: France, Germany, Italy, Russian Federation and the United Kingdom. The European Commission is also represented in some fora as is the country that holds the Presidency (if it not one of the four EU states that are core members), (Non-European members: Canada, Japan and USA).	No participation by any refugee agency with relationship to trafficking or smuggling, UNHCR has been invited to some Summits for other issues (such as Balkans Stability)
High Level Working Group on Asylum and Migration At the General Affairs Council on 7-8 December 1998 it was agreed to set up the High Level Working Group on Asylum and Migration 'to	All 15 European Union member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United	UNHCR has been invited to contribute to all of the Action Plans and to attend some of the

establish a common, integrated, cross-pillar approach targeted at the situation in the most important countries of origin of asylum-seekers and migrants'. The High Level Working Group is comprised of 'high level officials' from each EU member state and the European Commission. Six Draft Actions were produced during 1999 relating to Afghanistan, Albania (and Kosovo), Morocco, Somalia, Sri Lanka and Iraq (developed from the existing EU Action Plan) respectively.	Kingdom	working group meetings relating to specific countries of origin. European NGOs such as ECRE and Amnesty International have had more limited access.
Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC). Established in 1985, IGC facilitates informal, non-decision making forum for information exchange and 'policy concertation' between Governments. The confidential *Trafficking Information Exchange System (TIES)* database (accessible via the Internet) collects non-personal data on the number of trafficking interceptions and details of their activities and the nationalities of the migrants.	There are currently 12 European members: Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, Netherlands, Norway, Spain, Switzerland, United Kingdom; IOM. (Non-European members: Australia, Canada and USA)	UNHCR participates in most sessions. No refugee agency has access to the TIES database.
INTERPOL The *Organised Crime Branch* of *Interpol* was established in 1989 with the long-term aim of creating an extensive data base of organised criminal enterprises and persons who are engaged in continued, illegal activity in order to generate illicit profits. Since the publication of the *Marco Polo* study in 1997, there has been increased interest in specific aspects of the smuggling of/ trafficking in persons by organised crime groups to identify the membership of such groups, their means of operation and the criminal activities that illegal migrants engage in upon arrival.	There are currently 48 European members: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, FYR Macedonia, Turkey, Ukraine, United Kingdom, Uzbekistan. (130 other non European members)	No refugee agencies have participated in Interpol seminars or conferences, whilst other migration organisations (such as IOM, ICMPD) have.
International Organisation for Migration (IOM) The International Organisation for Migration has long been instrumental in many regional fora around the world that discuss the trafficking of migrants. It has also commissioned more research on the subject than any other intergovernmenal body and is represented in most European countries where it assists individual migrants.	IOM has 76 member states of which the following are European: Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Sweden, Switzerland. Observer status is held by the following European states: Belarus, Bosnia and Herzegovina, Estonia, Georgia, Holy See, Ireland, Kazakstan, Kyrgyzstan, Malta, Moldova, Russian	A large range of IGOs and NGOs hold observer status: including UNHCR, OCHA, HCHR, Council of Europe, ICVA, Caritas, Catholic Relief Services, International Federation of Red Cross and Red Crescent Societies, International Rescue

	Federation, San Marino, Slovenia, Spain, Turkey, Turkmenistan, Ukraine, United Kingdom, FYR Macedonia and Yugoslavia	Committee, Norwegian Refugee Council and the World Council of Churches.
International Programme on the Elimination of Child Labour (IPEC) IPEC is the largest programme run by the *International Labour Organisation* (ILO) and now runs, or is preparing programmes, in 69 countries. With the adoption of *ILO Convention 182 on the Elimination of the Worst Forms of Child Labour*, some of these national programmes are taking increasing action to tackle the trafficking of children for the purposes of domestic labour or sexual exploitation.	IPEC has operational presence in the following European countries: Albania, Kazakstan, Romania, Russia and Ukraine (as well as an additional 64 non-European countries). Most European countries have made preparations to ratify ILO Convention 182.	There are no formal relations between IPEC and refugee agencies at the international level, but there might be co-operation in the field.
Organisation for Security and Co-operation in Europe (OSCE) The issue of trafficking in human beings, and in particular trafficking in women, has been raised at various times in the *OSCE* context since the early 1990s, when the *OSCE* participating states included a commitment to combat trafficking in the Moscow document of 1991 (para 40.7). This was reiterated at the Istanbul Summit in November 1999 and now forms a mainstream activity of the *Office for Democratic Institutions and Human Rights (ODIHR*). Within Europe, most *OSCE*-led operational collaboration against trafficking is centred on Albania and the countries of the former Yugoslavia (except F.R.Yugoslavia itself – with the exception of Kosovo and to some extent Montenegro) overseen by the *'OSCE Regional Trafficking Co-ordinator for South Eastern Europe'* (sic).	European member states of *OSCE* are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Holy See, Hungary, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, FYR Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan. Non European members are Canada and the USA.	No participation by refugee agencies within *OSCE*'s government structures, yet there has been operational collaboration between *UNHCR* and *OSCE* in South-Eastern Europe and through the structures of the *Stability Pact*.
Schengen Acquis The Schengen acquis are now part of the European Union, although look likely to remain under the 'third pillar' (i.e. outside of the remit of the European Commission and the European Parliament). The European Council now owns the contracts to run the Schengen Secretariat and the co-ordination of *the Schengen Information System (SIS)* and the *SIRENE* bureaux. As well as the maintenance of the common travel area, *SIS* and *SIRENE* facilitate data exchange and co-	All 15 European Union member states, although Ireland and the United Kingdom have only applied to join those parts of the Schengen acquis that relate to asylum and civil judicial cooperation and therefore not to join the Schengen common travel area. Norway, although not a European Union member, is party to the Schengen acquis. The Dublin Convention is now operational in all 15 European states and covers most areas of co-operation on issues of	UNHCR is consulted on issues of policy by the European Union but no refugee agency has access to any of the data collected under the Schengen system, other than that published in annual reports

operation between immigration and police officials on issues of border control, visas, drugs and human trafficking. There is also scope for Judicial co-operation.	asylum once an asylum-seeker manages to reach a member state.	published by member states.

2.3 The context of the trafficking/smuggling debate in Europe

Table Two shows the main Governmental fora in which European concerns over trafficking in and smuggling of persons have so far been discussed. It is apparent from this table that refugee agencies have not be present at some of the most significant fora at which the policy has been discussed and formulated by European governments. In part this is because refugee NGOs and even UNHCR has been denied access to some of the more confidential networks but also that many refugee NGOs have been particularly slow at realising the profound effect that anti-trafficking and smuggling measures will have on the future of asylum in Europe. Despite the growing interest in organised crime and human rights concerns, the anti-trafficking debate in Europe is dominated by concerns over border control. Governments have interpreted the growth of organised clandestine entry into the European Union as, in part, a result of effectiveness of their own border enforcement measures in the early 1990s.

Refugee agencies have not been able to engage effectively in a debate that has now framed their client group as a significant component of the 'illegal migration problem'. It is possible to identity several truisms that have so far tended to frame the European debate. These beliefs can be characterised as:

- "The large majority of migrants that claim asylum upon European territory are not deserving of 1951 Refugee Convention Status. They are either fleeing more general situations of unrest or persecution by non-state actors, or they are would-be economic or social immigrants."
- "There is little to gain and a lot to lose politically by opening a broader debate about a more comprehensive immigration policy in Europe. European immigration policy remains essentially a non-immigration policy, with the right to claim asylum its main loophole."
- "The tolerance of illegal entry in some cases, as allowed under Article 31 of the 1951 Refugee Convention, is the antithesis of any national or European strategy against irregular migration."
- "Given obligations under international law, the most effective way to reduce asylum claims is to stop the asylum-seekers reaching the territory of the European Union in the first place. Approaches to migration problems and refugee protection that stress 'regional solutions' outside of the European Union are seen as the best way forward."
- "Irregular migration is increasingly a problem of international organised crime and should be seen as a threat to democracy and civil society itself."
- "The human rights interests of would-be migrants are best served by seeking to stop all possibilities of irregular migration. There is seen to be no corresponding obligation to create legal alternatives. Put simply, the migrants should not migrate, or at least, should not migrate to the European Union."

Whilst there is some validity in each of these blanket assertions, their reliability can be challenged almost immediately by a look at the existing data.

2.4 What the existing data on trafficking in and smuggling of refugees indicates

> " The lack of hard data, combined with the fact that many commentators on trafficking repeat estimates derived from interviews with officials, means that many of the statistics quoted are in (often large) round numbers, are unchecked and are frequently rehearsed."[25]

There are some important shortcomings in the data that currently exists for Europe. It is difficult to gain access to much existing European Union data. This is collected by Eurostat but is for internal use by CIREFI only. Likewise, the data collected by the Inter-Governmental Consultations (IGC)'s TIES system was not available to the author. Nevertheless some of the limitations of both data systems are apparent. The CIREFI system itself is not yet complete and there remain significant holes in the quantitative date. The IGC data, which covers all the European Union with the exception of France, again has limitations; not least the quality of the data forwarded by each participating Government (for example only a minority of Governments systematically record the gender of the victims of trafficking). There are also a range of direct and indirect methods by which Governments and academics have attempted to estimate the scale of 'the problem', involving a combination of administrative statistics, surveys, comparison of sources, inferences from secondary events and work statistics. It is in Italy that the greatest range of methodologies are being conducted, with lesser amounts of work ongoing in Belgium, France, Greece, the Netherlands, Portugal, Switzerland and the Czech Republic.[26]

Also apparent is the problem of distinguishing between migrants who are trafficked and those that are smuggled or who meet neither definition. Only a few countries have developed a distinctive policy towards migrants who are trafficked (e.g. Belgium has a programme for the victims of trafficking and Denmark is about to develop such a system).[27] In Germany, border officials were able to detect 11,101 smuggled persons in 1999, compared to 12,533 in 1998[28], but were unable to even estimate how additional migrants might have been trafficked. For example, the border police are aware of large scale trafficking in young women from Poland and the Czech Republic. However, without a visa requirement for these countries, it is difficult to detect at the border. When trafficking offences are detected they are mainly detected in-country by the police forces of each separate Länder.

What seems likely is that a very large number - perhaps the majority - of asylum seekers arriving in Central or Western Europe have been smuggled or trafficked. In 1994, ICMPD used a working figure of between 15%-30% of all 'illegal migrants' and curiously suggested the

[25] John Salt and Jennifer Hogarth (2000) *op. cit*.
[26] OECD (1999) *Trends in International Migration*, 1999 Edition, SOPEMI, Paris.
[27] Communication to the author from the Secretariat of the *International Governmental Consultations (IGC)*, January 2000.
[28] Data on smuggling interceptions in 1998 prepared for this report by *Grenzschutzdirektion* in Koblenz, January 2000

percentage amongst asylum-seekers without 'well founded claims' was slight higher at 20%-40% (no figure is suggested for asylum-seekers with well founded claims!).[29] Circumstantial evidence suggests that the percentage of all asylum seekers using smugglers or traffickers is now significantly higher, not least because of developments in Europe's own border enforcement policies. Smuggled migrants account for 29% of illegal entrants detected at the German frontier during 1999. In the UK, 77% of all illegal entrants detected during 1999 had attempted clandestine entry. Illegal entrants when detected were also very likely to claim asylum. In the case of the UK, 11,950, or 72% of the total detection rate.[30] These figures of course only reflect those detected, and so, in themselves, give no direct indication as to what percentage of smuggling and trafficking is successful at evading border controls or the total number of such migrants that claim asylum.

It is known, for instance, that up to 90% of asylum seekers in certain countries are unable to produce valid documentation (indicating in many cases that it has been taken away by the smugglers for recycling).[31] The *German Federal Refugee Office (BAFI)* estimated in December 1997 that about half their asylum seekers were smuggled into the country whilst the *Dutch Immigration Service* have upgraded their estimates of about 30% in 1996 to 60-70% in recent years.[32] Again, the problem is that in many EU countries only a small percentage of asylum claims are successfully lodged at the border (in Germany less than 10% of all asylum claims), and so it is difficult to correlate them directly to known smuggling offences. Some of those detected at a border check point are readmitted to a 'third safe country' before an asylum claim is made (Germany has such readmission agreements with all its non-EU neighbours). The figures for 1999 suggest that of the 95,113 asylum claims made in Germany that year, 86,118 were in-country applications.[33] Given the nationalities of most asylum claimants, and the universal visa requirements, it is unlikely that many of these claimants were able to enter Germany or the European Union legally: they entered Germany with relative ease from other EU countries in the Schengen travel area. The conclusion that a large majority of asylum seekers now enter in an irregular fashion seems certain. It is also reasonable to assume, until better data exists or is forthcoming, that a majority of asylum seekers entering the Europe Union are now either smuggled and, in some cases, trafficked.

The conclusion from the logic of the data in **Table Three** is inescapable. The main nationalities that being smuggled and trafficked to Europe in order to claim asylum are those very same nationalities that are recognised as refugees by European countries themselves. Yet, these are also the same nationalities that have been the main target of all European anti-trafficking and anti-smuggling activity. A modest, but very logical conclusion to make here, is that it is

[29] Jonas Widgren (1994) *op. cit*.
[30] Communication to the author by the *Immigration and Nationality Department* of the *Home Office*, Croydon, January 2000.
[31] Communications between the author and *IGC*, January 2000.
[32] Aninia Nadig (1999) '*Human Smuggling: A National Security Issue?*', Masters Thesis in International Relations, University of Amesterdam.
[33] Data from *Grenzschutzdirektion* in Koblenz, *op. cit*.

misleading to describe the customers of traffickers and smugglers as ‘illegal migrants’ or ‘illegal aliens’, and that the term ‘refugee in need of international protection’ would in fact be more appropriate in many cases. Also if the objective of anti-trafficking and anti-smuggling initiatives is purely to stop such activity without providing other migration alternatives for refugees, we are *de facto* attempting to abrogate the very existence of European asylum policy. **Table Four** shows that, although the asylum recognition rates vary dramatically between member states (even with regard to same nationality of asylum seeker), a significant number (and sometimes the majority) of all Iraqi, Afghan, Somali and Yugoslav nationals that claim asylum in European Union are gaining status. These are the very countries that are receiving the highest priority of cross-pillar co-operation within the structures of the European Union and are the subject of country-specific Action Plans and working groups. As shall be discussed in Chapter Three, none of these Action Plans make any reference to the right to asylum nor the fact that the border enforcement and anti-smuggling initiatives proposed will deny refugees any safe opportunity of reaching Europe.

TABLE THREE: **Comparison between the ranking of asylum and refugee nationalities and those nationalities that were most frequently smuggled or trafficked into the European Union during 1998.**

	Top ten countries of origin for asylum claims in Europe during 1998[34]	Top ten countries in terms of asylum recognition (resulting in either 1951 Convention Status or a humanitarian status in Europe)[35]	Top ten countries of origin of migrants where the method of irregular entry into the European Union was the result of trafficking or smuggling activities that have been intercepted by the national authorities during 1998				
			IGC[36]		UK[37]	Germany[38]	Hungary[39]
1st	F. R. Yugoslavia	Bosnia and Herz.	Iraq		F.R. Yugo	F.R. Yugo	F.R. Yugo
2nd	Iraq	Iraq	F.R. Yugo		Sri Lanka	Afghanistan	Romania
3rd	Turkey	F.R. Yugo	Afghanistan		Albania	Romania	Afghanistan
4th	Afghanistan	Turkey	Albania		Romania	Iraq	Bangladesh
5th	Sri Lanka	Somalia	Romania		Pakistan	Turkey	Iraq
6th	Somalia	Iran	Somalia		India	Macedonia	China
7th	Bosnia and Herz.	Sri Lanka	Sri Lanka		China	Sri Lanka	Turkey
8th	Romania	Afghanistan	Turkey		Nigeria	Viet Nam	Sierra Leone
9th	Iran	Ethiopia	Poland		Poland	China	Algeria
10th	Algeria	Viet Nam	India		Turkey	Bulgaria	Moldovia

[34] Derived from *UNHCR* (1999) Table VI.I Asylum applications by origin, Europe, *Statistical Overview 1998*, UNHCR, Geneva.
[35] Derived from *UNHCR* (1999) figures for 1989-98 *op. cit* Table V1.8
[36] Membership of *IGC*. Communication to the author from the Secretariat of the *International Governmental Consultations (IGC)*, January 2000.
[37] The United Kingdom. Communication to the author by the *Immigration and Nationality Department* of the *Home Office*, Croydon, January 2000. Figures relate to all those attempting illegal entry in 1998 - 56% was clandestine. The ranking of illegal entrants that go on to claim asylum is virtually identical, save the promotion of 'Turkey' to 9th position (in place of 'Poland') and the inclusion of 'Algeria' in 10th place.
[38] Germany. Derived from figures for smuggling interceptions in 1998 prepared for this report by *Grenzschutzdirektion* in Koblenz, January 2000.
[39] Hungary. Figures given to the author by the ICMPD office at the HQ of the Hungarian border police, January 2000.

TABLE FOUR **Asylum claims and refugee status determination by EU states relating to nationals from the 'Action Plan' countries during 1998**[40]

(note: there are many other applications in other European states not part of the European Union)

Country of Origin	*Country of asylum*													
	Austria	**Belgium**	**Denmark**	**Finland**	**France**	**Germany**	**Greece**	**Ireland**	**Italy**	**Nether-lands**	**Portugal**	**Spain**	**Sweden**	**UK**
Afghanistan	316 *51* **16.1%**	*No figures given*	360 *219* **60.8%**	*No figures given*	*No figures given*	5,716 *1,948* **34.1%**	126 *2* **1.6%**	*No figures given*	*No figures given*	6,927 3,987 **57.6%**	*No figures given*	*No figures given*	240 168 **70.0%**	1,605 1,535 **95.6%**
F. R. Yugoslavia (including Kosovo)	3,725 *124* **3.3%**	514 *140* **27.2%**	387 *242* **62.5%**	197 *93* **47.2%**	871 *185* **21.2%**	41,460 *1,171* **2.8%**	*No figures given*	*No figures given*	397 *101* **25.4%**	2,734 55 **6.0%**	*No figures given*	*No figures given*	3,237 1,249 **38.6%**	1,575 1,010 **64.1%**
Iraq	2,020 *77* **3.8%**	199 *51* **25.6%**	1,732 *1511* **87.2%**	*No figures given*	287 *134* **46.7%**	9,720 *3,641* **37.5%**	3,470 *69* **6.8%**	*No figures given*	1,232 *323* **26.2%**	11,851 *5,987* **50.5%**	*No figures given*	113 *32* **31.0%**	3,090 *2,329* **75.4%**	1,095 *1,010* **92.2%**
Somalia	*No figures given*	*No figures given*	930 *857* **92.2%**	126 *108* **85.7%**	*No figures given*	1,175 *170* **14.8%**	*No figures given*	150 *54* **36.0%**	*No figures given*	2,425 *875* **36.1%**	*No figures given*	*No figures given*	232 *124* **53.4%**	2,805 *2,705* **96.4%**
Sri Lanka	124 *1* **0.8%**	*No figures given*	142 *54* **39.4%**	*No figures given*	1,583 *816* **51.5%**	4,395 *243* **5.5%**	*No figures given*	*No figures given*	*No figures given*	1,460 *161* **11.0%**	*No figures given*	*No figures given*	*No figures given*	2,010 *60* **3.0%**

Key: Total number of cases decided within 1998
Total number recognised as refugees (1951 Convention) or gaining humanitarian status.
Total recognition rate (%)

[40] Derived from UNHCR (1999) *op. cit*., Table IV.3

2.5 What does the 'right to asylum' in Europe mean?

Legally defined asylum is only open to a minority of the world's refugees. In 1998 only 0.9 million of the 22.4 million of the people of concern to UNHCR were within the asylum systems of mainly industrialised countries.[41] Given the financial and humanitarian costs involved in irregular migration, asylum in the European Union is also not an equitable form of protection. It advantages those with the money and the connections required to engage the services of the smuggler. This is dramatically illustrated when the socio-economic background of asylum-seekers in Europe is compared to that of 'quota refugees' (either on resettlement or temporary protection programmes).[42] It is the poorest and most marginalised populations around the world that are least likely to be able to pay the price to enjoy asylum in Europe. Although most of the world's refugees are women and children[43], they represent a smaller percentage of those who successfully complete the clandestine journey to European countries. Women[44] and unaccompanied children[45] also face discrimination when it comes to accessing asylum procedures and gaining recognised status. How then can a European asylum policy be defended when it offers a 'Cadillac service'[46] accessible to only a small minority of the world's refugees?

There have been some recent proposals in Europe, not least during the Austrian Presidency of the European Union, to start moving away from an asylum system based on the right of individual protection, to one where at its discretion the state may offer protection to an individual or a group in need.[47] This would be a fundamental shift from the basic right of asylum enshrined in the 1948 Universal Declaration of Human Rights and 1966 Covenant on Civil and Political Rights and would take Europe back to the administrative and ad hoc refugee policies closer to the Europe of the 1920s and 1930s. .

One limitation is that, whilst asylum exists in international law largely as an obligation on states to receive requests for asylum, it is not yet defined clearly as an individual human right (despite the direct reference in Article 14 of the 1948 Universal Declaration on Human Rights). The 'right to asylum' does not appear in the European Convention on Human Rights, but as with the 1951 Convention, it places the responsibility of *non-refoulement* upon agents of the state.[48]

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[41] UNHCR (1998) *UNCR by Numbers*, Geneva.
[42] Home Office Research carried out in the UK by Salford University (1996) compared with British Refugee Council evaluations of the UK Bosnian (1993-96) and Kosovan (1999) Temporary Protection programmes.
[43] UNHCR (1998)
[44] See for example: Heaven Crawley (1997) *Women as Asylum Seekers: A Legal Handbook*, Immigration Law Practitioner's Association, London.
[45] See for example: UNHCR (1994) *Refugee Children: Guidelines on Protection and Care*, Geneva; or Simon Russell (1999) 'Unaccompanied Refugee Children in the United Kingdom', *International Journal of Refugee Law*, 11(1).
[46] See the work of James Hathaway.
[47] The most explicit example being the *Austrian Presidency's Draft Strategy Paper on Immigration and Asylum Policy* of July 1998.
[48] Article 3 of the *European Convention on Human Rights*.

Therefore, arguments for the defence of asylum in Europe have largely used moral grounds or reminders of hegemonic responsibilities:

> **"** Although no right to receive asylum yet exists in international, regional or municipal law … a willingness to provide asylum is the litmus test for the commitment by affluent states to human rights. Affluent states cannot expect other, more vulnerable nations to execute demanding reforms or improve human rights conditions and at the same time claim that it is beyond their own substantial means to sustain a commitment to asylum."[49]

In recent years there is some evidence of international obligations to refugees that might not be the responsibility of any specific state. The 'ground breaking' decision of the United Nations Human Right's Committee on State Succession to the Obligations of the Former Yugoslavia in 1993 extended the application of human rights, in this case the International Covenant on Civil and Political Rights, to those who no longer enjoyed the protection of their former state. In this way human rights, including perhaps the 'right to asylum', can be seen as individual rights and not just inter-State obligations. With this in mind, one reaction to the Austrian Presidency's Draft Strategy paper in 1998 stated:

> "What the Austrian Presidency paper appears to be proposing is that the clock be turned back on the development of individual rights deriving directly from international human rights instruments to a situation where compliance with internationally accepted human rights duties is the discretion of the state. Such a reversal carries with it a second consequence: if international human rights obligations are premised on inter state relations then the individual whose state had collapsed or disintegrated may be excluded. The question of the extent of duty of protection to individuals who are the object of non-state persecution is one which has engaged much discussion, court rulings and difference of opinion in Europe. The Austrian Presidency proposal, by reformulating the question of protection into one of discretion to the state at best on the basis of inter state agreements, would remove the legal underpinning of any duty to protect an individual from persecution without regard to the source of that persecution."[50]

Therefore the right to asylum, or at least Government's responsibilities to refugee protection upon European soil, lie at the centre of the European Union's overall commitment to human rights. European Governments have, when they have chosen to, admirably extended their responsibility for protecting refugees far beyond international law. A good example is the 1999 NATO intervention in Kosovo, one of the aims of which was to protect the internally displaced Kosovar people who had yet to become refugees. It would then be contradictory in the extreme to retreat from one of the very building blocks of international human rights obligations by

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[49] Andrew Shacknove (1996) 'Asylum seekers in affluent states', paper presented to the *UNHCR* conference '*People of Concern'*, Geneva. November 1996, quoted in UNHCR (1997) *The State of the World's Refugees*, Oxford University Press.

[50] Immigration Law Practitioner's Association (1998) *European Update: September 1998*, London.

denying national responsibility for considering unsolicited asylum claims made by nationals of the Federal Republic of Yugoslavia or anywhere else.

With the adoption of the *Amsterdam Treaty*, it now seems most likely that the *European Union* as a whole will firmly wed itself to the principles, if not the practice, of all aspects of the 1951 Refugee Convention. Signing the 1951 Convention and 1967 Protocol are already prerequisites of European Union membership and its seems likely that the communitarization of asylum policies will lead to much greater standardisation between the asylum procedures of member states.[51] It is very difficult to see how this principle of the right to claim, but not necessarily to gain, asylum can be taken away from refugees who reach European Union territory, whatever direction proposed reforms of member states or the European Commission might take in years to come. Of critical importance, is how Europe will mesh its responsibilities to asylum-seekers with it extra-territorial efforts to limit refugee flows and find regional solutions.

2.6 The negation of the asylum principle in practice

> " From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law...This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union."[52]

This is a positive political statement that takes the 1951 Convention in Europe into a new century. A distinction between 'asylum' and 'immigration' is made in the call for common policies and 'guarantees' are offered to 'those who seek protection or access to the European Union'. Further on in Conclusions, the EU Presidency reaffirms its 'full commitment' to the 1951 Convention and calls for a 'comprehensive approach'.

[51] The possible effects of the communitarization of asylum within the European Union are set out in full by Gregor Noll and Jens Vedsted-Hanen (1999) in Philip Alston [ed.] *The EU and Human Rights*, Oxford University Press.
[52] Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999, paragraphs 1 and 3.

These conclusions from the European Union Heads of State meeting in Tampere Finland on 15 and 16 October 1999 are self-consciously *fin de siècle*. They are important words of intent that balance the European Union's interest in human rights and democracy against the need for border enforcement and migration control. At face value, they represent an important vision, a benchmark perhaps, for the beginning of the twenty-first century. The contemporary relevance of the 1951 United Nations [Geneva] Convention Relating to the Status of Refugees, forged in the post-war and post-holocaust melting pot of Europe in the middle of the last century, is made explicit within paragraph 13 of the Conclusions:

> " The European Council reaffirms the importance the Union and Member States attach to absolute respect to the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*."

Such a holistic endorsement of the 1951 Convention is vital when we come to examine the relationship of refugees coming to Europe and the extent to which they engage the help of human traffickers and smugglers to do so. As this report shall show, there are very few legal means by which an asylum-seeker can enter European territory, so illegal entry is a reality for many, if not most, refugees. This was already the reality in 1951 and is embraced by Article 31(1) of the Convention:

> " The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1 [the refugee definition], enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."[53]

Although, there is no direct reference to 'illegal entry' in the Tampere Conclusions, there are two clear references to 'access' to European territory in the first paragraph quoted above. Given the full endorsement of the 1951 Convention, then it would be logical to infer that this 'access' to Europe need not only be 'legal access' but also illegal entry where 'good cause' could be shown. It is not clear if the phrase 'those whose circumstances lead them justifiably to seek access to our territory' in the Tampere Conclusions is intended to embrace such 'justifiable' illegal entry. Later the Conclusions make what might be seen as a somewhat contradictory blanket statement:

> " The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants."

[53] Article 31 of the 1951 United Nations Convention Relating to the Status of Refugees.

The statement is contradictory because human trafficking (and/or smuggling) has become the only viable means of entry into Europe for many refugees. The unresolved paradox between asylum in Europe and blanket border enforcement lies just below the good words of the Tampere Conclusions. In fact the EU High Level Working Group on Asylum and Migration Action Plans on Somalia, Afghanistan, Sri Lanka, Iraq, Morocco and Albania, five of which became public days before the Tampere Summit, make no reference to 'access to European territory' in their suggested solutions for tackling the refugee and migration problems in those respective countries. Rather, the focus is on the indisputable need to tackle the 'root causes' that create refugees in the first place, and then to find 'regional solutions' for those refugees that will inevitably come into existence. 'Regional solutions', as shall be discussed later in this report, are an essential component of any comprehensive approach to refugee protection. The fact that five European Union documents, each significantly longer than the Tampere Conclusions, can make no reference at all to 'asylum in Europe' speaks to the largely unvoiced reality of European asylum policy: that it lies in direct contradiction to the strong political imperative to be seen to be managing and controlling migration effectively and rigorously.

The asylum principle has already been constrained in practice by a host of other European initiatives such as readmission treaties, visa policies, safe third country rules, carriers liability legislation; each of which will be examined in Chapter Three of this report. Also of symbolic importance has been the practical curtailment of the right of E.U. citizens to seek asylum in another E.U. member state under a Protocol to the Treaty of Amsterdam.[54] Initiated by the Spanish Government to facilitate the extradition of Basque terrorists elsewhere in Europe, it has made procedurally very difficult for E.U. Governments to grant asylum to other EU nationals. This complacency of policy-makers with regards to human rights standards within the Union is particularly ironic in context of wide European condemnation of the electoral successes of extreme right-wing political parties in member states during recent years.

This is the context in which this report seeks to explain current Governmental activity relating to organised illegal migration into Europe. Whilst mapping out some of the broader policy and research activity on human trafficking and smuggling, the core interest of this report lies in how irregular migration and Governments' attempts to control it have affected the viability of European refugee protection. It is recognised that such protection might consist of 'off-shore' and 'regional protection' measures outside of European territory but facilitated or supported by European Governments directly or through inter-governmental agencies such as the European Union. However, a central premise is that there is no viable European approach to refugee protection that does not consist, in some measure, of the right of 'spontaneous' flight to and asylum on European territory.

[54] *The Protocol on Asylum for nationals of Member States of the European Union to The Treaty of Amsterdam, Official Journal*, 10 November 1997, C340/1

3 ASYLUM AND THE EUROPEAN RESPONSE TO IRREGULAR MIGRATION: AGENDAS IN CONTRADICTION

3.1 The growth of asylum and irregular migration

> " What is essentially a zero immigration policy has been operating in Europe since the '70s. It has led to a preoccupation with the efficacy of exclusion policies and methods, to focus on prevention of illegal immigration and on a strict and co-ordinated asylum policy, since it is the route by which migrants increasingly, however inappropriately, seek entry."[55]

A rapid increase in the number of asylum claims registered in West European countries from 1985-92 has been well documented. So too was the peaking of these numbers in 1992, at the start of the Bosnia crisis, and then the gradual decline in numbers between 1992-97. Some observers close to European Governments have attributed the rise in asylum claims during the first period to curtailment of 'legal' migratory opportunities and the growth in the numbers of otherwise 'illegal' migrants exploiting the loophole of asylum:

> " The following factors may explain the significant increase in asylum applications between 1985 and 1992:
> - Most other legal forms of immigration apart from family reunification and formation had been stopped or significantly reduced
> - The asylum procedure came to be seen by some applicants as a de facto immigration mechanism, because it allowed asylum applicants to remain in a country and often to work or receive welfare benefits while the claim was being processed
> - As the number of applications increased, the existing procedures which were designed to deal with small numbers of claims became less able to deal with the claims and the time taken to determine claims subsequently increased. Backlogs were created: cases remained pending for long periods before being considered. This created a potential pull factor. In view of the time it took to take a decision, the result was often that rejected asylum seekers could remain, not because they were in need of protection, but because they had been in the country for such a long period that it was no longer possible to return them."[56]

The fall in the number of asylum claims after 1992 is most often attributed by Governments to the improved efficiency of European asylum systems. Some of the factors cited include:

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[55] *Short Report on Wilton Park Conference 497*: 'Migration Prevention, Control and Management', Wiston House, 7-11 April 1997, United Kingdom.

[56] IGC (1997) *Report on Asylum Procedures: Overview of Policies and Practices in IGC Participating States*, Secretariat of the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia: Geneva.

> " The streamlining of asylum procedures, accelerated procedures, increased personnel, increased specialisation, computerisation of determination procedures and fingerprinting have led to a reduction in the length of procedures and backlogs involved.[57]"
>
> " Likelihood of shorter screening periods and shorter procedures, in general, along with considerable reductions and even suppression of entitlements, usually associated with asylum application (right to housing, social and cash entitlements, housing) might have had a dissuasive effect on those considering departure from countries of origin on economic grounds. In addition, safe country declarations may have similarly led to a reduction in the number of unjustified claims."[58]

These are clearly only suggested interpretations and draw on no independent data. However, they are very representative of perhaps the dominant strain of governmental thinking on asylum in Europe: i.e. it is both a means and a magnet to uninvited social and economic migrants and that reforms to the asylum system, including the denial of welfare benefits, can have a significant deterrent affect on the number of asylum claims in future years.

There has also been a blurring of asylum issues with wider issues of migration control. At the start of the 1990s, the *European Commission* noted that although the issues of asylum and immigration were related, they were "each governed by specific policies and rules that reflect fundamentally different principles and preoccupations."[59] However, by the late 90s the Commission had developed a more comprehensive approach, recognising that the two phenomena had become intrinsically entwined and neither area of policy could be approached in isolation. [60]

The danger now is that attempts to control illegal migration into and across Europe have become the dominant paradigm regardless of how if might affect the possibility of claiming asylum. This chapter demonstrates that there are few or no legal means by which refugees can now reach most parts of Europe, in particular the countries of the European Union, and that refugees are obliged to use ever more clandestine (and therefore hazardous) means.

3.2 Lack of 'regular' possibilities for refugees wishing to come to Europe

Whilst the recognition that some refugees will always arrive by 'irregular' means (involving 'illegal entry' as defined by Article 31 of the 1951 Convention), some regular alternatives would

[57] *Ibid.*
[58] *Ibid.*
[59] European Commission (1991), *Communication from the Commission to the Council and the European Parliament on the Right to Asylum* [SEC/91/1857).
[60] Noll and Vedsted-Hansen (1999) *op. cit.*

at least provide some choice for some refugees other than engaging the services of traffickers and smugglers. However, the regular possibilities for refugees to reach the European Union as a 'refugee' are very limited indeed:

3.2.1 *Visa requirements*

There is no such thing as a 'refugee visa' to gain entry into the European Union explicitly for the purpose of claiming asylum. Although occasional 'diplomatic protection' is offered by specific national embassies abroad[61], the only regular channels for refugee migration are those requiring a 'tourist', 'business', 'student' or some other category of visa. If any applicant is suspected of being a potential asylum-seeker then they will almost always be declined any type of entry clearance.

In December 1993, the European Commission presented to the Council and the European Parliament a Communication covering two closely linked proposals:

- Proposal for a decision, based on Article K3 of the Treaty of European Union establishing the Convention on crossing of the external frontiers of the Member States.
- Proposal for a regulation, based on Article 100c of The Treaty establishing the European Community, determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Members States.[62]

The effect has been the increasing standardisation of visa imposition across all members of the European Union, in particular the members of the Schengen travel area. There are now visa requirements in place for every country of origin that generates significant number of asylum-seekers, with the notable exceptions of Poland, Hungary and the Czech Republic (all E.U. accession countries that nevertheless generate asylum-seekers, in particular from their Roma minorities). These visas are largely in place specifically because these countries generate refugees. There is now a new draft EC Regulation 2000 on a common visa regime.

In March 1996 a similar agreement was adopted by the European Council on Airport Transit Visas (ATVs) and placed a common requirement on nationals from Afghanistan, Ethiopia, Eritrea, Ghana, Iraq, Iran, Nigeria, Somalia, Sri Lanka and the former Zaire (most of which are significant refugee-producing regions).[63] In many ways, this achievement is all the more remarkable given the competitive disadvantage such visas impose on major European airlines such as British Airways, KLM and Lufthansa, that all rely heavily of transit passengers.

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[61] The foreign embassies of all European countries have, at some time or another, implicitly facilitated the migration of known refugees according to national interest. 'Diplomatic asylum' is never publicised and is not without serious problems, particularly if operated within the prospective refugee's country of origin. Such initiatives are required to be covert so as not to endanger embassy officials and not least the refugee themselves.

[62] *Communication from the Commission to the Council and the European Parliament* on 10 December 1993 [com/93/684]. A full analysis of both these proposals can be found in 'Visa and Control of External Borders of the Member States', Select Committee on the European Communities, *House of Lords*, 14th Report, 1993-94 Session: London.

[63] Joint Action adopted by the Council on 4 March 1996 [96/197/JHA], *Official Journal* L63/8, 13.3.96.

The extension of the European Union visa regime has been clearly signalled in the 1999 Tampere Conclusions:

> " A common active policy on visas and false documents should be further developed, including closer co-operation between EU consulates in third countries and, the establishment of common EU visa issuing officers."[64]

The imposition of visa restrictions on all countries that generate refugees is the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal migration.

3.2.2 *UNHCR Resettlement*

A second theoretical possibility for regular migration would be to resettled by UNHCR from an original country of asylum to resettlement countries, several of which are in Europe. However as can be seen in **Table Five** the opportunity for such resettlement for refugees from the 'Action Plan' countries is severely limited. Only a few hundred refugees from Iraq, Somalia, Afghanistan, Sri Lanka and the Federal Republic of Yugoslavia (e.g. Kosovo) are resettled under the UNHCR programme in any one year. With the exception of Sweden and Denmark, most other E.U. states only accept a handful of refugees in this way. It was noteworthy that during the early 1970s, UNHCR resettled over 200,000 refugees a year through such programmes, but now combined quotas have shrunk to below 27,000.[65] For most refugees, the opportunity for resettlement is unlikely to be available and the numbers are tiny when compared to the numbers of asylum claims and refugee status determinations (shown in **Table Four**).

3.2.3 *Temporary protection programmes*

The final 'legal' means for refugee migration to Europe have been the two occasions upon which European countries have participated in 'temporary protection' programmes in response to crises in South East Europe. By 1995, some 700,000 people from the former Yugoslavia (mainly Bosnians) held temporary protection in Europe, the vast majority of whom were in Germany.[66] Again in 1999, the 'Humanitarian Evacuation Programme' (HEP) resettled 92,000 Kosovar refugees from FYR Macedonia and Albania to 29 other countries, many of which were in Europe.[67] In both cases, the 'temporariness' of the status has varied significantly between E.U. members states, with both voluntary and mandatory return programmes from some countries. Since many Kosovars had been trafficked from the former Yugoslavia during

[64] Paragraph 22 of the *Presidency Conclusions of the Tampere European Council*, Finland, 15 and 16 October 1999.
[65] UNHCR (1997) The State of The World's Refugees.
[66] UNHCR (1995) The State of the World's Refugees.
[67] UNHCR (2000) The Kosovo Refugee Crisis: An independent evaluation of UNHCR's emergency preparedness and response.

the 1990s it would be interesting to analyse any data for how this more 'legal' opportunity affecting the demand for illegal migration. It is also worth noting that during the start of the Bosnian crisis in the Summer of 1992 many European states delayed in imposing a visa requirement until the Autumn, allowing many of their citizens to ferry aid and also bring out refugees from Croatia.[68] During the escalation of the Kosovan crisis in the mid to late 1990s, a visa requirement was already in place and, in fact, a transit visa requirement was also introduced by EU states in 1998. It is unavoidable conclusion that the migration options for Bosnians entering legally in the backs of cars and the Kosovans arriving hidden in the backs of lorries in the years that followed, differed only because of these visa restrictions.

This brief analysis of visa regimes, resettlement programmes and temporary protection is sufficient to conclude that for the vast majority of refugees aiming to seek asylum in the European Union, there is no 'legal' migratory option available.

[68] See Morrison (1998) *op. cit.*

TABLE FIVE **Refugees resettled by UNHCR to countries in the European Union during 1998 from the 'Action Plan' countries**[69]

(note: greater numbers of refugees are resettled to Canada, USA and Australia. Norway and New Zealand also carry resettlement quotas)

Country of Origin	*Country of resettlement*													
	Austria	**Belgium**	**Denmark**	**Finland**	**France**	**Germany**	**Greece**	**Ireland**	**Italy**	**Nether-lands**	**Portugal**	**Spain**	**Sweden**	
Afghanistan[70]	None	8	2	1	15	2	None	None	None	5	None	2	8	
F. R. Yugoslavia (incl. Kosovo)[71]	None (Bosnia 1)	None	None	None (Bosnia 1)	None	None	None	None	None	None (Bosnia 97)	None	None	None Bosnia 25)	N (Bo
Iraq[72]	1	1	295	105	1	93	None	191	6	63	None	None	673	
Somalia[73]	None	3	223	41	7	None	None	7	None	21	None	None	97	

[69] Derived from UNHCR (2000) Resettlement statistics for 1998.
[70] Most Afghans resettled from India and Pakistan; UNHCR also resettled to Australia (217), Canada (508), USA (139) and Norway (67).
[71] No FRY nationals were resettled but some Bosnian nationals were, including in addition: Australia (1,684), Canada (124), USA (3,111), Norway (14), Iceland (23).
[72] Most Iraqi nationals were resettled from Jordan, Pakistan, Lebanon, Syria and Turkey; including in addition: Australia (245), Canada (468), New Zealand (56), USA (789), Norway (215), Switzerland (7), Bulgaria (5).
[73] Most Somalis were resettled from Djibouti, Egypt and Kenya; in addition to Australia (527), Canada (157), New Zealand (282), Norway (76), Switzerland (9), USA (2,217).

Sri Lanka[74]	None	None	None	None	None	None	None	None	None	None	None	None	None	N

[74] The total resettlement figure for Sri Lankans during 1998 was 10 to Canada (from Hong Kong, Thailand and Turkey).

3.3 Extra-territorial border enforcement

In addition to visa policy, there are several other mechanisms by which European nations, and now the European Union, attempt to control the arrival of 'irregular migrants'. The best documented of these are a consequence of Carriers Liability legislation that was first introduced by some European states in 1987, following the lead of the United States, Canada and Australia.[75] Such legislation most often requires the carrier (usually an airline or a shipping company[76]) to pay a fixed fine, in addition to any other possible detention or readmission costs, for any passenger that arrives with incorrect papers or visas. The UK, Belgium and Germany were the first EU members to introduce these fines at a time when the number of asylum claims had started to rise significantly.[77] In 1990, carriers' liability became a requirement of the Schengen Convention (under article 26). To avoid paying these fines, carriers have taken a series of proactive measures. As well as the training in detecting fraudulent passports and visas offered by Governments and the *International Air Transport Association (IATA)*, some airlines make specific arrangements with specific EU member states. For example, as of January 1998, 46 carriers at 163 operating locations world-wide had registered with the UK Government's *Approved Gate Check (AGC)* system which waives fines provided that a series of rigorous pre-boarding checks are routinely followed by airline staff.[78] Airlines have gone even further in their attempts to evade fines, resulting in outright racial discrimination against passengers[79] or denying even correctly documented passengers specific transit routes.[80] In the first two years of its application in the UK (1987-89), the threat of carrier liability fines is thought to have resulted in the *refoulement* of many Sri Lankan and Turkish refugees from the tarmac of Heathrow airport.[81] Unfortunately, in the case commercial sea vessels such proactive action by ship's crews to avoid carrier fines is known to sometimes have fatal consequences.[82] International Maritime Organisation guidelines given to ships crew on the detection of stowaways make no reference to the right to asylum or the dangers of *refoulement*.[83]

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[75] See A. Cruz (1995) *Shifting responsibility: Carriers' liability in the Member States of the European Union and North America*, Trentham Books.

[76] Carriers' Liability has also been applied by the UK Government on the Belgian operators of the *Eurostar* train service and some German regional authorities have applied to fines to taxis crossing the Polish-German border.

[77] Several articles were written at the time, notably E. Feller (1989) 'Carrier Sanctions and International Law', *International Journal of Refugee Law* 1; A. Ruff (1989) 'The Immigration (Carriers' Liability) Act 1987:Its implications for Refugees and Airlines', *International Journal of Refugee Law* 1; M. Kjærum et al. (1991) *The Effects of Carrier Sanctions on the Asylum System*, Danish Refugee Council: Copenhagen.

[78] See J. Morrison (1998) *The Cost of Survival*, British Refugee Council: London.

[79] See F. Nicholson (1997) 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the expense of International Obligations?', *International and Comparative Law Quarterly*, Vol.46.

[80] *The Times Newspaper* (31 March 1998) 'Italy to take back refugees 'dumped' at Heathrow'.

[81] See D. Burgess (1991) 'Asylum by Ordeal', *New Law Journal*, 18 January 1991.

[82] Some of these accounts are explored in some depth in J. Morrison (1998) *The Cost of Survival*, British Refugee Council: London.

[83] Ibid.

The data kept by airlines on passengers ('passenger profiling') is sometimes used to determine 'irregular' migration routes, even when there is no threat of carriers' liability being applied. Shortly before the EU applied an ATV on the Federal Republic of Yugoslavia , 56 Kosovan refugees had legally flown to Amman in Jordan and then bought a return flight to Belgrade that transited both Rome and London with no visa being required for the journey.[84] Such situations can place the company in a difficult legal situation, as was the case for managers of a cross-channel ferry company in France, after denying passage to asylum seekers from the Czech and Slovak Republics to travel to the UK in October 1997, even though there was no visa requirement. Three of the company's managers were arrested on charges of racial discrimination by the French authorities.[85]

The most recent development in extra-territorial border enforcement - that of Airline Liaison Officers (ALOs) - was adopted by the European Union in October 1996.[86] These officers are immigration staff posted to embassies and consulates of participating EU States to advise airlines staff about the authenticity of specific travel documents. The UK, Danish, German and Dutch Governments all now operate such schemes and are already working in close, informal co-operation in key locations, such as Istanbul airport. The UK, which has recently extended its ALO programme from 5 to 20 international airports[87], has a record of interventions in New Delhi, Colombo, Accra, Nairobi and Dakar. It is impossible to quantify what percentage of these would-be irregular immigrants would have claimed asylum upon arrival in the European Union nor what percentage would have gained Convention status. However, an inspection of the operational manuals used by ALOs, as well as Government reports of their activities, shows no reference to possible refugee protection issues or other human rights concerns. Rather, the focus is on blanket border control against irregular migration and information-gathering to support strategic anti-trafficking measures. Such activities do prevent refugees from leaving their country of origin or at times a neighbouring state in which they are still unsafe. This might loosely be called *presumptive refoulement*.

The international jurisprudence on issues of territoriality and obligations for refugee protection remains undeveloped. The case of *USA versus Sale* has illustrated Governments' unwillingness to extend their obligations under Article 33 of the 1951 Convention beyond their territorial borders. Yet the view of the *Inter-American Commission on Human Rights* was that there was a violation of the United State's wider responsibilities for *non-refoulement*. A similar position is taken by UNHCR in its paper on the 'interception of asylum-seekers and refugees' requests governments 'not to obstruct the ability of asylum-seekers and refugees to benefit from international protection'.[88] There might also be potential in Article 3 of the *European*

[84] *The Times Newspaper* (31 March 1998) 'Italy to take back refugees 'dumped' at Heathrow'.
[85] Interviews conducted by author in April 1998.
[86] Joint position of 25 October 1996 defined by the Council on pre-frontier assistance and training assignments; European Union, *Official Journal* L281/1.
[87] Under the *1999 Asylum and Immigration Act*.
[88] UNHCR (2000) 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', Standing Committee, 9 June 2000 [EC/50/SC/CRP.17].

Convention on Human Rights that might yet prove to have extra-territorial effect when agents of the state are involved.

European governments should be aware that some of the actions of Airline Liaison Officers (ALOs) are at the edge of what is acceptable behaviour under international human rights standards. The *Farah* case in the UK showed that a European Government could be held accountable for the actions of its Airline Liaison Officers even when they were only acting in an 'advisory capacity' to a European airline at an airport outside of Europe. In this case, family members of a Somali refugee in the UK (with 1951 Refugee Convention status) had been granted entry visas by the British Embassy in Ethiopia only to be refused transit by the airline in Cairo on the advice of the ALO. The result was arrest by the Egyptian police and explusion to Addis Adiba with the risk of possible *refoulement* to Somalia. Although, the legality of travel documents was not at issue here, this case does give an indication of Governmental responsibility towards *non-refoulement*.

These concerns receive little succour from references to ALOs in the Action Plans of the EU High Level Working Group on Asylum and Migration; directly relating the activities of these officers to the migratory routes of Tamil and Afghan refugees. The reference in the Sri Lanka Action Plan, reinforces the reality that Immigration Officers are already co-operating extensively with each other, as well as Officers from non-EU members, in territories well outside their jurisdiction:

> " There is an effective cadre of liaison officers based in Colombo who have a good working relationship, both between themselves and the Sri Lankan authorities. Canada, with its world-wide coverage through Immigration Control Officers, is well placed to monitor migratory patterns."[89]

The rules of engagement of such officers are blurred still further in the Afghanistan Action Plan, where the role of ALOs explicitly seems to prevent refugees from leaving the region:

> "…(e) Increase the effectiveness of Airline Liaison Officers (ALOs) in Pakistan though enhanced EU co-operation, Investigate the possibilities of extending the number of ALO's.
> (f) Encourage member states to deploy Immigration Officers in the neighbouring region, and to share information on a regular basis with Immigration Officers of other EU Member States.
> (g) Organisation of an information campaign, in particular for Afghan refugees in Pakistan and in Iran, to advise on migration options and to warn against the

[89] Paragraph 29 of the EU High Level Working Group on Asylum and Migration Action Plan on Sri Lanka (SN 3443/3/99 REV 3).

consequences of illegally entering Member States, of unlawful employment and of using facilitators to gain entry to the EU."[90]

The extra-territorial border enforcement activities of EU Governments raises refugee protection and broader human rights concerns. As these activities are taking place external to the territory of any EU member state, then concerns of *refoulement* under Article 33 of the 1951 Refugee Convention cannot be applied. However, the applicability of *non-refoulement* under other human rights instruments, such as the *European Convention on Human Rights* or the *UN Convention Against Torture*, remain more open questions. These concerns might also apply to the disembarkation of stowaways from European registered ships to their country of origin or to other states likely to *refoule*, torture or degrade them merely for being irregular migrants. In addition, the refusal to disembark asylum-seeker stowaways at European destinations, not uncommon even amongst EU member states, might also breach the standards set in the *Safety Of Lives At Sea (SOLAS) Convention*.[91]

3.4 Regional containment

In January 1998, the EU Council adopted an action plan on the 'influx of migrants from Iraq and the neighbouring region'[92], in response to the increase in the arrival of Kurdish and other Iraqi asylum-seekers into the European Union[93]. Many of these individuals were clearly Convention status refugees, even by the standards of Member States own recognition rates (see **Table Four**). However, the thrust of the action plan was not to ensure effective reception in the EU but rather to bolster efforts to keep as many Iraqi refugees within 'the region' as possible (i.e. the 'Safe Haven' in Northern Iraq or, failing this, Turkey or Jordan). UNHCR did not agree that the 'influx' was of such dramatic proportions, but Member Governments were eager to highlight the complexity of 'trafficking' (sic) routes from Iraq to member states such as Germany and France.[94]Regional protection is not by definition an unsound concept: in fact it is the reality for most refugees. The concern expressed by agencies such as UNHCR and ECRE at the time was over-riding emphasis put on operational measures aimed at 'combating illegal immigration' such as 'the effective application of the Joint Position on pre-frontier assistance and training assignments in relation to countries of origin and transit'; the extension of the Airline Liaison programme within transit countries in the region and the 'exchange of officials by mutual agreement'. Very little attention was paid to how reception conditions could be improved in

[90] The *EU High Level Working Group on Asylum and Migration* Action Plan on Afghanistan, paragraphs 138(d-g).
[91] Author's interview with Missions to Seamen, London.
[92] EU action plan on the influx of migrants from Iraq and the neighbouring region, adopted by the EU General Affairs Council, 26-27 January 1998 [5573/98/ASIM13].
[93] Interviews with Governmental officials conducted during the writing of this report: the volume of asylum applications made by Iraqi citizens more than doubled from 14,500 in 1995 to nearly 35,000 in 1997, with between 60-80% being of Kurdish origin.
[94] Interviews with Governmental officials conducted during the writing of this report.

countries such as Turkey, or what assistance might be given to the refugees were incurring huge financial and humanitarian risks in order to claim asylum within the European Union.

The two years that followed the adoption of the Action Plan have seen considerable activity towards the rapid implementation of measures, with a particular focus on Turkey. In fact by June 1998, it was clear that EU member states were interested in Istanbul, not just as a hub for the 'illegal migration' of Iraqis, but also a significant transit point for nationals of Iran, Sri Lanka, Bangladesh, Pakistan and Egypt. The Turkish authorities had provided the EU with a list of technical and technological requirements to be used in the prevention of illegal immigration, including "assistance in the construction of reception centres for those refugees held in Turkey pending their return to their country of origin, but for whom return could give rise to considerable difficulties."[95] It should be noted at this point that as Turkey has made a geographical reservation relating to Article 1B of the 1951 Convention, and so all non-European refugees have no right of claiming asylum in Turkey. The Odysseus programme, adopted by the Justice and Home Affairs Council on 19 March 1998, has been used to finance a range of training and technical support programmes for senior Turkish police officers[96]. Regional meetings focusing on the transit routes used by Iraqi and other 'illegal immigrants' have been held by CIREFI, involving representatives of Central and Eastern European States.

The Iraqi Action Plan and the subsequent co-operation that followed with transit countries in the region has acted as the blue-print for the 5 Action Plans that have so far emerged from the High Level Working Group. A second 'Iraq Action Plan' made suggestions to augment the ongoing work. Whilst the Sri Lanka, Afghanistan and Somalia Plans all make specific recommendations for regional containment work in neighbouring countries:

> "The so-called fraud squad has already existed in Colombo for some years, its purpose being to combat illegal entry by Sri Lankan nationals into western countries. It comprises officials from consular departments of the following Missions represented on the spot (Australia, Canada, Denmark, France, United Kingdom, Italy, the Netherlands, Sweden and Norway."[97]
>
> " Conclude readmission agreements with Pakistan based on the readmission clause contained in the EC-Pakistan Co-operation Agreement (not yet signed/entered into force), either by individual Members States or by the Community. Such agreements should not only cover their own nationals but also stateless persons and third-country nationals, in particular Afghan nationals who have been living in Pakistan for a substantial

[95] Italian proposal submitted to the K4 meeting with Turkey on 25 June 1998.
[96] UNHCR has participated in such training programmes, such as the training of Ministry of the Interior and regional officials in Ankara 28 September-2 October 1998.
[97] Annex II, Section 5, of The EU High Level Working Group on Asylum and Migration Action Plan on Sri Lanka (SN 3443/3/99 REV 3).

period of time. Similar agreements should also be concluded with Iran and the Central-Asian Republics."[98]

" ...Seminars are planned for Turkish officials in order to improve proper screening of asylum-seekers. The training will be led by Austria and supported by Germany. UNHCR will also assist in this project, which is financed within the EU-Odysseus programme. At a meeting of Turkish, Austrian and German representatives, which took place in Ankara on 4 May 1999, it was agreed, that five seminars for 20 participants each would be held in summer and autumn 1999. The target group for these seminars will be Turkish police officers, who are responsible for first interviews with asylum seekers. Additionally, Austria made a presentation on its asylum system for 10 Turkish officials in a one-week seminar in Vienna."[99]

3.5 Burden-shifting policies

Readmission treaties are key to any programme of regional containment to work There are over 100 such agreements between Western European countries and non European countries of origin, the vast majority being bilateral[100]. These agreements are valued by western countries when there are "significant numbers of nationals, third country nationals, stateless persons with no legal right to remain (including rejected asylum-seekers) who are residing illegally on its territory." Significantly Governments also see such agreements as a pre-emptive measure to those who might attempt to enter or stay illegally as well as having a deterrent effect on potential irregular arrivals.[101]There is no reference to the *non-refoulement* or obligations under the 1951 Refugee Convention in any of these agreements, nor is reference made in a 'specimen bilateral readmission agreement' produced by the EU in 1994 for guidance to Member States.[102] Following its own survey in 1993, UNHCR has taken the view that such agreements most often operate informally, often with no notification or indication that the individual is an asylum seeker requiring access to procedures. This concept of 'Safe Third Country' has been searchingly questioned in subsequent research by ECRE (1995)[103], Amnesty International (1995),[104] and

[98] The *EU High Level Working Group on Asylum and Migration* Action Plan on Afghanistan, October 1999, paragraph 138(c).
[99] The EU High Level Working Group on Asylum and Migration Action Plan on Iraq, October 1999, paragraph 34.
[100] IGC (1999), *IGC Report on Readmission Agreements*, Inter-Governmental Consultations for Asylum, Refugee and Migration Policies in Europe, North America and Australia: Geneva, August 1999.
[101] IGC (1999), *IGC Report on Readmission Agreements*, Inter-Governmental Consultations for Asylum, Refugee and Migration Policies in Europe, North America and Australia: Geneva, August 1999
[102] *Council Recommendation concerning a specimen bilateral readmission agreement between all Member States and a third country*, 30 November 1994, *Official Journal* C274/20.
[103] European Council on Refugees and Exiles (1995) *'Safe Third Countries': Myths and Realities*, London.
[104] Amnesty International UK (1995) *Playing Human Pinball: The Home Office Practice in 'Safe Third Country' Asylum Cases*, London.

then again by the U.S. Committee for Refugees in 1997[105]. All studies point to the real dangers of *refoulement* as asylum-seekers are passed back down the chain as 'illegal immigrants for removal'. In 1998, UNHCR retained its position stating:

> " [Readmission Treaties] have not traditionally been drafted to respect the particular situation of asylum-seekers and as such will usually be inadequate vehicles through which to effect this return. Most important, they have not been framed to ensure protection against *refoulement*, by, for example, including guarantees of access to asylum procedures in the third country. In *UNHCR*'s view, these classical bilateral readmission agreements should not be used to return asylum-seekers, even where this is technically possible."[106]

Since the Treaty of Amsterdam, readmission clauses have been inserted in partnership and co-operation agreements between the *European Union* and third countries, again with no reference to refugee protection. Most recently the Finnish Government has tabled an initiative in the Council of the European Union for common EU regulations determining obligation between EU Member States and third country nationals.[107] This will be the basis for the gradual harmonisation of such agreements within the European Union from 2000 onwards. The EU is also considering new multi-lateral agreements with the countries under discussion in the Action Plans of the High Level Working Group on Migration and Asylum as well as key transit countries such as Turkey, Pakistan, India and the Russian Federation.

Readmission agreements also play an important role within Europe itself. If the pre-embarkation checks are geographically the outermost of three concentric circles of enforcement around Western Europe and the 'Schengen frontier' is the innermost, then the middle circle is represented by the network of bilateral readmission arrangements that have been established between the countries of Central and Eastern Europe. There are now over 100 such agreements that exist creating what is has been called the 'buffer zone' or the 'cordon sanitaire' of Western Europe. The most substantial of all these arrangements is that between Germany and Poland signed on 7 May 1993. From 1993 to 1996, DM 120 million of German money was spent on 'financing material and equipment along Poland's western border and creating a Polish administrative system for refugees and deportation.' Now the interest of German authorities has spread further eastward to strengthening Poland's border with the Ukraine and Belarus (both parts of the former Soviet Union):

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[105] U.S. Committee for Refugees (1997) *At Fortress Europe's Moat: The 'Safe Third Country' Concept*, Washington D.C.

[106] UNHCR (1998) *Note for the Standing Committee of the Executive Committee from the Division of International Protection* [EC/48/SC/CRP.29], 25 May 1998; quoted in Karin Landgren (1999) Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests, *New Issues in Refugee Research Working Paper No. 10*, Centre for Documentation and Research, UNHCR: Geneva.

[107] *Initiative of the Republic of Finland with a view to the adoption of a Council Regulation determining obligations as between the Member States for the readmission of third-country nationals* [1999/C/353/05], *Official Journal* C353/6, 7.12.1999.

> " Until the collapse of the Soviet Union, Poland's eastern neighbour itself ensured the inviolability of borders. Today that power is no longer there... Rough forest terrain [on the eastern Polish border] offers traffickers in illegal immigrants and criminal organizations the best conditions for going about 'their' business...All those who illegally cross that border [into Poland] will one day will one day find their way into the territory of the EU - unless they are rejected at the EU's outer borders."

Important to note is that none of these readmission agreements contain any criteria for dealing with asylum seekers and refugees as opposed to illegal migrants in general. Germany regards all of its neighbours, including Poland and the Czech Republic, as 'safe places' to return refugees interdicted at the border. So if the German authorities can ascertain the country through which the refugee passed, they will be returned to claim asylum there. However of the 9,655 people who were deported to Poland by German border guards in 1996, only 1,696 claimed asylum in Poland upon re-entry. 1,453 of those bounced back to Poland were subsequently deported from Poland to its eastern neighbours (Belarus and the Ukraine) or directly back to countries of origin (such as Sri Lanka), mostly within 48 hours of being arrested. The concern voiced by agencies such as the UNHCR or the European Council on Refugees and Exiles (ECRE) is that the 'domino effect' of chain removals can result in *refoulement*, when the refugee gets no opportunity to claim asylum at all and end up back in their original country or region of persecution. Slovakia, for example, is alleged to routinely deny access to the Slovak asylum procedure for any refugee without adequate documentation.

> " There is no sense between States as to how to define the concept of 'safe' when applying 'safe third country' policies in Europe, nor do European States apply the same criteria for denying access to asylum procedures on 'safe third country' grounds....With regard to the principle of 'burden-sharing', the 'safe third country' notion operates entirely on the basis of countries' geographical location in relation to asylum seeker movements and travel routes, and does not imply any element of equity or fair distribution of asylum seekers.... A major concern is that present 'third safe country' practices largely result in shifting the burden of asylum seekers and refugees from West to East, without taking into consideration the substantial strain which this places on the still fragile asylum institutions of countries in central and eastern Europe."[108]

The Executive Committee of UNHCR has continuously emphasised how they consider international solidarity and burden-sharing as key to the protection of refugees and the resolution of refugee problems. And indeed recent years have seen several examples of regional and international burden-sharing.[109] This is particularly the case where specific regions and/or states are hosting large refugee populations and at the same time are trying to cope with their own

[108] Danish Refugee Council (1997) *Third Safe Country: Policies in European Countries*, Copenhagen.
[109] For details see ExComm 49th Session (1998) *Annual Theme – International Solidarity and Burden-Sharing in all its Aspects: National, Regional and Interantional Responsibilities forRefugees* A/AC.96/904

political, economic, environmental and social problems. However, as UNHCR's annual theme paper on this issue stresses,

> 'In principle, international solidarity and burden-sharing should not be seen as a prerequisite for meeting fundamental protection obligations'[110]

Any burden-sharing arrangement must also ensure respect for the fundamental principles of refugee protection including asylum, *non-refoulement* and family unity. The arrangement should also be part of an overall plan to promote a lasting solution to the problems.[111]

UNHCR is also of the opinion that 'the most successful burden-sharing arrangements are those which are not limited exclusively to countries from the region'[112] as the effect of regional burden-sharing arrangements can mean an inequitable sharing of responsibility. In the light of the provisions for regional containment operations in the Action Plans of the HLWG, outlined above and the effect of many of the readmission agreements signed by EU members with non-members outlined below, these comments seem particularly pertinent.

3.6 Domestic deterrents against irregular migration and asylum

As well as the international policies of the European Union and its member states, there are an array of domestic initiatives clearly aimed as disincentives for would-be asylum seekers. These include dispersal policies for asylum-seekers, the denial of welfare payments and the risk of detention, not to mention hostility and xenophobia that greet refugees in some provincial towns. The method of arrival used by refugees might result in the risk of *refoulement* (particularly in the case of stowaways arriving at minor sea ports) or will result in expedited appeals procedures if the asylum-seeker attempts clandestine entry.[113] This despite commitments under Article 31 of the 1951 Convention relating to the Status of Refugees not to penalise refugees for attempting illegal entry if they 'present themselves without delay' and show 'good cause'.

One example, that highlights the inhumane results of domestic responses to irregular migration, was the systematic policy of stopping refugees at British airports who intended to claim asylum in either the United States or Canada during the mid to late 1990s. During this period, several hundred refugees were arrested, charged under UK criminal law (for acts of forgery and counterfeiting) and imprisoned for up to nine months.[114] In some cases families were split up and children taken into care without individuals being given the opportunity of claiming asylum. In a

[110] Ibid
[111] Ibid
[112] Ibid
[113] The affects of these domestic restrictions on the asylum process are discussed at length in the case of the UK in Morrison (1998).
[114] See Liz Hales (1996) *Refugees and criminal justice?*, Cambridge University: Institute of Criminology and Richard Dunstan (1998) *op.cit*.

ruling which appeared to be strongly critical of both the [UK] Home Office and the Director of Public Prosecutions (DPP), Lord Justice Simon Brown said

> "One cannot help wondering whether perhaps increasing incidence of such prosecutions is yet another weapon in the battle to deter refugees from seeking asylum in this country." The judge added that he was struck that neither the Home Secretary nor the DPP appeared to have given "the least thought to the UK's obligations under Article 31."[115]

3.7 Specific Anti-trafficking Initiatives

Within the wider debate in the EU about how to control the growth of asylum and irregular migration, the various institutions of the EU have all undertaken specific anti-trafficking initiatives.

At an overarching level, Tworney[116] has analysed the activity resulting from the Amsterdam Treaty and concludes that whereas possibilities for a wider approach to anti-trafficking initiatives could have been taken up, Amsterdam has prioritised a policing and crime control approach. He draws on the Action Plan of 1997 to combat organised crime as illustration of this.[117] He goes on to show how some states see trafficking as such a threat that they have at times reintroduced border checks acting as a counter-current to proposed communitarianism.[118]

However, the Council of Europe and the European Parliament in particular have approached the issue less from a control perspective, stressing the needs of victims. The Parliamentary assembly of the Council of Europe made trafficking a priority issue throughout the 1990's. They adopted a Recommendation on traffic in women and forced prostitution[119] and have called for the Council of Ministers to elaborate a Convention on this issue. They have also urged the Committee of Ministers to encourage members states to raise public awareness of the problem and specifically to sensitise immigration staff and police to the issues, so that victims are adequately protected.[120] The Council of Europe also works in partnership with IGOs and NGOs and has been involved since 1999 in a joint initiative with the HCHR in Albania where specifically they are educating those in refugee camps about the dangers of traffickers.[121]

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[115] *Guardian, Times* and *Independent* newspapers on 30 July 1999 and reproduced in *Statewatch* Vol.9, No.6, November and December 1999.
[116] P.Tworney, *Trafficking in Persons: Europe's Other Market*, Forthcoming publication.
[117] For details see OJ 1997 C251
[118] For more details of EU crime-orientated anti-trafficking activity see Chapter 4.
[119] *Recommendation 1325* (1997) adopted by the Assembly on 23 April 1997.
[120] For details on European human rights based initiatives see *Trafficking in Women and Girls Note Prepared by the HCHR and the Economic Commission for Europe secretariat* (1999) for the Regional Preparatory Meeting on the 2000 Review of Implementation of the Beijing Platform for Action January 2000 UN Doc. E/ECE/RW.2/2000/3.
[121] For details of this project and the HCHR Trafficking Programme see HCHR (2000) *Trafficking in Persons Information Note*

The European Parliament has commissioned two reports on trafficking - the Servo report[122] and the Soerenson report[123]. The latter provides an up to date review of European Commission activity, including their two Communications on trafficking in women for the purpose of sexual exploitation[124] and their funding of two multi-disciplinary approach programmes involving NGO participation – the STOP programme concerning the sexual exploitation of children[125] and the more recent DAPHNE programme which aims at the prevention of violence against children, young people and women[126]. An important innovation of the latter being that it is open to non-member states including applicant states from where many of the victims and the perpetrators originate. The report also reviews the work being carried out at this level on comparative research on legislation and penalties relating to trafficking in women, reflecting the Commission's new right of initiative on judicial and law enforcement.

The range of activity and approach of the EU institutions admirably reflects the conflicting agendas and priorities which the issue of trafficking raises. Whilst there is obvious concern to protect victims and to prevent the abuses of trafficking the overall debate is still dominated by the desire to seal Europe's borders which as it has been shown can have detrimental effects on refugee protection.

[122] *Report on Trafficking in Human Beings of 14 December 1995 by Rapporteur Colombo Servo,* A4-0326/95
[123] Forthcoming publication
[124] Com (96)0567 and COM (98)726
[125] OJ 1996 L322/7
[126] OJ 2000 L34/1

4 THE TRAFFICKING AND SMUGGLING OF MIGRANTS AS TRANSNATIONAL ORGANIZED CRIME

4.1 What is transnational organised crime?

If we have take the international definition of an 'organised criminal' group as:

> " a structured group [of three or more persons] existing for a period of time and having the aim of committing a serious [transnational] crime [through concerted action] [by using intimidation, violence, corruption or other means] in order to obtain, directly or indirectly, a financial or other material benefit."[127]

The Group of Eight Industrialised Democracies *(G-8)* are also committed "to the fight against the dark side of globalisation: transnational organized crime which threatens to damage our societies and our economies."[128] But what are the roots of organised crime and why have they become linked to debates about globalisation? The recognition of economic features in criminal behaviour began in the United States in the late 1960s, with some academics seeking to examine such behaviour purely in the light of a rationale based on economic factors:

> " The individual calculates (1) all his practical opportunities of earning legitimite income, (2) the amounts of income offered by these opportunities, (3) the amounts of income offered by various illegal methods, (4) the probability of being arrested if he acts illegally and (5) the probable punishment should he be caught. After making these calculations, he chooses the act or occupation with the highest discounted return."[129]

Following such an economic analysis, 'organised crime' can be differentiated from 'ordinary crime' by the degree to which it follows economic principles. The major goal of organised crime is to maximise economic gain and profit, whilst ordinary crime is normally directly appropriative (i.e. the proceeds are kept by the perpetrator of the criminal act).[130] The success of organised crime depends on there being an illegal markets, the existence of which directly relates to the actions of Governments:

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[127] Article 2 of the Revised draft *United Nations Convention against Transnational Organized Crime*, United Nations General Assembly, [AC.254/4/Rev.5], 16 November 1999.
[128] *Communiqué* of the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime, Moscow, 19-20 October 1999.
[129] Gary Becker (1968) quoted in Andreas Schloenhardt (1999) *Organised Crime and the Business of Migrant Trafficking: An Economic Analysis*, Australian Institute of Criminology, AIC Occasional Seminar, Canberra, 10 November 1999.
[130] See, for example, Ruggiero et al. (1998) [eds.] *The New European Criminology*, Routledge: London; or Fiorentini Peltzman (1995) [eds.] *The Economics of Organised Crime*, Cambridge University Press.

> "The determination of which goods and services are available in the illegal market strictly depends on the relevant laws. Hence, it can be stated that it is the decisions of the legislative authorities that create illegal markets with economic opportunities for criminal organisations. The larger the markets in which transactions are proscribed by governments, the greater are the incentives for organised crime."[131]

The transnational dimension of organised crime operates across borders and under the legislative jurisdictions of at least two states. Like other legal economic activities, organised crime has responded to the opportunities opened by the increasing shift of power from nation states to economic markets under the phenomenon of 'globalisation':

> "It is the detachment from territory, made possible by rapid technological change - including new communications technology - which is so significant and so distinctive about the structures and processes of the 'global economy', and which is having such a profound impact on the nature and functions of the state. Deterritorialisation, indeed, is what sets globalisation apart crucially from the parallel (but state-centred) processes of 'internationalisation' or 'interdependence' (denoting increased exchanges between countries) or 'liberalisation' (denoting the opening of borders between countries). 'Global' phenomena do not cross or open borders so much as *transcend* them, extending across widely dispersed locations simultaneously and moving between places anywhere more or less instantaneously.."[132]

The significant actors in the globalisation process: transnational corporations, financial institutions and organised crime, all represent a direct threat to the sovereignty of nation states. In response, states can often react by opting for solutions that, however wasteful or inefficient, maintain at least the illusion of control.[133] The rhetoric of the G8 States explicitly links organised crime to the globalisation process and sees it as a direct threat to existing societies:

> "Globalisation has been accompanied by a dramatic increase in transnational crime. This takes many forms, including trafficking in drugs and weapons; smuggling of human beings; the abuse of new technologies to steal, defraud and evade the law; and the laundering of the proceeds of crime. Such crimes pose a threat not only to our own citizens and their communities, through lives blighted by drugs and societies living in fear of organised crime; but also a global threat which can undermine the democratic and economic basis of societies through the investment of illegal money by international

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[131] Andreas Schloenhardt (1999) *Organised Crime and the Business of Migrant Trafficking: An Economic Analysis*, Australian Institute of Criminology, AIC Occasional Seminar, Canberra, 10 November 1999.
[132] Sarah Collinson (1999) *Globalisation and the dynamics of international migration: the implications of the refugee regime*, New Issues in Refugee Research, Working Paper No.1, UNHCR, Centre for Documentation and Research, Geneva.
[133] Kenichi Ohmae (1995) *The End of the Nation State: The Rise of Regional Economies*, Harper Collins: London.

> cartels, corruption, a weakening of institutions and a loss of confidence in the rule of law."[134]

However, elected governments have not always been so clear in their opposition to organised crime. Stable symbiotic relationships have existed between governments and *mafias*, not least in the recent history of countries such as Italy, China and Colombia. However, globalisation has tended to overturn such arrangements in favour of the organised criminals and some authors are pessimistic about the possibility of even cooperating nation states being able to reassert themselves without radical restructuring:

> "The chances of an international regime for the management and containment of organised crime are likely to be poor. It would require far more cooperation and coordination between national police and enforcement agencies than either *Interpol* or high-level ministerial conferences have so far been able to achieve. To reduce or even limit the economic wealth and potential for political and social disruption of these transnational criminal groups to manageable levels would strike at the very heart of national sovereignty - the responsibility for maintaining law and order and administering criminal justice."[135]

Within Europe, this threat to sovereignty is felt acutely in the transitional states in the East and South-East. The *Organisation for Security and Co-operation in Europe (OSCE)* recognised that the fledgling democracies require the full backing of Western European states to combat the malign economic strength and political influence of organised crime. A comprehensive regional approach to organised crime has been incorporated into the *Stability Pact for South-East Europe*, the first manifestation of which is an international initiative against trafficking in humans based in Croatia.[136]

4.2 Evidence of increasing organisation in irregular migration to Europe

There is no doubt that governments throughout the world now view human trafficking and smuggling as significant components of transnational organised crime. A survey of 45 countries by the United Nations in October 1999, showed that 'Trafficking in Human Beings' incurs an average punishment of between 5 and 15 years imprisonment.[137] This is comparable with other

[134] Statement made at the Birmingham *G8 Summit in Birmingham*, UK, 16 May 1998.
[135] Susan Strange (1996) *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge Studies in International Relations, Cambridge University Press.
[136] Statement from *the OSCE Organised Crime Initiative in South-East Europe*, Zagreb, 23-24 November 1999.
[137] *Analytical study on serious crime*, Report by the Secretariat, *Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, General Assembly [AC.254/22], 30 November 1999.

types of serious transnational crime such as trafficking in drugs (5-20 years), counterfeiting in money (3-10 years), money-laundering (5-15 years) and the smuggling of firearms (1-10 years).

Descriptions of the elements of organisation of illegal migration in Europe are not new. The activities of Varian Fry[138], Oscar Schindler[139], Raoul Wallenberg[140], Frank Foley[141] and Nicholas Winton[142] in the 1930s and 1940s have been well-documented, as has the action of Danish fishermen who ferried Jewish refugees to relative safety but are known to have charged for their services.[143] European Governments were also well aware that it was illegal organisation ('Snakeheads') that helped many refugees reach Hong Kong after the protests of Tianamen Square.[144] The involvement of organised crime in migration was not seen as a significant problem for European Governments until the 1990s.

The materialisation of the problem into the political consciousness of Europe is best symbolised by a paper presented at the 11th IOM Seminar on Migration in 1994:

> "Trafficking brings annual incomes to gangster syndicates in the magnitude of at least US$5 to US$7 billion a year. Official data on illegal immigration to various countries is by definition not available. However, various estimates can be made. Thus, the number of aliens who in 1993 managed to illegally trepass the borders of Western European States, for the sake of illegal employment or residence, could be estimated to have been in the magnitude of 250,000 to 350,000. This estimate is established on the basis of extrapolations on how many illegals finally reached their intended goal, as a reflection of the known number of migrants who were apprehended when seeking to transit through the green [i.e. land] borders of intermediate countries on their way to the stated final goal."[145]

For some communities, however, smuggling networks are clearly well developed. As is the intelligence-gathering of western Governments (albeit that the Canadian Government is slightly more open with this information than European counterparts). The organised movement of Sri Lankan Tamils is a good example. In 1995 there were reported to be 1,000 'travel agencies' operating in Colombo charging up to £10,000 for travel to the UK and Canada, as the

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[138] 'The Saviour' by Donald Carroll in *The Independent Magazine*, London, 11 March 1995.
[139] Thomas Keneally (1992*) Schindler's Ark*
[140] Sharon Linnea (1993) *Raoul Wallenberg: The Man Who Stopped Death*, also an ongoing exhibition at the U.S. Holocaust Museum, Washington D.C.
[141] Michael Smith (1999) *Foley: The Spy who saved 10,000 Jews*, Hodder & Stoughton: London.
[142] Nicholas Winton organised the Kindertransport to help Jewish children flee Prague in 1939;
[143] The author's interviews with staff at the Danish Refugee Council, Copenhagen, January 1998; first cited in John Morrison (1998) *The Cost of Survival*, The British Refugee Council: London.
[144] The author's conversation with Professor Hugh Baker at the School for Oriental and African Studies, London, January 1998; first cited in John Morrison (1998) *The Cost of Survival*, The British Refugee Council: London.
[145] Jonas Widgren (1994) *Multinational Co-operation to Combat Trafficking in Migrants and the role of International Organisations*, Discussion paper submitted at the Eleventh IOM Seminar on Migration, 26-28 October 1994, Geneva.

'preferred destinations'. Only a limited number of refugees could ever afford such a sum, so provided they were known within the wealthier Tamil community, most agents were happy to be paid in instalments once the refugee arrived in the West. In fact, the process of negotiating with agents is often initiated by family members in Canada or the UK. This account is offered by a Canadian Government official in 1997, and relates to the systems used by Tamil Tigers at that time:

> "Once your family has contacted the escort or the agent you can be smuggled over, then you must pay a certain fee… Once the fee is negotiated and agreed upon and you've paid the money, then almost instantaneously the Tiger representative back in Sri Lanka closest to your family member will let him [or her] know. They're often on the phone within a day or two calling you indicating that the fee has been paid, they've been given the departure paper and they can leave the Tiger area. It's a very, very, or was a very, very efficient way. I know of instances where people have paid the money and the next day they've been notified by their family that since they've paid the money they could leave in a day or two once the documents are ready… The fee to smuggle someone from Sri Lanka to Canada is fairly constant. Generally its been $24,000 [Can] to $26,000 [Can] that's per person. If you brought a family over, a women and children, you might get a small discount, but generally the fees are fairly standard."[146]

This represents the top end of the market and most Tamil families could never afford to smuggle family members in such an organised way. Cheaper alternatives include flights to destinations in Africa, Russia or Central Asia followed by many weeks or months of overland travel towards Europe or North America. Sri Lankan 'alien smugglers' and 'illegal immigrants' have been intercepted in such diverse countries as the Philippines, Fiji, Turkey, the Netherlands, Albania, Austria, Zambia, Malaysia, Poland, Belarus, Lithuania[147], France, the Czech Republic, Slovakia, China, Pakistan and Italy. However there are very significant hazards for the migrants, not least the risk of getting stranded. In 1997, The *Tamil Refugee International Network (TRIN)* estimated there to be 20,000 Sri Lankans stuck in over 12 countries across South-East Asia, Africa and Eastern Europe, including 5,000 in Russia and 5,000 in Thailand.[148] The condition of those in Russia has been documented. Most try to maintain some existence in and around Moscow but are dependent on the black economy and highly vulnerable to exploitation as prostitutes or forced labour.[149] For some their fate is even worse, left to suffocate in the back of lorries[150] or to drown in the holds of fishing boats.[151]

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[146] Canadian Immigration and Refugee Board (1996) *'Sri Lanka: Alien Smuggling'*, Question and Answer Series, Ottawa, May 1996.

[147] IOM (1997) shows that in the first eight months of 1996, 27% of all transit migrants detained in Lithuania were from Sri Lanka, the highest percentage of any nationality.

[148] British Refugee Council (1997) 'No refuge', article in the *Sri Lanka Monitor*, London, October 1997.

[149] The British Refugee Council (1994) 'The Moscow Route', *The Sri Lanka Monitor*, February 1994.

[150] For example, the suffocation of 18 Sri Lankan Tamils in Györ in Hungary in July 1995 or the 16 Tamils found dead in a refrigerated container upon arrival in the UK in December 1997.

[151] For example, the sinking of the 'Yiohan' between Malta and Sicily in December 1996, with the death of all 280 migrants locked below deck, Sri Lankans representing the most significant nationality.

In 1996, the Organised Crime Branch of *Interpol* undertook a study of the routes, modus operandi and organised crime groups involved in illegal immigration from any country to Western Europe. This research, known as the *Project Marco Polo*, was published in 1997 and indicated that the largest number of illegal immigrants coming to Western Europe between 1992 and 1997 were from Iraq, China, Pakistan, India, Nigeria, Rwanda and Somalia. The report also highlighted several of the routes utilised in the smuggling of Chinese nationals. *Interpol* has also emphasised the linkages between trafficking in human beings and other forms of organise crime, such as forced-labour, organized begging, pick pocketing and prostitution.[152]

In 1996, a more regional mandate was handed to '*Europol*' in 1996, a European Union police organization that was originally set up under Title VI of the Maastricht Treaty as the 'European Drugs Unit'. Although set up in the Hague as a 'non-operational' team, Europol has been recently connected with "concrete investigations" in eastern Europe, including the detention of 22 migrants (possibly refugees); activities which have drawn the criticism of the European Parliament. Other European initiatives included a five-year 'incentive and exchange programme' which was established by the Council of Justice and Home Affairs ministers in November 1996 to combat "trade in human beings and the sexual exploitation of children". In addition, there are currently no less than sixteen working groups operating under the Steering Groups and K4 Committee of the Council of Justice and Home Affairs (with additional 'horizontal' groups combining different aspects of migration, enforcement and anti-trafficking initiatives). These groups both respond to, and commission, the information gathered by the Centre for Information, Discussion and Exchange on Asylum (CIREA) and the Centre for Information, Discussion and Exchange on the crossing of Borders and Immigration (CIREFI).[153]

The position on Europol at the forefront of the European fight against illegal migration was affirmed in the 1999 Tampere Conclusions:

> " *Europol* has a key role in supporting Union-wide crime prevention, analyses and investigation. The European Council calls on the Council to provide *Europol* with the necessary support and resources. In the near future its role should be strengthened by means of receiving operational data from Member States and authorising it to ask Member States to initiate, conduct or co-ordinate investigations or to create joint investigative teams in certain areas of crime, while respecting systems of judicial control of Member States."[154]

Some European Governments have also been active within the auspices of the United Nations system attempting to link illegal migration to moves to tackle organised crime. By 1997, due the

[152] *The relationship between organised crime and trafficking in aliens*, Study prepared by the Secretariat of the Budapest Group, Vienna, June 1999.
[153] The acronyms are derived from the French spelling of these groups.
[154] Paragraphs 45 of the *Presidency Conclusions of the Tampere European Council*, Finland, 15 and 16 October 1999

increasing interest in the numbers of migrants arriving on the peninsular, the Italian government sought to promote an international convention to combat illegal migration by sea. This was to be presented in London at *the 76th Session of the International Maritime Organisation* in 1997. Instead, the Assembly referred it to their *Marine Safety Committee* as a resolution[155], noting that human trafficking per se was outside the remit of their organisation. The Italian proposal was then consolidated with an Austrian draft convention on the Smuggling of Illegal Migrants[156] and was considered by *the UN Commission for the Prevention of Crime and Penal Justice* in April 1998. This has formed the basis for the *Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime*[157] that aims to present a draft Convention to the Millennium year meeting of the UN General Assembly. The work on this draft convention has taken place in six sessions in Vienna throughout 1999, and three Protocols have evolved in addition to the main Convention. It is here that the distinction between 'smuggling' and 'trafficking', as defined in the Introductory Chapter to this report, has emerged and has gained more consistent usage throughout some sectors of the international community. It has been the European Governments, in particular the Austrians and Italians, that have continued to take most interest in the Smuggling Protocol and have maintained the focus between transnational organised crime and 'illegal migration' as a service in its own right (i.e. not connected to other forms of exploitation, such as 'trafficking').

4.3 The criminalization of irregular migration

A person's right to leave any country is enshrined in the Universal Declaration of Human Rights[158] and is substantiated in the *International Covenant on Civil and Political Rights*[159]. Even if this 'right to leave' is thwarted by the migration controls of the destination country, it remains a fundamental human right. The following three quotes reflect on how this fundamental right to leave your country of origin and migrate, whether a refugee or not, is being criminalised by the international community.

> "While the political and social reality that many traditional receiving countries are closing their doors to continued immigration should be borne in mind, the factual impossibility of exercising one's rights fully can never be used as an excuse for denying the legal

[155] 'Note by Italy' (MSC 69/21/2) accompanying Assembly Resolution A.867(20) '*Combatting unsafe practices associated with the trafficking or transport of migrants by sea*'. The resolution was discussed at the 69th Session of the Marine Safety Committee at the *International Maritime Organisation* in London, 11-20 May 1998.
[156] Letter dated 16 September 1997 from the Austrian Permanent Representative to the United Nations to the Secretary General accompanying the '*Draft International Convention against the Smuggling of Illegal Migrants*', [A/52/357].
[157] Established by the *United Nations General Assembly* on 9 December 1998 [Resolution 53/111].
[158] Article 13(2) of the *Universal Declaration of Human Rights*, United Nations, 1948.
[159] Article 12(2) of the *International Covenant on Civil and Political Rights*, United Nations, 1966.

possibility of exercising those rights. The right to leave cannot be made to depend on the ability to exercise the right immediately or even in the foreseeable future."[160]

"Many have remarked on the irony of the very governments now seeking to restrict the right of individuals to leave being those which championed it for many years, condemned the Iron Curtain regime of Eastern Europe, the difficulties for Jews seeking to leave the Soviet Union, and the punishment of Vietnam on those attempting to leave illegally. A former European government minister once remarked in private to UNHCR that future asylum seekers would reach Europe only by parachute. Looking ahead, the consequence for asylum seekers of treaties seeking to criminalize illegal departure may not only make it all but impossible for asylum seekers to reach safety, but may then classify them as having committed - through their illegal departure - a serious non-political crime prior to entry."[161]

" In recent years, [European] police forces have emphasized the struggle against so-called organised crime as an overriding and all-embracing theme into which refugee policy, too, is being fitted. Illegal migration is now being construed as an imported crime, so that commercial assistance for refugees is accordingly categorised as 'organised crime'. In line with this scenario, risks to internal security are to be met by addressing 'criminal geography' and by identifying socially adjusted 'control filters'. Phenotypical criteria like skin pigmentation, speech, 'alien' behaviour and other visible signs of foreign origin are the triggers for surveillance, monitoring and investigation. Whole regions and populations can be defined and labelled by such 'markers'..... Ultimately, an 'overall European security zone' will be constructed based on the 'organised crime' scenario and on the criminalization of migration.... Using a criminological redefinition of offenders ('smugglers and traffickers') and victims (penniless refugees, women forced into prostitution), police forces and public authorities are trying to use human rights to justify and legitimise their actions...."[162]

Although dramatic, the above quotes make clear the point. The stakes are continually rising for those many asylum-seekers that need to attempt irregular migration to reach Europe. Not just is it an offence under the immigration laws of the receiving state (which at least receives some respite under Article 31 of the 1951 Refugee Convention) but now the international community is moving to criminalise the process of unregulated migration itself.

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[160] Hurst Hannum (1987), *The Right to Leave and Return in International Law and Practice*, quoted in Karin Landgren (1999) Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests, *New Issues in Refugee Research Working Paper No. 10*, Centre for Documentation and Research, UNHCR: Geneva

[161] Karin Landgren (1999) Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests, *New Issues in Refugee Research Working Paper No. 10*, Centre for Documentation and Research, UNHCR: Geneva

[162] Forschungsgesellschaft Flucht and Migration (FFM) (1998) 'Germany, Poland and Ukraine: asylum-seekers and the 'domino effect', *Race and Class*, 39(4).

5 TRAFFICKING AND THE DEVELOPMENT OF A HUMAN RIGHTS FRAMEWORK

5.1 Background

Trafficking in people has always raised human rights concerns and the creation of a human rights framework has been a major approach to combating it. Refugees however, have not traditionally been recognised as victims of trafficking. Concern has focused specifically on the trafficking of women and children for sexual exploitation, although an understanding of trafficking includes the practice of trafficking in migrants for forced labour. Therefore, the human rights framework, which has been developed to combat these abuses, has reflected the protection needs of these specific groups and this chapter will explore this. However, the main focus within this discussion will be the specific human rights concerns of refugees who become involved in the trafficking process; essentially the right to seek and to enjoy in other countries asylum from persecution, Article 14 of the UDHR, the right of illegal entry and the right to non-refoulement, Articles 31 and 33 respectively of the 1951 Geneva Convention on the Status of Refugees. This chapter will also address the problems arising from the fact that even though the trafficking process can be highly abusive, it is the cost of survival for the majority of refugees if they are to reach European territory and claim asylum. The question as to how a human rights approach to combating trafficking can also ensure refugee protection will therefore be the central concern.

Human rights instruments have traditionally focused on the practice of trafficking as opposed to smuggling, (as defined in the Vienna protocols); since the inherently exploitative nature of trafficking gives rise to major human rights abuses. However, as the Vienna process is likely to create a distinction in international law between the two practices, this chapter will also focus on the human rights concerns raised by smuggling.

5.2 The Early Human Rights Framework

Early human rights instruments against trafficking reflected the concerns of their time and the issue was dealt with from the perspective of the fight against prostitution and slavery.

The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others is often sited as the first attempt by the international community to address the issue.[163] The Convention though reads as more of an anti-prostitution instrument than as an

[163] P.Tworney, *Trafficking in Persons: Europe's Other Market,* Forthcoming Publication. This paper mentions that international attention to the issue of the trafficking of women predated the twentieth century human rights regime. An international conference was held on the subject in Paris in 1895 and treaties concerned with the practice were adopted in 1904, 1910, 1921 and 1933.

anti-trafficking one. It calls for the eradication of 'traffic in persons' and makes clear that this term is to be equated solely with recruitment into prostitution and not with any other kind of 'traffic in persons' or trafficking for any other type of sexual exploitation. The fact that it also prohibits the 'exploitation of prostitution' by others even with the consent of the person involved, confirms its real focus - the abolition of prostitution.

Fifty years on, the Convention has only been ratified by seventy-two of the UN's 185 member states. It also has very weak implementation machinery. There is no mandate for an international authority to monitor its implementation, and so it could be argued that it is little more than exhortatory. The adequacy or appropriateness of this Convention, therefore, to deal effectively with the modern manifestations of trafficking and the many human rights abuses associated with these practices is thus highly questionable.[164] Importantly, the Convention has also been criticised for its failure to empower meaningfully the victims of trafficking or to take a rights based approach to addressing the issue.[165] It is not surprising that many prominent human rights bodies either call for its radical reform or abolition and re-drafting.

Trafficking in people has in some of its manifestations been equated to slavery or slavery-like practices. Indeed the Working Group on Contemporary Forms of Slavery in its 1998 session adopted a recommendation that explicitly declared that 'trans-border trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights'.[166] In this respect the Slavery Conventions of 1926 and 1956 can be identified as part of the international human rights framework to combat trafficking. Article 1(1) of the 1926 Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.' The cross over here with the definition of trafficking in the draft trafficking protocol, with its focus on coercion and loss of liberty, are obvious.

The Supplementary Slavery Convention of 1956 widens the understanding of slavery-like practices by explicitly prohibiting debt-bondage, serfdom, servile marriage and child labour. Article 1 of the 1956 Convention specifically condemns incidents of child labour when children are 'delivered' by a parent or guardian in order that their labour can be exploited by someone else. It also condemns the practice or institution whereby women are promised, for any kind of payment, without a right of refusal, for marriage or other purposes to another person or group. The trafficking of children for labour purposes and the forced transfer of women for marriage or

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[164] See M. Dottridge, (1999) International Instruments Against Traffic in Persons--When the "Excellent" is the Enemy of the "Good", *p. 79 : In NGO Consultation with the UN/IGOs on Trafficking in Persons, Prostitution and the Global Sex Industry "Trafficking and the Global Sex Industry: Need for Human Rights Framework"* June 21-22 1999 Room XII Palais des Nations, Geneva, Switzerland.

[165] International Movement Against All Forms of Discrimination and Racism (IMADR), (1998) *"Strengthening the International Regime to Eliminate the Traffic in Persons and the Exploitation of the Prostitution of Others"*. A Working Paper presented to the Working Group on Contemporary Forms of Slavery, May 1998, p.27.

[166] Recommendation of the 1998 Session of the Working Group on Contemporary Forms of Slavery, United Nations Human Rights Committee.

other purposes, particularly involving family members, are major manifestations of modern trafficking and a focus for human rights campaigners. Instances of victims of trafficking ending up in a situation of debt-bondage or serfdom are also major current concerns. Unfortunately however, the Slavery Conventions suffer from the same implementation weaknesses as the Suppression of Traffic Convention.

Forced Labour has also been associated with the trafficking process. The International Labour Organisations (ILO) Forced Labour Conventions 29 of 1930 and 105 of 1957 strengthened the prohibition of it. Again, the parallels with the definition of trafficking in the trafficking protocol can be drawn. Article 2(1) of the 1930 Convention, defines forced or compulsory labour as, 'all work or service which is exacted from any person under the menace of any penalty and from which the said person has not offered himself voluntarily'.[167]

5.3 'The Growth of Anti-Trafficking Norms'

Despite these early attempts to combat trafficking in humans, recent years have seen a massive growth in the trafficking industry. It has become a very diverse industry generating billions of dollars. [168] One response to this has been a proliferation of activity from human rights bodies, both from within the UN machinery itself and from individual NGOs, to attempt to create a rights framework to address the problems.[169] These initiatives have led to the inclusion of anti-trafficking provisions in several major human rights treaties and the appointment of several Special Rapporteurs and Working Groups at a UN level to investigate the issues. The major initiatives can be summarised as follows.

5.3.1 *Women:*

In terms of the trafficking of women specifically, the Convention on the Elimination of All Forms of Discrimination Against Women (1979) in Article 6 requires all States Parties to "take appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. " The Vienna Declaration and Programme of Action (1993) in section 3 "The Equal Status and Human Rights of Women" calls for similar measures as well as highlighting the human rights abuses which push woman into trafficking. The

[167] D.Weissbrodt and Anti-Slavery International (1999) *Consolidation and Review of the Conventions on Slavery, Executive Summary of the Working Paper,* prepared for the Commission on Prevention of Discrimination and Protection of Minorities Fifty-first session Working Group on Contemporary Forms of Slavery Twenty-fourth session. UN Doc. E/CN.4/Sub.2/1999/--The paper provides a detailed overview of core international law against slavery and the evolving definitions of slavery, contemporary forms of slavery and other related practices including trafficking in people. The above discussion of slavery and forced labour is based extensively on this work.

[168] For expansion refer to Chapter 2 of this report.

[169] For an excellent overview of this activity see IMADR loc.cit. and in terms specifically of the trafficking of women and girls see *Trafficking in Women and Girls* Report of the Secretary- General (1998) UN Doc. A/53/409.

Programme of Action also calls for the appointment of a Special Rapporteur on Violence Against Women. Her subsequent appointment has resulted in drawing attention to the problem, and she has made it clear that her report for the year 2000 will concentrate on this issue.[170] The Beijing Declaration and Platform for Action at the Fourth World Conference on Women (1995) has as one of its strategic objectives the elimination of trafficking in women and the assistance of victims of violence due to prostitution and trafficking by counties of origin, transit and destination. It also widens the scope of trafficking and exploitation to include forced marriage and forced labour. Trafficking in women has also been identified in the Statute of the International Criminal Court as a crime against humanity in Article 7.2(c).

5.3.2 *Children:*

The specific human rights concerns arising from the trafficking of children have been given normative status by the Convention on the Rights of the Child in Articles 34 and 35. Article 35 calls on states to take 'all appropriate national, bilateral and multilateral measures to prevent the abduction, sale of or traffic in children for any purpose or in any form'. It also contains important safeguards against illegal adoption and transfer of children from their parents and particularly stresses that international adoption must not involve 'improper financial gain'. Most importantly, the Convention puts the interests of the child at the centre of any discussion of his or her rights. A working group is currently drafting an optional protocol to the Convention that will explicitly address the sale of children, child prostitution and child pornography.[171]

The Special Rapporteur on the sale of children, child prostitution and child pornography, also gave the issue detailed attention in her 1999 report to the Human Rights Commission.[172] The ILO has also launched an International Programme on the Elimination of Child Labour (IPEC) which in many cases has a specific focus on trafficking. The Commission on Human Rights at its Fifty-first session in July 1999 adopted the ILO Convention on the worst forms of child labour and its accompanying Recommendation, which identified the sale and trafficking of children as a practice similar to slavery.

5.3.3 *Migrants:*

The setting of normative standards to protect the rights of migrants, many of whom may have been trafficked, has received considerably less attention than women and children. The major human rights instruments which give some protection in this respect are the 1990 Convention on

[170] She has already given the issue attention in previous reports see *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Cause and Consequences, Ms Radhika Coomaraswarmy,* (1994) UN Doc. E/CN.4/1995/42, *Report of the Special Rapporteur on Violence against Women, its Cause and Consequences, Ms Radhika Coomaraswarmy,* (1997) UN Doc. E/CN.4/1997/47 and *Report of the Special Rapporteur on Violence against Women, its Cause and Consequences, Ms Radhika Coomaraswarmy, Report of a mission to Poland,* (1996) UN Doc. E/CXN.4/1997/47/Add.1.

[171] For details of the fifth session see E/CN.4/1999/74

[172] *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms Ofelia Calcetas-Santos* (1999) UN Doc. E/CN.4/1999/71 section III

the Protection of the Rights of All Migrant Workers and Members of their Families (which has not as yet been sufficiently ratified to have entered into force) and the ILO Convention concerning Migration for Employment (Revised), 1949 (No.97) and the ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality and Treatment of Migrant Workers, 1975 (No.143), both of which are also poorly ratified. The protection offered by the 1990 Convention is significant in that it stresses that fundamental human rights are the property of all migrant workers and their families, whether documented or undocumented. The Human Rights Commission has recently mandated a working group of Intergovernmental Experts to address the vulnerability of migrants in general, and as a result of this has appointed a Special Rapporteur for the Rights of Migrants.

The human rights framework against trafficking has become progressively more comprehensive. It has developed from only recognising the trafficking of women for sexual exploitation to encompass a much wider definition including many modern forms of slavery. The last fifty years have seen the development of human rights treaties that build on the UDHR and focus on specific groups of people. Provisions that relate to trafficking have been included in most of these treaties and they can be seen as further progress, in so far as they have sought not only to condemn the practice but also to empower the victims of it. They also take a more comprehensive approach to the problem in attempting to address root causes.

In contrast with this concern to protect especially women, children and migrants from trafficking; little attention has been given to the specific human rights of refugees who have become increasingly dependent on trafficking or smuggling in order to reach safety. From the beginning the 1951 Convention has recognised the plight of refugees in this respect through Article 31 which effectively grants the right of illegally entry. However, the success of European border control, especially extra-territorial border control, has meant that the right to leave one's country and seek asylum from persecution, Article 14 of the UDHR, has been progressively undermined to the point that it is practically negated. The following discussion of the Vienna process, therefore, will look at the human rights endemic to trafficking, and especially seek to suggest how any action to combat it, can incorporate adequate refugee protection.

5.4 'The Vienna Process: A Global Initiative'

The importance of the 'Vienna Process' in the fight against trafficking/smuggling is hard to overstate. The High Commissioner for Human Rights has made this very point about specifically the 'trafficking protocol'. She draws attention to the fact that for the first time it could mean that trafficking is defined in international law and reflects that it is over fifty years since the international community last developed an instrument to deal with the problem.[173] However, as

[173] *Informal note by the* HCHR (1999) for the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime Fourth session, Vienna, 28 June-9 July 1999 para. 7.

she also stresses, the Vienna Convention and its two protocols are not human rights instruments; they aim at combating transnational organised crime, and thus, unless adequate human rights protection is incorporated into them, this could be a very dangerous development.

Nevertheless in terms of refugee protection, the two protocols present great opportunities. For the first time since the 1951 Convention, the fact that refugees need to use traffickers/smugglers is being highlighted in an international treaty. It is to the credit of UNHCR, HCHR and the NGO Caucus Against Trafficking that the specific human rights of refugees have been put on the agenda. The 1951 Convention on the Status of Refugees is mentioned in both protocols, however there are still great weaknesses in ensuring refugee protection and these will be discussed below.

The main innovation of the Vienna process is the distinction that it marks out between trafficking and smuggling. The two categories of people that this creates are defined by the protocols as follows:

- Victim of trafficking - someone who has been coerced in some way into being transported for the purpose of involving them in an exploitative practice.

- Smuggled migrant - someone who has requested assistance in order that they can illegally procure entry into a state where they have no right of residence. The arrangement with the smuggler goes no further than procuring entry.

Refugees are more likely to be smuggled than trafficked.[174] However, there are instances where refugees can become involved with traffickers, or indeed, where involvement in the trafficking process can give rise to an asylum claim. There are three major examples of how this can happen:

- Much research into trafficking highlights how traffickers target vulnerable groups. Refugees in camps are an obvious group, especially as 80% of refugees are women and children. IOM has reported that their staff know of instances where young refugee women have been abducted from refugee camps in Albania by members of organised crime syndicates, with the objective of forcing them into prostitution in Italy and elsewhere in West Europe.[175]

- The reality of the limited options for flight mean that some refugees will have to take any option available to them. Engaging the services of a trafficker as opposed to a smuggler, whether knowingly or not may be the only option. This may happen at the outset of the journey or part way through in a transit country.

[174] See J.Morrison (1998) *The Cost of Survival the trafficking of refugees to the UK*, The British Refugee Council, London.
[175] IOM (1999) Traffickers make money through humanitarian crises, In *Trafficking in Migrants,19, p.1.*

- The final example relates to whether victims of trafficking can qualify for refugee status on the grounds of the persecution inherent in trafficking. The area where this is most likely to be the case is concerning women trafficked into forced prostitution where persecution can be determined on the basis of their membership of a social group. A gendered approach to the nature and scope of persecution in terms of refugee law is a relatively new area, however, Tworney[176] has identified a case before the Canadian Convention Refugee Determination Division (CRDD)[177] which could signify great potential for victims of trafficking in this respect. He explains that the board, deemed a Ukrainian woman trafficked into prostitution by Ukrainian organised criminals to be a member of a particular social group, namely impoverished young women from the former Soviet Union. In the strongest of terms and citing Article 27 of CEDAW, the Board stated that "…[the] recruitment and exploitation of young women for the international sex trade by force or threat of force is a fundamental and abhorrent violation of basic human rights. International refugee protection would be a hollow concept if it did not encompass protection of persons finding themselves in the claimants position".

The fact therefore, that refugees can be both smuggled and trafficked underlines the need to ensure that adequate refugee protection is built into both protocols.

Using the two categories identified above, the remainder of this chapter will examine the 'Vienna Process' stage by stage as it relates to the trafficking/smuggling process itself and the human rights abuses which are endemic to all of them. The stages can be identified as follows:

- Entrance into the process
- The journey, whether within or across national boundaries
- Arrival
- Interruption – intervention at any stage by state authorities

5.5 Entrance into the process: through Exploitation or Consensus? Trafficked or Smuggled?

Understanding the reasons why people become involved in trafficking/smuggling are of the utmost importance for governments if they are to develop effective legislation and policies to combat it. The causes behind entrance into the process also determine whether someone will be considered as trafficked or smuggled. Particular attention therefore needs to be given to this stage of the process.

Trafficked people, according to the trafficking protocol are transported against their will to engage in practises to which they have not consented. They therefore, do not seek out the services of traffickers. The result of this conceptualisation has been the inclusion of a strong

[176] Tworney, op. cit., p 32.

[177] *Neuenfeldt*, CRDD, V95-02904, 26 November 1997.

protection principle within the trafficking protocol, in draft article 1, to ensure that the instrument addresses the needs of victims as well as punishing the perpetrators. In contrast, the definition of smuggling, in the smuggling protocol, focuses on intentional procurement for profit of illegal entry.[178] The migrant is taken to have consented to the process and therefore not to be deserving of or needing protection with the result that there is no protection principle in the smuggling protocol.[179] It is also assumed that the migrants' relationship with the smuggler will terminate once the journey is over and that the migrant will not become forced into a situation of, for example debt bondage.

This report accepts the need for the above distinction as indeed do UNHCR and HCHR[180] and recognises that states have a sovereign right to control who enters their territory. However, the following analysis of the issues surrounding entrance into the smuggling process will demonstrate that the practice is not as consensual or as free from human rights abuses as the smuggling process suggests. The case for a more victim centred approach to smuggling as well as trafficking will therefore be presented.

The following three factors are particularly relevant to this discussion:

- The grave human rights abuses, which force people into trafficking, are both well documented and accepted by NGOs and governments alike. They clearly demonstrate that victims need extra protection and support. The violations, particularly of economic and social rights which propel many migrants into the smuggling process, are well documented in many instances, but rarely given due concern by governments.

- The second session of the drafting process brought up the issue whether it is possible in practice to prove coercion. [181] Considering the question whether a person has been coerced or has voluntarily consented is central to their being regarded as trafficked or smuggled, this would seem to be a very significant stumbling block. The issue of consent has been shown, particularly by the women's human rights lobby in reference to prostitution, to be complicated. The issue as to whether acute deprivation of economic rights constitutes some kind of coercion is also relevant.

[178] At the eighth session of the drafting process there were discussions around deleting the wording 'for profit'. This move was successfully opposed by UNHCR and several governments on the grounds that its deletion would risk penalising organisations motivated by humanitarian concerns when helping those fleeing from persecution and violence.
[179] Significant progress towards remedying this however was made at the eighth session of the drafting process. It was agreed to include a protection principle in brackets pending further discussion.
[180] For the eighth session HCHR, UNICEF, IOM and UNHCR issued an Inter-Agency Note on the two draft protocols (produced as an Official Conference Document A/AC.254.27). One of the issues which they raised in this note was the question of the relationship between the two draft protocols. Although supporting the distinction between smuggled person and trafficked victim, they expressed concerns about how easy in practice it would be to identify each group of people. They also asked what would happen of a state ratified one but not both instruments.
[181] footnote 21 to trafficking protocol

- Neither trafficking nor smuggling can be properly explained unless the pull as well as the push factors sustaining the process are explored and understood. There are powerful interest groups sustaining the process and their part in perpetuating many of the human rights abuses associated with trafficking/smuggling needs to be addressed.

5.5.1 The human rights abuses feeding the trafficking/smuggling process

Considerable work has been carried out by Special Rapporteurs and human rights NGOs that explores in detail the human rights abuses pushing various groups of people into trafficking. The UN Special Rapporteur on Violence Against Women recently conceptualised/described trafficking in women as follows:

> "Modern trafficking practices demand that we reconceptualise the trafficking problem in light of the human rights abuses endemic to trafficking. The absence of viable economic opportunities, the inequitable distribution of wealth between and within countries, and the continued and increasing social and economic marginalisation of women in many countries render women vulnerable to traffickers deceptive promises of better opportunities abroad."[182]

Many women's groups have carried out extensive research into the sexual and racial discrimination as well as the economic and social marginalisation of women in many parts of the world, which often forces them into the hands of traffickers.[183]

The human rights abuses at the root cause of trafficking in children, particularly when the child being trafficked is a girl, are very similar to those sustaining trafficking in women. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has identified the causes of trafficking in children to be largely related to structural human rights abuses: poverty, lack of employment opportunities, low social status of the girl child, leading to lack of education.[184] A recent report for ECOSOC prepared by HCHR put the issue more directly:

> "The relative impact of various 'causes' will depend upon a wide range of variables. It is therefore not possible to present a definitive list of trafficking causes which will apply equally to all regions and all situations. There is however, one uniting and pervasive

[182] R.Commaraswamy (1999) *Keynote Speech* p.26 In *NGO Consultation with the UN/IGOs on Trafficking in Persons, Prostitution and the Global Sex Industry "Trafficking and the Global Sex Industry: Need for Human Rights Framework"* June 21-22 1999 Room XII Palais des Nations, Geneva, Switzerland.
[183] See IMADR op.cit., and International Human Rights Law Group (1999) *Recommendations* p.8 In *NGO Consultation with the UN/IGOs on Trafficking in Persons, Prostitution and the Global Sex Industry "Trafficking and the Global Sex Industry: Need for Human Rights Framework"* June 21-22 1999 Room XII Palais des Nations, Geneva, Switzerland
[184] *Calcetas-Santos, op. cit., para. 49.*

> factor: the multi-layered discrimination and equality which serve to prevent women and girls from exercising power over their lives."[185]

Even when entrance into the trafficking process involves family members 'selling' their women or children, the fact that this action could be prompted by a desperate economic situation must also be considered.

A similar scenario is often the case with migrant workers. A report by Migrants Rights Watch describes one of the trends causing mass migration as: "The increasingly severe breakdown of economic, political and environmental situations are making it more difficult for people to survive and remain in their traditional communities and countries". The report goes on to state that:

> "Migrants- and migration- are becoming stigmatised as a major threat to host societies. Migrants themselves are increasingly associated with crime and other ills, in short, criminalized. Nowhere is this more apparent than in their now widespread designation as 'illegals' (instead of undocumented or irregular migrants).. Governments world-wide, following the lead of the industrialised countries, are imposing restrictive immigration controls and draconian 'deterrence measures' against the movement of people. In national and international fora, the dominant considerations regarding displacement of people have deteriorated from assistance and hospitality to rejection and hostility."[186]

And this is the crux of the issue. Violations of economic and social rights do not give individuals the automatic right of irregular migration and illegal entry into other countries. However, the absence of any desire by States to recognises all the human rights abuses at the root of the trafficking/smuggling process, including economic and social rights, is very apparent. Beyond the very brief mention of the need for a 'global approach including socio-economic measures'[187] to counter the phenomenon, the protocol is evidence of governments' neglect of their human rights obligations under international law. Without losing sight of the fact that victims of trafficking are subjected to exploitative practices after transportation, whereas smuggled migrants are not, a case could be made for arguing that the causes of trafficking and smuggling are in fact very similar. It could also be suggested that without a comprehensive approach embracing protection of social and economic rights the instrument will have limited success as it is not addressing root causes.[188]

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[185] *Trafficking in Women and Girls Note Prepared by the OHCHR and the Economic Commission for Europe secretariat* (1999) for the Regional Preparatory Meeting on the 2000 Review of Implementation of the Beijing Platform for Action January 2000 para. 19 UN Doc. E/ECE/RW.2/2000/3.

[186] P.Taran (1999) *Migration, Globalisation and Human Rights: New Challenges for Africa* Presentation for the ICJ Workshop: African Commission on Human and Peoples Rights, Kigali, Rwanda, 28 October-5November, 1999.

[187] Preamble to the *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organised Crime* para (i) UN Doc. A/AC.254/4/Add.1/Rev.3

[188] This point is made in the Inter Agency Note op.cit. para. 12

5.5.2 The issue of consent and how to prove it

The fight against trafficking in human rights terms has traditionally been linked to the fight against prostitution. However, the issue as to whether all prostitution is forced and thus, whether any woman can voluntarily consent to prostitution has always split the women's human rights lobby. This has implications for the process at Vienna, as it could argued that not all women involved in the prostitution industry have been trafficked and that instead they may have been smuggled to engage in sex work.[189] This observation shows the complexities of the human rights issues involved in the trafficking/smuggling debate and the need for governments to think very clearly about the designation of certain categories of people as victims, in order to avoid being paternalistic or discriminatory.

An area where economic deprivation and the issue of force are less complicated is when children are involved. The issue surfaces most often in reference to the trafficking of children for international adoption, especially when they are being trafficker from poor to wealthier parents. Against the argument that this practice can be justified if the child ends up in a better situation than its original one, the Special Rapporteur has stated,

> "Trafficking of a person that reduces that person to the level of a commodity and is therefore inherently condemnable, regardless of the ultimate purpose for which it is carried out. Thus the argument that in most cases of adoption the children end up in much improved living conditions, would not in any way justify the trafficking of babies and children."[190]

The complexities surrounding the issue of consent are also very crucial if it is accepted that social and economic rights abuse cause entry into the trafficking/smuggling process. Weissbrodt and others have argued that "the question of whether economic imperatives constitute a form of force is pertinent".[191] IOM have also written:

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[189] For details of the debate within the women's human rights lobby consult *Panel A and Panel B* In NGO Consultation with the UN/IGOs on Trafficking in Persons, Prostitution and the Global Sex Industry "Trafficking and the Global Sex Industry: Need for Human Rights Framework" June 21-22 1999 Room XII Palais des Nations, Geneva, Switzerland Much of the human rights research on women and trafficking, is dominated by the prostitution debate. Those who argue that all prostitution is forced prostitution see prostitution itself as a human rights abuse and call for its abolition, whilst those that argue for a distinction between voluntary and forced prostitution, concentrate more on the conditions in which prostitution occurs and argue for regularisaation of the industry, to guard against the exploitation of prostitutes.

[190] *Calcetas-Santos, op. cit., para* . 47 Attempts to stem abuses resulting from commercialism and malpractice attendant upon intercountry adoption were given force by the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993, which entered into force on 1 May 1995.

[191] Weissbrodt op. cit., para.17.

> "The question of the voluntariness of the movement of trafficked migrants merits particular attention. For many migrants who are eager to escape poverty or political and social insecurity, and who are unaware or unmindful of the pitfalls of irregular migration, it seems worth paying a fee to try their luck, thereby allowing their dream for a better life to be exploited by traffickers. Still, in many instances, trafficked migrants are lured by false promises, misled by misinformation concerning migration regulations, or driven by economic despair or large-scale violence. In such cases, the migrant's freedom of choice is so seriously impaired that the "voluntariness"of the transaction must be questioned"[192]

Clearly, deception can also be seen as a manifestation of force and thus the designation of only a trafficked person as a victim by the draft protocols becomes difficult to sustain. The fact that the smuggling protocol also does not criminalise the migrant only the smuggler (draft article 4.7) would suggest that there is some recognition by governments of the vulnerability of the migrant who, although having consented to the transaction, is still in the hands of organised criminals. The acknowledgement in the original draft protocol that "illegal trafficking and transport of migrants is a particularly heinous form of transnational exploitation of individuals in distress' has been removed[193], however there is still a reference to the fact that smuggling 'can endanger the lives and security of individual migrants involved'. This would suggest that governments are aware of this contradiction.
Once again the need for a protection principle within the smuggling protocol is demonstrated, as is the need for a wider understanding of the human rights abuses sustaining the trafficking/smuggling process.

5.5.3 Trafficking and smuggling: the pull as well as the push factors

The need to understand the pull as well as the push factors driving the trafficking/smuggling process is illustrated by the following comment from Anti-Slavery International on the growth of the global sex industry:

> "...the current mass involvement of migrant women in the global sex industry has implications which go beyond the issue of the individual rights of the women (and men) involved, who may be looking to better themselves and their families. The issue, to put it bluntly, is that the poverty of certain regions of the world makes their women available to the men of the industrialised world for sex in return for money. This is much more than a labour rights issue or an issue to do with unequal development. It is a basic human rights issue because it entails such a massive form of discrimination."[194]

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[192] See "Irregular Migration and Migrant Trafficking: An Overview", Background Paper submitted by IOM p3
[193] This observation is made by the NGO Caucus *Joint Submission* to the Sixth Session of the Vienna Process para. 8.
[194] Dottridge op. cit., pp.82-3.

This example's subjects, sex workers and the global sex industry, could quite easily be substituted for migrant workers and the illegal sweatshop labour market. Trafficking and smuggling occur because there is a demand for the labour/services that the victims/subjects provide. Any attempt to counter trafficking/smuggling will fail unless the wider issues and the human rights abuses involved in them are recognised and addressed. For example, in the case of the trafficking and smuggling of migrant workers to fulfil the demands of the informal labour market, it has been convincingly argued that there are enough benefits for those who profit from the availability of the lower cost of illegal and often trafficked migrants to sustain this process. The failure of many receiving states to recognise their labour needs and to adopt clearly formulated policies further fuels the problem.[195] The preamble to the 1990 Convention on the Rights of Migrants includes the following paragraph which explains the vicious circle of human rights abuses sustaining this process:

> "'Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognised and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned"

With respect to the sex industry a recent report by the ILO[196] recognised prostitution as sex work and called for labour standards and protection to be built into the industry to empower those working in it. It argued that women who voluntarily choose to enter prostitution would be much more effectively protected from any exploitation of their labour if the industry were regulated so that those working in it could bring grievances for redress.

5.6 The Journey

Victims of trafficking and smuggling may suffer human rights abuses during their journey, which may or may not be across an international border. IOM's Bulletin, 'Trafficking in Migrants' and Migration NewsSheet both regularly record instances of migrants and refugees being crammed into airless containers or overfilled boats. [197] Migrants are also often not informed or are misled as to how they will be transported and if the journey involves crossing a national border, the method in which this will be carried out. Even if a person has consented to the process and the

[195] J. A.Bustamente (1998) Chairman/Rapporteur of the working group of intergovernmental experts on the human rights of migrants *Working Paper*, UN Doc. E/CN.4/AC.46/1998/5 and *Report of the working group on intergovernmental experts on the human rights of migrants*, 1999, UN Doc. E/CN.4/1999/80.
[196] Lim Leam Lin edt (1998) *The Sex Sector*, ILO.
[197] UNITED an NGO attributed over 1000 documented deaths to trafficking and related policies of enforcement between 1995 and 1998 see UNITED (1998) *Information* leaflet number 14,

problems with this issue have been illustrated above, both protocols only refer to organised crime and so implicit in any situation is the power relationship between the agent and the subject.

In extreme cases transportation may amount to slavery, in that the agent exerts powers of ownership over the victim, at the very least the migrant is dependent on the agent to complete the journey. The case for including a protection principle within the smuggling protocol is obvious. Smuggled migrants in an irregular situation are especially vulnerable to the whims of their agents, who are aware that their illegal status renders them less likely to gain state protection, should the process be interrupted or should they voluntarily seek protection. The case for including a protection principle within the smuggling protocol is obvious.

5.7 Arrival

The exploitative practices into which victims of trafficking are pushed on arrival at their destination are well documented by human rights groups. The Special Rapporteur on Violence Against Women has reported,

> "Women find themselves living under slavery-like conditions, not only as prostitutes, but also as domestic and factory workers, and in forced marriages. Employers often illegally confine these women, confiscate their passports and identification, and force them to work excessive hours and under inhumane conditions. They often beat and rape them, and withhold their wages until the 'debt' of their recruitment is paid off. Meanwhile, the threat of reprisals and the lack of identity papers prevent many of them from being able to escape the abuse."[198]

The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has identified the following main practices for which children are trafficked or sold: adoption, begging, armed conflict, sports, marriage, prostitution, pornography and trafficking in organs.[199]

Smuggled migrants, by virtue of the definition in the draft protocol, should exit the process at this stage. However, it could be argued that, someone can be a smuggled migrant one day and a trafficked victim the next. A migrant may enlist the services of a smuggler for the purpose of illegal entry into a state, but upon arrival be forced into some kind of exploitative enterprise to which they have not consented.

The wider issue of the vulnerability of even the regular migrant to the trafficking process needs to be considered. As the definition of trafficking in the draft protocol does not mention the need to cross an international border, it is quite plausible that a regular migrant, through lack of other viable economic alternatives could become co-opted into the exploitative labour practices

[198] R.Commaraswamy op.cit., *Keynote Speech*
[199] *Calcetas-Santos, op. cit.*, section 2.

associated with the trafficking process. This issue has been addressed by the Chairman of the Intergovernmental Group on the Rights of Migrants and he concludes that it is the lack of human rights protection accorded to regular migrants which makes them vulnerable to exploitative practices. He speaks of the 'structural vulnerability' of migrants both regular and irregular, and thus their vulnerability to the trafficking process.[200] Away from their state of origin they encounter difficulties because of problems with language, custom and culture. A newly arrived migrant/migrant family will also lack a network of social support. Their vulnerability will be compounded by recent manifestations of racism and xenophobia in Europe in particular. Once they become involved in illegal practice, like other victims, they then enter a circle of exploitation from which it is very difficult to extricate themselves. The call for the recognition of the rights of migrant workers is made once more.

On arrival at their destination, refugees should be able to claim asylum, which should then automatically guarantee them adequate protection. The rights issues involved in assuring proper access to the asylum process should a refugee be interrupted mid journey, and specifically at sea will be addressed in the next section. However, UNHCR and HCHR have highlighted their main concerns about the impact which trafficking/smuggling can have on an asylum claim. They relate to the consequences of having effected illegal entry and the use of fraudulent documents. Article 31 of the Refugee Convention states that refugees may often have to use illegal means to enter a state to claim asylum and that this should not adversely affect them as long as they prevent themselves to the authorities without due delay. In practice it is often very difficult for refugees to know whom to prevent themselves to with the result that there is considerable delay. In this respect the HCHR,

> 'strongly advocates the insertion of a provision to the effect that illegality of an individuals entry into a State will not be a factor adversely that persons claim for asylum'[201]

UNHCR has raised its concern about the provisions in Article 4(2) which seeks to criminalise 'the using, possessing, dealing with and acting on fraudulent travel or identity documents. They suggest that this provision would seem to contradict protection granted to refugees by Article 31 of the Convention. As a result UNHCR has advocated insertion of a clause into Article 4 which states that its application should be without prejudice to the obligations of Article 31.

The vulnerability of all groups, whether smuggled or trafficked has been exposed, as has the complexity of the rights issues involved. If proper human rights protection is to be achieved, the need to understand these complexities is particularly crucial for those government officials who may intercept the process at any of its stages.

[200] Bustamente loc. cit.
[201] HCHR Informal Note op. cit., para. 8.

5.8 Intervention in the Trafficking/Smuggling Process:

Any anti-trafficking or anti-smuggling initiative will only add further human rights abuses to the list unless they incorporate human rights training for officials involved in intercepting the process. It has been re-iterated many times in this chapter that the lack of a protection principle in the smuggling protocol is highly dangerous. If the fundamental human rights of migrants, regular or irregular are not merited as important enough to mention in a legal instrument, the chances of them being followed in practice are even slimmer. HCHR has made the following comment on this issue by urging for the insertion of,

> 'a provision to the effect that Member States are under an obligation to ensure respect for and protection of the rights of illegal migrants, which are owed to them under applicable international law. Such a general provision could be strengthen through reference to the core rights to which irregular or illegal migrants are entitled, including the rights to life; the prohibition of torture and cruel, inhuman or degrading treatment or punishment; and the principle of non-discrimination'[202]

Migrant Rights Watch have also drawn attention to the issue. Taran has explained how the current widespread categorisation of undocumented migrants as 'illegal migrants' effectively removes them from the protection of the law. He states that,

> 'The imagery of this categorisation is of persons with no legal status, no legal identity, no existence. This practice is a denial of the fundamental human rights enshrined in the UDHR, Article 6 which states that every human being has a right to recognition before the law, and article 7 which states that every person has a right to due process.'[203]

Smuggled migrants are often detained without review for long periods of time on account of their illegal entry or presence in a state. HCHR's concern on this particular issues is emphasised by a specific reference in her informal note. She notes that,

> 'Irregular or illegal migrants who are detained by the receiving State, have recognised rights under international law to be treated with humanity and dignity - both before and after a determination is made concerning the lawfulness of their detention. The practical importance of this right justifies a direct and specific reference in the Protocol'.[204]

Victims of trafficking on account of the inherently exploitative nature of the process have been recognised by the Vienna process as being deserving of extra protection and assistance. This is an initiative which has been strongly supported and indeed probably driven by human rights groups. HCHR has noted with concern however, that victim protection and assistance

[202] HCHR Informal Note op. cit., para. 6.
[203] Taran op.cit., p.7.
[204] HCHR Informal Note op. cit., para. 7.

provisions in the trafficking protocol are weak and that unless victim support is extensive enough, victims of trafficking will have little to gain from co-operating with the police to combat trafficking but more importantly will have little faith in approaching the police themselves.[205] The Special Rapporteur on Violence Against Women has also devoted particular attention to this issue. She discusses it within the context of 'the atmosphere of discrimination and marginalisation' which female victims of trafficking often find themselves in and she advocates the insertion of a strong non-discrimination principle into the trafficking protocol.[206]

HCHR has indicated that they will shortly be releasing a comprehensive list of guidelines for the treatment of trafficked people. However, in her informal note she stresses the importance of ensuring that trafficked persons are not detained on account of their illegal status or entry. She also makes reference to the need for adequate witness protection should a person become involved in legal proceedings. Assistance provisions in terms of housing and health care should also meet international human rights standards.[207] The Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women and the International Human Rights Law Group, have also produced a document entitled 'Human Rights Standards for the Treatment of Trafficked Persons'[208] which provides a very comprehensive survey of the necessary safeguards. The specific vulnerability of trafficked children are addressed by the NGO Caucus by drawing attention to the specific rights provisions in the Convention on the Rights of the Child.[209]

The point made by human rights groups in respect of the treatment of all groups of trafficked/smuggled people is that internationally recognised human rights instruments have been created, for example the International Convention on the Elimination of All Forms of Discrimination Against women, Convention on the Rights of the Child and 1990 Convention on the Rights of Migrants and thus they should be adhered to. There is no call for the creation of new international human rights norms, merely respect for existing ones[210]. A footnote (number 5) to the discussion on the trafficking protocol at the fifth session suggests that the preamble should make specific reference to other relevant human rights treaties and not just the provision of the Covenant which it accompanies. This provision should obviously be extended to the smuggling protocol.

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[205] HCHR Informal Note op. cit., para. 16.
[206] R. Coomaraswarmy (1999) *Position Paper on the Draft Protocol To Prevent, Suppress and Punish Trafficking in Women* Submitted by the Special Rapporteur on Violence against Women to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime Fourth session, Vienna, 28 June-9 July 1999 UN Doc. A/AC.254/CRP.13
[207] HCHR Informal Note op. cit., para 16-19.
[208] Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women and the International Human Rights Law Group (1999)*'Human Rights Standards for the Treatment of Trafficked Persons'* [Online] Available: http://www.inet.co.th/org/gaatw/|SMR99.htm [1999, November 12]
[209] NGO Caucus Joint Submission op.cit., section (c).
[210] This is something which the NGO Caucus stresses in their *Joint Submission.*

Refugees obviously require the basic and specific human rights protection discussed above. However on account of their special status in international law, they particularly require adequate access, including full information on how to claim asylum. Thus any set of guidelines to advise on how to treat trafficked and smuggled people would be incomplete unless it provided for the above.

Chapter 2 of this report demonstrated that the vast majority of asylum-seekers now enter Europe in an irregular fashion and more than likely with the assistance of traffickers and smugglers. It also argued that the main nationalities who are trafficked/smuggled are those who go on to gain refugee status. Indeed the central thesis of this report is that with respect to Europe, an anti-trafficking/smuggling policy in the context of the current situation around access to Europe is in effect an anti-refugee policy. The potential for anti-trafficking and smuggling initiatives to cause violations of refugee rights is thus very great.

Chapter 3 explored in detail the implications of deploying Airline Liaison Officers and how their activity, although very hard to prove must result in the refoulement of refugees. Anti-trafficking and smuggling initiatives operating in countries of origin must therefore be particularly aware that it is more than likely that their actions negate the right of refugees to leave their own country and seek asylum from persecution (Article 14 UDHR).

The issue of freedom of movement and the effect that anti-trafficking and smuggling initiatives may have on this right has also been shown to be an issue, particularly in relation to women. The HCHR has said:

> "… national anti-trafficking measures have been used in some situations to discriminate against women and other groups in a manner that amounts to a denial of their basic right to leave a country and to migrate legally"[211]

HCHR has drawn attention to the fact that the US Consulates in Central and Eastern Europe have already begun to refuse visas to women whom they think are of the age at which they could be susceptible to trafficking. The government of Nepal is also in the process of enacting a law that will prevent women of a certain age from migrating. Both of these initiatives are being justified as anti-trafficking initiatives." [212]

Interdiction of the trafficking/smuggling process at sea poses specific dangers for refugees. The current provisions in the smuggling protocol do not clearly delineate which state – the flag state, the state in whose jurisdiction the ship is, or the state of the ship carrying out the interdiction, has responsibility for examining the asylum claim. There is also no mention in either protocol of the need for specific protection for stowaways at sea. Although the 1957 Brussels Convention on Stowaways has never received enough ratifications to enter into force the IMO has produced

[211] HCHR Informal Note , op. cit., para. 25.
[212]Conversation of the researcher with the adviser to the OHCHR on trafficking.

guidelines for dealing with stowaways which include the issues of access to the asylum procedure which could act as a guide. The implications of the Safety of Life at Sea (SOLAS) Convention which limits the number of passengers which any commercial ship or boat can carry must also be considered. Blind adherence to this instrument could result in a ship being forced to return to its point of embarkation. All these eventualities could result in the *refoulement* of refugees.

Much research on trafficking by human rights groups advocates the need for effective victim 'restitution, compensation and assistance' including access to justice and if necessary temporary residence permits. The HCHR notes that under international human rights law, victims of violations should be 'provided with access to adequate and appropriate remedies' and expresses concern about the way in which the trafficking protocol fails to live up to these standards.[213]

Many victims of trafficking will be returned to where they have come from and indeed this will be the express wish of some. However as much research into trafficking shows, victims have often been sold into the trafficking process by family or members of their close community and so a thorough investigation of a victims situation must be carried out so as not to allow revictimisation on return. The work of IMADR also draws attention to the fact that once women are involved in the trafficking process, it is very difficult for them to break out of it. They become involved in a vicious circle of economic and social marginalisation. Even if a woman manages to escape from for example, forced prostitution, the stigma of having been associated with this practice may mean near permanent isolation from her original support system, which can result in a push back into the trafficking process.[214] The NGO Caucus has also drawn attention to the specific obligations on states to investigate the situation to which children are returned.[215]

Smuggled migrants, in view of a states sovereign right to control who enters their country will obviously have to be returned, but this should be carried out in a way which ensures the full dignity of the migrants in question.

Refugees by law cannot and should never be returned until they have had a full determination process as laid down in the 1951 Convention.

By way of summing up - The two Vienna protocols are not human rights instruments, but as the HCHR and the ECE have said,

> 'Human rights are not a separate consideration or an additional perspective. They are the common thread which should unite all anti-trafficking efforts.'[216]

[213] HCHR Informal Note op. cit., para. 22-24.
[214] IMADR op.cit., p.6.
[215] NGO Caucus Joint Submission op.cit., section (d).
[216] HCHR and ECE *Trafficking in Women and Girls Note*, op.cit., para. 56.

The international community has developed a large number of human rights norms on this issue and so they should not be ignored. Trafficking and much smuggling are inherently abusive, but crucially any attempts to counter it must not add to that abuse. The vast majority of refugees who claim asylum in Europe are trafficked/smuggled and anti-trafficking/smuggling initiatives must be very mindful of this. The possibilities for *refoulement* are very real unless adequate refugee protection is built into combative measures. Governments need to develop effective anti-trafficking/smuggling legislation and programmes but they must also address the issue that trafficking/smuggling at present represents the only way for many refugees to exercise their right to seek asylum in Europe.

The lack of a protection principle in the smuggling protocol as it stands is detrimental to all victims of the process. The difficulty in practice of differentiating the trafficked from the smuggled makes this need all the more pressing. Governments also need to address the issue that trafficking/smuggling are not isolated phenomenon, they are the products of an inherently discriminatory and abusive environment. Unless the rights abuses at the root cause of the problem are addressed, any initiative to defeat the practice will not only fail but is also likely to push the practice further underground and in so doing force it to take on even more abusive forms.

6 A COMPREHENSIVE APPROCH TO ASYLUM, TRAFFICKING AND SMUGGLING

6.1 Comprehensive approaches to migration

A consensus has developed within the European Union and elsewhere that a 'comprehensive approach' to migration is required. For the first time the *High Level Working Group on Asylum and Migration* has brought together second and third pillar perspectives on migration (i.e. Foreign policy and Justice and Home Affairs) into one forum. The Action Plans that have so far emerged stress the need to European augment border enforcement policies with development and humanitarian assistance in the region surrounding the refugee-producing state. The Action Plans and the Presidential Conclusions at Tampere also call for policies that tackle the root causes of forced migration:

> "The European Union needs a comprehensive approach to migration addressing political, human rights and develop issues in countries and regions of origin and transit. This requires combating poverty, improving life conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular the rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnerships with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development."[217]

The five Action Plans adopted by Foreign Ministers on 11 October 1999[218] entered a stage of expert working groups, that in part included the participation of UNHCR, IOM and ICRC and NGOs such as ECRE, Amnesty International and Medicins Sans Frontiere. Comprehensive can at least mean being more inclusive.

6.1.1 *What is a comprehensive approach?*

This report has noted that all the asylum-seekers are rarely overlooked statistically in analyses of European migration, there are substantial differences in the attention given to their basic human rights and their protection needs in the range of proposed 'solutions'. At a minimum, consensus exists that no comprehensive approach can afford to be dominated by enforcement concerns alone:

[217] Paragraph 11 of the *Presidency Conclusions of the Tampere European Council* held in Finland between 15 and 16 October 1999.
[218] The *EU High Level Working Group on Asylum and Migration* Action Plans on Somalia, Afghanistan, Sri Lanka, Iraq, Morocco and Albania, Brussels, made public on 11 October 1999.

> " Although … stricter border control and related punitive measures are potent instruments to combat irregular flows (with some dissuasive effect also on future movements), their limits need to be recognised… A comprehensive strategy should combine three types of action: (a) punitive and remedial measures against current irregular migration; (b) preventative measures to attenuate the immediate pressure for irregular migration and redress root causes; and (c) legal and institutional measures to sustain and help implement remedial and preventative action and remove those direct causes of irregular migration that are linked to existing legal and institutional deficiencies."[219]

At heart any comprehensive approach has to balance the interest of states (sovereignty and control) against the rights of individuals (all citizens of Europe as well as refugees). Proposed solutions need to be sustainable and their impact needs in some way to be measurable. At the end of the twentieth century, in particular between 1997 and 1999, there were a range of such 'comprehensive' plans suggested by academics, advisors and Governments themselves, some being more comprehensive than others. A selection of these are listed in the Table Six below:

TABLE SIX:

Examples of some of the 'comprehensive approaches' to migration suggested in recent years that have applicability to Europe
The 1999 Tampere Declaration and the Action Plans of the European Union's High Level Working Group on Asylum and Migration. The ongoing work of the European Commission under the Treaty of Amsterdam and the implementation of specific initiatives from 2000 under the 'scoreboard' system.
Efficient, effective and encompassing approaches to a European Immigration and Asylum Policy, a draft paper by the *Academic Group on [Im]migration - Tampere (AGIT)*, June 1999, shortly to be published in the *International Journal of Refugee Law.*
The recommendations of the *Conference of Ministers on the Prevention of Illegal Migration*, held in Prague in October 1997 and the ongoing work of the Budapest Process supported *by International Council for Migration Policy Development (ICMPD)* in Vienna.
The recommendations of Bimal Ghosh (1998) in his book 'Huddled Masses and Uncertain Shores: Insights into Irregular Migration' written for the *International Organisation for Migration (IOM)* in Geneva.
The refugee law 'reformulation' movement during the 1990s and best epitomised by the work of James Hathaway. Specific recommendations are made to the European Union

[219] Bimal Ghosh (1998) *Huddled Masses and Uncertain Shores: Insights into Irregular Migration*, IOM, Martinus Nijhoff Publishers: The Hague.

states in papers such as: Hathaway and Neve (1998) 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection, *Harvard Human Rights Journal*, Vol.10.
1994 ('Flynn') Communication form the European Commission to the Council of the European Union, considered as a valuable comprehensive approach to refugee and migration problems.

Clearly the approaches set out by above lie on a spectrum, at one end those that emphasize the individual human rights of refugees above all else (such as the work of Hathaway or the 'AGIT' group), and at the other extreme the focus on national border enforcement and migration control of the Budapest Process. However, as stated in the Introductory Chapter of this report, all approaches are trying to explain and address what is basically the same phenomenon, that of irregular migration into Europe with a large proportion of the migrants lodging asylum claims upon arrival.

6.1.2 *Some minimum criteria for a comprehensive approach that embodies refugee protection*

Comprehensive approaches that are serious about providing durable solutions for refugees, as well as controlling irregular migration, need to give at least some weight to the following factors:

- Fundamental principles behind migration policy

Border enforcement and Control:

- Effective border enforcement
- Tackling organised crime and protecting victims

Regional solutions outside of Europe:

- Long-term development objectives in the region or country of origin ('root causes')
- Reception in the region
- Human rights and civil society

Managing migrants and refugees within the European Union:

- Legal rights of asylum-seekers and refugees
- Family reunion
- Better balance of responsibilities between European states
- Return of refugees and other migrants
- Socio-economic rights given to migrants and their integration in host societies.
- Quotas of legal immigration
- Tackling racism and xenophobia in the European Union
- Public information campaigns
- Training and technical assistance

6.2 An analysis of the key elements

6.2.1 *Fundamental principles behind migration policy*

All comprehensive analysis of migration in Europe need draw on some under-pinning principles. These principles are not always made explicit but they have determined the way the 'problem' of irregular migration is framed and the priority of the solutions offered. These principles can be briefing summarised as:

- **Sovereignty**: the recognition between States that each has the right to enforce their own borders, each within common travel areas such as Schengen or that between the United Kingdom and Ireland. Although the economic and political relevance of many borders have now greatly diminished, they still hold great symbolic identity for nation states. If migration has become 'high politics' in recent years[220], then it is largely because it is seen to challenge the Cold War certainties that compartmentalised the planet along ideological lines. The arrival of migrants into European societies is a very tangible symptom of the much deeper impotence of individual nations in the age of globalisation and is perceived as a direct threat to the political survival of elected governments.[221]
- **Security**: the national security interests of states can be directly challenged by the flow of migrants and so there is a diplomatic and military incentive for prevention and containment. The *Balkans Stability Pact* is a classic example of, if somewhat belated, strategic approach from the international community to the management of whole populations of peoples living in adjoining countries and localities.
- **Maintaining or challenging the status quo**: Although Europe is now a continent of immigration rather than emigration it does not perceive itself as such. With birth-rates amongst European populations falling, migration [limited though it is] now accounts for 60% of Western Europe's total population growth.[222] Yet there are few demographic projections of multi-ethnicity to compare with North America or Australia. There are very few elected officials in Europe prepared to promote a vision of Europe that radically departs from many hundreds of years of mainstream white Christian hegemony.
- **Asylum and human rights**: Europe's identity, its two permanent seats on the UN Security Council and the legitimacy of its military interventions rely, in some degree, on the perception of Europe as a guardian of human rights. This is recognised in the Tampere Conclusions:

[220] See: Sharon Stanton Russell (1996) 'International Migration: Global Trends and National Responses', *The Fletcher Forum of World Affairs*, Vol. 20(2).
[221] See: Okmae (1995); Strange (1996); Collinson (1999) *op. cit.*
[222] SOPEMI (1998), Trends in International Migration 1997, Organisation for Economic Co-operation and Development (OECD), Paris.

> "From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law….."[223]

That these conclusions make reference to the access to Europe territory for protection is relevant. The right to seek asylum remains a fundamental human right and does the responsibility of *non-refoulement*.

6.2.2 *Border enforcement and Control:*

States clearly have a sovereign right and duty to protect their borders. Many Governments see rigorous border and pre-border enforcement as preferable to tightening too many internal controls:

> " None of the policy choices for preventing the entry of large numbers of illegals is morally attractive. Border controls may entail extensive military surveillance, barbed-wire fences, visa checks at border posts and by airlines, and other controls that can be personally irritating and humiliating as well as insulting to neighbouring states with which one has friendly associations. The alternative may entail internal checks involving employer sanctions, identity cards for all citizens and legal residents, police raids on small businesses where illegals may be employed, and fines and prison sentences for illegals - policies that are intrusive for employers and for residents and may put at risk legal immigrants and people of the same ethnic background as those who are in the country illegally. Again, both choices are unattractive, but most governments (and their citizens) would clearly prefer border controls as these are the least intrusive for citizens and legal residents."[224]

Some commentators defend controls as essential for defending any future integrity of asylum policy itself:

> " For a country to have an acceptable immigration policy, it must be able to control illegal immigration. And for a country to have an acceptable refugee policy, it must be able to prevent large numbers of immigrants from entering under false asylum claims. The unwillingness of governments to take steps to halt the unwanted mass influx of foreigners can erode immigration and refugee policies, strengthen [extreme] right-wing parties, and generate xenophobic fears that may put democratic society at risk."[225]

But central to our analysis here (and discussed in Chapter Three of this report) is the contention that the border enforcement agenda contradicts the safeguards of access to European territory and guarantees of *non-refoulement*, as a result of such control policies. Most of the

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[223] EU Presidency Conclusions in Tampere (1999) *op. cit.*
[224] Myron Weiner (1995) *The Global Migration Crisis: Challenge to States and to Human Rights*, New York: Harper Collins.
[225] Myron Weiner (1995) *op. cit.*

comprehensive approaches give little attention to the responsibility on States to safeguard the right to asylum as a fundamental human right:

> " The responsibility rests with the returning State, and it is only discharged if it is scrupulously elaborated by an individual assessment that the refugee will be granted unlimited access to the determination procedure after arrival in the third State, A general agreement to shift the responsibility does not relieve the returning State from this essential procedural remedy."[226]

6.2.3 *Tackling organised crime and protecting victims*

As discussed in Chapter Five, there is now a conceptual difference between smuggling and trafficking, and it is in the latter process that the migrants are most readily perceived as victims. Yet both trafficking and much smuggling are inherently abusive. Any attempts to counter it must not add to that abuse. As a large percentage of refugees who claim asylum in Europe are trafficked/smuggled, anti-trafficking/smuggling initiatives must be very mindful of this. The possibilities for *refoulement* are very real unless adequate refugee protection is built into combative measures. Governments need to develop effective anti-trafficking/smuggling legislation and programmes but they must also address the issue that trafficking/smuggling at present represents the only way for many refugees to exercise their right to seek asylum in Europe.

The lack of a protection principle in the smuggling protocol as it stands is detrimental to all victims of the process. The difficulty in practice of differentiating the trafficked from the smuggled makes this need all the more pressing. Governments also need to address the issue that trafficking/smuggling are not isolated phenomenon, they are the products of an inherently discriminatory and abusive environment. Unless the rights abuses at the root cause of the problem are addressed, any initiative to defeat the practice will not only fail but is also likely to push the practice further underground and in so doing force it to take on even more abusive forms.

Chapter Four of this report raised concerns about how refugees risk being criminalised because of their method of irregular migration into the European Union. There does not seem to be enough attention paid in international fora about the human rights rationale for irregular migration, not least the imperative for escaping persecution.

6.2.4 *Long-term development objectives in the region or country of origin ('root causes'*

[226] Reinhard Marx (1995) 'Non-refoulement, access to procedures, and responsibility for determining refugee claims', *International Journal of Refugee Law* Vol.7(3), Oxford University Press.

The European Union Country Action Plans puts considerable weight on the development of civil society and human rights in countries of origin in order to try and diminish the incidence of irregular migration in future years.

For example, in the case of Afghanistan:

> " The EU supports the call of the UN Special Rapporteur for Afghanistan, Mr Kamal Hossain, for an overall strategy to uphold and implement human rights in Afghanistan. In this context, the EU will support the deployment of a UN special civil affairs unit whose primary objective will be to monitor the human rights situation in Afghanistan."[227]

And Somalia:

> " Enhance practical co-operation with de facto authorities in the region to tackle illegal immigration racketeering…. Draw up a plan specifically targeted at the reduction of trafficking in children and enhance co-operation with NGOs in the region with the aim of running information campaigns on the destructive effects of trafficking in children"[228]

European Governments have also recognised that underpinning economic and social conditions both cause migration and also heighten the chances of political persecution.

E.U. members have submitted details of all bilateral aid and major trading programmes with Afghanistan, Albania, Iraq*, Somalia, Sri Lanka and Morocco (* in some case these contacts are very limited) with the intention that both bilateral and collective aid programmes should have some strategic link to eliminating the roots causes of irregular migration.

There is a clear need to alleviate poverty and social and political injustice in many parts of the world. Linking this specifically to migration is problematic when the emphasis is as much on the prevention of migration as it is the prevention of root causes. This presents a zero sum game that creates an expectation that increases in European overseas development and humanitarian assistance will be repaid by decreases in irregular migration to Europe.

From a human rights perspective, as opposed to one purely framed in terms of development and border control, the trade-off between economic and social development and migration control represents neither a universal nor an indivisible commitment to human rights.[229] The right to leave your country of origin and seek the protection of another Government must remain an integral

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[227] The *EU High Level Working Group on Asylum and Migration* Action Plan on Afghanistan, paragraph 136(b).
[228] The EU High Level Working Group on Asylum and Migration Action Plan on Somalia, paragraph 97(e).
[229] Note the commitment by the Secretary General of the United Nations and the High Commissioner for Human Rights to: 'mainstream' all human rights, stress their universality to all and the inter-connectedness of all human rights instruments - not least the two Covenants of 1966.

safeguard in any in-country approaches to develop the civil, political, economic, social or cultural rights. Whilst it can be argued that democratic States with strong civil societies produce fewer refugees, the development towards the full realisation of these rights is not always a speedy or necessarily peaceful one.[230]

It is ironic then, that social and economic root causes have received scant attention in the Vienna Process, analysed in Chapter Five of this report. Proposed articles, such as the following, have received little serious attention from other Governments and are unlikely to receive reference in an international convention framed by concerns about organised crime and irregular migration:

> " States Parties shall foster development programmes and co-operation at the national, regional and international levels, paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the trafficking in migrants…. States Parties shall encourage co-operation on immigration and asylum policies and shall adopt such global migration strategies as may be necessary to prevent trafficking in migrants."[231]

6.2.5 *Reception in the region*

Improving reception conditions in the region is part of any comprehensive approach to asylum and migration in Europe. It plays a very significant role in European Government thinking, first made explicit in then original Action Plan relating to Iraq in 1998. Other commentators have accepted the principle of regional protection only if certain minimum criteria are met:

- Such reception facilities should be run or at least supervised by UNHCR and should maintain internationally agreed standards which are humane, dignified and guarantee the protection and human rights.
- The European Union, and other industrialised nations, would have to contribute financially and technically to the establishment and maintenance of these facilities,
- Reception facilities would be located in areas where they would not add a destabilising factor,
- Oversight mechanisms should be put in place to ensure that standards of treating asylum seekers and refugees are adhered to.
- "When after a period of, for example two years, the international community has not succeeded in addressing the root causes and the refugees have not returned to their country of origin, the international community will have to live with the consequences.

[230] Examples from the 1980s and 1990s include increased repression in Kosova, East Timor, Mynamar and Tibet during times when there were attempts to develop human rights and civil society by communities and activists in these countries.

[231] Proposal made by the Holy See, *Proposals and contributions received by Governments*, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Sixth Session, Vienna, 6-17 December 1999 [AC.254/5/Add.15].

> This implies that the countries of first reception will have to be relieved of their responsibility and the first reception has to be supplemented by resettlement elsewhere in the world."[232]

There is little doubt that the European Union will develop the potential for EU-assisted regional solutions beyond that relating to Iraqi refugees in Turkey, as described in Chapter Three of this report. For example:

> " The EU will start a constructive dialogue with the Iranian Government to discuss the issue of the Afghan refugee population on its territory. Acknowledging the hospitality of Iran in hosting large numbers of Afghan nationals, the EU will look into appropriate ways to support the Iranian government in achieving a durable solution for this issue. The EU will address the issue of alleged reports of forced repatriation of Afghan nationals to Afghanistan."[233].

It is also hoped that 'regional approaches' will be backed up by collective readmission agreements enabling the return of irregular migrants who do make it to Europe back to the region in question:

> "The Amsterdam Treaty conferred powers on the Community in the field of readmission. The European Council invites the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries."[234]

It remains an open question when the European Union might start regarding countries in a region as 'safe third countries' and therefore routinely remove asylum claimants from Europe in the way Germany presently attempts to transfer asylum claims to its European neighbours. The theoretical end goal of regional approaches is to negate the perceived need for asylum in Europe. Once the European Union is satisfied with the protection standards of Iraqis in Turkey, Afghans in Pakistan, Somalis in Kenya etc.. on what grounds, if it all, will the EU continue to accept asylum claims from these nationals? Likewise it should not be assumed that 'regional solutions' will diminish the demand from refugees on the services of traffickers or smuggling, especially if a refugee feels they have a compelling reason to come to the European Union, as much for social/ family reasons as economic gain.

6.2.6 *Human rights of refugees*

[232] Derived and quoted from the Academic Group on [Im]migration - Tampere (1999) *op. cit.*
[233] The *EU High Level Working Group on Asylum and Migration* Action Plan on Afghanistan, paragraph 136(c).
[234] Paragraphs 26 and 27 of the *Presidency Conclusions of the Tampere European Council*, Finland, 15 and 16 October 1999

For refugee protection to work in practice, the right of asylum, underpinned by the state's responsibility for *non-refoulement*, needs to be at the centre of all Governmental commitments to human rights.

> " …the notion of the right of asylum as an international human right signifies the shift of State responsibility which is an inherent affect of a refugee's leaving his or her State of nationality or habitual residence. The international community accordingly becomes responsible for providing protection to the refugee. The protection of human rights is ensured by scrupulously adhering to the principle of *non-refoulement*. No derogation, no weakening of this protection remedy, even in exceptional circumstances, is allowed."[235]

However, there is little reflection of this linkage in comprehensive approaches of European Governments. As is discussed in Chapter Five of this report, the human rights interest in a smuggled migrant seems to diminish sharply once they are outside of their country of origin and there is the potential of them becoming a refugee. As discussed in Chapter Four, most European Governments have yet to develop discrete programmes for dealing with the victims of trafficking, Belgium and the Netherlands being notable exceptions. The *OSCE Pilot Programme on Embassy Roundtables to Enhance Co-operation against Trafficking* envisages a more proactive role for E.U. diplomatic staff abroad:

> " Embassies are sometimes the only place to which victims of trafficking can turn to for help while in transit and in destination countries. Although some embassies have actively helped victims in trafficking situations, anecdotal evidence suggests that many embassies and consulates are ill-prepared and ill-equipped to assist nationals when help is requested. In far too many cases, victims seeking help are turned away for lack of proper documentation or other reasons. In other cases, well-meaning officials find themselves without the authority or resources to provide needed assistance."[236]

Several recommendations shall be made in the last section of this Chapter as to how the generic human rights sensitivity of diplomatic staff from E.U. states might be enhanced to better protect refugees who themselves are the victims of smuggling or trafficking.

6.2.7 *Legal status of asylum-seekers and refugees*

The opportunity of gaining internationally-recognised legal status is a major 'pull factor' for refugees and the smugglers they pay in the selection of asylum country. This is of direct importance to the future of the asylum-seeker themselves and the economic and social rights

[235] Reinhard Marx (1995) 'Non-refoulement, access to procedures, and responsibility for determining refugee claims', *International Journal of Refugee Law* Vol,7(3), Oxford University Press.
[236] OSCE (1999), *Proposed Action Plan 2000 for activities to combat trafficking in human beings*, Office for Democratic Institutions and Human Rights, Warsaw, November 1999.

they might enjoy in exile, but also for any family members the original applicant might be able to send for once they have status (see 6.2.8)

Yet, as discussed in Chapter Two of this report, there is a extraordinary variation in the recognition rates afforded to nationals from the Action Plan countries during 1998. Many factors are involved here[237], such differences between E.U. states are a great dissuasive to asylum claims in some countries, encouraging the smuggler or the refugee to keep transiting to the country of destination. The limitations on such rights throughout the European Union, can also increase the demand from some communities to transit the length and breadth of the European continent, only to be smuggled on to a destination in Canada or the United States.[238]

The inconsistent use and varied nature of 'complementary' or 'humanitarian' statuses also complicates the situation. In a few countries the beneficiaries of subsidiary/complementary protection are given nearly the same rights as Convention refugees (Denmark, Finland, Sweden), while in most of the EU countries their rights are similar to those of non-nationals in general. No special provisions facilitate family reunification. In nearly all the countries concerned, socio-economic rights are not progressive.[239] Some countries have introduced precise regulation, mainly at legislative level, describing in detail the beneficiaries (Denmark, The Netherlands, Spain), while others have a single form of protection which is broadened to cover those who cannot be returned because they would risk human rights violations or for whom there is no means of transportation available (Finland, Belgium, United Kingdom). In a number of countries, a form of toleration is granted, which has a legal basis but is not necessarily matched with a residence right (Germany, Spain, Belgium) [240]

The inequalities between European asylum recognition procedures is on the 'scoreboard' for European attention in the years to come. Done well, this should make a positive impact, not just on the lives of refugees, but also on the efficiency of inter-state referral systems, and should lessen the demand for smugglers. If the homogenisation of legal processes is drawn down to the lowest common denominator, this will increase opportunities for *refoulement*. The few references to asylum that exist in European Union Action Plans have not been encouraging:

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[237] For example, " In recent cases, the UK courts have been influenced by Canadian jurisprudence on the Refugee Convention, which in turn has drawn support from a wide body of UN Conventions, declarations and actions… by this route at least, it is likely that the courts will have to engage with the 1979 Convention on the Elimination of all forms of Discrimination Against Women. The British Courts have made use of the EU Guidelines on the interpretation of the Refugee Convention . (OJL63/2 1996), despite the declaration that the text is not binding on judicial authorities in the UK." Nicholas Blake (1999) 'Citing International Instruments in Domestic Cases Concerning Economic, Social and Cultural Rights' in Burchill et al. [eds.*] Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law*, University of Nottingham: Human Rights Centre.

[238] See Liz Hales (1996) *op. cit*.; Richard Dunstan (1998) *op. cit*.

[239] Complementary/ Subsidiary Forms of Protection in the EU States: An Overview, *European Legal Network on Asylum (ELENA)*, a project of the *European Council on Refugees and Exiles (ECRE*), April 1999.

[240] ECRE (1999) *op. cit*.

> " Develop a common strategy for the treatment of those Afghan asylum seekers where there are serious reasons for considering the application of the exclusion clauses in Article 1F of the 1951 Geneva Convention."[241]

6.2.8 *Family Reunion*

Given that a significant factor in the choice of asylum country is the presence of existing family members, family reunion entitlements must play a crucial role in any strategy to combat trafficking or smuggling. Family Reunion is rightly seen one the main challenges for any European migration system:

> "As family reunification increasingly is recognised as a principle of domestic law and international conventions, an over-restrictive approach could, from a legal point of view, be problematic…. Too many restrictions may in practice have adverse effects: persons not fully integrated, development of illicit networks, trafficking and fraud. The benefits of restriction need to be weighed against the costs, not only to States but also to migrants, including, in the family reunification category, many women and children."[242]

It is also recognised as such by the European Union:

> " The European Union recognises and confirms that family reunion is fundamental to the exercise of movement rights in freedom and dignity (Preamble 1612/68). It is also fundamental to integration policies… [The Union] is under a legal obligation to respect fundamental rights, as guaranteed by the European Convention on Human Rights and the UN Convention on the Rights of the Child (1989), and as they result from the constitutional traditions common to the Member States, as a general principle of Community Law."[243]

Yet the reality is far removed from this ideal. A survey conducted by *the European Council on Refugee and Exiles (ECRE)* in 1999 found significant differences in the family reunion provisions of member states: There was found to be significant differences in:

- The Definition of the Family Unit in EU Member states
- The Procedure for Family Reunion
- Differences between Convention Refugees and those with Complementary Statuses

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[241] The *EU High Level Working Group on Asylum and Migration* Action Plan on Afghanistan, paragraph 138(h).

[242] *Report on Family Reunification: Overview of Policies and Practices in IGC Participating States* (1997), Secretariat of the *Inter-Governmental Consultations (IGC) on Asylum, Refugee and Migration Policies in Europe, North America and Australia*, Geneva.

[243] Efficient, effective and encompassing approaches to a European Immigration and Asylum Policy, a draft paper by the *Academic Group on [Im]migration - Tampere (AGIT),* June 1999, shortly to be published in the *International Journal of Refugee Law*.

- The extent to which the Dublin Convention has been used to facilitate family reunion by member Governments. [244]

6.2.9 *Integration of refugees into host societies*

The demographics of Europe make interesting reading;

> "Since the late eighties, Western Europe has received a gross inflow of up to 2 million immigrants. This and previous migrations has produced a legally resident foreign population of over 15 million (8.5 million from outside of Europe). As fertility has fallen, migration has increased, so that while net migration accounted for 23% of Western Europe's population increase in 1975, by 1994 it accounted for 68%. As a result, population increase, which was falling up to the mid eighties, is now rising to levels of around 1970."[245]

However, by the late 1990s migration was no greater a factor on population growth in the European Union than the natural rate of increase. In both cases the rate of population increase is now very small and in some countries, Italy and Spain for example, population levels have been dipping sharply with or without migration. Germany and the United Kingdom host the largest number of 'foreigners' in the European Union but it is Luxembourg that has the greatest density [246]

As important as the actual *number* of asylum-seekers arriving into European states is the *perception*, fuelled by many Government ministers,[247] that refugees that use 'illegal means' of arrival are in some way 'bogus':

> "The involvement of smugglers and the frequently devious practices necessary to ensure successful arrival in the traditional asylum states deepened suspicion about whether the claimants were truly deserving. Incidents involving mass arrivals by ship, with the assistance of organised smuggling rings, tended to evoke sharp reactions from officials and the public."[248]

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[244] Survey of Provisions for Family Reunion in the European Union, *European Council on Refugees and Exiles (ECRE)*, November 1999.

[245] *Report on Family Reunification: Overview of Policies and Practices in IGC Participating States* (1997), Secretariat of the *Inter-Governmental Consultations (IGC) on Asylum, Refugee and Migration Policies in Europe, North America and Australia*, Geneva

[246] OECD (1999) *op. cit.* Figures on the 'number of foreigners' can not easily be contrasted as France and the United Kingdom have much more inclusive citizenship laws than Germany for example.

[247] Whilst completing this report, the author could not help hear the UK Immigration Minister repeating the inaccurate and damaging mantra that there are well-founded asylum claims and those made by 'clandestine illegal immigrants', *BBC Radio 4*, Today Programme, 28 January 2000.

[248] Fitzpatrick, *Flight from Asylum*, p.29, quoted in Karin Landgren (1999) Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests, *New Issues in Refugee Research Working Paper No. 10*, Centre for Documentation and Research, UNHCR: Geneva

Asylum-seekers and refugees are known to be the victims of racism and anti-foreigner sentiments right across the European Union.[249] The fact that many refugees have no other choice than to arrive illegally with the assistance of smugglers (or not arrive at all) is rarely explained to the public by any political leader or Government official. In fact the myth is sometimes reinforced by officialdom helping to entrench the perception of refugees as uninvited deviants and criminals.

Chapter Three of this report outlined how integration into a host community is undermined by legal and social constraints put on asylum-seekers, not because of the quality of their asylum claim, but because of their method of arrival into the country of asylum. The indiscriminate use of detention and imprisonment to deter the activities of smugglers and traffickers clearly victimises refugees and undermines opportunities for integration.

6.2.10 *Better balance of responsibilities between European states*

Chapter Three of this report shows how the existing policies of the *European Union* operate to concentrate the responsibility of hosting asylum-seekers rather than sharing it. So-called 'burden-sharing' mechanisms continue to be on the drawing board of the European Union and need to be a central part of any comprehensive approach. Any equitable means of distributing asylum claimants, particularly if trying to unite refugee families, would withdraw some of the demand of irregular migration within the European Union and between the United Kingdom, Ireland and the Schengen area. The Dublin Convention is one of the first items that the European Union is absorbing into its more comprehensive. The indications at end of 1999 were that no radical changes were expected[250], despite the Dublin Convention being only 20% effective at best.[251] The effects of the Schengen border enforcement, 'third safe country' rules and readmission treaties are not only to risk *refoulement*, but also to increase the 'burden' on non-EU states in Central Europe and, in particular, Hungary.

6.2.11 *Return of refugees and other migrants*

Any comprehensive solution needs clear recommendations for dealing with unsuccessful asylum applicants and those that do not fit and other immigration category. One of three approaches has been taken by different European Union members:

- Rigorous attempts at forcibly returning unsuccessful asylum-seekers and other migrants (Germany and Scandinavia).
- Strong rhetoric but historically relatively low numbers of involuntary returns compared to the number of unsuccessful asylum claims (France, Netherlands and the United Kingdom).

[249] European Monitoring Centre on Racism and Xenophobia (1999) *Looking Reality in the Face*, Annual Report for 1998, European Union Monitoring Centre: Vienna. [Established by Council Regulation 1035/97].
[250] Author's informal communication with *ECRE* in December 1999.
[251] CIREFI Report on the Dublin Convention.

There is now a greater political will to start returning a greater percentage of unsuccessful asylum applicants.

- Less emphasis on external controls and more on labour market and other forms of restrictions (Greece, Italy and Spain). Italy and Spain have now move to regularise a large number of the irregular migrants on their territory (including failed asylum seekers).

A comprehensive plan requires a clear position on how to respond to those who are not granted status, or when it is safe for those on temporary protection (or even 1951 Convention status) to return.[252] *UNHCR* and *IOM* will, at least in principle, only support voluntary return programmes. Several North European Governments supply small financial incentives to refugees considering voluntary return. However, neither organisation gives advice to Governments on how to deal with migrants who are manifestly not refugees.

6.2.12 *Legal Migration Opportunities*:

> " The European Council stresses the need for more efficient management of migration flows at all their stages. It calls for the development, in close co-operation with countries of origin and transit, of information campaigns on the actual possibilities for legal immigration, and for the prevention of all forms of trafficking in human beings."[253]

The Tampere Conclusions themselves talk of the possibility of legal immigration into the European Union as an alternative to trafficking. However, such quotas for skilled labour and immediate family members are very restrictive and it is disingenuous to discuss this as a viable means of entry into Europe for the majority of those fleeing persecution or in positions of social or economic hardship.[254]

Yet, nearly all comprehensive analyses of current European migration policy, advocate a legal quota system on purely economic[255] or demographic[256] grounds alone. Whilst there is no clear evidence that a European social and economic immigration policy would diminish the number of unsuccessful asylum claims or even the use of smuggling and trafficking networks, it would provide a more systematic, and perhaps even more ethical basis, for balancing the border enforcement concerns of the European Union against the human rights of migrants. Regardless of the legal programme for social or economic migration that is eventually devised, the qualitative difference to a refugee's claim for asylum must be maintained, and no single European quota can be set for the number of refugees the continent will receive in a year.

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[252] For example, many Bosnians, Croatians and Kosovans were forcibly returned by Germany and Switzerland (between 1995-97) as the region was deemed to be 'safe'.

[253] Paragraph 22 of the *Presidency Conclusions of the Tampere European Council*, Finland, 15 and 16 October 1999

[254] In early 2000, the UK government was considering a £10,000 bail scheme for tourist visas from South Asia where the Government believes the immigration official believed the migrant might not abide by the conditions of entry (this might include a claim for asylum).

[255] For example, The Economist (1998) 'Millions want to come', *The Economist*, 4 April 1998.

[256] OECD (1999) *op. cit.*

6.2.13 *Information campaigns and training*

European Commission information (e.g. under DG5) and training programmes (e.g. '*Odysseus*') on refugees and migration have existed but have not always been strategically congruent to the Council's own activities on enforcement. For example, the development of thinking around temporary protection programmes between 1997-99 was never squared with the Commission's own funding on refugee integration (integration being the oxymoron of temporary protection).[257] Likewise, there is little attention given to how the issue of trafficking/smuggling relates to that of refugee protection within the Union. *European Commission* funded public information campaigns on refugees have never addressed the question why so many of these refugees arrive 'illegally' in such a manner, linked to smuggling and the growing problem of international organised crime. On the other hand, *Odysseus* funding has been used to train the very officials that are fighting known smuggling routes, in Turkey for example. Although *UNHCR* has been invited to some of these programmes, most NGOs and refugee community representatives have not.

[257] Several representatives from all over Europe was unable to attend, or were severely delayed for, the Third European Commission Conference on 'Refugee Integration' in Brussels in 1999. Given the subject of the conference, it was symbolic that those unable to attend were themselves refugees who had been denied visas by the Belgian Government or had been interrogated for hours at the Airport.

7. RECOMMENDATIONS

7.1 Recommendations for finding the common ground between the paradigms and interests

7.1.1 *Consensus about subject and the people under discussion*

Given the data shown in this report, and others that exists, it is clear that between one third to two thirds of Europe's main trafficked and smuggled nationalities, are refugees according to Europe's own determination procedures. Regardless of whether the issue of irregular migration is approached from the perspective of border enforcement, organised crime or human rights, we are essentially talking about the same people: many of them, not a few, refugees. This common ground and shared responsibility needs to be explicitly and fully recognised by European Governments, UNHCR and NGOs alike.[258]

7.1.2 *The need for accuracy and consistency in language and terminology*

Given the previous recommendation, it is misleading in the extreme to continually refer to people, who are likely to be refugees, as 'aliens', 'bogus asylum-seekers', 'clandestines' or 'illegal immigrants'. All parties must be clear and consistent in the language they use in order to overcome the large amount of public confusion and mistrust on issues of asylum policy. This report recommends that all parties endeavour to use the more neutral term 'irregular migrant' in all situations of trafficking or smuggling until the point that protection is actively sought by the migrant, at which point they become an 'asylum-seeker'. The word 'refugee' can and should be used in its presumptive sense at any stage of the migratory process once the individual has left their country of origin. The distinction between 'trafficking' and 'smuggling' that has emerged during 1999 is not an absolute one but remains valid none-the-less. All agencies/ authors should be explicit about exactly 'who' they are talking about and refrain from using the more emotive phase 'trafficking' when they are actually talking about 'smuggling'.[259]

7.1.3 *Opening up the border enforcement and organised crime debate*

The discussions on transnational organised crime and migration control have remained closed and inaccessible to many specialists in refugee rights and, in particular, to refugee communities themselves. The precise role and the relevance of European Union agencies such as *CIREA*, *CIREFI* or *Europol* still remain opaque for too many people working for and with refugees in Europe. Too few commentators have appreciated the way that pre-border enforcement measures (such as visas, carriers' liability, airline liaison officers and passenger profiling) have

[258] For expansion refer to Chapter Two of this report.
[259] For expansion refer to Chapter Two of this report.

affected the options open to refugees. Whilst the functions of *IGC, OECD, ICMPD* and the *Budapest Process* are better known, NGO participation is very limited. *UNHCR* should continue to use its seat in some of these processes to safeguard protection standards and to inform and consult a wider range of European refugee agencies.[260]

7.1.4 *Broader thinking by European refugee and human rights agencies*

With the exception of *UNHCR*, too few European refugee agencies have been tracking the development of *Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime* in Vienna. There is room for a much greater strategic sharing of resources amongst the *ECRE* membership to monitor and contribute to a fuller range of migration relevant intergovernmental agencies, such as the *CICP*, *Europol*, *ICMPD, Interpol*, *IOM, IMO* and *UNICRI*. During 1999 the *High Commissioner for Human Rights* has played a very inclusive role in widening the human rights lobby from concerns for the victims of trafficking to incorporate wider issues of migration and refugee protection. All sectors of civil society concerned with defending the right of access to Europe territory for asylum or related family reunion, should play an active role in all fora engaged in developing or influencing international border enforcement and crime prevention initiatives.[261]

7.2 Recommendations for mainstreaming human rights in migration policy

7.2.1 *The right to asylum as a core European value*

The right to asylum on European territory remains a cornerstone of all European positions on human rights. It is ethnically indefensible for member states to promote human rights in their foreign policy is the right to asylum is negated by pre-entry border control measures. The peoples of all 15 member states as well as those in accession states require an honest explanation why asylum policy is relevant, if not essential, for Europe in the 21st century. The right to asylum should be advanced as complementary, and not as an alternative, to regional measures for protecting refugees. A European asylum policy, when it comes into existence should be transparent, clear in purpose and explicit about the fundamental values upon which the European Union was founded. Elected leaders in all member states and representatives of the Commission need to be proactive in explaining, defending and advancing the rationale behind asylum policy in Europe.[262]

7.2.2 *The principle of non-refoulement as an absolute*

[260] For expansion refer to Chapter Three of this report.
[261] For expansion refer to Chapters Four and Five of this report.
[262] For expansion refer to Chapter Two of this report.

Non-refoulement should continue to represent the most fundamental obligation on all members of both the *European Union* and the *Council of Europe*. Article 3 of the *European Convention of Human Rights* and Article 33 of the *United Nations Convention Relating to the Status of Refugees*. *Non-refoulement* should be understood in its fullest international sense and should apply to the actions of any representative of a European Government regardless of where in the world they are performing their duties. With this in mind, Governments have a duty to ensure that the effects of pre-entry screening and advice given by European officials oversees does not risk *refouling* refugees. Under present arrangements, it is difficult to eliminate the very strong theoretical possibility that the activities of Airline Liaison Officers can and do return refugees to persecution or human rights abuse in an unsafe transit country. All European Governments need to review the procedures of all overseas staff, with or without diplomatic status, and to submit their work to scrutiny by an impartial observer. Governments should ensure that private carriers, in particular road haulage and shipping companies, do not *refoule* refugees in order to evade carriers' liability penalties.[263]

7.2.3 *The protection of refugees and other migrants at sea*

Governments should affirm that the position of all irregular migrants aboard sea-going craft is a very vulnerable one and that the immediate concern is always the safety of all passengers on board. Although it is recognised that the *1957 Brussels Convention* is unlikely to ever become international law, the existing guidelines of the *International Chamber of Shipping* regarding the disembarkation of stowaways should explicitly mention refugees as a category of migrant and the importance of *non-refoulement*. The draft *United Nations Convention against Transnational Organisation Crime* represents the best opportunity for clearly apportioning responsibility for asylum claims in international waters at the present time. Governments throughout Europe should ensure that their immigration and harbour officials are rigorous in disembarking all stowaways upon arrival at any European port, regardless of the flag state or insurance arrangements. *UNHCR Protection Officers* and NGOs with access to ports (in particular *Missions to Seamen*) should monitor as best they can disembarkation records and possible contravention of the *Safety of Lives at Sea (SOLAS) Conventions* by returning irregular migrants to sea.[264]

7.2.4 *The human rights of all migrants in Europe*

All migrants have human rights, regardless of their immigration status, their legality or whether they are refugees or not. An effective asylum system must be accompanied by an effective systems for dealing swiftly and fairly with those not requiring protection under the *1951 Convention*, *European Convention on Human Rights* or the *Convention Against Torture*. The human rights of the migrant must be respected at every stage of what might be, in some cases, a mandatory returns programme. Full note should be taken of all migrants, who were not

[263] For expansion refer to Chapters Two and Three of this report.
[264] For expansion refer to Chapters 4 and 5 of this report.

originally refugees when departing from their country of origin, but suffered persecution from traffickers or other state or non-state actors upon route. The case law should be shared amongst legal practitioners on how the experiences of being smuggled or trafficked has in itself given grounds for 1951 Convention or other humanitarian status.[265]

7.2.5 *The economic, social and cultural rights of refugees in Europe*

Successful integration of refugees in Europe requires full recognition of their economic, social and cultural rights. A human rights approach to integration is required by the *European Commission* and all States that participate in the distribution of resources under the *Refugee Fund* from 2000 onwards. For many refugees successful integration will also require reunion with a missing family member, and so all family reunion policies for asylum-seekers and refugees needs to be re-examined in line with the recommendations of specialist reports by both the *IGC* and the *ECRE* Secretariats. Frustrated family reunion should be seen as a major causal factor in the existence of smuggling of and trafficking in refugees.[266]

7.2.6 *Protecting all migrants from racism and xenophobia*

European Governments have a basic obligation to protect all irregular migrants from racism and actions of discrimination. As part of this, governments have a duty not to accommodate or settle refugees in situations where they risk such persecution. There is a duty not to portray refugees who used an illegal means of entry (as set out in Article 31 of the 1951 Refugee Convention) as being in any way criminal.[267]

7.3 Recommendations for regional responses to migration

7.3.1 *Regional solutions an essential part of refugee protection*

The country specific approach of *CIREA* and more recently the *Action Plans* of the *High Level Working Group on Asylum and Migration* offer an opportunity to understand the role of smuggling and trafficking as they relate to a specific refugee nationality. A more regional approach to refugee protection could help though to protect some refugees from exploitation, but certain minimum standards need to be adhered to. Those suggested by *AGIT* can be summarised as:

- All reception facilities should be run or at least supervised by *UNHCR* and should maintain internationally agreed standards which are humane, dignified and guarantee protection and human rights.

[265] For expansion refer to Chapter 5 of this report.
[266] For expansion refer to Chapter 5 of this report.
[267] For expansion refer to Chapters 2 and 6 of this report.

- The *European Union*, and other industrialised nations, would have to contribute financially and technically to the establishment and maintenance of these facilities,
- Reception facilities would be located in areas where they would not add a destabilising factor,
- Monitoring mechanisms should be put in place to ensure that standards of treating asylum seekers and refugees are adhered to.
- Regional protection should be time limited to two years and is supplemented by an expanded resettlement programme to within the *European Union* and elsewhere.

All enforcement activities would need to dovetail with the regional protection strategy and there would need to be direct lines of voluntary referral for all Airline Liaison Officers and Consular staff to reception facilities. An independent European agency should oversee all status determinations, including those processed within the regional reception facilities, and family reunion should determine the country of resettlement. Asylum-seekers who continue to utilise the services of traffickers or smugglers should not be penalised and claims should still be received within the European Union on a fully spontaneous basis. Methods for a more equitable sharing of these asylum claims between EU states should be put in place, with family unity as a core criterion. Asylum processing and recognition rates would be congruent with those under regional protection. At the end of an initial two year period, all status determinations should be complete and family reunion effected where possible. At this point all refugees requiring continuing protection should be given a more permanent status and full integration rights in the European Union.[268]

7.3.2 *When regional solutions do not work*

Regional protection is not a panacea and needs to be complemented by a full commitment to asylum policy and a much great commitment to *UNHCR* resettlement quotas from all Central and West European states. There will always be some refugees for whom regional protection will never be a safe option from day one and resettlement systems, although rigorous in their determination, flexible and responsive to the human rights needs of individuals or minority groups. The capacity for large-scale resettlement will also be required should the first country of asylum become unstable or the protection standards of a facility fail to meet those required by *UNHCR*.[269]

7.3.3 *Europe as a region*

In terms of refugee protection, Europe should not be perceived as a fortress surrounded by several walls of enforcement, but rather as a 'region' in its own right. When refugee-producing situations occur on the borders of the European Union, or even within the Union itself, the humanitarian response must be swift and full access to protection made available. The work of the *Balkans Stability Pact* should be underwritten by unfettered access to asylum, as should all

[268] For expansion refer to Chapters 3 and 6 of this report.
[269] For expansion refer to Chapters 3 and 6 of this report

civil society initiatives in Central or Eastern Europe aimed at protecting minorities (for example the Roma). The Spanish Government's Protocol to the *Treaty of Amsterdam* should be repealed without delay as a basic infringement of the rights of all European Union citizens and as an ethical contradiction to the high-minded rhetoric and bilateral measures taken against Austria since the incorporation of the *Freedom Party* in its Government. All European refugee protection should be underpinned by *the European Convention on Human Rights*, as should the actions of all representatives of European states throughout the world. A regional focus should strengthen and not lessen Europe's commitment to helping refugees in other regions through financial assistance to the region and to *UNHCR*, technical support and training and a much fuller commitment to inter-regional refugee resettlement. Representatives from other regions should be available to audit the protection standards of the European region.[270]

7.4 Recommendations for building the 'comprehensive approach' to European migration

7.4.1 *The immediate need for good research and accurate data*

There is almost a complete absence of any good data about how smuggling and trafficking activities affect the lives of refugees coming to Europe. Local and European-wide research initiatives are urgently required to illuminate the following:

- Exactly how and why specific refugee nationalities engage with the smuggling and trafficking process. What are the humanitarian and financial costs involved? What are the risks that refugees are forced to take?
- How is this choice constrained by the situation in the refugee's country of origin, first country of asylum and by the actions of European Governments?
- How does the refugee community in Europe interact with the country of origin or with the smugglers, and what are the range of social and financial remittances involved?
- What factors determine the refugee's or the smuggler's choice of asylum country?[271]

7.4.2 *The need for greater transparency and co-operation*

Much of the data on the trafficking and smuggling of refugees that does exist remains within the confines of national or European Government. It is very difficult for academics or NGOs to participate in a common research agenda if key aspects of the data remain unpublished and confidential. These data need not be biographical, as in the context of *Europol*, but a synthesis of the reporting mechanisms of *SOPEMI*, *CIREFI*, *IGC* and the *Budapest Process* could provide the most comprehensive overview of the trafficking/smuggling phenomena from a top-

[270] For expansion refer to Chapters 3 and 6 of this report
[271] For expansion refer to Chapters 2 and 6 of this report.

down perspective. This report encourages the *United Nations Interregional Crime and Research Institute* (*UNICRI*) in Rome and the *United Nations Centre for International Crime Prevention* (*CICP*) in Vienna to remain sensitive to the refugee dimension of the trafficking and smuggling operations and to look at areas of co-operation with *UNHCR* and other refugee agencies.[272]

7.4.3 *Europe as a continent of immigration*

Europe has now become a continent of immigration. This is the inevitable result of globalisation and the need to meet its own demographic short-fall. There is an immediate need for the development of immigration policy that reflects both the needs of the European labour market and the social and economic needs of migrants. Social and economic immigration quotas are an essential part of any comprehensive approach to migration, and their almost total absence has undoubtedly burdened asylum systems with unfounded claims, as well as contributed to the activities of smugglers and traffickers.[273]

7.4.4 *The role of public perception and political leadership*

No comprehensive reform of Europe' s migration policies will be possible without clear and decisive leadership at all levels of Government. It is an area of policy-making that has for too long been avoided by many elected officials and one in which greater public transparency is likely to create negative reactions in the shorter term. Europe requires a vision of itself in 50 or 100 years that is multi-cultural, diverse and based on a common set of values and not any particular historical, ethnic or social groupings. Migration will inevitably change the composition of every town and city in Europe and this needs to be explained and debated clearly in all parts of the continent. Asylum and refugee policy is just one part of this process. However, there are many elected officials in every European country that continue to use asylum-seekers stereotypically for the purpose of popular politics, frustrating any open dialogue based on facts and research and thereby maintaining a significant market niche for traffickers and smugglers.[274]

7.5 Recommendations for other operational measures

7.5.1 *Monitoring and auditing of enforcement measures*

The external border enforcement measures currently used by the states of the *European Union* require a good deal of scrutiny. Several aspects of these policies are in clear contradiction to the values of universal human rights and some might well be found to be contravening the *Council of Europe*'s own *Convention on Human Rights.* Governments and human rights agencies

[272] For expansion refer to Chapters 3, 4 and 5 of this report.
[273] For expansion refer to Chapter 2 of this report.
[274] For expansion refer to Chapters 2 and 6 of this report.

should monitor the activities of *Airline Liaison Officers*, and other off-shore representatives, to be certain that opportunities for *refoulement* are removed. Particular attention should be paid to the vulnerability of stowaways and their treatment upon arrival in Europe's ports. In many ways visa regimes, readmission treaties, carrier's liability and airline liaison officers have all been strategically deployed to frustrate the arrival of asylum-seekers. These links are made explicit in the *Action Plans* of the *High Level Working Group on Asylum and Migration*. This fundamental contradiction in European refugee policy must end and be replaced by a comprehensive system of regional protection, asylum and resettlement.[275]

7.5.2 *The role of the corporate sector in Europe*

International business has to a large extent been caught in the middle of this struggle between the right of sovereign states to enforce the will of the collective (or elite interest groups) and their obligations to protect the rights of individuals. Non-state actors such as transnational corporations have an increasing amount of influence, both in terms of the conditions under which refugees are created, their opportunities for migration aboard commercial carriers. Several of the major European airlines were involved in dialogue with refugee agencies during the imposition of carrier sanctions in the late 1980s and early 1990s, but this has since diminished. UNHCR and all other European refugee agencies must be proactive in forging links with the private sector, both at the senior policy level as well as in terms of day-to-day assistance of airline, shipping, train and road haulage operators. In many ways it is now airline staff, and the private security companies they employ, that apply non-immigration policies of European states.[276]

7.5.3 *Training and funding opportunities*

Opportunities for co-operative training ventures, such as those funded under the *Odysseus* programme, should be extended. Governments, *UNHCR* and NGOs should work collaboratively under such programmes to develop a holistic approach to migration within Central and Eastern Europe. Funding arrangements under the *European Refugee Fund* should be sensitive to the particular needs of refugees who are smuggled or trafficked. Explanations of the 'irregular nature' by which refugees are obliged to enter the European Union should be at the centre of all public information and media initiatives.[277]

7.5.4 *Reporting mechanisms within the European Union and the United Nations*

Expertise and responsibility for observing and commenting on the current situation facing refugees trying to enter European territory must be clearly allocated. Several of the existing *United Nations Special Rapporteurs* must be kept informed of the foremost aspects of the issue (e.g. violence against women, the rights of the child, migrant's rights) but the refugee-

[275] For expansion refer to Chapter 3 of this report.
[276] For expansion refer to Chapter 3 of this report.
[277] For expansion refer to Chapter 3 of this report.

dimension of irregular migration warrants greater prominence on its own. This means the creation of a specialist post within the offices of *UNHCR*, or possibly the *High Commissioner for Human Rights*, to monitor the protection issues the arise from the migration process itself. Within the European Union, much greater prominence should be given to the observance of Articles 31 and 33 of the *United Nations Convention Relating to the Status of Refugees*, and Article 3 of the *European Convention on Human Rights.* This could take the form of an expert rapporteur or an observational function undertaken by an NGO such as *ECRE*. The *European Monitoring Centre on Racism and Xenophobia* in Vienna should take a particular interest in refugee integration and how this might be frustrated both by smuggling/trafficking activities and the Governmental response to it.[278]

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[278] For expansion refer to Chapters 3 and 5 of this report.