

## Pécs Journal of International and European Law



# Table of Contents

Editorial	5
WŁADYSŁAW CZAPLIŃSKI – Recognition and International Legal Personality of Non-State Actors	7
CATHERINE ENOREDIA ODORIGE – The Dark Side of Migration Remittances and Development: The Case of Edo Sex Trade in Europe	18
JORN JOHANNES MARINUS VAN RIJ – Modus Operandi of Organised Crime Groups Involved in the Trafficking and Sexual Exploitation of Hungarian Women – A Case Study on the Hungary-Netherlands Transit	33
HENNING BANG FUGLSANG MADSEN SØRENSEN – Mutual Trust – Blind Trust or General Trust with Exceptions? The CJEU Hears Key Cases on the European Arrest Warrant	58
ANNEMIEKE VAN ES – Policy in a Time of Fear: Blinded by Safety and Security	65
<i>Review</i>	
VERONIKA GREKSZA – D. Moeckli – S. Shah – S. Sivakumaran (eds.): International Human Rights Law	79

## Editorial

The editors are pleased to present to the reader the 2016/I issue of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

In the current issue, Władysław Czapliński looks at the question of the International Legal Personality of Non-State Actors and their Recognition in public international law. Henning Bang Fuglsang Madsen Sørensen analyses the question of mutual trust as regards the European Arrest Warrant in light of recent hearings before the Court of Justice of the European Union. Jorn van Rij provides a case study on the *modus operandi* of organised crime groups involved in the trafficking and sexual exploitation of Hungarian women to the Netherlands. Catherine Enoredia Odorige discusses migration and remittances in relation to sex trade from Edo (Nigeria). Annemieke van Es contrasts freedom and security when looking the compatibility of a Dutch anti-terrorism related legislative proposal with freedom of expression as enshrined in the European Convention on Human Rights. Finally, Veronika Greksza reviews the edited volume International Human Rights Law published by Oxford University Press in 2014.

We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law. The next formal deadline for submission of articles is 15 October 2016, though submissions are welcomed at any time.

THE EDITORS



# Recognition and International Legal Personality of Non-State Actors<sup>1</sup>

Władysław Czapliński

*Professor of International and European Law, Institute of Law Studies, Polish Academy of Sciences, Warsaw, Poland*

*There is no doubt that states and international organizations are regarded as subjects of international law. The position of other entities acting in international relations is unclear. The international legal personality of groupings [including armed ones] struggling for the right to self-determination is the most controversial, as there are no universally accepted criteria of the personality under international law. The author discusses the role of recognition in granting international legal personality, as well as the function of non-recognition of unlawful acts as an element of the law on international responsibility.*

*Keywords: International Subjects, statehood, international organizations non-state actors, recognition, international responsibility for unlawful acts*

## 1. Introduction

Although from today's perspective one must admit that legal personality belongs to the key theoretical problems of international law, such an approach has been elaborated relatively late in the development of the law of nations.<sup>2</sup> This is hardly surprising, as before the 1920s states were considered to be the only subjects of international law. The establishing of the League of Nations and International Labor Organization modified to some extent the approach of the international community to the problem, and the creation of the United Nations forced the ICJ to formulate some important requirements relating to the recognition of legal personality of international organizations.

There is a growing interest among international lawyers for a legal personality of non-state actors. This is a new phenomenon, in particular if one leaves aside international organizations. Surprisingly, publications concerning the issue are relatively limited. The aim of the present paper is an attempt to define, to what extent the legal personality of the non-state actors can be derived directly from international law, and/or whether it depends on recognition by the international community.

Our starting point is that the international personality is in principle indivisible, and its scope should be the same with respect to all primary (states) and derivative or secondary (all other subjects including non-state actors, sometimes called non-state participants in international relations) actors. There is no

---

<sup>1</sup> The research was supported by the National Science Centre in Cracow, in the framework of the research project 2014/13/B/HS5/01490.

<sup>2</sup> On theoretical aspects of legal personality under international law see recently two monographs: J. E. Nijman, *The Concept of International Legal Personality. An Inquiry into the History and Theory of International Law*, The Hague 2004; and R. Portmann, *Legal Personality in International Law*, Cambridge 2010. On Non-State Actors cf. selection of articles edited by A. Bianchi, *Non-State Actors and International Law*, Ashgate, Farnham 2009; and First Report of the Committee on Non-State Actors in International Law, Report of the 74<sup>th</sup> Conference 2010, p.630, and subsequent work of the Committee.

doubt that every state possesses legal personality; doubt can exist, however, as to a qualification of a particular subject as a state (an example of Palestine is especially striking from the point of view of international theory and practice). The legal personality of other subjects and its consequences give rise to doubts and disputes. Moreover, it is not possible to treat all the non-state actors as a homogenous category; on the contrary, we have to approach each kind of subject individually. This is an important complication as far as general conclusions on legal personality and recognition are concerned.

There are four elements connected with international legal personality: a treaty-making power (often referred to as *jus tractatum*), a right to send and receive diplomatic envoys (*jus legationis*), a right to present claims based on international responsibility, and a right to use armed force.<sup>3</sup> Consequently, according to our main thesis, every international subject must possess these features. We have to make a distinction between the international legal personality and competence to act in international relations. Those powers should be provided in a statute (founding treaty) of the international organization concerned, or – with respect to other non-state actors – in any instrument defining or confirming their international legal status. An option to undertake an effective international action opposable to other subjects and shaping the international position of the entity concerned is an indispensable element of the international legal personality.

A mere fact of possessing rights and obligations based on international law is not sufficient to claim international personality. Such rights and duties must be based upon an international agreement concluded between the states or other subjects of international law, and they are binding exclusively if accepted by them. Let's take the example of the (nearly universally accepted<sup>4</sup>) Washington Convention of 3 March 1973 on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>5</sup> Does the conclusion of or accession to the convention grant international legal personality to all endangered animals, to Amur tigers as a whole, or to particular tigers? What is the influence of reservations to the Convention upon the legal situation of specific animals? In fact under current international law states only can be parties to the CITES, and wild animals and plants do not themselves accede, etc. In fact, the same reasoning applies to individuals (human beings). We discuss a possible legal personality of transnational corporations, legal persons of public law and private law of specific states, foreign investors (protected under BITs or multilateral instruments), finally of individuals as such (in connection with human rights treaties or with the international criminal responsibility). We can ask the same question with respect to endangered plants and animals.

Can we assume that all subjects of international law possess *ipso iure* the characteristics mentioned above, but they do not have specific powers to exercise them? What are similarities and differences between the nature of subjects of international law, the scope of their personality, and the effectiveness of their action under international law?

The creation of intergovernmental organizations raises a question about a distinction between the legal personality of states and other subjects of international law. We are unable to quote here a full list of the latter. We find some, the personality of which is traditionally accepted – like national liberation movements, belligerents, or guerillas. The latter two categories usually relate to the parties to a civil

---

<sup>3</sup> Even though the power to wage war is limited under the UN Charter, the practice shows that states under various circumstances refer to the use of force, although they try to justify it. As to international organizations, the power to use armed force can be considered with respect to the UN and regional organizations within the meaning of the Charter. It is hardly imaginable that some states establish an international organization with a single goal to use armed force at its own account, and the member states would not bear any responsibility (what is a logical consequence of separate legal personality of the organization and its members).

<sup>4</sup> In September 2013 some 178 states were parties to the Convention.

<sup>5</sup> <http://www.cites.org/eng/disc/text.php> (20 March 2016).

war, attempting at secession. In that sense all those subjects claim the exercise of their right to self-determination. Such a formula is controversial. Let's remind ourselves that the use of armed force by Russia against Georgia in August 2008 was justified by the necessity of support to Southern Ossetia and its people, internationally recognized and allegedly lawfully struggling for independence.

## 2. Legal Personality of International Organizations

International intergovernmental organizations represent the most numerous and characteristic group of non-state actors. We deliberately exclude here non-governmental organizations. The dominant view is that they are not subjects of international law, although they can play an important role in international relations. The creation of the first international organizations in the first half of the 19<sup>th</sup> century did not constitute a revolution in international law. International river commissions were international organs rather than international organizations. By the way, the category of international organs deserves more attention from international legal writing. Up to now, no definition of such organs was formulated; we do not know what its features are— in particular we do not know what the differences are between international organs and organizations: one of them is that international organs do not have members (?!); nor do we have a clear classification of international organs. This category encompasses many various entities, starting with river commissions (from their very beginning they were exceptionally progressive – they could regulate the conduct of individuals in connection with the navigation on international rivers or other forms of their exploitation, albeit in a limited scope), through control bodies established in accordance with human rights treaties, to international courts and tribunals.

Two theories have been formulated during the recent decades to define the legal personality of international organizations. The objective one was proposed by F. Seyersted; among the proponents of the subjective one we can mention H. Schermes/N. Blokker, A. Reinisch, D. Bowett and C. F. Amerasinghe. According to the objective concept, the international organization can be granted the legal personality notwithstanding its statute, if some objective criteria required by (general) international law are met. The partisans of the dominant, subjective theory maintain that the legal personality can be either based on express provisions of the founding (constitutional) treaty, or implied from powers, rights and obligations imposed upon the organization by the member states. In fact, both theories suggest that international legal personality and particular powers to act are somehow connected with the will of the member states.

The World Court in two advisory opinions concerning the international legal position of non-state actors emphasized that international subjects can possess different scopes of powers. The first opinion related to the territorial scope of the European Commission of the Danube and was adopted on 12 August 1927.<sup>6</sup> Two commissions were established on the basis of Articles XVI-XVIII of the Treaty of Paris of 1856. The scope of powers of the final European Commission for the Danube was defined by the so-called Public Act of 2 November 1865 regulating the navigation on the Danube. The states-parties put the Commission under the protection of international law (Article 1). The Additional Public Act of 28 May 1881 conferred upon the Commission numerous powers of double nature: regulatory and technical. The commission was supposed to become a sort of a “river state”.<sup>7</sup> The dispute referred to the Court

---

<sup>6</sup> PCIJ Publ. 1927, Series B, No. 14, p.5;

[http://www.worldcourts.com/pcij/eng/decisions/1927.12.08\\_danube.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.12.08_danube.htm) (20 March 2016).

<sup>7</sup> See P. M. Dupuy, *Droit international public*, Paris 2010, at 198. Strictly speaking, neither the protocol itself, nor the 1927 advisory opinion do not use this notion. In 1930, one G.A. Blackburn stressed that the powers of the Commission justify the treating of it in future like the state, including the membership in the League of Nations. Cf. "International Control of the River

concerned whether the territorial changes before the riparian states after the conclusion of the said Public Act led to any modification of the competence of the Commission with respect to the lower part of the Danube between Galatz and Braila. The advisory opinion stated that the powers of the Commission were confirmed by the international treaties concluded after its establishing, in particular by the Public Act. If the parties agreed as to their substantive scope, there was no need to decide on their nature or legal basis. The Court emphasized that the Commission was not the state, as it did not dispose of territorial powers. Its activity was independent of the territorial sovereignty vested upon the riparian states. However, it was an international institution (*institution internationale*)<sup>8</sup>, exercising powers of functional character. They encompassed *inter alia* the power to intervene if the states-parties acted contrary to their engagements concerning the exploitation of the Danube. These activities of the Commissions should not exceed its powers granted by the states under the treaties. The opinion should be considered as the recognition of competence of the international agency, and the rejecting of any form of its international legal personality – so that it could not have any power deriving directly from international law.

The second opinion was passed on 11 April 1949 and concerned the reparation for injuries suffered in the service of the UN.<sup>9</sup> Contrary to the 1927 opinion, the Court was invited to rule on the powers of the UN not defined in the Charter. The Court used the opportunity to formulate a general theory of the legal personality of international organizations. The 1949 opinion must be interpreted with caution and restrictively, as an exceptional solution, as the international community was at that time fully dominated by the states. The opinion was applicable to the United Nations as the universal organization with nearly general participation, so that the will of the member states was decisive for an opposability of the legal personality of the UN towards all states. The Charter did not provide *expressis verbis* the competence to present international claims nor to send diplomatic envoys (special missions, using contemporary language). The Court stated however that if the member states conferred upon the organization certain powers, they had to grant the UN certain scope of legal personality. In fact Art.104 of the Charter provides for a legal personality, limiting it to domestic legal orders of the member states. A proposal to grant international legal personality was rejected at the San Francisco conference, as the delegates decided that the personality would derive from the Charter as a whole.<sup>10</sup>

The court stressed that not all the subjects acting in international relations have the same scope of legal personality. The states are sovereign and therefore they have the full scope of legal personality. The powers of the international organizations are limited and strictly connected with the functions conferred by the member states. There was no doubt that the power to send diplomatic agents was indispensable to perform the functions of the UN, and that those agents had to be protected under international law. This protection corresponds with the diplomatic protection by the states, but because of the nature of the UN it's purely functional. The Court based the protection on the context of all the provisions of the Charter, what corresponded with the proposals from San Francisco. So it rejected any powers of the organizations based directly upon international law, but referred to the conception known later as the doctrine of implied powers.

Summing up, both advisory opinions went in the same direction. The opinion of 1949 to a certain narrow extent completes the previous opinion of 1927. Both opinions found a source of the competence of the

---

Danube", *Current History*, XXXXII (September 1930). This opinion was criticized by J.Kunz in 1945. He stated that the river commissions constituted an object of international law regulation, and were not subjects of law. See "Experience and Techniques in International Administration", *Iowa Law Review*, XXXI (November 1945), p. 50.

<sup>8</sup> Advisory Opinion, at 64. The Court referred also to a notion of a *international body* (at 43).

<sup>9</sup> ICJ Rep. 1949, s.174; [http://www.worldcourts.com/icj/eng/decisions/1949.04.11\\_reparation\\_for\\_injuries.htm](http://www.worldcourts.com/icj/eng/decisions/1949.04.11_reparation_for_injuries.htm) (20 March 2016).

<sup>10</sup> Por. C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge 2007, at.78.



international organizations in the will of the member states. They also confirmed the principle of conferred powers as the basis of action of the organizations on the international plane. This principle is currently universally accepted. It expresses the subjective legal personality, depending upon the decision of the founding fathers of the organization. There is a dispute concerning the nature of implied powers, which are not provided by the statute, but necessary to achieve the goals of the organization. The *Reparation for injuries* opinion based the implied powers on the general context of the Charter. On the contrary, in the practice of the European Union the decision on the implied powers is vested upon the Council, depending on the proposal of the Commission and subject to consent of the European Parliament. In practice, the possible scope of the implied powers was framed extensively, the only limit being the letter of the founding treaties. We could discuss whether the conception of implied powers does not reflect the objective legal personality of the international organization, as certain powers could possibly be derived from general international law.

Comparing with other subjects of international law, the role of recognition with respect to international organizations and international organs is much less significant. It is of certain importance for the relations between the particular organizations with non-member states, but it does not constitute a condition of its activity in international relations. However, if we accept the objective theory of legal personality, we have to cope with its significant weakness: it does not clarify how the international personality could be imposed on the organization against the will of the member states and of the organization itself. In such a situation the recognition by third parties would play a more important role than now, in particular in the context of the opposability of the activities of the organization, and of the effectiveness of its acts.

What is difficult is not the definition of the international organization or its legal personality, but the qualification of the specific entity as the organization.

The discussion on the objective character of the legal personality took place also in the European Union after the conclusion of the Treaty of Maastricht. Some authors stated<sup>11</sup> that the Union acquired an implied international legal personality, with the consent of the member states which empowered the Union to conclude international agreements in the areas of common foreign and security policy, and the cooperation in justice and home affairs. Moreover, those agreements could be concluded on behalf of the Union, and not of the member states.

### 3. Recognition and Legal Personality

Classical international law included national liberation movements, guerillas and belligerents in civil wars in the category of international legal subjects. Those notions and expressions used in international language have positive connotation, and express a support of the international community for those subjects. On the other hand, we often face certain groupings engaged in armed confrontation with existing states and governments but deprived of an international support and condemned by the international subjects. It is interesting to investigate what factors decide whether the groupings in

---

<sup>11</sup> E.g. J. Klabbers, *Presumptive Personality: the European Union in International Law*, in M.Koskenniemi (ed.), *The International Law Aspects of the European Union*, The Hague-London 1998, p. 231; R.A.Wessel, *The International Legal Status of the European Union*, *European Foreign Affairs Review* 2(1997), p.109 ff; G. Hafner, *The Amsterdam Treaty and the Treaty-Making Power of the European Union*, in G. Hafner et al (ed.) *Liber Amicorum Professor Ignaz Seidl Hohenveldern*, The Hague et al. 1998, p.257 ff.

question are treated as pioneers of independence and heroic freedom fighters, or rather as armed bands and terrorists.

The said groupings are connected with internal (non-international) armed conflicts, and they conduct armed hostilities in order to proclaim independence, or – from the other perspective – to secede. In that sense all these subjects struggle for their self-determination which can be understood either as the external self-determination (aimed at the establishing of a new state), or as internal self-determination (unconstitutional change of government, modification of a political, economic and social system, etc.).

In order to check the legal situation of non-state actors we start by a defining who is a bearer of the right to self-determination. In the colonial context it was based on a list proposed by the special UN Committee on Decolonization, indicating all dependent territories. In accordance with UNGA Resolutions 1514 and 1541 (XIV), they had – alternatively – an option either to create a newly independent state, or to join already existing newly independent state (former colony), or to establish a new state together with another former colonial territory. A dependent territory could not, however, remain part of the former colonial power. Plebiscites in Gibraltar and Mayotte to maintain a colonial status were exceptional.<sup>12</sup> Already in the time of decolonization the right of self-determination did not concern people in ethnic (tribal) sense, but instead it was granted to a population of a specific territory. That can be seen in particular in Africa. The OAU confirmed the principles of intangibility of frontiers and territorial integrity during its first session in 1964. The same principles were included subsequently by Art. 4(a) of the Constitutional Act of the African Union. In the meantime the said principles were put in question by secessions of Eritrea (1993) and South Sudan (2011). This suggests that from the point of view of the territorial integrity of the state the secession of the part of territory is evaluated in a different way than the modification of frontiers by foreign intervention.

The approach to possible subjects of self-determination was verified and modified in the process of the Conference on Security and Cooperation in Europe. Under pressure by Western European states, the instruments of the CSCE confirmed that the right to self-determination is not limited to colonial people, but it is attributable to all nations (peoples organized in states). It consists of the right to determine freely the political, economic and social system of the state. From such an angle, the boundaries in Europe are not fixed once for all eternity, but they can be modified if the peoples (nations) concerned freely express such a will in a democratic way. This idea paved a way towards a unification of Germany under favorable circumstances, nearly 25 years after the adoption of the Helsinki Act.

More recently the role of *uti possidetis* was emphasized in the process of dissolution of the USSR and Yugoslavia, and – from a perspective particularly close and interesting for us – in the case of regaining independence by Lithuania.<sup>13</sup> In all cases connected with the dismemberment of the federations the international community was eager to recognize new states in the former administrative frontiers within the predecessor states. This confirms that self-determination has a territorial dimension. Also opinions of an arbitration commission, the so-called Badinter Committee, accepted the *uti possidetis* principle. In Opinion No. 3 of 11 January 1992<sup>14</sup> the Committee stated that together with the gaining of

---

<sup>12</sup> In fact, a referendum in Gibraltar in 2002 concerned an establishing of a British-Spanish condominium, and not independence.

<sup>13</sup> The Declaration of Independence of 11 March 1990 refers to the principles of territorial integrity and inviolability of frontiers, as formulated in the Final Act of the CSCE, while the two remaining Baltic states in their declarations of independence invoked the revival of their prewar statehood and boundaries. The reason of invoking *uti possidetis* is clear: Lithuania acquired rights to the (then Polish) city of Wilna on the basis of a treaty between the USSR and Lithuania of 10 October 1939. The conclusion of that treaty was possible thanks to the Hitler-Stalin Pact of August 1939, the validity of which Lithuania constantly challenged. This situation is a perfect example of a political schizophrenia.

<sup>14</sup> EJIL 3(1992), p.182.

independence by the former Yugoslav republics and their international recognition, the administrative boundaries turned into state borders and were therefore protected by international law. The importance of *uti possidetis* was further strengthened by accepting a protection of the territorial integrity of Bosnia and Herzegovina. Opinion No. 2 of 11 January 1992 confirmed that the Serbian and Croatian minorities had the right to autonomy within the state, but were not entitled to join Serbia and Croatia, respectively – as they did not possess the right to self-determination. Again, the territorial dimension of self-determination replaced the ethnic one.

The ICJ emphasized the importance of *uti possidetis* in its judgment in the Territorial dispute (Burkina Faso/Mali) case.<sup>15</sup> It indicated that the principle belonged to general principles of law, and its application went beyond regional relations in the African context. The Court's argument is puzzling, as because of its content and role in international practice *uti possidetis* should be interpreted rather as customary norm. Perhaps it would be too difficult to give evidence of the customary nature of the norm.

Recent UNSC resolutions concerning Western Sahara,<sup>16</sup> one of the last dependent territories, confirm the connection between self-determination and population of specific territory, notwithstanding its ethnic composition.

The issue of subjects of the right to self-determination (ethnic groups, other groups of individuals, population of the territory) is of crucial importance for our topic. The recognition of that right will be decisive for the establishing of their position in international relations, and for granting them rights and obligations. Those rights depend therefore of the will of the third parties, so in fact the said non-state actors do not have international legal personality.

Specific problems occurred in the cases of civil wars in Libya and Syria. The oppositional movements were recognized by the international community as "legitimate representatives of the people". Formerly the same formula was used in a colonial or similar to colonial context (PLO, ANC in South Africa, and FRELIMO in Mozambique). The recognition (not necessarily amounting to *de iure*) by the resolution of the UN General Assembly or by the majority of states was decisive. The same expression was used in the ICJ's advisory opinion on the accordance with international law of the unilateral declaration of independence of Kosovo (2010) where the Court stated that the act passed by the elected representatives of the people was not attributable to the international administration of Kosovo. The Libyan Transitional Council declared itself a sole representative of the Libyan people (but not as the transitional government) at the end of February 2011, and as such it was recognized by France and a number of other states. The recognition of the new government was possible first after the occupation of Tripoli and defeat of the Gaddafi regime, and took the form of voting on the credentials in the UN General Assembly (16 September 2011). The *Syrian* National Coalition of *Syrian* Revolution and Opposition Forces was established in November 2011, after several months of civil war, as a result of consolidation of a part of oppositional organizations. It was subsequently recognized by Libya, France and a group of other states. On the contrary, the government in exile for Syria, established in Turkey in March 2013, did not get an international recognition.

What is the significance of recognition as legitimate representatives of people? Under classical international law, a legitimism of state authorities was subordinated to legalism and effectiveness. This tradition was challenged in the 1990s, as the right to democracy was invoked as customary rule in Europe

---

<sup>15</sup> ICJ Rep. 1986, p.565 ff.

<sup>16</sup> Resolutions 1495(2003), 1813(2008), 1871(2009), or 2099 (2013).

and America.<sup>17</sup> If it becomes universal, the role of recognition/non-recognition as a measure protecting democracy will increase. Taking into account a military coup d'état in Egypt in summer 2013, there is still a long way to go. Secondly, the recognition as legitimate representative does not amount to the recognition of government, but allows certain level of protection under international law, enables purchase of weapons and other equipment, as well as possibly giving access to financial resources. Finally, from the perspective of third parties, it strengthened possible reparation claims for damages suffered during the civil war. Art. 10 of Articles on international responsibility of states (as annexed to the UNGA resolution 56/83 of 12 December 2001) provides for a responsibility of new governments for damages incurred during the insurrection, although the responsibility can be implemented first after the collapse of the previous regime.

#### 4. Obligation of Non-Recognition of Illegal Situations<sup>18</sup>

If recognition is the source of international legal personality of non-state actors, it should imply the obligation not to recognize those entities, the establishing and activities of which are unlawful. We should deny a priori any effects of such acts. Such an approach is particularly important when armed groups claiming recognition invoke the right to self-determination; as such situations constitute a threat to the territorial integrity of the state concerned.

The principle of non-recognition of unlawful territorial acquisitions was initiated by the so-called Stimson doctrine, proposed by the US government in connection with the Japanese aggression in China in January 1932, and continued with respect to the annexation of the Baltic States by the USSR in 1940. In international practice the problem became acute after a proclamation of independence by Southern Rhodesia (1965) and in the context of the Israeli-Arab war in 1967. Resolution 216(1965) called the member states not to recognize the illegal regime of prime minister I. Smith and its declaration of independence. The same idea was repeated in the following resolutions, including resolution 423(1978) rejecting all effects of activities of the illegal government, and resolution 448(1979) calling for non-recognition of the results of domestic elections. As to the situation in the Middle East, resolution 242 (1967) emphasized the illegality of territorial acquisitions by force and called on the parties to the conflict to respect the territorial integrity of all states in the region. One can invoke also resolution 402 (1976) condemning the recognition of Transkei by Lesotho, resolution 541 (1983) on the Turkish Republic of Northern Cyprus, resolution 662 (1992) on the invasion of Kuwait by Iraq, and resolution 757 (1992) on the war in Bosnia and Herzegovina.

The obligation not to recognize unlawful situations was confirmed in the 1970s, by numerous resolutions of the UNGA and decisions of international courts. The Declaration on Principles of International Law (resolution 2625[XXV] of 24 October 1970) stated in al.10 of Principle 1: *No territorial acquisition*

<sup>17</sup> See *i.a.* Th. Franck, *The Emerging Right to Democratic Governance*, AJIL 86(1992), p.46; J. Crawford, *Democracy and International Law*, BYBIL 64(1993), p.113; R. Müllerson, *Democracy Promotion: Institutions*, International Law and Politics, RCADI 333(2008), s.9; G. H. Fox & B. Roth, *Democracy and International Law*, Review of International Studies 27(2001), p.327; J. Wouters & B. de Mester & C. Ryngaert, *Democracy and International Law*, NethYBIL 34(2003), p.137; selection of papers by R. Burchill, *Democracy in International Law*, Ashgate 2006.

<sup>18</sup> See recently S. Talmon, *The Duty Not to „Recognize as Lawful” a Situation Created by the Illegal Use of Force or other Serious Breaches of a Jus Cogens Obligations: An Obligation without Real Substance*, in M. Thouvenin & Ch. Tomuschat (eds.), *The Fundamental Rules of the International Legal Order*, Leiden-Boston 2006, p.99; M. Dawidowicz, *The Obligation of Non-Recognition*, in J. Crawford & A. Pellet & S. Olleson (eds), *The Law of State Responsibility*, Oxford 2010, p.677; A. Pert, *The “duty” of non-recognition in contemporary international law: issues and uncertainties*, 2013 ILA-ASIL Asia-Pacific research Forum: Challenges in the Asia Pacific, May 15-16, 2013; Taipei, Taiwan, Republic of China.

resulting from the threat or use of force shall be recognized as legal. The same formula can be found in resolution 2734[XXV] of 16 December 1970, or the Declaration on the Strengthening of International Security. Finally the Definition of aggression (resolution 3314[XXIX] of 14 December 1974) reads in Art. 5(3), that *no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful*. All those resolutions were adopted by consensus.

As to the jurisprudence of the ICJ, we start with the advisory opinion on Namibia (1971).<sup>19</sup> The Court confirmed the extinction of the mandate of South Africa with respect to Namibia, so that the occupation of the territory became illegal. All the member states of the United Nations should abstain from any acts suggesting, that they recognized (even *de facto*) the legality of that occupation. In *East Timor* case,<sup>20</sup> the Hague judges stated surprisingly that no international organ obligated the states not to recognize the annexation of East Timor by Indonesia and consequently not to negotiate any question relating to it with any state other than Portugal as colonial power. Finally, in the advisory opinion on the wall in the Palestinian territory<sup>21</sup> the Court confirmed the acquisition of territory by force is illegal and cannot be recognized. In the latter cases there was a certain discrepancy between judges as to an interpretation of the principle of non-recognition. Judge Skubiszewski in his separate opinion of 1995 stated that the obligation is automatic, absolute and self-executing; while Judge Higgins in her opinion of 2004 considered that the decision of the UNSC was required.

European courts also referred in their jurisprudence to the illegality of certain situations and the obligation not to recognize their effects (*e.g.* the ECJ in its judgment in *SP Anastasiou (Pissouri)* [1994],<sup>22</sup> concerning the rejection of the certificate of origin issued by the customs authorities of the Turkish Republic of Northern Cyprus, while in *Brita*[2010]<sup>23</sup> it denied it; or the decision of the European Court of Human Rights in Strasbourg in *Ilaşcu* [2004],<sup>24</sup> concerning the responsibility of Russia for the violations of human rights in Transdnistria).

Articles on state responsibility pronounce *expressis verbis* on the non-recognition of unlawful situations in a mysterious way, in the context of responsibility for serious violations of peremptory norms of international law (Art.41). This seems to restrict the significance of the rule, and also to undermine a universal application of another principle: *ex iniuria jus non oritur*.

The obligation of non-recognition of unlawful situations is usually invoked in the context of illegal territorial situations, but it should not be limited to them. The non-recognition concerns also an illegal (unconstitutional) government and other cases. It seems that the customary nature of the principle is sufficiently confirmed by the international practice.

In this context we should address one more question: who decides whether the questionable situation is really unlawful. The ICJ seems to suggest (in the *East Timor* case) that there must be a basis for the decision in the form of the resolution of political organs of the UN. We disagree with this postulate,

<sup>19</sup> *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), ICJ Rep. 1971, p.16

<sup>20</sup> ICJ Rep. 1995, p.90.

<sup>21</sup> *Advisory Opinion on Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, ICJ Rep. 2004, p.136.

<sup>22</sup> Case C-432/92, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, ECJ Rep. 1994, p.I-3087;

[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61992J0432&lg=en](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61992J0432&lg=en) (20 March 2016).

<sup>23</sup> Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg Hafem*,

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0386:EN:HTML> (20 March 2016).

<sup>24</sup> *Ilaşcu and others v Moldova and Russia*, Application 48787/99, judgment of 8 July 2004.

simply because of the political nature of the acts of the General Assembly or the Security Council. Articles on state responsibility go in a similar direction, as they leave to the states a decision as to claiming international responsibility for violations of obligations *erga omnes* (Art. 42(b) and 48(1)(b)). The practice relating to sanctions and countermeasures decisively confirms this solution. Each state<sup>25</sup> itself takes a decision on recognition of other international actors and their rights and obligations.

## 5. The UN Security Council and the Status of Non-State Actors

The question remains open whether the fact that particular non-state actors were directly addressed by the Security Council resolutions can influence their international legal situation and confer legal personality. The UNSC deals with such entities mostly – if not exclusively – while acting in accordance with Chapter VII of the Charter, and tries to enforce the principles of law of armed conflicts and humanitarian law. A common usage is an appeal for cessation of hostilities.

We find numerous examples of resolutions addressed to non-state actors other than international organizations. This is in a way special, as according to Art. 48 (2) of the UN Charter exclusively the states are obligated to obey to the decisions of the Organization.

Examples of resolutions addressed to non-state actors are more and more numerous, starting with resolution 46(1948), addressed to the Arab Higher Committee and Jewish Agency in Palestine. Further instruments include *e.g.* Resolution 1193 (1998) concerning different groups in Afghanistan, including Taliban, Resolution 1270 (1999) addressed to armed groups in Sierra Leone, Resolution 1822 (2008) concerning terrorist activities of Al-Qaeda and Taliban, Resolution 1856 (2008), relating to different armed groups in the Democratic Republic of the Congo (including in particular the Congrès national pour la Défense du peuple (CNDP), Lord's Resistance Army, and Forces Démocratiques de Libération du Rwanda (FDLR)), Resolution 1860 (2009) addressed to Israel and Hamas, calling to ceasefire, and finally Resolution 1701 (2006), concerning the situation in Lebanon, calling for cessation of hostilities, disarmament of Hezbollah, and establishing of demilitarized zone in Southern Lebanon. Moreover, the non-implementation of such resolutions can result in imposing sanctions upon the groups concerned – *e.g.* Resolution 1127 (1997) proclaimed sanctions against UNITA (acting in Angola) for disobeying the peace agreements of Lusaka.<sup>26</sup> We emphasize that the adoption of those resolutions did not amount to the recognition of international legal personality of the addressees, but granted them certain powers to act in international relations (rights and obligations), without taking any firm position towards their status.

## 6. Concluding Remarks

The passage of the ICJ's advisory opinion of 1949 in the *Bernadotte* case emphasizing that the scope of legal personality, international rights and obligations, varies with respect to different categories of subjects remains fully actual. It's time to modify and to systematize the approach to non-state actors.

---

<sup>25</sup> We do not consider here a situation where some particular states are under international obligations to coordinate their policies.

<sup>26</sup> The UNSC addressed certain resolutions directly to individuals, *e.g.* imposing smart sanctions (travel ban, freezing of assets), but also calling to participate in processes of national reconciliation (see resolution 1072[1996] concerning the situation in Burundi, resolution 1258[1999] on the situation in the Democratic Republic of the Congo) or even to stop producing and distributing drugs (resolution 1333[2000] on Afghanistan). It might be interesting to analyze whether the resolutions could have direct effect (become self-executing).

The legal personality of international organizations depends upon the will of the founding states, and it cannot be questioned, at least by the members. The universal organizations like the UN are opposable to all states including non-members (which are not numerous anyway) – in that sense Art. 2(6) of the UN Charter establishes an objective regime (effective *erga omnes*) within the meaning of Art. 35-37 of the Vienna Convention of 1969 on the Law of Treaties. A possible protest against the legal personality of the said organization by third parties is not of importance. International organs based on international treaties can also have international legal personality of a functional nature and limited powers. Two specific subjects, the Holy See and the Order of Malta, are universally recognized on the basis of the general consensus. Their personality derives from the former territorial status. There is also a consensus as to the personality of the International Committee of the Red Cross, although there is no ground to expand this international personality to other NGOs.

It is much more difficult to build up such a consensus as to other non-state actors. The notions of “belligerent” or “guerilla” are fluent and indeterminate, there are no homogenous criteria allowing the identification of particular subjects, and their acceptance depends upon recognition, so it’s highly political. The expression “national liberation movement” is in a way outdated, conditioned by ideology and connected with the process of decolonization by armed force. The legality of their activities in the era of the ban on the use of armed force can be disputable. This category should be more and more replaced by a notion of separatist or secessionist movements. Such expressions are, however, pejorative. We suggest replacing it by “people attempting to exercise their right to self-determination”. The classification of those subjects will also depend on recognition. The subjects expressly or at least implicitly recognized on the forum of universal international organizations will be privileged, even though recognition of this kind does not prejudge their international legal personality (see the case of Palestine after being granted observer status within the UNGA).

The situation of groups of individuals or political fractions is even more complicated. We do not suppose that they are subjects of international law. They only possess certain international legal rights and obligations, *e.g.* in the domain of the law of armed conflicts (as to admissible weapons and methods of warfare) and humanitarian law. The scope of those rights and obligations is dependent upon the recognition by third parties, and consequently on conferral by them. The recognition will be of constitutive importance. The recognized non-state actors do not have per se any attributes of international legal personality, derived directly from general international law, except those connected with customary international human rights law. One has to remember that human rights protection is individual. Certain doubts exist with respect to a possibly collective nature of protection of minorities (individual rights can be exercised jointly by the individuals belonging to the same group) and to self-determination. The latter can be exercised exclusively if recognized by third parties, and thus we start following a vicious circle.

# The Dark Side of Migration Remittances and Development: The Case of Edo Sex Trade in Europe

Catherine Enoredia Odorige

*PhD Candidate, National University of Public Service Budapest*

*Migrants' remittances outflow to developing nations has gained wide attention in recent times. This is due to the fact that it has surpassed the amount in total aid money from developed nations to these developing nations. According to World Bank estimates in 2011 remittances by migrants in the United Kingdom to India is 4billion USD compared to 450million USD aid to the country in that same year<sup>1</sup>. When looked at in real terms it means how much impact these money can have on the developmental strides of developing countries in the long and short run. The remittance flow to developing nations in 2008 was put at 336 billion US dollars and in 2009 it was 316 billion US dollars from developed countries.<sup>2</sup> These remittances have in no small way had increased positive impact on the ways of life of persons and relatives living in these less developed countries. It is a relief to many homes from the grip of intense poverty. But the question is how much of these remittances are from legitimate and morally right sources? This paper seeks to look at remittances from Europe to Edo state of the federal republic of Nigeria and analyse the possible sources of remittances that have had an impact on the lives of the peoples of Edo state.*

*Keywords: migration, remittances, human trafficking, human traffickers and sex trade.*

## 1. Introduction

The interconnectivity between migration and development is not a new phenomenon. The periods before the industrial revolution between the mid sixteenth century and the 1820's brought about the uprooting of people from their homes in coastal parts of West Africa to provide the needed manpower for the development of societies in the Europe and America. This was a form of forced migration known as the period of transatlantic slave trade. An estimated 12million slaves were moved out of Africa.<sup>3</sup> The twin pronged trajectory of resistance movements by the slaves and rights activists of that time and redundancy occasioned by industrial revolution meant that the services of the slaves was no longer needed, led the abolition of slave trade. Many had to be returned to Africa to the coastal region which is today known as Liberia and Sierra Leone. However many remained, this influenced the composition of American and Caribbean populations of African descent who are mostly descendants of African slaves.<sup>4</sup>

---

<sup>1</sup> Ratha Dillip & Sonia Plaza, *Diaspora and Development: Critical Issues*, in India Migration Report, Irudaya Rajan. S. (Ed), India and London, Routledge, 2014 See <http://www.theguardian.com/global-development/2013/jan/30/migrants-billions-overshadow-aid> (3 May 2016).

<sup>2</sup> Dillip Ratha & Sanket Mohapatra & Ani Silwal, *Outlook for Remittance flow 2010 to 2011; Remittance outflow to developing nations remained resilient in 2009 expected to recover during 2010-2011*, Migration and Development Brief; Migration and Remittances Team Development Prospect Group, World Bank, 2010.

<sup>3</sup> David Eltis & David Richardson, *The Numbers Game*, in David Northrup, *The Atlantic Slave Trade*, 2nd edn, Houghton Mifflin Co. 2002, p. 95.

<sup>4</sup> M. C. Waters & P. Kasinitz & L. Asad, *Immigrants and African Americans*, *The Annual Review Of Sociology*, 2014, 10<sup>th</sup> March 2016.



In October 1961 the first bilateral agreements to move Turkish guest workers to West Germany was reached between Germany and Turkey, as Germany needed young men to work in its post-World War 2 booming economy. The migration of Turkish workers was by individual and small group responses to the initiatives of German and other business enterprise.<sup>5</sup> Workers were also attracted from countries like Greece, Portugal, Italy, Spain and Yugoslavia.<sup>6</sup> Some immigrants outsourcing were born out of colonial relationships between the colonies and the colonial masters. Evidences of these are the North and some of West Africans origins in France, Indians, Pakistani, Nigerians Ghanaians and others from former British Colonies in the United Kingdom<sup>7</sup>. The important point here is that these migrants and host relationships have imparted on the development of these developed nations in no small way.

The focus of migration and development today is the amount of remittances migrants living and working in host developed nations are sending back to their home countries. The United Nations says it was more than the entire sum of aid from these developed nations to developing nations. This influenced the interest of the UN in the Global Forum on Migration and Development which was inaugurated in Belgium in 2007. This forum is not a creation of the United Nations but its relevance has made the United Nation an active participant in the forum. The United Nations *Secretary General recognized that "one of the main achievements of the Global Forum has been its focus on the contributions of international migration to development and on building better understanding and collaboration among countries linked by migration; that the meetings of the Global Forum on Migration and Development have successfully engaged both Governments and the multilateral system in realizing the benefits of international migration for development and is collaborating to address its potentially detrimental effects"*<sup>8</sup>.

*Regardless of their origin and the causes of the relocation of almost 200 million migrants worldwide, their productivity and earnings constitute a powerful force for poverty reduction. Remittances are the financial counterpart to migration and are the most tangible contribution of migrants to the development of their areas of origin.*<sup>9</sup> According to the Central Bank of Nigeria in 2007 formal inflow of remittances to Nigeria was 17.9 billion USD representing 6.7% of the GDP, with the United States of America being the highest remittance sending country, followed by the United Kingdom, Italy, Canada, Spain and France<sup>10</sup>

---

<sup>5</sup> Gündünz Atalik & Brian Beeley, *What Mass Migration has meant for Turkey*, in Russell King (Ed), *Mass Migration in Europe: The Legacy and Future*, John Wiley & Sons, Sussex England, pp. 156-173, 1993.

<sup>6</sup> German missions in the United States of America History of guest workers. Immigration of foreign workers. <http://www.germany.info/Vertretung/usa/en> (1 February 2016).

<sup>7</sup> Erik Bleich, *The legacies of history; Colonization Immigrant Integration in Britain and France* 2005, Springer.

<sup>8</sup> United Nations General Assembly, 65<sup>th</sup> session, *International Migration and Development*, Report of the Secretary-General 2<sup>nd</sup> August 2010 p. 14.

<sup>9</sup> Vargas Rosemary & Maecella Villareal & Guillaume Lanly & Martha Osorio, *International Migration Remittance and Rural Development*, International Fund for Agricultural Development, 2008, IFAD p. 6.

<sup>10</sup> Central Bank of Nigeria (CBN), *The Remittance Environment in Nigeria*, Unpublished report of a study by the Research & Statistics Department, Abuja, 2007, Cited in Adejumoke A. & IOM research division, *Migration Trends in Nigeria; A Country Profile* 2009, IOM Switzerland 2009.

## 2. Factors Influencing Migration

*Discourses on migration have identified two major factors responsible for migration. According to Ghaffari and Singh The centripetal and centrifugal forces otherwise known as push-pull are factors that could compel people to migrate.<sup>11</sup>*

*The push factors are those challenges in the country of origin of the migrant that causes him to move out. These factors range from economic, political, cultural and religious. Economics have been identified as the major push factor responsible for why people migrate. These range from unemployment, underemployment draught, famine these challenges that produce poverty and encourage rural out-migration.<sup>12</sup> According to the International Labour Organization, the greater number of international migrants of over 100 million has left their homes to find better jobs and opportunities for their families abroad. Migrants tend to move to places where they can receive added value for their services.*

*Other push factors are political instability, civil strife, wars, ethnic and religious persecutions, infringements on human rights. Immigrants who fall under these categories are considered as asylum seekers who become refugees if their application for asylum is positive. This is based on the 1951 convention relating to the status of Refugees. Studies have shown that because of better integration packages for refugees as against economic migrants many would rather claim to be refugees or asylum seekers so that they can enjoy more favourable integration packages.<sup>13</sup>*

*Pull factors have been identified as those factors in the destination country that pull migrants to it, these range from political stability, stable and growing economic environment, availability of jobs, modern infrastructure, higher life expectancy, access to justice and human rights. De Haas posits that there is usually urban ward migration where more commercial business takes place.<sup>14</sup> A lot have also migrated on technically incorrect information, based on ideas, perception and deceptive information from human traffickers.*

## 3. Nigerian Migration Trends Pull and Push Factors

*Nigeria like most developing countries of the world has faced a myriad of political problems. This has in no small way imparted on its development. The country's dependence on oil has made it impossible to diversify its economy which would be much needed to provide employment for its ever growing population estimated at 17 0million people. The situation was not too different in the 1980's: it was indeed worse with the military in power. Growth and development was stalled and high level of inflation meant that people were not able to meet their basic needs. Changes in the economic and political policies of the country resulted in changes in the pattern of migration in Nigeria. One important change in particular is the adoption of the Structural Adjustment Programme (SAP) in 1986. This dictated a shift from the official policy of full employment to substantially reduced government spending on critical*

---

<sup>11</sup> H. Ghaffari & S. P. Singh, *Push-Pull Determinants of Inter Provincial Migration: Iran's case study*, Indian Journal Of Economics, 2000, 81(32), pp. 269-275.

<sup>12</sup> G. S. Kainth, *Push and Pull Factors of Migration: A case of Brick Kiln Industry of Punjab State*, Asia Pacific Journal of Social Science 2009, 1(1), pp. 82-116.

<sup>13</sup> Cortes E. Kalena, *Are Refugees Different From Economic Migrants? Some Empirical Evidence on the Heterogeneity of Immigrant Groups In the United States*, March 2004, IZA Discussion Paper No 1063. Available at SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=52460](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=52460) (10<sup>th</sup> March 2016).

<sup>14</sup> H. De Haas, *Remittances, Migration and Social Development; A Conceptual Review of the Literature Social Policy and Development Programme Paper Number 34 United Nations Research Institute for Social Development*, 2007.

services, such as health, education and housing.<sup>15</sup> This government policy encouraged many Nigerians to engage in international migration to affluent and developed countries in search of better life conditions. *Also political persecutions the military government against perceived enemies, this led many to seek refuge in other countries. Those who migrated were mostly of the educated class who sought countries where their services will be adequately paid for. An estimation by DRC<sup>16</sup> says that 1,041,284 million Nigerians live abroad mostly in Organization for Economic Cooperation and Development (OECD) countries. 10.7% of the highly skilled population who were trained in Nigeria work abroad with 83% of those emigrants from Nigeria in the United States of America being highly skilled as well as and 46% of emigrants to the United Kingdom being highly skilled. An average 64% of Nigerian emigrants possess a tertiary certificate.<sup>17</sup> An estimated 14% of Nigerians trained in the medical field in Nigeria live and work in the United States and the United Kingdom.<sup>18</sup> Nigerian emigrants for educational purpose have been on the rise since 2002.<sup>19</sup> This is the result of government's reduced spending on the educational sector that has brought about friction between government and the academic unions because of their demand for improved government spending on education. They sought to put pressure on government through strike actions that has led to loss of academic sessions. Between 1988 and 2013 the Academic Staff Union of Universities had embarked on sixteen strike actions.<sup>20</sup> With students staying at home for long periods when they ought to be studying in school, parents who could afford it began sending their children abroad for studies. The economic hardship that set in by reason of the SAP and the limited employment opportunities were the genesis of this out migration<sup>21</sup>*

#### 4. Theories of Prostitution and Edo Historical Perspectives.

*Literature on the history of prostitution in Edo is quite scarce, but we will try to understand Edo people's perception of prostitution from the point of view of theories of prostitution and the communal system that existed among the Edo people of pre-colonial times. Garner defined prostitution as the act or practice of engaging in sexual activities for money or its equivalent.<sup>22</sup> Prostitution is the act of engaging in sexual activity, usually with individuals other than a spouse or friend in exchange for immediate payment in money or other valuables. Prostitutes may be of either sex and may engage in either heterosexual or homosexual activity, but historically most prostitution has been by female with males as clients.<sup>23</sup> So much talk about prostitution being the oldest profession, Ayittey, espousing African*

<sup>15</sup> A. A. Afolayan & I. O. Adelekan, *The role of climatic variations on migration and human health in Africa*, The Environmentalist, Vol.18, pp. 213-218, University of Ibadan, Kluwer Academic Publishers 1998, Cited in A. A. Afolayan & O. Ikuyatum & O. Abejide, *African Perspectives on Human Mobility Programme Funded by MacArthur Foundation, A Country Paper: Dynamics of International Migration In Nigeria* 2008.

<sup>16</sup> Development Research Centre on Migration, Globalisation and Poverty (DRC) 2007 Global Migrant Origin Database, Development Research Centre on Migration Globalisation and Poverty, March 2007, Version 4. (29 February 2016).

<sup>17</sup> F. Docquier & A. Marfouk, *Measuring the international mobility of skilled workers (1990–2000)*, World- Bank Policy Research Working Paper 2004. No. 3381. (16 February 2016).

<sup>18</sup> M. A. Clemens & G. Pettersson, *New data on African health professionals abroad*. Working Paper 95, Centre for Global Development, Washington DC. 2007, (10 December 2015).

<sup>19</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO) *Human trafficking in Nigeria: Root causes and recommendations*, Policy Paper Poverty Series 2004 No. 14.2(E), Paris. (10 March 2016).

<sup>20</sup> Ibrahim Adamu, *Impact Appraisals of Academic Staff Union of Universities Strike on the Quality of University Education in Nigeria*, The Online Journal in Quality in Higher Education, July 2015, Vol. 2 issue 3 pp. 84-88. (23 February 2016).

<sup>21</sup> Frontex, *Handbook on Risk Profiles on Trafficking in Human Beings*, 2015, p.62; BBC, *Human trafficking: The lives bought and sold*, 28 July 2015; UNESCO, *Human Trafficking in Nigeria: Root Causes and Recommendations*, 2006, pp. 33-34. (16 December 2016).

<sup>22</sup> See, E. E Aloba & Ndifon Rita, *Addressing Prostitution Concerns in Nigeria: Issues Problem and Prospects*, European Scientific Journal May 2014 edition Vol.10, No.14. (23 April 2016).

<sup>23</sup> E. E Aloba & Ndifon Rita, *Addressing Prostitution Concerns in Nigeria: Issues Problem and Prospects*, European Scientific Journal May 2014 edition vol.10, No.14. (23 April 2016).

indigenous social system by citing Kenyatta, states that sexual intercourse between a man and his wife(s) is looked upon as an act of reproduction, not merely as the gratification of bodily desire. His research is situated in Gikuyu community and it typically represents African perception of the sexual relationship that exists between a man and a woman and the Edo people are no exception.<sup>24</sup>

Alobo and Ndifon discuss three theoretical perspectives of prostitution, *the functionalist* theory in the works of Kinsley Davis he gives two parallel ideologies of prostitution

1. Sexual morality that condemns prostitutes.
2. The existence of prostitution strengthening morality.

The second is the *social psychological* theory which holds that certain factors causes women to become prostitutes, traumatised childhood, like parental neglect and child abuse, the notion that prostitution can be a source of wealth and livelihood, and finally unemployment or pressure from peers and pimps.

The *feminist* theory which holds that society has a sexist view of women that is why the law goes only after a woman in a crime committed by both gender. And the societal encouragement of the patriarchal gender stratified system which dominates and exploits the female gender thereby promoting prostitution.<sup>25</sup>

The ancient Edo people lived in small close communities suitable for administration and this were divided into three age grade *edion* the elders, *ighele* the adults and *iroghae* the youths. The communal system here meant that the basic needs of individuals were met with the age group. Ayithey posits that in Africa primary duty is owed to the community, persons exist only in relation to another. Citing Jackson he explains that the essence of moral responsibility springs from the fact that a person's action affects and implicates all those who are related to him. He emphasised the importance of 'we' as against 'I' which implied unity and cooperation. This unity meant that all had access to livelihood, shelter and feeling of belongingness which run contrary to the social psychological factors that produce prostitutes. Ayithey emphasise further the African indigenous social system by quoting, Williams who outlines these communal lifestyle as "rights" (a) to equal protection of the law (b) right to own a home (c) right to livelihood through land distribution, (d) right to aid in time of trouble and other rights.<sup>26</sup>

The close communal life style of the ancient Edo people would have made it difficult to find a clandestine profession like prostitution existing among the people, there were traditional provisions that made it possible for widows to be remarried within her spouse family and be catered for. The changes that took transformed the traditional conservative Edo society may not be unconnected with Benedict Anderson's<sup>27</sup> discourse on state and nations where he talks about the transformation of society from agrarian practice to industrialization and increase in population. That the creation of the state as we know it today, gave rise to breakdown of communal society and created room for individualism that promotes social ills which prostitution is one of them.

---

<sup>24</sup> Ayithey George, *Indigenous African Institutions*, Transnational Publishers incorporated, New York USA.1991.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Benedict Anderson, *Imagined communities, Reflection on the Origin and spread of Nationalism*, Verso, London and New York.

## 5. Edo State of Nigeria and Italy and Europe

*The demand for farm labourers in the southern part of Europe led less educated Nigerians to countries like Italy and Spain in Europe during planting and harvest periods to work in tomato and fruit farms.<sup>28</sup> Braimoh states that “the first generation of Edo women and girls who went to Italy initially went abroad to conduct legitimate business such as the buying and selling of goods which included clothes shoes and jewellery. However, in the process of engaging in such business, a lot of women became compromised and augmented their business with prostitution.<sup>29</sup> Proceeds from the farm work was meagre when compared with proceed from prostitution. Many female immigrants started to supplement farm labour with prostitution. The high demand for sex workers in Europe and the relatively higher remunerations was the main reason behind this.<sup>30</sup> Hughes classified the demand for prostitutes into three categories: users or purchasers of sex, profiteers from selling sex and social cultural attitudes towards sex. Users or purchasers refers to persons who pay prostitutes to render a sexual service; brothel owners and pimps comprises of profiteers from selling sex and academics and media reporting and writing about prostitutes form part of socio-cultural attitudes towards sex, Hughes<sup>31</sup> By extension from Hughes analysis the highest profiteers from sex trade are the madams and traffickers as we will see with the case of prostitutes and victims travelling from Edo to Italy. These women were inspired by socio-cultural attitudes towards sex and the sex industry in Europe<sup>32</sup> and the cover of distance and away from the watchful eyes of those who will question their actions many were lured into this trade.*

*The proceeds from prostitution became too good to hide. Many women became transnational travelling to and from Europe under the pretext of buying goods from Europe and selling them in Nigeria. But underneath recruiting and encourage other friends or family members to take to the trade as it was seen as a great money spinner. Nigerian naira (means of financial exchange in Nigeria) had been devalued against international currencies because of the implementation of the SAP policies.<sup>33</sup> More international currencies meant much more naira.*

*Other multiple co-existing social psychological factors are illiteracy and the discrimination and violence faced by women in Nigerian society with the societal acceptance of polygamous family system. A man is entitled to take as many wives as he can cope with. Many go into polygamy without counting the cost and this may lead to the disruption of support systems. Many women are left with no choice but to fend for their children because the man has abdicated his responsibility to his family because of lack of employment or because a sense of lack of commitment to his duties as a father.*

*Life expectancy is 47.3 years for men and 48.3 for women,<sup>34</sup> this has led to early loss of family members. Many women experience early widowhood and accordingly they have to provide for their families by*

<sup>28</sup> S. Plambech, *Points of Departure*, 2014, p. 34. Cited in Afolayan, Ikwuyatum and Abijide 2008.

<sup>29</sup> T. S. Braimoh, *Sex Trafficking in Edo State, Nigeria*, 2013, pp. 2 & 10-11; UNICRI, *Trafficking of Nigerian Girls in Italy*, April 2010, p. 41. Cited in EASO Country of Information Report; *Nigeria Sex Trafficking of Women*.

<sup>30</sup> T. S. Braimoh, *Sex Trafficking in Edo State, Nigeria*, 2013, pp. 13, 21-22; UNESCO, *Human Trafficking in Nigeria: Root Causes and Recommendations*, 2006, p. 41; NAP TIP, Factsheet, Factsheet 2 – *What is human trafficking?* Cited in EASO Country of Information Report; *Nigeria Sex Trafficking of Women*.

<sup>31</sup> M. D. Hughes, *Best practices to address the demand side of sex trafficking*. Rhode Island: University of Rhode Island. 2004.

<sup>32</sup> Schulz Erika (Ed), *Sexual Exploitation and Prostitution and its Impact on Gender Equality*, European Parliament: Directorate General for Internal Policies; Policy Department, Citizens Rights and Constitutional Affairs, EU Brussels 2014. (In Nigeria there yet to be any form of legal consideration for regulating the sex trade based on fundamental human rights.)

<sup>33</sup> Lall Sanjaya, *Structural Adjustments and African Industry*, World Developments, Vol.23 issue Elsevier 12 December 1995 12, p. 2019-203.

<sup>34</sup> Chimobi Ucha, *Poverty in Nigeria: Some Dimensions and Contributing Factors*. Global Majority E-Journal, Vol. 1, No. 1, June 2010 pp. 46-56.,

any means possible. Others factors are the desire for greater autonomy and adventure, divorce, love, and family expectations.

Restrictive migratory policies in Europe made it difficult for many to get access to visas. They are then likely to turn to illegal agents to procure travel documents to migrate to Europe. Corruption among Nigerian officials both immigration officials and others working at the airports was instrumental to the growth of the sex trade and human trafficking in Edo state Nigeria.<sup>35</sup> To a large extent a ‘strong respect for and belief in certain aspects of traditional African religion has in no small way influenced the growth and secrecy needed for this “business” to thrive.’<sup>36</sup>

*Many were lured, cajoled or forced by poverty into the sex trade. It grew into a network<sup>37</sup>, a cartel which includes recruiters, traffickers’ madams at home and abroad, voodoo priests, intimidators, pimps and victims. What started as secret additional ways to acquire more foreign currency has grown in leaps and bounds to and evolved into international challenge involving drugs and prostitution, connecting illegal trade across continents and immoral and illegal alliances among mafia gangs.<sup>38</sup>*

## 6. Nigeria and Sex Trafficking

The Palermo protocol of the UN<sup>39</sup> to prevent, suppress and punish trafficking in persons especially women and children, defines trafficking in persons as, recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the afore-mentioned means have been used. The recruitment, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons,’ even if it does not involve any of the above listed means. “Child” shall mean any person less than eighteen years of age (Art. 3). This was supplemented to the UN Convention against Transnational organised Crime.<sup>40</sup> *According to the United States Department of State Trafficking in Persons Report 2015 ‘Nigeria is a source, transit, and destination country for women and children subjected to forced labour and sex trafficking<sup>41</sup> The trade of prostitution and drugs has been on-going since the 1980’s. The proceeds of crime have made it an established and growing industry that shows no sign of going away soon.*

[https://www.american.edu/cas/economics/ejournal/upload/Global\\_Majority\\_e\\_Journal\\_1-1\\_Ucha.pdf](https://www.american.edu/cas/economics/ejournal/upload/Global_Majority_e_Journal_1-1_Ucha.pdf) (3 May 2016).

<sup>35</sup> UNODC, “*Corruption: The Grease that Turns the Wheels of Human Trafficking*”, Background paper, Vienna, Forum on Human Trafficking, (13-15 February 2008).

<sup>36</sup> Agbu Osita, *Re-visiting Corruption and Human Trafficking in Nigeria: Any Progress?*

<sup>37</sup> John Barner & David Okech & Meghan Camp, *Socio-Economic Inequality, Human Trafficking and Global Slave Trade*, Vol. 4, pp. 148–160.; doi:10.3390/soc4020148 Open Access Societies, 2014.

<sup>38</sup> Chiara Caprio, *The deadly alliance between Nigerian and Italian mafia gangs*. The Independence online news <http://www.independent.co.uk/news/world/italian-and-nigerian-gangs-a-deadly-alliance-2361393.html> (21 December 2015).

<sup>39</sup> United Nations Human Rights Office of the High Commissioner, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx> (3 May 2016).

<sup>40</sup> UNESCO *Human Trafficking in Nigeria, Root Causes and Recommendation*, Policy Paper No. 14.2(E) Paris 2006, (15 January 2016).

<sup>41</sup> US DoS, *2015 Trafficking in Persons Report*, Nigeria, p. 265 (27 July 2015).

The source of the growth of this industry is simply its ability to reproduce itself according to this report by European Asylum Support Office EASO country of origin information on sex trafficking in Nigeria, new ‘madams’ in the industry have themselves been victims who starting off as prostitutes working on the streets, indebted to their madams who transported them to Europe or bought them over from peddlers or traffickers and became madams after repaying off their debt, the amount often dictated by their “madams.”<sup>42</sup> Europol posits that, victims often become members of the criminal groups exploiting them, ultimately assuming the role of a “madam” and exploiting other victims they (new madams) have recruited or bought off from traffickers. In turn, this cultural novelty reduces the likelihood that victims will cooperate with law enforcement.<sup>43</sup> Carling designates this system a ‘self-reproducing organisation.’<sup>44</sup>

In 2009, the United Nations Office on Drugs and Crimes (UNODC) estimated the number of victims of sex trafficking from West Africa, at 3,800-5,700 per year among which Nigeria constituted the main source country. In the period between 2007-2012 Nigerian victims accounted for more than 10% of the total number of detected victims in Western and Central Europe, making this route the most prominent trans-regional flow in this sub region.<sup>45</sup> Recent reports also by (UNODC) on *Global Trafficking in Persons (2014)* identify young women from Nigeria to Europe for the purpose of sexual exploitation as one of the most persistent trafficking flows.<sup>46</sup> In a Eurostat report for the reference period 2010-2012 regarding absolute numbers of registered victims of human trafficking in the European Union (EU), Nigerians were amongst the top five non-EU citizens<sup>47</sup> Regions also covered in this report are statistics from the Netherland, France and the United Kingdom.<sup>48</sup> Italy and Spain appear as the primary destinations of trafficked Nigerian women, from where they are trafficked to northern, central, and eastern European countries.<sup>49</sup> Europol identifies Nigerian organised crime related to trafficking in persons as one of the greatest law enforcement challenges to European government.<sup>50</sup> The phenomenon of human trafficking and international sex trade is not peculiar to Nigerian alone it indeed is a global challenge which is a product of social inequality and poverty which creates vulnerability among certain groups in the society. Barner and others in this discourse discusses the social inequalities and vulnerabilities that expose victims to this phenomenon in various regions in the world.<sup>51</sup>

## 7. Sources and Profiles of Victims

Nigeria is a source, transit, and destination country for women and children subjected to forced labour, sex trafficking and organ harvesting according to the United States Department of State for Trafficking in Persons Report from 2015<sup>52</sup>. In many cases, internal trafficking will constitute a first step to

<sup>42</sup> E. M. O. Baye, *Experiences of Nigerian Trafficked Women*, p. 25., (December 2012).

<sup>43</sup> EUROPOL, *Trafficking in Human Beings in the European Union*, pp. 15-16. (1 September 2011).

<sup>44</sup> J. Carling, *Trafficking in Women from Nigeria to Europe*, (1 July 2005).

<sup>45</sup> UNODC, *Transnational Trafficking and the Rule of Law in West Africa*, July 2009, p. 41.

<sup>46</sup> UNODC, *Global Report on Trafficking in Persons 2014*, pp. 56-57.

<sup>47</sup> The other countries of citizenship for registered victims were: Brazil, China, Viet Nam and Russia. See: Eurostat, *Trafficking in Human Beings*, 2015.

<sup>48</sup> Eurostat, *Trafficking in Human Beings*, 2015, cited in EASO country report on Nigeria sex trafficking.

<sup>49</sup> B. U. Mberu & R. Pongou, Nigeria: Multiple Forms of Mobility in Africa’s Demographic Giant, 30 June 2010; Women’s Link Worldwide, *Trafficking of Nigerian Women and Girls*, June 2015, p. 12.

<sup>50</sup> US DoS, *Trafficking in Persons Report, Nigeria*, 27 July 2015, p. 265.; Cited EASO Country of Origin Information Report – Nigeria: *Sex trafficking of women*.

<sup>51</sup> John Barner & David Okech & Meghan Camp, *Socio-Economic Inequality, Human Trafficking and Global Slave Trade*, Vol. 4, pp. 148–160; doi:10.3390/soc4020148 Open Access Societies. 2014.

<sup>52</sup> *Ibid.*

trafficking out of Nigeria.<sup>53</sup> Edo state in Nigeria represents the epi-centre for the recruitment for human trafficking to Europe. According to Beatrice Jedy Agba Executive Secretary of the National Agency for the Prohibition of Traffic in Persons and Other Related Matters (NAPTIP) “it is strongly concentrated in Edo state”.<sup>54</sup> This was also reiterated by the founder, Committee for the Support of the Dignity of Women (COSUDOW) in an interview by Land info of Norway in 2006 said pioneers in human trafficking to Europe with evidence of success were from Edo State.<sup>55</sup> Participants in this illegal trade all originated from Benin City, the capital of Edo State and nearby villages. Participants here refers to all those linked with the trade comprising, recruiters, traffickers, madams at home and abroad, voodoo priest and the unfortunate ones, the victims. Not all participants are Edo speaking people. Origins here could mean those resident or having friends or relatives resident in Edo state. Estimates show that 85% of Nigerian women selling sex in Europe travelled from, but did not necessarily originate in Benin City.<sup>56</sup> The focus of recruitment have shifted from the main city to the rural areas this is due to the clamp down by NAPTIP and other law enforcement agencies on the activities of traffickers, and the level of awareness created by NAPTIP among residents in Benin city, but this is not to say that city recruitment is completely ruled out. In the poverty stricken areas rural around Benin parents may be more inclined to put pressure on their young daughters to yield to the recruiters so as to change the family status. After recruitment from rural areas and the usual ritual of oath taking administered by the juju/voodoo priest women report that they were then taken to major cities, particularly to Benin City and to Lagos.

Recruitment takes place in places where there are possibilities of establishing relationships these include includes the markets where women work, churches or schools and within meeting groups like progressive unions. Women may also be recruited from other states, especially Delta State, but also from other southern states of Abia, Anambra, Akwa Ibom, Cross River, Ebonyi, Ekiti, Enugu, Lagos, Oyo, Osun, Ondo, Imo or from the more central states of Kaduna and Plateau. In Benin City of where, one can hardly find an extended family that does not have a family member, mostly women, who migrated to Europe.<sup>57</sup> It is note-worthy that not all were trafficked or migrated for the purpose of sex trade

## 8. Level of Awareness

The initial group of women in international prostitution in the 1980s were predominantly married or separated, searching for income to support their families. Recent recruitments are young girls who are between the age of 17 and 28 years.<sup>58</sup> Recruitment of minors has been on the increase because adult women especially in cities are more aware of the risks to which they are likely to be exposed, especially with the level of awareness that has been created through the media by NAPTIP and by women groups fighting against this menace. Young girls are easier prey lured by the promises of fast success by recruiters. The age declared by girls and women in the course of this journeys are unreliable as age is

<sup>53</sup> Cherti *et al*, *Beyond Borders*, p. 24. (January 2013).

<sup>54</sup> In June 2014, the United States government conferred the award of 2014 Trafficking in Persons Report Hero to the Executive Secretary of NAPTIP, Beatrice Jedy-Agba, NAPTIP Boss Emerges 2014 Trafficking in Person's Hero, June 2014 EASO.

<sup>55</sup> Sister Florence was interviewed during the Land-info (Country of Origin Information Centre, Norway) fact-finding trip to Nigeria in March 2006. See: Land-info, *Trafficking in Women*, May 2006, p. 13. For information on COSUDOW see its website at: <http://cosudowlagos.org/home/>.

<sup>56</sup> Carling 2005, Kasner 2009 IOM 2011b.

<sup>57</sup> S. Plambech, *Points of Departure*, 2014, p. 39.

<sup>58</sup> C. Okojie *et al*, *Trafficking of Nigerian Girls to Italy*, 2003, p. 108; Baye, E. M.-O., *Experiences of Nigerian Trafficked Women*, December 2012, p. 25; Aghatise, E., *Trafficking for prostitution in Italy*, 8 November 2002, p. 4.



declared according to the need of the recruiter. Age is increased to avert the watchful eyes authorities or indeed decreased for “marketing purposes”.<sup>59</sup>

The only period residents in Edo state can claim ignorance about trafficking for the purposes of prostitution, to Italy and other parts of Europe was in the 1990's. A lot were actually tricked into thinking that they were travelling to Europe to work as hair dressers in salons, baby sitters or as domestic house-helpers, working in factories, restaurants, beauty parlours or have been promise a modelling career.<sup>60</sup> By the time news of the activities of these cartels began to filter down to Nigeria and the level of campaigns that government initiated since that time, it is evident that all should have been informed about the consequences of becoming victims of traffickers. Nowadays people are aware that women go to Europe to work as prostitutes.<sup>61</sup> It should be noted here that Edo people do not normally accept prostitution or promiscuous behaviour. Women have been ostracised for this both by family and by society according to Aghatise and Braimoh. Despite remittances from sex trade abroad prostitution is still not an acceptable behaviour for the Edo society. Poverty and limited choices are the primary reasons why families cannot say no to income from prostitution. The financial success of these women portrayed by their large houses exotic cars and jewellery is one of the reasons why they become role models for younger girls, especially uneducated ones. Many are aware before they leave Nigeria that they will end up as prostitutes but are ignorant of the conditions, the harsh atmosphere, the exposure to violence and the enormity of the debt.<sup>62</sup> These young girls consider two to three years working hard as prostitutes to repay the debts to their facilitators<sup>63</sup> as being worth it to alleviate themselves and their families from poverty.

## 9. Efforts by the Government to Stem the Tide

Efforts by the Nigerian government to end the social menace of trafficking in persons, have been enormous and consistent, from raising awareness to discouraging its patronage and to the punishment of those found to be culpable of the act. A rehabilitation programme for victims caught in the act of prostitution Europe and repatriated back to Nigeria. One major instrument that the government has created to tackle human trafficking is NAPTIP the National Agency for the Prohibition of Trafficking in Persons and other related matters. Its mandate includes investigation, prosecution, monitoring, counselling, rehabilitation, awareness raising, research, and training.<sup>64</sup> The Agency works both as a social tool for creating awareness and legal tool for apprehending and prosecuting offenders. NAPTIP working with other stake-holders uses all forms of media to create awareness of the public about the activities of traffickers. Television and radio announcements, talk-shows are broadcast in various local

<sup>59</sup> UNICRI, *Trafficking of Nigerian girls in Italy*, April 2010, pp. 41-42.

<sup>60</sup> C. Okojie, et al, *Trafficking of Nigerian Girls to Italy*, 2003, p. 57; Baye, E. M.-O., *Experiences of Nigerian Trafficked Women*, December 2012, p. 33; Voice of America, *Bound By Magic, Nigerian Women Enslaved*, 21 November 2012; *Women's Link Worldwide, Trafficking of Nigerian Women and Girls*, June 2015, p. 11; Global Post, *I was a slave, Nigerian women escape sexual bondage in Italy*, 14 July 2015; Frontex, *Handbook on Risk Profiles on Trafficking in Human Beings*, 2015, p. 68.

<sup>61</sup> DIS, *Protection of victims of trafficking in Nigeria*, April 2008, p. 31.; Carling, J., *Trafficking in Women from Nigeria to Europe*, 1 July 2005; Pascoal, R., *The situation of the Nigerian human trafficking victims and their children in Italy*, 19 December 2012, p. 22; Landinfo, *Trafficking in Women*, May 2006, p. 9; Skilbrei, M.-L. & Tveit, M., *Facing return*, 2007, p. 5; Plambech S., *Points of Departure*, 2014, p. 389.

<sup>62</sup> R. Pascoal, *The situation of the Nigerian human trafficking victims and their children in Italy*, 19 December 2012, p. 22; J. Carling, *Trafficking in Women from Nigeria to Europe*, 1 July 2005; M. L. Skilbrei & M. Tveit, *Facing return*, 2007, p. 5.; S. Plambech, *Points of Departure*, 2014, p. 389.

<sup>63</sup> Europol, *Trafficking in Human Beings in the European Union*, p. 12., (1 September 2011).

<sup>64</sup> S. K. Kigbu & Y. B. Hassan, *Legal Framework for Combating Human Trafficking In Nigeria*, 2015, p. 206.

*dialects and Pidgin English (a form of corrupted English spoken by majority of residents popular among the uneducated). Billboards warning people about the traffickers can be found in the major city centre (Benin City) and parts of the city where persons who have immigrant population and their relatives are concentrated. The Nigerian movie industry (Nollywood) has been very active in raising awareness of the dangers victims are exposed to trying to make it abroad.*

*NAPTIP along with other stakeholders developed a National Plan of Action (2009-2012) structured on the four theme areas of Prevention, Protection, Prosecution and Partnership, called the 4 Ps Strategy. This was followed by a Strategic Plan (2012-2017) focused on tackling human trafficking in five broad areas which are; strengthening law enforcement and prosecutorial response, reinforcing public enlightenment, using various mediums, including movies, drama and documentaries to create greater awareness on the real impact of trafficking, expanding platforms for victim protection and assistance and addressing factors which increase vulnerability, strengthening partnerships at national, regional and international levels and improving organisational development.<sup>65</sup>*

*Also of relevance are the ratification in 2000 and 2001 of the United Nations Convention against Transnational Organized crime and its supplementing protocol on trafficking in persons in 2003, by the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act which was amended in 2005 and 2015 to increase penalties for trafficking offenders. This act is applicable to the 36 states of Nigeria and the federal capital territory (FCT) Abuja.<sup>66</sup>*

## 10. Remittances and their Positive Impact

The International Monetary Fund IMF defined workers' remittances as international transfer of funds sent by migrant workers from the country where they are working (and have stayed for more than one year to be considered resident in the countries) to their family members in their countries of origin. Similarly, the IMF Balance of Payment Manual 5 (BPM5) defines remittances as the portion of international migrant workers earning sent home from the country of employment to the country of origin. Solimano<sup>67</sup> considers remittances as that portion of migrants' earnings sent from the migration destination to the place of origin. Remittances can be sent in cash or kind. The Central Bank of Nigeria (CBN) also shares this position as it considers remittances as both financial and non-financial resources freely sent to migrants' households in the home countries. They contribute immensely to financing domestic investment as well as providing sustenance funds for dependent relatives, thereby alleviating partly poverty in developing countries, kind refers to here to items such as food, jewellery, books, medicine, clothing, electronics and cars meant for immediate use by the recipient, but alternatively they are sold to acquire funds for other uses. Remittances are also considered as unilateral transfers and so they do not create any future liabilities such as debt servicing or profit transfers. So remittances are generally less volatile, hence they are a more dependable source of funds in some countries than private

---

<sup>65</sup>NAPTIP, *Nigeria, Finland collaborate against human trafficking* – Press release, 13 January 2015; J. Famakin, *A paper on 'sex-work and human trafficking of women and girls'*, 31 July 2013, NAPTIP, National Rapporteurs on Trafficking in Persons and Equivalent Mechanisms in Addressing Trafficking in Persons (NREM), 21 – 22 May 2014.

<sup>66</sup> UNODC, *Trafficking in Persons Report, Nigeria* Signatories to the CTOC Trafficking Protocol, US DoS, 2015, (27 July 2015).

<sup>67</sup> Solimano Andrea, *Workers Remittances to the Andean Region, Mechanism Cost and Development impact*. Paper prepared for multilateral investment fund IDB conference on remittances and development. Quito-Ecuador, May 2003.

capital inflow. *Remittances from abroad play an important role in poverty reduction.*<sup>68</sup> *Many of the migrant girls interviewed by Braimoh in 2013 confessed their willingness to take the risk of being trafficked because of the desire to salvage their families from the grip of poverty. Many can afford to go to school, have a decent meal, have access to health care and live in decent housing because of a relative living abroad.*

Remittances are commonly used to acquire housing, land, financial assets and to fund businesses in the community of migrants' countries of origin. This may be due to the fact that these are more durable investment and require little or no monitoring. It can also be argued that migrants' investment decisions are closely related to their return migration plans.<sup>69</sup> This accounts for the many modern houses in Benin City today especially in suburbs and densely populated areas. Prior to migration trends Benin City had more of mud houses basically overcrowded with extended families living together. This brought a lot of strife among family members, due to overcrowding.

*There is no denying the fact that remittances from emigrants have impacted on the life of many residents in Edo state and in Nigeria in general.* Remittance income does not benefit only individual recipients; it benefits the local and national economies in which they live. Indeed, the spending allowed by remittances has a multiplier effect on local economies as funds subsequently spent create incomes for others and stimulate economic activities in general. Beyond such multiplier effects, however, are other factors conducive to economic growth and stability.<sup>70</sup> Remittance received from migrants abroad is one of the largest sources of external finance for developing countries. The true size of remittances cannot be truly documented most of the data on remittances are from formal channels. Unrecorded flows from informal channels can double the data from formal flow if documented. In Edo state for example the informal channel of flow of remittances is ultimately large as bureau de change offices which double as pay-out agents are found in various places within Benin City. These channels are believed to be as large as the formal sectors of Western Union and Money Gram. Freund and Spatafora<sup>71</sup> carried out studies on literature on informal remittances for more than 100 developing countries on shadow economies. Findings revealed that informal remittances amounted to 35-75 % of formal remittances to these countries. But results vary from country to country. Informal remittances to Eastern Europe and Sub-Saharan Africa are higher than those to East Asia and the Pacific. The reasons put forward by Orozco from researches from remittances to Latin America is the percentage cost of sending money through formal channels which is much higher than informal channels.<sup>72</sup>

## 11. Consequences of Migration and Remittances on the Victims and Youth Population

Regardless of the seeming glamour displayed by so called successful victims turned madams, negative consequences of human trafficking outweigh positive impact of remittances. Human rights violations and deterioration of mental and physical health are some of the negative experiences victims of human

---

<sup>68</sup> Dillip Ratha & Sanket Mohapatra & Ani Silwal, *Outlook for Remittance flow 2010 to 2011; Remittance outflow to developing nations remained resilient in 2009 expected to recover during 2010-2011*, Migration and Development Brief; Migration and Remittances Team Development Prospect Group, World Bank, 2010.

<sup>69</sup> OECD International Migration Outlook 2008.

<sup>70</sup> Caroline L. Freund & Nicola Spatafora, *Remittances: Transaction Costs, Determinants, and Informal Flows* (August 2005). World Bank Policy Research Working Paper No. 3704.

<sup>71</sup> *Ibid.*

<sup>72</sup> Orozco Manuel, *International flow of Remittances Cost Competition and Financial Access in Latin America and the Caribbean Inter- American Dialogue*, Towards an Industry Score card, Washington DC May 2006

trafficking go through during and after the process of trafficking. Free will, human dignity and an inability to make their own decisions are some of the human rights violations experienced by victims at the hands of human traffickers.<sup>73</sup> The stigmatization associated with prostitution in Edo state can also be a source of social-psychological disorder for ex-prostitutes or victims especially those deported without anything to show for their *travel*. As stated earlier, it is the level of poverty that throttles many families from saying no to proceeds of prostitution, but prostitution is still not an acceptable norm in the Edo society.

The glamour and wealth displayed by migrants' are a source of inspiration for many young people to migrate to Europe. This accounts for why many both male and female are determined to make the journey at all cost. Youth population with the desire to travel are no more inclined to get an education as traffickers do not specify educational qualification as a prerequisite, as such many have lost the desire to get an education or acquire skills. Youth populations, both male and female are on their way through various unconventional routes to get to Europe.<sup>74</sup> Many lose their lives on the way to Europe.<sup>75</sup> Cultism and drug trafficking is common among young men from Nigeria resident in Italy and Spain many have been killed because of this. Mafia gangs promote cultism because these young men are vulnerable tools in their hands for their illicit trade in drugs and prostitution.<sup>76</sup> Many Nigerian youths who were deported from Libya waiting to cross to Europe became a social menace in the society. Prostitutes deported from Europe back to Nigeria become traumatised and have to receive a lot of psycho-therapy to fit into society again. More often because of the shattered dreams of not being able to come back glamorous they distance themselves from the family which was the consideration for making the journey in the first place.<sup>77</sup> This negative impact of traffickers information and activities on the youth population cannot be over-emphasised much need to be done to get them out of business or neutralise information they pass to young men and women so that whole populations will not be lost to unrealistic dreams because of their activities.

## 12. Conclusion and Recommendation

*The Nigerian nation have been going through political instability since the first coup d'état in 1966. After its independence from colonial rule in 1960 a better part of its political existence has been in the hands of the military spanning over 30 years. This accounts for the high level of mismanagement of resources, corruption, nepotism, infrastructural decay, unemployment youth restiveness and poverty. However for the decision by many to immigrate to places where there are better living conditions and opportunities for work, the level of poverty would have been more extreme. This could have led to some form of implosion. Looking at the figures from remittances it is obvious that it is a life saver. Government should not discourage immigration but search for ways to take traffickers out of the business. This could be done by opening up channels of communication with countries needing labour. This can create job*

<sup>73</sup> Luty and Lanier, *An Integrated Theoretical Framework to Describe Human Trafficking of Young Women and Girls for Involuntary Prostitution*, Journal of Public Health Social and Behavioural Health May 2012.

<sup>74</sup> Kumolu Charles, *Suicide Trip to Europe By road; Uncovering Fatal Attraction Among Nigerian Migrants*, Vanguard Newspapers, April 28 2015 <http://www.vanguardngr.com/2015/04/suicide-trip-to-europe-by-road-uncovering-fatal-attraction-among-nigerian-migrant/> (1 February 2016).

<sup>75</sup> Marc Herman, *From Africa to Europe: A surprisingly Dangerous Journey*, December 2013, <http://www.takepart.com/article/2013/12/03/dangerous-journey-senegal-spain>;

Joan Baxter, *Mali; Dangerous Desert Gateway*, June 2002 <http://news.bbc.co.uk/2/hi/africa/2063526.stm> (23 April 2016).

<sup>76</sup> Oladimeji Ramon, *How Nigerian Cult Groups Traffic women into Europe*; Spanish Police Punch Newspapers (January 28 2016); <http://www.punchng.com/how-nigerian-cult-group-traffics-women-into-europe-spanish-police/> <http://www.nigerianeye.com/2016/01/exposed-how-nigerian-cult-group.html> (23 April 2016).

<sup>77</sup> R. Pascoal, *The situation of the Nigerian human trafficking victims and their children in Italy*, 19 December 2012, p. 24.

opportunities for its large and growing youth population and prevent their exposure to crime and illiteracy which the traffickers subject them to. Also educating people on how they can directly have access to travel without needing to go through traffickers.

Countries experiencing out migration and the international community in general need to begin to ask is how much of these remittances come from illicit and illegal sources. From evidences above we saw how the initial group of migrants to Italy and Spain abandoned farm work and augmented transnational business with prostitution. No doubt large amount of these remittances are from illegitimate and morally decadent sources, but on which cost? At the cost of allowing a group of traffickers, madams and mafia groups breed for our society cultists and prostitutes, convincing them, that this is all life is about? Increased efforts should be made to stop these groups of people with governments adopting pro-active steps to fight against traffickers. And government should engineer the right policies to educate the people, provide employment and open up legitimate migration channels.

Migration is significantly reshaping the traditional social and economic structures of rural communities in Edo state in both positive and negative ways. Braimoh has identified illiteracy as the major factor driving victims and their families to yield to traffickers. For many years Nigeria's budget for education has been relative low this has accounted for why majority of the poor people could educate their children. The Mohammadu Buhari government identified this and takes steps to deploy teachers to the rural area to teach.<sup>78</sup> Yet much more still has to be done, the Nigerian education system suffered from the many years of political instability and infrastructural decay. This led to falling educational standards which affected teachers training colleges in the country. Those in teaching profession today may not have had the prerequisite training needed to teach. Therefore many may not have needed tools for passing knowledge. So a retraining of teachers for basic pedagogic skills may be necessary.<sup>79</sup>

Guidance and counselling units in schools need to be strengthened to help in this fight, as the girls under family pressure could talk with guidance counsellors.

Welfare from governments has eluded Nigerians for many years of governance, although it could be a way of alleviating many from poverty. It can go a long way in also getting the citizen to trust in the government, by showing that it cares for their welfare. The fight against traffickers has been unsuccessful because a lot of people do not have a real choice. As step in the right direction the new government is introducing welfare for Nigerians.<sup>80</sup>

The fight against illicit and illegal transnational crimes is not a fight of the international community all hands must be on deck for information sharing, and expert advice sharing to stop or at least reduce this trend drastically so that the many benefits of immigration will not be high-jacked by a few unscrupulous actors.

---

<sup>78</sup> Adelakun Abimbola, *Education and Buhari's 2016. Budget*. Punch newspapers December 31 2015 <http://www.punchng.com/education-and-buharis-2016-budget/> (31 January 2016).

<sup>79</sup> Oladunjoye Patrick & Omenu Felix, *Revitalizing Teachers Training Colleges in Nigeria, Issues and Challenges*, Journal of Education Practice, Vol. 4 No.17 2013 (23 February 2016).

<sup>80</sup> Buhari plans to introduce social welfare by making payments to 23million extremely poor. Nigerian Watch 03 September 2015; <http://www.nigerianwatch.com/news/7703-buhari-regime-plans-to-introduce-social-welfare-by-making-payments-to-25m-poor-families> (30 January 2016).

# Modus Operandi of Organised Crime Groups Involved in the Trafficking and Sexual Exploitation of Hungarian Women – A Case Study on the Hungary-Netherlands Transit

Jorn Johannes Marinus van Rij

*Senior Lecturer, Inholland University of Applied Sciences*

*Human trafficking, especially with the aim of sexual exploitation of women, has been at the centre of political debate for decades now. This has resulted in new legislation and approaches and perspectives on how to react to this type of transnational organised crime, out of a European as well as from a national level. Exact numbers of victimisation are unclear but on the basis of the Dutch data an annually top five representation of native Hungarian speaking women, out of both Hungary and Romania who have fallen victim to human trafficking and sexual exploitation, can be recognized. Beside these numbers, little is known on the circumstances surrounding the trafficking and sexual exploitation of these women. Most research, due to a too small or biased sample, is commonly not representative. This research sought to fill this void in such a way that the known scientific pitfalls surrounding research on the topic of the sexual exploitation of women were being avoided. The data gathered was analysed and partly confirmed other primary and secondary data on the modus operandi applied in the Netherlands by transnational operating organised crime groups. Next to this it also provided insight on the start of the exploitation of the women, the methods used and trafficking routes followed by organised crime network structures and it provided in-depth background information on the women and the situation they found themselves in.*

*Keywords: Organised Crime, Human Trafficking, Sexual Exploitation, Ethnographic Research, Roma Minorities, Prostitution Carrousel*

## 1. Introduction

While researching the phenomenon of human trafficking combined with the sexual exploitation of women by forced prostitution the researcher finds himself confronted with having to operate in a grey sub-system of society which in nature which would rather not reveal itself and therefore holds a lot of secrets and ambiguities. Despite wider interest still little scientific ethnographic research has been done on the topic and the research that has been done often has a (too) limited sample to be valid and reliable. This article uses first hand information and aims to give more insight in the parties involved, the stories behind the persons and by doing so prove the value of doing ethnographic criminological fieldwork.<sup>1</sup>

---

<sup>1</sup> For Dutch ethnographic contributions see D. Siegel & F. Bovenkerk *Crime and manipulation of identity amongst Russian-speaking immigrants in the Netherlands*, in: Contemporary Criminal Justice, 2000, 16(4);

D. Siegel & Y. Yesilgoz *Natashas and Turkish men: new trends in women trafficking and prostitution*, in: D. Siegel & H. van de Bunt & D. Zaich (eds), *Global Organised Crime. Trends and developments*, Dordrecht: Kluwer, 2003; D. Siegel, *Recent*

Usually the more common and theoretical orientated research focuses on the issue of explaining the *who* and *why* by using the limited available ethnographic work done by others or by using practical examples from the news or court cases. This is undesirable as prostitution, especially when trafficking and sexual exploitation is involved, is highly flexible, diversified and both the nature and extend of the crime committed within this context tend to change almost daily.<sup>2</sup> Because of this it is near impossible to avail oneself of existing knowledge and experiences which makes measuring the volume, scope and patterns of trafficking and sexual exploitation a difficult and time consuming process.<sup>3</sup>

In order to avoid the well registered pitfalls the research has a longitudinal design and the actual fieldwork started in 2009 and ended in 2013 and took place in both the Netherlands as a destination country as well as Hungary as a source country for victims of human trafficking. It was designed in such a way that it uses both quantitative and qualitative methods of data collection and analysis in order to guarantee validity and reliability of the research, on the basis of saturation as basic criterion. This triangulation of methods is a necessity considering the clandestine nature of the research topic and the vulnerability of the persons involved. According to Tyldum<sup>4</sup> research involving victims of trafficking can be performed on three stages. The first stage is orientated towards persons at risk, the second stage focuses on current victims and the third stage looks at former victims of trafficking. Tyldum states that only the third group would make for a desirable sample even though this group also has its practical objections and representational errors. This group however is still a better option than the other two groups because of sampling difficulties and the intrusive elements of the research.<sup>5</sup> Within the research conducted this assumption was put to discussion as this research identifies criminal structures by researching the second group, involving current victims as a main source of information which has proven possible and successful while taken into account the common restrictions and limitations.

## 2. Sampling and Methodology

For the research an ethnographic bottom-up approach using an empirical victims-perspective has been applied to correctly address the issues regarding human trafficking and forced prostitution. In order to do so it was necessary to establish entry through and with the help of the persons directly involved within prostitution. As it is impossible to contact traffickers directly, the option for a current victim

---

*trends in women trafficking and voluntary prostitution: Russian-speaking sex workers in the Netherlands*, in: Transnational Crime, 2005, 4 (1); H. Dekker & R. Tap G. & Homburg *Het bordeelverbod opgeheven, de sociale positie van prostituees*, Amsterdam: Regioplan Beleidsonderzoek, 2006; S. Biesma & R. van der Stoep, R. Naayer & B. Bielemans, *Verboden bordelen. Evaluatie opheffing bordeelverbod*, Groningen: Intraval, 2006; M. Janssen, *Reizende sekswerkers: Latijns-Amerikaanse vrouwen in de Europese prostitutie*, Amsterdam: Het spinhuis, 2007; D. Siegel & S. de Blank, *Vrouwen die in vrouwen handelen. De rol van vrouwen in criminele netwerken*, in: Tijdschrift voor criminologie 50(1), 2008.

For other contributions see: L. Agustín, *Sex at the margins: migration, labour markets and the rescue industry*, London: Zed Books, 2007; B. C. Oude Breuil, *Precious children in a heartless world? The complexities of child trafficking in Marseille*, in Children and Society 22(3), 2008; A. Brunovskis & R. Surtees, *Agency or illness- the conceptualisation of trafficking: victim's choices and behaviours in the assistance system*, in Gender technology development journal 12(1), 2008; J. Davies, *My name is not Natasha. How Albanian Women in France use trafficking to overcome social exclusion*, Amsterdam: Amsterdam University Press, 2009; M. Roguski *Occupational health and safety of migrant sex workers in New-Zealand*, Wellington: Kaitiaki Research and Evaluation, 2013; H. Wagenaar & S. Altink & H. Amesberger, *Final Report of the International Comparative Study of Prostitution Policy: Austria and the Netherlands*, The Hague: Platform 31, 2013.

<sup>2</sup> G. Tyldum, *Limitations in Research on Human Trafficking*, in International Migration 48 (5), 2010.

<sup>3</sup> N. Lindstrom, *Regional Sex trafficking in the Balkans. Transnational Networks in an Enlarged Europe*, in Problems of Post-Communism (51) 3, 2004.

<sup>4</sup> G. Tyldum, 2010.

<sup>5</sup> G. Tyldum, 2010.

approach, as mentioned in the introduction, was selected.<sup>6</sup> The research therefore started by examining the working areas of the women involved in sex work, as prostitution in the Netherlands is very much identifiable and recognisable in designated areas. The population of Hungarian women was selected as main research group as Hungarian women are one of the most frequently reported nationalities to have fallen victim of trafficking and sexual exploitation in recent years.<sup>7</sup>

For representative purposes larger Dutch cities which hold one or more red light district were selected. The assumption was that these window areas, which are relatively cheap and profitable, harbour a lot of trafficking victims. The selected cities were Amsterdam (Old Church area), The Hague (Hunse-, Geleen- and Doubletstraat, Groningen (Nieuwstad) and Utrecht (Zandpad). It is well known these cities are composed of a multicultural population and therefore could provide sufficient social capital<sup>8</sup> which exists out of '[t]he possibilities that individuals have to mobilise resources out of social networks to which they belong'<sup>9</sup> and the amplitude of the city itself provides anonymity and sufficient possibilities for cheap accommodation and living, so costs can be kept low and in the case of human trafficking and the exploitation of its victims, profits high. This list of cities was supplemented with the city of Rotterdam, which despite the absence of a red light district has a very active prostitution scene. Rotterdam, a few years back, issued at or near 100 licenses for brothels to conduct business on a legal basis. Led by the mayor and city council this number is currently being reduced down to less than 25 by natural decay which means no new licenses are being issued and if a brothel closes down the permit is automatically expired without change of renewal. The ideology behind this method is that both prostitutes and facilitators will choose a different profession or relocate and leave the municipality when no legal options to conduct business remain. This is commonly known as the waterbed or wrinkle effect.<sup>10</sup> This idea of dejection, has first been implemented in the red light district of Amsterdam in 2009 under the work title; 'project 1012' and the results of this policy show signs of the wrinkle effect as prostitution has moved into illegality.<sup>11</sup> Notwithstanding this example, the city of Rotterdam, continues its course and continues ignoring the transition effects as pointed out by Van Wijk *et al.*<sup>12</sup>

Despite the absence of a red light district and the ongoing limitation of brothels etc., Rotterdam has a very active online prostitution scene which is used by women to place advertisements for men to view and which they can use to contact them. In practice this usually means that the women who offer themselves are working without a license and operate out of a private flat or only conduct out-call (escort) services.<sup>13</sup> It is assumed that this method of work makes the women more vulnerable to exploitation and abuse by both pimps and punters<sup>14</sup>, as regulation and control is difficult and limited.

In March of 2013 the Regional Information and Expertise Centre (RIEC) conducted an explorative study on the status and extend of internet advertisements by prostitutes and facilitators in the region of

<sup>6</sup> *Ibid.*

<sup>7</sup> Bureau Nationaal Rapporteur Mensenhandel (BNRM) (2015) *Mensenhandel in en uit beeld Update cijfers mogelijke slachtoffers 2010-2014*.

<sup>8</sup> N. Mai, *Migrant Workers in the UK Sex Industry. Final Policy-Relevant Report*, London: ESRC/London Metropolitan University, 2010.

<sup>9</sup> J. Burgers & A. Komter & G. Engbersen, *Het cement van de samenleving*, Amsterdam: Amsterdam University Press, 2000.

<sup>10</sup> M. Goderie & H. Boutellier, *Prostitutie in Rotterdam*, Utrecht: Verwey Jonkers Instituut, 2006.

<sup>11</sup> Rodney Haan in Nieuwsuur 29 March 2016 <http://nos.nl/nieuwsuur/artikel/2095831-prostitutie-anno-2016-in-de-schemerwereld-van-de-illegaliteit.html?title=prostitutie-anno-2016-in-de-schemerwereld-van-de-illegaliteit> (3. May 2016).

<sup>12</sup> A. van Wijk & A. Nieuwenhuis & D. van Tuyn & T. van Ham & J. Kuppens & H. Ferwerda, *Kwetsbaar beroep. Een onderzoek naar de prostitutiebranche in Amsterdam*, Amsterdam: Beke, 2010, p. 214.

<sup>13</sup> M. Goderie & H. Boutellier, 2006.

<sup>14</sup> M. Farley & E. Butler, *Prostitution and Trafficking-quick facts*, 2012, accessed via: <http://www.prostitutionresearch.com/Prostitution%20Quick%20Facts%2012-21-12.pdf> (3 May 2016).



Rotterdam-Rijnmond. They analysed different websites on which sex ads can be placed.<sup>15</sup> The researchers looked at the websites Kinky.nl, Sexjobs.nl and Speurders.nl. They found 338 women working as a licensed prostitute and 369 women who were offering their services through the internet but did not have a license to work as a prostitute. The researchers give warning that the number of the latter group is presumably much higher as there is a presumable (relatively high) dark number.<sup>16</sup>

Even though this ad-hoc research by the RIEC is methodologically quite weak, due to the choice of cross-sectional sampling and the absence of the option of verifying the data by contacting the women, it nevertheless gives a glimpse of the issues as they exist within a system of online supply of sexual services.<sup>17</sup> Over half of the women try to evade costs and the paperwork which is needed to legalise the means of income by prostitution. The sampling as used by the RIEC researchers was comparable with that of this specific study. The difference being that for this research, internet was seen as a way, the means so to speak, to select the contacts and respondents while for the RIEC the internet review was the main topic for the research itself.

This research used the internet for sampling to make a selection out of the numerous women who advertise their services via different online channels. The first selection made was on the basis of a specific region or city, in this case Rotterdam. Other cities out of the sample have been looked at to compare numbers of and women advertising while the women themselves were selected on basis of working in a red light district and therefore approached as such. Secondly a selection was made on age and gender. This research looks only at trafficked women who are forced into prostitution with the specific age range of 18 till 30 as this age group is most likely to exist out of women who presumably would have fallen victim to trafficking.<sup>18</sup> It is necessary to take into consideration the situation that Hungarian women could also have travelled (either under force, deception or out of their free will) as a prostitution virgin directly to the Netherlands while others could have been working as a prostitute (either forced or out of free will) before travelling over to the Netherlands. Next to this age criterion a selection was made on services offered. Women who are forced to work in prostitution usually do not have the luxury to be picky and therefore have to accept and offer all forms of sexual services and accept all clients. Due to this large target group of possible clients, the costs can be kept low which is necessary as they will have to compete with other women. By lowering the price and offering other (more extreme) services like anal sex, anilingus or sex without a condom, they can attract more clients. This is necessary for them to meet the minimum expected daily amount of money as demanded by the pimps casu quo traffickers. After the selections were entered in and the results of the search made visible, the texts of the different ads were compared on word usage and mistakes made in spelling and general use of language. Finally the pictures of the women were examined to see if the girl was Caucasian and if she broadly matched the general physical outward appearance as what to be expected of someone from the European region to which Hungary belongs and/or general descriptions fitting to people from Roma origin. On a more longitudinal basis the internet advertisements of the women were monitored to learn more on the travel of the women within the Netherlands.

---

<sup>15</sup> See for similar research in Utrecht: A. Mein & R. Verwijs & L. Drost & M. Goderie, *Verborgene prostitutie in Utrecht. Kenmerken en hulpverleningsbehoefte van 'verborgene prostituees'*, Utrecht: Verwey Jonker Instituut, 2011.

<sup>16</sup> Regionaal Informatie en Expertise Centrum (RIEC), *Onderzoek naar aanbieders van commerciële seksuele dienstverlening op internet*, (non published confidential research), 2013.

<sup>17</sup> R. H. J. M. Staring, *Human trafficking in the Netherlands: trends and recent developments*, in *International review of law, computers & technology*, 26(1), 2012.

<sup>18</sup> Bureau Nationaal Rapporteur Mensenhandel, *Mensenhandel. Zevende rapportage van de Nationaal Rapporteur* Den Haag: BNRM, 2009, p. 37.

As a final and extra check, the selected women were searched for on the website Hookers.nl. This website offers punters, who call themselves travellers on this online forum, the possibility to review, and grade the women they visited as well as leave comments. These comments usually contain relevant details on the girls like confirmation of age and appearance but also ethnicity/nationality as this is frequently discussed during the interaction between prostitute and client. This review and grading of women can best be certified as a cattle fair, but for research purposes it provides useful additional information and therefore has proven its worth as a sample confirmation method. After this the women from the ads were contacted by telephone.

Brothels were also contacted but this was not successful as out of the 24 contacted brothels none had any native Hungarian women working for them at that moment in time. Two brothel owners gave information on the fact they have had Hungarian women working for them in the past but that these employments had ended a few years back.

Women working in the red light districts were approached directly after a certain period in which trust was gained and some sort of familiarity was established. This usually took several weeks to win their trust and required multiple visits and a lot of small talk. This way of operating has proven its worth and successfully limited the number of non-response. In comparison: the online sample had a 85% non-response against a 25% of refusals in the red-light districts.

Besides these visits, the retrieval of primary data was initiated by using the method of ethnographic observations in the red light districts of Amsterdam, The Hague, Groningen and Utrecht. The aim of these observations was twofold. Firstly, they were necessary to get an idea of the reality as exists in the specific red light districts and to assess the characteristic of the situation of legalised prostitution in the Netherlands. Secondly, to get in contact with relevant persons *i.e.* prostitutes, pimps and punters who could function as gatekeepers. These first observations were conducted on a non-structured, direct and concealed basis with help of the method of time sampling. Out of a safety perspective all observations were carried out by the author while being accompanied by a second person. The observations were structured in such a manner they took place at different days during the week as well as in the weekends and always on different times of the day. All of this to get an understanding of the working conditions, the amount of women present at a certain period in time, the type and amount of clientele etc. As more insight in the situation and the social sub-system in which the concept of prostitution existed, was obtained, the observations became more open and were used to get in contact with gatekeepers in the person of prostitutes who have been working there for a longer period of time and who are present on a regular basis. Beside these women, volunteers of the salvation army, who regularly talk to the women and on occasion also bring them drinks and nibbles, were also contacted and deployed as gatekeepers. Eventually trust was gained with the help of prostitutes who would fit the profile of the research group<sup>19</sup> and of whom was to be expected they could function as gatekeepers. By investing time by talking with the women on all sorts of things, instead of just talking to them on behalf of the research, and by occasionally bringing them some snacks and drinks, these women gained confidence and eventually opened up. In the end these investments in gaining trust have proven to be of great value as it both resulted in respondents and gatekeepers willing to cooperate and give their support.

The participating women were asked, on different occasions ranging from short five minute talks to in-depth interview settings lasting several hours, on their work experiences, their personal feelings towards their work, clients and facilitators etc. as well as their entry into prostitution, taking into account the

---

<sup>19</sup> W. Huisman & E. Kleefmans, *The challenges of fighting sex trafficking in the legalized prostitution market of the Netherlands*, in *Crime, Law and Social Change* accessed via Springerlink.com, 2014.

who, when, and why, their travel routes and methods, earnings and their possibilities on exiting prostitution. These indicators were used to determine if there was a situation of trafficking and sexual exploitation and by doing so helped tackling the points of discussion as raised by Tyldum<sup>20</sup> on the impossibilities of researching the nature and extend of forced prostitution.

The observations, once they provided entry, were followed by a combination of semi-structured and in-depth interviews.<sup>21</sup> These interviews were set up with just the topics to keep the interviews as objective as possible.<sup>22</sup> As mentioned before, saturation was initially used as a criterion for validation but this prove to be insufficient due to the unique content of the stories of the women so no correlation was significant recognisable.<sup>23</sup> Eventually set time frames were selected to conduct the interviews and all relevant interviews within that specific period of time were processed. After a fair amount of refusals due to a lack of trust or situations concerning pimps who prohibited the women to speak, a lot of the women were willing to cooperate when asked a second or third time usually in the absence of their pimp. This refusal conversion<sup>24</sup> is emphatically present when you can convince the respondents of your incentives. Eventually, over the period of January 2010 till February 2013, (N=)222 women working as prostitutes at several well know red lights districts in the cities of Amsterdam, The Hague, Utrecht and Groningen as well as women working in a private surrounding in the city and area of Rotterdam were interviewed. Of these women (of whom the majority were interviewed several times), N=137 held the Hungarian nationality and did actually came from Hungary, more specific Szeged and the surrounding villages, the Budapest region and the Balaton region (mostly Siófok), 63 of the women belonged to the Hungarian minority in Romania, and would usually originate from the regions of Szatmár Megye and Bihar. One girl belonged to the Hungarian minority in Slovakia. The other N=23 interviewed women came from Lithuania (N=2), Bulgaria (N=7), Romania (N=8), Poland (N=4), Greece (N=1) and Estonia (N=1). Even though these women did not meet the characteristics of the research group they were interviewed nevertheless as they functioned as a control group and on occasion were friends with women from the research group, which made them function as gatekeepers as well. Almost 35% of the women interviewed belonged to a Roma minority out of one of the specific countries.

In addition to these interviews with the women working in prostitution, (N=) 23 pimps were interviewed. This group had the following specifications;

N=	2	2	3	2	3	4	4	3
<b>Ethnicity</b>	Albanian	Surinamese	Curacaos	Bulgarian	Hungarian	Romanian	Turkish	Moroccan
<b>Age</b>	33 & 34	37 & 39	21,24 &27	41 & 43	36, 38 & 44	29, 29, 34 & 54	25, 27, 39 & 43	23, 28 &31

Beside these men working as pimps, multiple experts working for the police, the public prosecutions' office, judges, sex work aid organisations and scholars were asked on their knowledge, experiences and views on prostitution policy, forced prostitution and organised crime. Each interview addressed the following topics in regards to prostitution and the women working as a prostitute: (knowledge of) personal situation and background, (knowledge of) working position, (knowledge of) working

<sup>20</sup> G. Tyldum, 2010, p. 9.

<sup>21</sup> C. Bijleveld, *Methoden en Technieken van Onderzoek in de Criminologie*, Den Haag, BJU, 2007, p. 213.

<sup>22</sup> J. Arsovska, *Researching Difficult Populations: Interviewing Techniques and Methodological Issues in Face-to-Face interviews in the Study of Organised Crime*, in L. Gideon (ed.) *Handbook of Survey Methodology for the social Sciences*, New York, Springer, 2012.

<sup>23</sup> H. Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Oxford: Hart Publishers, 2007, p. 7.

<sup>24</sup> C. Bijleveld, 2007 p. 213.

conditions, the possibility to exit prostitution, nationality, travel *i.e.* the prostitution carousel,<sup>25</sup> perceptions of safety and feelings of trust towards the police and aid workers. Schematically the entire sample is as follows<sup>26</sup>:

N=	Amsterdam	Groningen	Rotterdam	The Hague	Utrecht
<b>Prostitutes Research group Hungary</b>	24	18	37	47	11
<b>Prostitutes Research Group Other</b>	10	2	16	28	7
<b>Prostitutes Control Group</b>	4	3	3	11	2
<b>Pimps</b>	5	0	8	9	1

Eventually, the interviews, on average, lasted about an hour and a half depending on the situation. In many occasions the interviews with the prostitutes needed a second or third session to retrieve all the in-depth information needed. The first sessions were used to get basic personal background information and to increase the women's trust even more and to make the women feel (more) familiar with being interviewed. Increasing the self-esteem of the women and reinforcing the idea and feelings of being a person instead of a mere utility during the interviews seemed to be an important way to retrieve the more confidential and relevant information.

During the time that the interviews with the women and their facilitators took place, punters who were present at the red light districts out of the sample, except for the city of Rotterdam, seen buying sex, were asked on their presence and them buying sex. The men were asked, with the help of a structured questionnaire with mostly closed answer options, on their motivations for being a 'walker' and what their general feelings towards prostitution were, the perceptions they have towards the prostitutes and how they feel about them buying sex. Next to these feelings, questions addressing their general knowledge of human trafficking and sexual exploitation through prostitution and their conciseness of buying sex as facilitation for prostitution and/or contributing to this type of criminal behaviour were asked. Finally, the men were questioned on, their reactions in the case they would come across an exploitative situation of one of the women and their willingness to report this to the authorities. In the end, the data of (N= 437) punters was analysed with the help of SPSS.

Finally the research focussed on Hungary as a source country. For this approach a questionnaire was set up in English and which were conducted by telephone. The questionnaires were translated in Hungarian which was necessary as even though a lot of women in their ad mentioned they spoke English or German, in practice any knowledge of these languages was limited or even absent. These questionnaires were

<sup>25</sup> This is an important element as it makes it difficult for law enforcement agencies and social work agencies to help women and successfully combat the trafficking and sexual exploitation (Bokhorst *et. al* 2011, p.45).

<sup>26</sup> The Hague was, due to the proximity factor, visited more often and therefore it was easier to contact the women and gain their trust as regular visits took place. The same applies for Rotterdam in so far it relates to the proximity and possible overrepresentation.

conducted over the period of March 2013 till December 2013 by trained students from the University of Pécs and the Inholland University of Applied Sciences. These students were all native Hungarian speakers who, after a training, were able to act as interviewers.

As prostitution is more or less still a taboo and thoughts surrounding the topic are usually based upon prejudice<sup>27</sup>, the research group was more difficult to locate and to get in contact with. In order to establish contact an internet search was conducted and websites like Videkilany.hu, Rosszslányok.hu and Szexmost.hu were applied in a similar way as had been done in order to contact the women working via the internet in Rotterdam. Women working in the cities of Budapest, Debrecen, Győr, Pécs, Szeged and Nyíregyháza were selected and contacted.<sup>28</sup> They were asked on their work, experiences, personal background and willingness and possibilities to work abroad. Because of the high number of non-response within a three day pilot, the sample criteria were adjusted and only the criterion of location was used to get a valid and representative sample. Eventually, after still having to accept a non-response of nearly 65%, mostly by predominantly young women who would fit the target group perfectly, as women between the age of 18 and 25 years are most likely to fall victim of trafficking,<sup>29</sup> 93 questionnaires were returned as being valid. Beside the information gathered, just as interesting were the notes made by the interviewers in the cases of non-response. These notes in itself gave insight into working conditions regarding caretakers as many young women felt the need to ask a man present with them, for permission to participate. Both the tone of voice and the way of responding gave reason for the interviewers, on several occasions, to make specific notes with references to this moment. In regards to the ads posted on the websites, these shown a lot of similarity to those seen in the Netherlands. Similarities in the use of sentences and recognisable mistakes in the use of language and similarity in picture backgrounds could be an indicator in Hungary as well, as it gives sign of some sort of an existing relation between the women advertising themselves or either it gives awareness of the presence of some sort of facilitator. Anyway, this raised the idea of the presence of some sort of (criminal) organisation behind the facilitation of the women.

The sample for the Hungarian fieldwork was composed as follows (figure 3):

N=	Budapest	Debrecen	Győr	Pécs	Szeged	Nyíregyháza
Prostitutes	39	22	9	11	6	6

### 3. The Concept of Organised Crime

While discussing the concepts of human trafficking and prostitution one comes across different narratives,<sup>30</sup> the concept of organised crime within the exploitation of women by forced prostitution also holds a narrative. This narrative is partly based on news coverage<sup>31</sup> and shaped by many authors who aim to discuss the role of organised crime in the sexual exploitation of women. These authors frequently

<sup>27</sup> J. Salt & J. Hogarth, *Migrant trafficking and human smuggling in Europe: a review of the evidence with case studies from Hungary, Poland and Ukraine*, Geneva: International Organisation for Migration, 2000.

<sup>28</sup> It is worth mentioning that conducting a similar search strategy on these websites show similar results as to the situation in Rotterdam and in the case these websites are monitored over a longer period of time patterns in representation of specific locations as well as movement by the women across the country can be witnessed.

<sup>29</sup> Bureau Nationaal Rapporteur Mensenhandel, *Mensenhandel. Negenderapportage van de Nationaal Rapporteur*, Den Haag: BNRM, 2009.

<sup>30</sup> J. van Rij, *Human Trafficking and Prostitution Policy: A European Issue?*, in: PJIEL 2014/I, 2014.

<sup>31</sup> E. Denton, *International News Coverage of Human trafficking Arrests and Prosecutions: A content Analysis*, in Women and Criminal Justice (20), 2010.

conclude that the role of organised crime is highly overrated and perhaps even purposely exaggerated.<sup>32</sup> To assess this presumption and react on this narrative it is necessary to examine the concept of organised crime, as shaped within the legal contexts of the European Union and the Netherlands.

The concept of organised crime emerged first in the United States in the 1920s. Not soon after the term was used internationally and is used to describe serious crimes, which denotes a set of criminal actors as well as a set of criminal activities,<sup>33</sup> which are difficult to research and even harder to control. It is defined as: ‘*the ongoing activities of those collectively engaged in production, supply and financing for illegal markets in goods and services*’.<sup>34</sup> Organised crime is not a homogenous type of crime conducted by a specific more or less stereotype criminal, but rather a term used to explain a diversity of criminal actions with a transnational character which are conducted in specific circumstances.<sup>35</sup>

This involves the mutual provision of services and entrepreneurial promotion between legal and illegal enterprises, both on a material and symbolic level.<sup>36</sup>

Article 2 of the United Nations Transnational Organised Crime Convention states that “*organised criminal group* shall mean a structured group of three or more persons, existing for a longer period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit; *serious crime* shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty; *structured group* shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its memberships or a developed structure.”

The topic of organised crime gives ground for discussion as is shown by examining the differences between the legal orientations of I. the United Nations, which upholds the more ‘classical’ shaped ‘act’ approach and II. the European Union, which in general uses an actor-centred logic with a focus on some specific key indicators as reinforced by the Serious Organised Crime Threat Assessment (SOCTA). These by the European Union wide applied key indicators are<sup>37</sup>:

A situation of international cooperation between non-indigenous groups or between an indigenous and non-indigenous group, or as international operations carried out directly by an organised crime group.

- Group structures which involves co-offending etc.
- Use of Legitimate Business Structures.
- Specialisation; organised crime groups recruit people with specific criminal skills.
- Influence and corruption in order to lower risks and costs.
- Violence; both deployed as an internal and external control mechanism.
- Counter measures to avoid detection.

---

<sup>32</sup> L. Sandy, *Commentary: Thaddeus Blanchette and the Ana Paula da Silva’s Myth of Maria*, in *Dialect Anthropol*, accessed via Springerlink.com, 2013.

<sup>33</sup> A. Cohen, *The concept of criminal organisation*, in *British Journal of Criminology*, 1977, (17).

<sup>34</sup> P. Gill, *Organized Crime*, in E. McLaughlin & J. Muncie, *The Sage Dictionary of Criminology*, London, Sage, 2008, p.280.

<sup>35</sup> C. Fijnaut & F. Bovenkerk & G. Bruinsma & H. van de Bunt, *Organised crime in The Netherlands*, The Hague, Kluwer, 1998.

<sup>36</sup> L. Paoli, *The paradoxes of organised crime*, in *Crime, Law & Social Change*, 2002, (37).

<sup>37</sup> A. Edwards & M. Levi, *Researching the organisation of serious crimes*, in *Criminology and Criminal Justice* 8, 2008, p. 379.

In general these key indicators match the eleven European Union criteria to define organised crime. These eleven criteria of which the first four are mandatory but which need to be supplemented by at least two criteria out of the remaining seven optional criteria in order to complete the conceptualisation of organised crime, are<sup>38</sup>:

1. Collaboration of more than two people.
2. Taking place over a prolonged or indefinite period of time.
3. Suspected of the commission of serious criminal offences.
4. Having as its central goal, the pursuit of profit and/or power.
5. Having a specialised division of labour.
6. Utilizing a system of discipline and control
7. Using violence and other means of intimidation
8. Having a commercial or business like structure.
9. Involved in money-laundering.
10. Operating internationally, across National borders.
11. Exerting influence over politics, judicial bodies, media and economy.

Based upon these key indicators, Europol's Organised Crime Threat Assessment (OCTA)<sup>39</sup> is able to classify all criminal crime groups. Focus here lies on their origins Europol narrows the groups down into three categories:<sup>40</sup>

- Traditionally indigenous organised crime groups or EU-based groups.
- Traditionally non-indigenous or non-EU-based groups.
- Intermediary situations including both second generation organised crime groups and groups combine aspects of both non-EU and EU-based groups.

Within these three categories, four types of organised crime groups can be distinguished.<sup>41</sup> These groups are:

- Principally territorially based, indigenous organised crime groups, with extensive transnational activities; especially with possibilities to shield their leadership and assets, even inside the European Union.
- Mainly ethnically homogenous groups with their leadership and main assets abroad.
- Dynamic networks of perpetrators, whose organizational setup is less viable to attack from a law enforcement perspective than their communications and finances.
- Organised crime groups based on strictly defined organizational principles without an ethnic component, coupled with a large international presence.

Another point of interest is the term transnational, which implicates that the cooperation in or facilitation of these serious crimes, takes places over different territories and jurisdictions. Because of this an international instrument is a must in order to effectively combat these types of serious crimes committed

---

<sup>38</sup> M. Levi, *The organisation of serious crimes*, in M. Maguire & R. Morgan & R. Reiner *The Oxford Handbook of Criminology*, Oxford: Oxford University Press, 2002, p. 882; T. Newburn, *Criminology*, Devon, Willan publishing p. 406.

<sup>39</sup> Europol, *EU Organised Crime Threat Assessment*, 2008, p. 13., accessed via: [http://www.europol.europa.eu/publications/European\\_Organised\\_Crime\\_Threat\\_Assessment\\_\(OCTA\)/OCTA2008.pdf](http://www.europol.europa.eu/publications/European_Organised_Crime_Threat_Assessment_(OCTA)/OCTA2008.pdf) (27 December 2013).

<sup>40</sup> W. Kegö & A. Molcean, *Russian Speaking Organized Crime Groups in the EU*, Stockholm: ISDP, 2011, p. 22.

<sup>41</sup> A. Edwards & M. Levi, 2008, p. 379.

by these organised crime groups. The United Nations focuses on the need to regulate the type of act orientated crime as a global threat.<sup>42</sup> Article 3 Sub 2 of the United Nations Transnational Organised Crime Convention states that an offence is transnational in nature if: It is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organised crime group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State.

There are currently over 3600 Organised Crime Groups active within the EU and most of them are operating on a network-style basis. Of these groups 70% are composed of members of multiple nationalities and over 30% of them are considered to be poly-crime groups.<sup>43</sup> The latter meaning that these organised crime groups do not have a specialism but that they rather operate there where the money is to be found.<sup>44</sup> This requires flexibility, knowledge of and a large (both social and business orientated) network. Based on these facts and findings by Europol it is to be expected that the percentage of active crime groups operating out of a network approach will only increase while the set criteria on defining and legally dealing with these groups mostly still focuses on a structured organisational approach based upon an Italian mafia style lay out as for many policing and security institutions within the European Union consider this Mafia/Godfather myth attitude towards organised crime as more workable than the idea of organised crime being a camouflaged octopus with tentacles grappling all fields of criminal behaviour<sup>45</sup> and extending its reach onto the area of everyday life and transcending the boundaries between this criminal underworld and socially crime free environment. This standpoint is a logic deduction as the visualisation of organised crime as a pyramid with a set structure, modus operandi, appointed expertise and membership based upon kinship or clan loyalty/alliance is comprehensible. While thinking of organised crime groups to be operating on a much smaller and less intimate level with highly flexible relationships, changing modus operandi, shifting expertise and contacts between networks during the course of criminal careers<sup>46</sup> which frequently are being established by independent third parties as they were crime agents, is off course a policy and investigative nightmare as bridges between networks, as created by third parties, are temporary in nature and insight in the nature and extend of the criminal acts is obtained, not before, a set period after the act itself. Therefore, what happens is comparable to viewing a stars' light. While seeing the stars' light shining bright, at the same time you are aware of the possibility that the star itself could have died out years ago, as the light we see in the present is actually looking into the past considering the thousands of years it took for the light to travel the distance to earth. For that a network approach can be compared to a set of stars/planets in the Galaxy, called a Milkyway.

In criminal concepts it can be displayed as follows, with planetoids being networks and the stars being crime agents creating bridges;

---

<sup>42</sup> M. Levi, 2002.

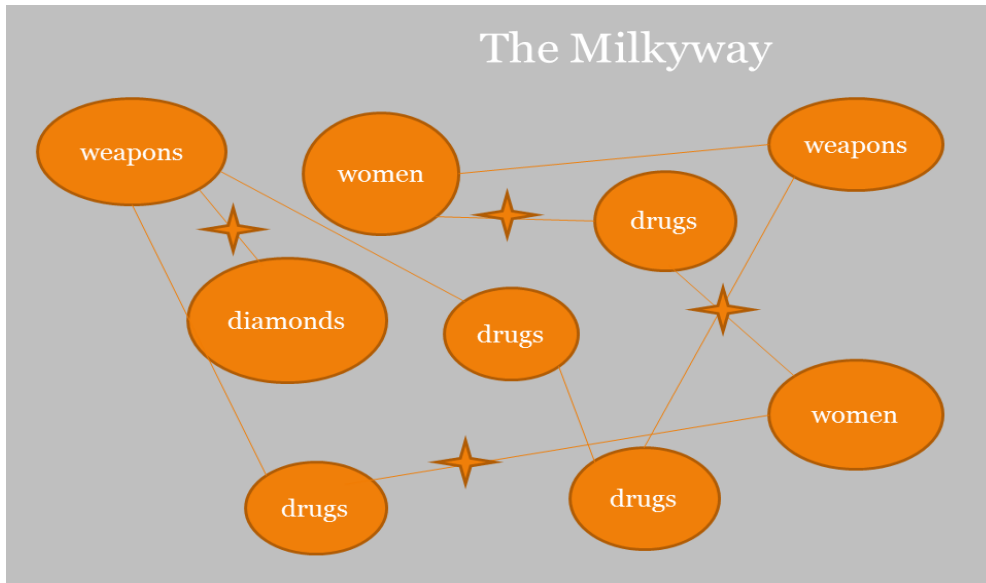
<sup>43</sup> Europol, *EU Serious Organised Crime Threat Assessment*, 2013, accessed via: <https://www.europol.europa.eu/sites/default/files/publications/socta2013.pdf> (27 December 2013) p. 32.

<sup>44</sup> A. Chang Lee, *The United States Experience in the Investigation and Prosecution of Transnational Organized Crime*, in International training course visiting experts' papers (134) 73., 2007, p. 3.

<sup>45</sup> K. von Lampe, *Measuring organised crime. A Critique of current approaches*, in P. C. van Duyne & M. Jager & K. von Lampe & J. L. Newell, *Threats and Phantoms of Organised crime, Corruption and Terrorism* Nijmegen, Wolf legal publishers, 2004.

<sup>46</sup> J. D. de Jong, *Kapot moeilijk. Een ethnografisch onderzoek naar opvallend delinquent groepsgedrag van 'Marokkaanse' jongens'* Amsterdam, Aksant, 2007.





This does not mean that it is not possible that on each star a set group of people could be working together as it were a miniature copy of the pyramid like structure as discussed previously. In that a situation the pyramid like basis of the cooperation would only be on a much smaller scale than it were the case in mafia like organised crime groups.

#### 4. Organised Crime and the Trafficking of Native Speaking Hungarian Women

As mentioned before, organised crime in its legal concept is present in a vast majority of criminal operations. This is not different within the trafficking and sexual exploitation of native Hungarian speaking women to and in the Netherlands. In order to arrange travel, stay and formal work consent by the authorities, the women need to rely on others to help them. Because of the nature, the persons involved and as a result of this, the operations consisting out of the long term internationally orientated cooperative actions can legally be defined as criminal based on art. 273f WvSR and these actions include aggravating circumstances due to their nature and the collaborative context in which the crimes take place. This context in turn should be orientated towards the exploitation of the women as Dutch policy also offers a legal ground for foreign women to work in prostitution.

Many of the female respondents stated they have started work as a prostitute in the country of origin. The following *modus operandi* were used to 'force' the women into a life of prostitution.

First the story of a girl named Victoria, she is the one respondent out of Slovakia. Victoria her story starts the moment she was kidnapped by a man from her village, both the village and man's name were not mentioned during the interviews. When Victoria was 16 years of age and while going to school, the man lured her in his van and starts expressing his feelings towards her. He told her, he wanted to marry her. When she refused, he became violent, raped her and she was held in his house for several days. After this time she was brought to Prague and sold to another man. Victoria witnessed this transaction and after this moment she was sold and exchanged several more times, eventually ending up in the Netherlands. The second type of *modus operandi*, next to kidnapping, is family pressure. Many of,

predominantly, the Roma women were prostituted by family members.<sup>47</sup> The women told stories about parents who needed money and forced the women, usually on a very young age,<sup>48</sup> to solicit themselves on the streets. They were expected to go with men, so-called kerb crawlers<sup>49</sup> in their automobiles and have some sort of sexual relation/encounter with them. Usually this included unprotected sex as this paid more and potential hazards were not (yet) recognised or they were deliberately not communicated to the girls. In many occasions the brothers and male cousins were the ones who would force the women to start working<sup>50</sup> and by doing so acting as pimps and in that role, in charge of setting up meetings with clients, function as a driver/protector for out-call services, provide the women with condoms etc. One of the women, named Katarina, told me she was raised by her grandmother. This grandmother had worked as a prostitute in the past but when she became too old, she forced her granddaughter, at the age of eleven, to have sex with a neighbour for no more than the sum of four euro's. From that moment one Katarina has been working as a prostitute, travelling across Europe, being exploited by numerous men in different settings, conditions and encounters.

Other women told stories which show a lot of similarity with conditions surrounding the operations of the Dutch PUP's.<sup>51</sup> This involves a selection process during which a vulnerable victim is selected, usually in the age range of 18 to 24,<sup>52</sup> who after the moment of getting in contact with the PUP unknowingly gets lured into a process of grooming which usually would last a couple of weeks up till a few months and which includes the stages of seduction, pampering and binding. This will most certainly lead to a romantic relationship, sexual contact during which the PUP searches for the girls boundaries. Once these boundaries are established the women get confronted with a situation involving problems for their 'boyfriends' which is the beginning of the next stage during which the girls were 'persuaded' to help their partners/boyfriends by working as a prostitute.<sup>53</sup> This usually starts as a onetime action but not soon after they will find themselves in such circumstances they cannot escape the situation as the grooming changed into violence and the initially voluntary action of prostitution itself became a with the violence enforced obligation. It is noted that the actions by Romanian men usually involve more frequent and severe use of violence, both verbally and physically and the same can be said for men from the Roma population in Hungary in comparison to indigenous Hungarian men.

While men are usually the ones responsible for the crimp of women, others were willingly or unwillingly lured into prostitution by girls, the so-called PERF's<sup>54</sup> of who they thought them to be friends or

<sup>47</sup> See for similar practices: V. Bekteshi & E. Gjermeni & M. van Hook, *Modern day slavery: sex trafficking in Albania*, in International journal of social policy, 32(7/8), 2012, p. 485.; S. Finger, *Ungarische Sexarbeiterinnen in Zürich zwischen Marginalisierung und Selbstbestimmung*, in B. Filep & M. Váradi & M. Walter & R. Wastl, *Grenzüberschreitende Nachbarschaften*, Festschrift für Doris Wastl-Walter, Klagenfurter Geographische Schriften, Heft 29' Klagenfurt, Institut für Geographie und Regionalforschung, 2013.

<sup>48</sup> M. Smit, *Trafficking in human beings for labour exploitation. The case of the Netherlands*, in Trends Organised Crime (14) accessed via Springerlink.com, 2011.

<sup>49</sup> R. Matthews, *Prostitution, Politics and Policy*, Oxon: Routledge Cavendish, 2008.

<sup>50</sup> S. Poucki & N. Bryan, *Vulnerability to Human Trafficking among the Roma Population in Serbia: The Role of Social Exclusion and Marginalization*, in Journal of Intercultural Studies (35) 2, 2014.

<sup>51</sup> As there has been a lot of discussion on the concept of loverboys as the word would have a too positive annotation. Former Dutch minister of Justice Hirsch Ballin introduced the concept of a 'pooierboy' (pimping boyfriend) which almost immediately was criticised as this word would have too little in common with the methods applied by the perpetrators.<sup>51</sup> A better description with a less positive annotation is the acronym PUP which in Dutch stands for 'Prostituerende Uitbuitende Partner'<sup>51</sup> and translates in English to 'Prostituting Utilizing Partner'.

<sup>52</sup> N. Lindstrom, *Regional Seks trafficking in the Balkans. Transnational Networks in an Enlarged Europe*, in Problems of Post-Communism (51) 3, 2004.

<sup>53</sup> M. Smit & M. Boot, *Het begrip mensenhandel in de Nederlandse context*, in: Justitiële Verkenningen 33(7), 2007.

<sup>54</sup> The role of female victims who start out as being a victim of trafficking and sexual exploitation but who after a while become active in recruiting of other female victims themselves, was researched and described by Verwijs *et. al* in 2011. These women nowadays are known as lovergirls, which again is a misplaced annotation to describe the operations of these

acquaintances. Some of these friends were open about the work they were getting involved in and what they had to do and the role they themselves played. This while others tricked the women by telling them lies or giving a misrepresentation of the work itself or the conditions or circumstances surrounding it. Only four of the interviewed women stated to have shown initiative to start work within prostitution and actively commit acquisition. In those cases the women became victimised while working as a prostitute during a time they were in need of assistance which could only be provided to them by pimps which then forced them into a commitment involving involuntary support and help by the same or other pimps or organisations facilitating the men acting as a pimp.

The division of native Hungarian speaking women on how they entered prostitution is as follows:

Type	Total N=200	Nationality and N=	Roma N=69
<b>Family related</b>	63	HU: 41 RO: 22 SK: 0	41
<b>PUP</b>	88	HU: 64 RO: 23 SK: 0	17
<b>PERF</b>	38	HU: 31 RO: 7 SK: 0	10
<b>Self-initiated</b>	4	HU:2 RO:2 SK: 0	0
<b>Kidnapped</b>	1	HU:0 RO:0 SK: 1	0
<b>Other (not specified)</b>	6	HU:5 RO:2 SK: 0	1

The types of crimp shown prior, involve a lot of different and specific methods and one of the most striking elements is the involvement of the amount of persons and their influence on the process in general. The initial element of luring the women into a life of prostitution is only the first step as after this, the transportation and all arrangements which are necessary to enable the travels of the women *i.e.* facilitate travel, work and housing need to be arranged and this involves many persons and both a significant amount of social and financial capital.

Almost all of the exploitative situations brought forth in this research started in the country of origin and after a set period the women would travel abroad were they continued, frequently by force, their activities. What is interesting to see is that one of the key elements in combating human trafficking is to make trafficking visible<sup>55</sup> on all levels with a centralised role for the official authorities and more

---

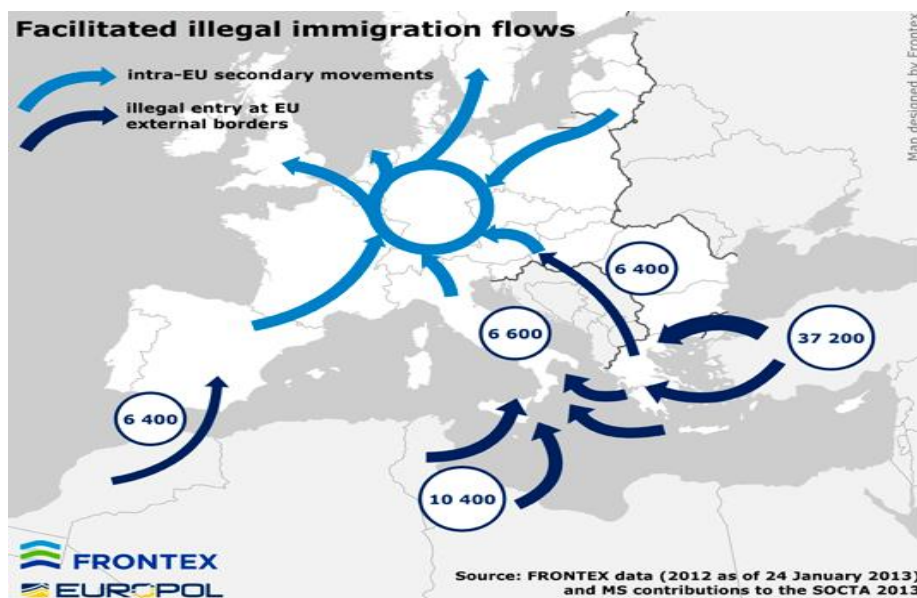
women as in these cases the concept of love is absent completely. Better it would be to make use of the acronym PERF which stands for 'Prostituting Exploiting Recruiting Friend' and tackles all the aspect of the applied modus operandi and will therefore is used.

<sup>55</sup> Bureau Nationaal Rapporteur Mensenhandel (BNRM), 2012.

specific, the municipalities<sup>56</sup> as they can most easily and at an early stage detect the signals related to trafficking. As exploitative situations can also start in the Netherlands in those cases the traffickers, trafficked the women directly from abroad or let the women come over and start work as a prostitute voluntarily before the process surrounding exploitation begins.<sup>57</sup>

In the mid-nineties the International Organisation of Migration (IOM) called for an increase of awareness of Hungarian women falling victim to trafficking as they estimated 6% of the Hungarian women was willing to travel abroad and engage in sex work<sup>58</sup> as by the women this was and is increasingly seen as the least bad among no great options.<sup>59</sup> The awareness raising campaign which followed was not effective as it offered little advice on legal means of travelling abroad and engaging in sex work, leaving the women dependent on and vulnerable to trafficking and further exploitation.<sup>60</sup> The fact these women found their way to the West is evident reviewing their numbers of involvement in sex work in, amongst other Western European countries, the Netherlands.<sup>61</sup>

Reviewing the patterns and routes travelled by the women as well as reviewing the persons supporting these travels it is possible to identify Germany, because of its centrally situated location between East and West Europe as the trafficking cross-road of Europe. This is confirmed by Europol which distinguishes the following migration flows:<sup>62</sup>



This overview however shows little specified information on the actual nationalities, groups, countries etc. involved. The UN stated that people from 136 nationalities fall victim to trafficking and these men, women and children have been detected in 118 countries worldwide,<sup>63</sup> 79% of whom are trafficked with

<sup>56</sup> Bureau Nationaal Rapporteur Mensenhandel (BNRM), 2012.

<sup>57</sup> M. Kromhout & H. Wubs & E. Beenackers, *Illegaal verblijf in Nederland. Een literatuuronderzoek*, Cahier 2008-3 Den Haag: WODC, 2008.

<sup>58</sup> IOM, 2012.

<sup>59</sup> M. Tolson, *Sometimes, Sex Work is the Least Bad*, in: IPS 24/10/2013 accessed via <http://www.globalissues.org/news/2013/10/24/17687> (3 May 2016).

<sup>60</sup> J. Davies & B. Davies, *How to Use a Trafficked Woman. The Alliance between Political and Criminal Trafficking Organisations*, in *Recherches sociologiques et anthropologiques* (39)1, 2008.

<sup>61</sup> Bureau Nationaal Rapporteur Mensenhandel (BNRM), 2009; Bureau Nationaal Rapporteur Mensenhandel (BNRM) (2012).

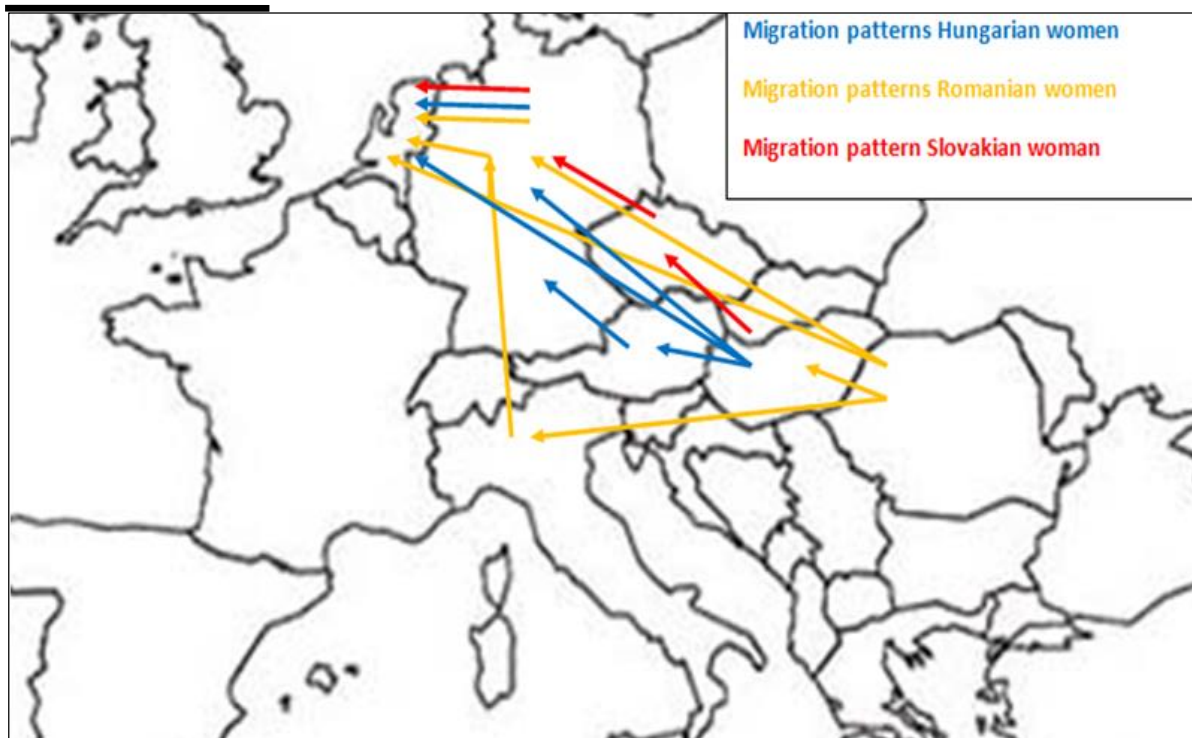
<sup>62</sup> Europol, *EU Serious Organised Crime Threat Assessment*, 2013, p. 24.

<sup>63</sup> UNODC, *Global Report on Trafficking in Persons*, New York, United Nations publication, 2012.

the purpose of being sexually exploited.<sup>64</sup> Assessing the trafficking routes from Eastern Europe to Western Europe, two main routes are identifiable. The first one runs from the Ukraine and Moldavia, crossing Romania, the Balkan and then into Italy. A second route runs from Poland, the Czech Republic and Hungary into Greece.<sup>65</sup> The routes documented within this research show difference as they are more orientated on Western Europe, presumably as the borders of fortress Europe have been expanded further to the East over the last couple of years. In both routes as described by Davies and Davies<sup>66</sup> an absence of Hungarian women is detected while both routes cross Hungary and or Hungarian speaking areas in the surrounding countries. This suggests that the trafficking of Hungarian women is a more autonomous venture not following documented trafficking routes and networks. The question is why?

Reviewing the data gathered within this research, identifications can be made in regards to the travels of the women across Europe. The women from Romania tend to travel different routes than women from Hungary. The Romanian women from the South-Western border regions will frequently travel through Hungary via Szeged or Budapest, to Italy. More frequently the women would travel directly to Northern Italy. This is a well-documented migration route<sup>67</sup> based upon historical relations and language similarities.<sup>68</sup> All respondents out of this research who undertook these routes, after having worked for several months in Turin and Milan have travelled directly onwards to the Netherlands or Belgium. This while women from the North-Western Romanian border regions more frequently would travel the Czech Republic, Germany or via Debrecen and Budapest further West.

This research identifies the following patterns in migration/trafficking routes from Hungary/Romania to the Netherlands:



<sup>64</sup> UNODC, *The Globalization of Crime. A transnational organized crime assessment*, New York, United Nations Publication, 2010, p. 40.

<sup>65</sup> J. Davies & B. Davies, 2008, p. 123.

<sup>66</sup> J. Davies & B. Davies, 2008.

<sup>67</sup> UNICEF & UNHCR & OSCE-ODIHR, *Trafficking in Human Beings in South-Eastern Europe*, Belgrade, UNICEF, 2002.

<sup>68</sup> R. Andrijasevic, *Trafficking in Women and the Politics of Mobility in Europe*, Utrecht: University of Utrecht, 2004.

The Romanian and Hungarian routes show great similarity on a European level but the question is if this also the case reviewing Hungarian internal migration? The Hungarian women started working in prostitution after they either moved from their villages/towns themselves or after they were relocated by their handlers in one of the bigger cities of Hungary. The most heard of cities at the start of this research for the women working in Amsterdam and The Hague, were Budapest and Szeged. During the research and while supplementing the sample with other Dutch cities, the cities of Debrecen, Győr and Pécs were mentioned more frequently as the towns women came from or started their work as a prostitute. At the end of the fieldwork, cities in the Balaton region as well as Nyíregyháza were mentioned more frequently in the areas of Amsterdam and The Hague. This shift is a significant signal that the people involved in the trafficking of women in the Netherlands change or that these persons remain the same but that they change suppliers or the people responsible for crimp change area. In general the following features can be recognised:

- The women travel frequently and over set patterns;
- Once the Romanian women entered Hungary their trafficking/migration routes show a lot of similarity to those of the Hungarian nationals;
- There is a significant division in Northern and Southern routes;
- Győr is an important source city while none of the women mentioned had been brought to Győr before travelling abroad;
- A majority of the women travelled directly North to Germany while others took a detour and went to Austria and or Switzerland first;
- Budapest is a central point from where the women would be gathered and prepared for departure.

This way of moving the women around is not specific for Hungary as the phenomenon, called the prostitution carrousel, is a business implementation.<sup>69</sup> Men who buy sex desire new faces and exploiters prevent the women to establish relations or get involved in some sort of social network outside of the one for them and the women are allowed to participate in. Beside this, they also avoid situations in which clients get to attached which can result in numerous problems. Therefore women are frequently moved around. This planning takes place on different levels. The first level is that of the city they start work. The women usually reside here for a longer period of time but they will have different locations they work out off. Examples were given by a girl, named Zsuzsanna from a town called Békéscsaba after she was forced by her brother. First she was forced to walk the streets in and outside Békéscsaba and after a year, her brother took her to Debrecen where she was engaged in all sorts of prostitution like practices including participating in sex cam role-playing and acting in adult movies. After her brother, handed Zsuzsanna over too one of their cousins she was taken by him to Budapest. While in Budapest she resided and worked out off no less than 14 houses in a time frame of four months. The work in Budapest included on-street prostitution but also working in clubs as a waiter/dancer as a cover up for prostitution like practices inside the establishments and finally, she provided in-call services in flats and out-call services to hotels and clients homes. After this period she was send to Zürich with another member of her extended family who forced her to work in the red light district on Sihlquai. After two months she was informed that from there they were going to Stuttgart and after Stuttgart, she went to Dusseldorf and then on to Amsterdam. The family line of control and exploitation was cut in Stuttgart after she had worked in service of some vaguely related 'uncles' and cousins who handed her over to a Turkish care taker, called Yasin or Boğa (Bull) who was responsible for the rest of her travels. Their cooperation

---

<sup>69</sup> M. A. Verhoeven, *Slachtoffer, heldin of hoer; net hoe het uitkomt*, Apeldoorn: Het Spinhuis, 2007.

ended in Groningen when a Turkish acquaintance of Yasin, called Semih who by Yasin and other Turkish men without exception was addressed as Abi (brother<sup>70</sup>). On average she worked at each location no longer than six months in end and during these months she always resided and worked from different locations. The moment she was interviewed, she was working in the city of Groningen where she started less than a week ago, after she had been working in Amsterdam for three months. In total she had been working in prostitution just shy of three years now and she just turned 18 a few months earlier. This means that when she was forced to start work she was under aged and exploited by her own family. She also mentioned working with other victimised female family members in both Hungary and Switzerland.

In general the following travel routes have been detected and reported within this research<sup>71</sup>:

For the Romanian women (N=62):

- The Romania – Hungary – Austria – Switzerland – Germany – the Netherlands transit (N=2 )
- The Romania – Hungary – Austria – Germany – the Netherlands transit (N=6)
- The Romania – Austria – Germany – the Netherlands transit (N=9)
- The Romania – Hungary – Switzerland – Germany - the Netherlands transit (N=2)
- The Romania – Hungary – Germany - the Netherlands transit (N=23)
- The Romania – Hungary – Italy – Germany- the Netherlands transit (N=2)
- The Romania – Italy – Germany – Belgium – the Netherlands transit (N=1)
- The Romania – Germany – the Netherlands transit (N=14)
- The Romania – Hungary – the Netherlands transit (N=3)

For the Hungarian women (N = 136):

- The Hungary – Austria – Switzerland – Germany – the Netherlands transit (N= 4)
- The Hungary – Austria – Germany – the Netherlands transit (N=45)
- The Hungary – Switzerland – Germany – Belgium – the Netherlands transit (N=1)
- The Hungary – Germany – Belgium – The Netherlands (N=2)
- The Hungary – Germany – the Netherlands transit (N=57)
- The Hungary – Belgium – the Netherlands transit (N=6)
- The Hungary – the Netherlands transit (N=21)

As supported by the figures both Romanian and Hungarian women most frequently make use of routes through Germany as is supported by Europol data. Striking within this comparison is the overlap of cities the women worked in. In Germany, the cities of Munich, Frankfurt, Stuttgart and Dusseldorf are frequently visited by the women while in Austria, Vienna is heard of almost exclusively and the same applies to Zürich in Switzerland.

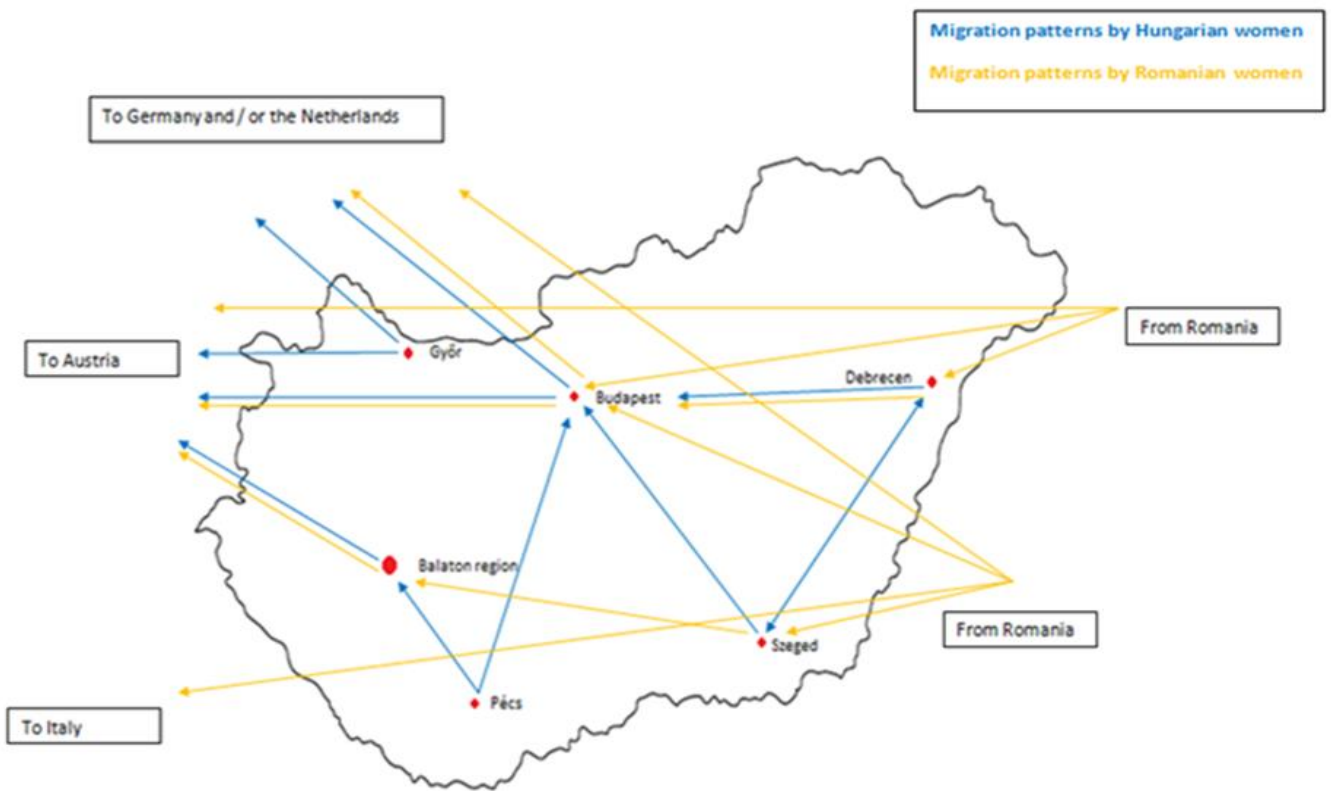
A remarkable fact is in the situation of those women who mentioned to work without care- takers, pimps or otherwise supportive people as they tend to travel more frequently directly to the Netherlands. The ways of transportation however remain the same as they usually make use of the budget flights from Budapest to Eindhoven or the even cheaper available bus charters. The women who travel, while being accompanied by their care- takers will more frequently travel by auto and in some occasions by train or

---

<sup>70</sup> Within Turkish culture it is normal to address an elder respected person with the term Abi. This does not necessarily mean the person is an actual brother but it also applies to cousins or no familial relationship at all.

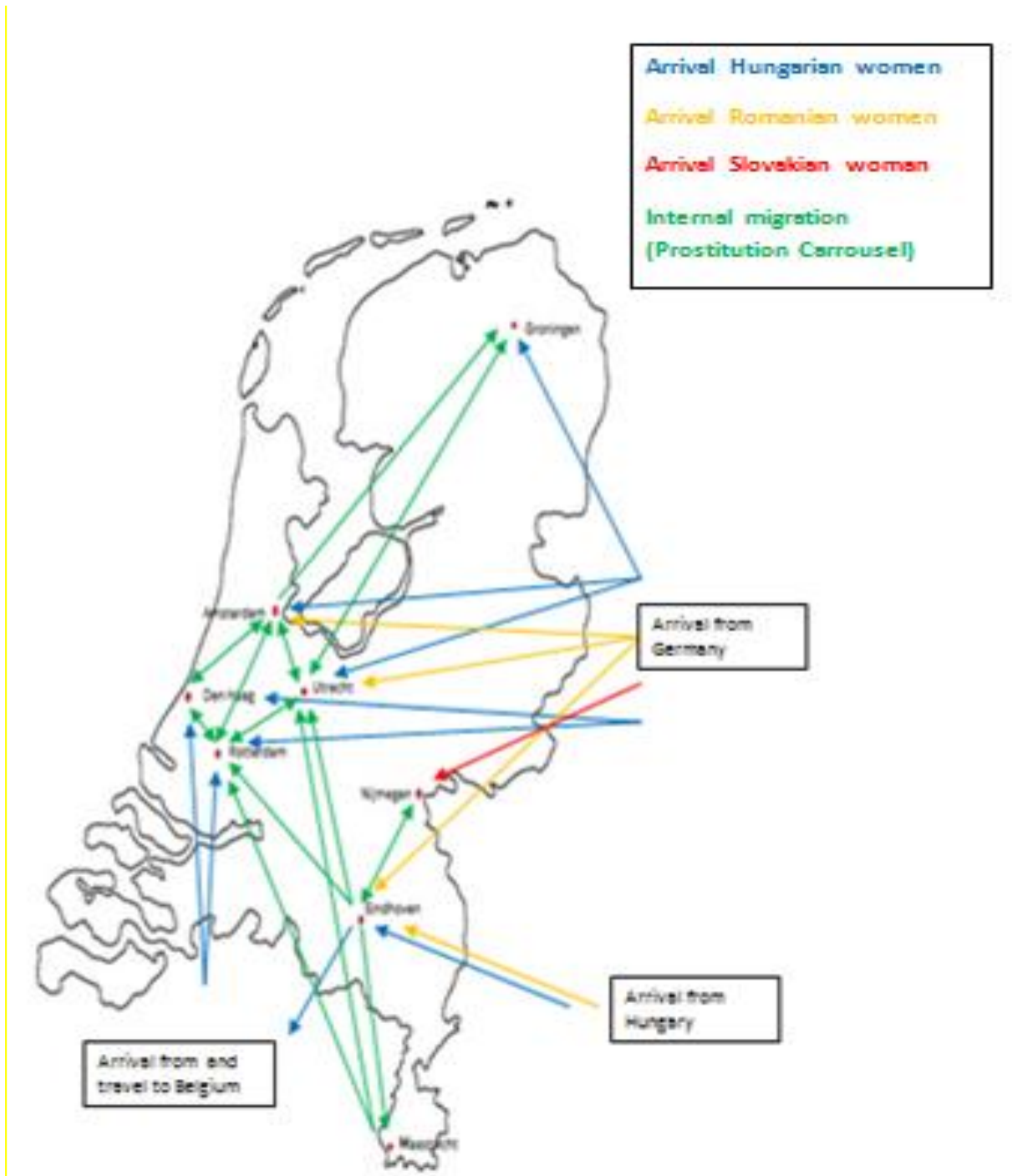
<sup>71</sup> The Slovakian route is not included as this transit and the circumstances surrounding it was already described previously .

bus when they are being re-located. While travelling back and forth from the Netherlands to Hungary or Romania, airplanes are more frequently used while they travel either individually or accompanied by others, depending on the autonomy given to them. The map below shows the internal movements by the women to, in and from Hungary.



The prostitution carousel is not just reserved for migration and the trafficking of women outside of the Netherlands, as many of the women show patterns of frequent travel between the red light districts in cities in the Netherlands. These routes are shown in the map below:





This map shows both the main entries into the Netherlands as well as the internal movements of the women. It needs to be mentioned that those women travelling more frequently and who reside for a shorter period of time at one specific city or location within a city, can usually be classified as being trafficked and exploited by others. While assessing the internal migration routes, reciprocity can be identified. As mentioned before, traffickers have reasons to rotate the women around, but they will need to have sufficient means to do so. In order to make this rotation possible a lot of traffickers, being organised criminals, will make use of their networks. On more than one occasion the names of persons involved in the sexual exploitation were mentioned by the women, while the women never to have been in contact with one and other. Because of this, the patterns were examined more precisely and

similarities in the *modus operandi* and routes could be identified. Most of the women have followed specific migration patterns. One of the most recognisable patterns is the diamond between The Hague, Rotterdam, Amsterdam and Utrecht, as a lot of the women have worked in all of these cities. Striking is the fact there was no direct travel between The Hague and Utrecht. Another point of interest is the city of Eindhoven as Eindhoven airport is a main entry into the Netherlands for native Hungarian speaking women. Beside this, Eindhoven also has an active prostitution sector but none of the women who entered the Netherlands via Eindhoven indicated to have worked there.

During the interviews, the men responsible for the exploitation of the women shared information on the way they operate and the roles they fulfil. The interviewed men appeared to be of low or middle hierarchy proven by the lack of necessary knowledge, presumably due to the fact they are regionally bound. This meaning they only operate out of a specific area/region but they are still able to make use of their contacts in order to frequently attract, change or buy women, from outside their own region to work for them. During the talks different men mentioned the internet as the future for their work as this medium provides them with possibility of online advertisement of the women to clients. However some also hinted on the existence of an online women's market place where they offer the women who are currently working for them, for exchange or sale. Others mentioned using their colleague competition contacts' network in order to have a steady flow of new women. These network related contacts also crossed borders and extended into Germany and Belgium. Only the Hungarian and Romanian pimps, as is to be expected, had contacts running all the way back to Hungary and Romania and they would usually bring the women over directly to the Netherlands<sup>72</sup>, showing similarity with the facts expressed in the court case of Máté Puskás in the United Kingdom<sup>73</sup> and the more recent arrests made in France.<sup>74</sup>

As a majority of the interviewed women meet the legal and social qualifications of being a victim of trafficking<sup>75</sup> and sexual exploitation by organised crime, they continuously refuse to see themselves as victims. This makes it hard for the police to get a victim statement and a filed report in order to start an investigation. As this is increasingly becoming the case, this leads to an insufficient supply of cases to bring to court<sup>76</sup> and in the wake the possibility to rescue the victims and end the exploitative situation.

The Stockholm Programme extends on the existing European strategy on trafficking which focuses on two interrelated solutions which need to be implemented simultaneously. This bifocal idea includes, on the one hand the strengthening of law enforcement capabilities while on the other hand, the goal is to improve social and economic conditions of women in source countries.<sup>77</sup> The question will be if this will be sufficient as strengthening alone will not be effective if applied wrongly. Just like a crocodile is a creature with one of most bite force, this force is only effective when a crocodile's mouth is open and ready for biting down on something. When a crocodile has its mouth closed a small person with limited strength can easily hold the mouth of the crocodile firmly closed and by doing so avoiding any danger. The same could apply for law enforcement initiatives. The operations and instruments of law need to be strengthened with an open mouth to bite down. In order to do so a new way of operating with new structures and *modus operandi* and set goals is necessary. These, to be effective on the long run, need to

<sup>72</sup> See *i.e* ECLI:NL:RBAMS:2015:1441.

<sup>73</sup> Ben James, News 31 November 2013 accessed via

[http://www.theargus.co.uk/news/10775463.Hungarian\\_sex\\_gang\\_who\\_allegedly\\_ran\\_brothel\\_based\\_on\\_University\\_of\\_Sussex\\_campus\\_in\\_court/](http://www.theargus.co.uk/news/10775463.Hungarian_sex_gang_who_allegedly_ran_brothel_based_on_University_of_Sussex_campus_in_court/) (3 May 2016).

<sup>74</sup> <http://www.ouest-france.fr/europe/hongrie/hongrie-demantelement-dun-reseau-de-prostitution-operant-en-france-4111625> (3 May 2016).

<sup>75</sup> R. Andrijasevic, 2004; H. Wagenaar & S. Altink & H. Amesberger, 2013.

<sup>76</sup> Respondent Roger Lambrichts (28 November 2013).

<sup>77</sup> N. Lindstrom, N., 2004.

be focussed on prevention and victims' human rights protection rather than being oppressive and intrusive.<sup>78</sup> Still this remains difficult as all agencies involved in combating trafficking tend to approach the issue of trafficking in different ways. These ways can be distinguished into four, interrelated approaches. The first one is the Migration approach which conceptualises human trafficking as a 'normal' process of unregulated or irregular type of economic migration. The second one is the Law Enforcement approach and this approach sees human trafficking as a serious crime, not unlike smuggling drugs. The third is called the Human Rights approach and frames the human trafficking process as a process of continuing violation of fundamental women rights and emphasises on the violent and coercive nature of the trade. The final approach is Structural and shifts the emphasis from intention-based understandings of trafficking to a focus on its structural roots, knowingly global and regional inequities in the distribution of jobs, resources or wealth.<sup>79</sup>

As human trafficking is a specialisation within the range of serious organised crime and as it has a transnational component it is necessary for member states to join forces if they want to be able to effectively fight organised crime. As shown in the previous maps, the trafficking of women for sexual exploitation is usually not organised in such a way that the women are being trafficked abroad and once abroad, the exploitation begins. The organisation, takes place over a longer period of time and it includes numerous methods, routes and persons<sup>80</sup> -here only mentioned the criminals leaving out of the equation corruption of officials etc.<sup>81</sup>

Europol directed by international guidelines<sup>82</sup> should take a leading positing as this organisation is the first to receive information from different channels and on the basis of this information can start an European wide investigation by informing national police agencies. In before, the OCTA and now the SOCTA, Europol works on estimating the extension of trafficking in Europe as well as the groups involved.<sup>83</sup> This information is being shared with national police agencies which in turn can make proper use of this information. This however is still not enough as the networks and modus operandi are flexible and many of the police agencies of source and transit countries have too little expertise or possibilities to act timely and effective. As mentioned previously cooperation is sought after with the help of so-called Joint Investigations Teams (JIT). These JIT's involves cooperation for the investigation of serious crimes, including human trafficking. Goals therein are defining offenses, gathering evidence, start prosecuting, stop networking and increase possibilities of seizure and confiscation. Hungary and the Netherlands have set up several of this type of cooperative structures<sup>84</sup> under the European Multidisciplinary Platform Against Criminal Threats (EMPACT).<sup>85</sup> These co-operations have proven to be successful in the past<sup>86</sup> and could be a useful way in which human trafficking and the organised criminals behind the exploitation could be more effectively stopped.<sup>87</sup> Even though these initiatives are

<sup>78</sup> M. Ditmore & J. Thukral, *Accountability and the Use of Raids to Fight Trafficking*, in *Anti-Trafficking Review* (1), 2012.

<sup>79</sup> N. Lindstrom, 2004, pp. 48-49.

<sup>80</sup> M. Lehti, *Trafficking in Women and Children in Europe*, in HEUNI paper (18), 2003.

<sup>81</sup> L. Kőhalmi, *A büntetőjog alapproblémái*, Pécsi Tudományegyetem Állam-és Jogtudományi Kar Gazdasági Büntetőjogi Kutatóintézet, Pécs, 2012.

<sup>82</sup> S. Scarpa, *Trafficking in human beings: Modern Slavery*, Oxford Scholarship online, 1(09), 2008.

<sup>83</sup> Europol, 2013.

<sup>84</sup> Respondent Warner ten Kate (2 July 2013).

<sup>85</sup> BNRM, 2013.

<sup>86</sup> Politie, *Hongaars mensenhandelnetwerk aangepakt*, 2014,

<https://www.politie.nl/nieuws/2014/oktober/23/06-den-haag-hongaars-mensenhandelnetwerk-aangepakt.html> (3 May 2016); Openbaar Ministerie, *Verdachten in bewaring gesteld in onderzoek mensenhandel*, 2015,

<https://www.om.nl/actueel/nieuwsberichten/@90443/verdachten-bewaring/> (3 May 2016).

<sup>87</sup> BNRM, 2013.

and should be welcomed, a more in-depth longitudinal cooperation will prove to be necessary as trafficking routes need to be described as well as the structures and modus operandi of the people involved in the trafficking and sexual exploitation of women in Europe. This however is and will remain intensely difficult and holds no guarantee for success.

## 5. Conclusion

This article examined the trafficking and sexual exploitation of native Hungarian speaking women to and in the Netherlands. The main purpose was to provide insight in way this was controlled by organised crime groups. Reviewing the way these transnational and locally active criminal organisations are structured and what the applied modus operandi exists out of, the primary data gathered within this research gives insight in the modus operandi of these criminals and provides prove of the existence of crime structures. A majority of the interviewed women have fallen victim to human trafficking and in a legal sense are being sexually exploited even though clear distinctions need to be made between legal and illegal prostitution as well as voluntary and involuntary situations. However this is very difficult and frequently not taken into account in empirical ethnographic research. Most of the exploitative situations did not show resemblance with the violent manners usually portrayed by (respected) journalists, non-scientific writers or the more dangerous “chick lit” authors who tend to make stories up.<sup>88</sup> Many of the women left out of the sample found themselves in situations where they merely did not uphold Dutch conditions to work in prostitution or they had no regards for Dutch labour law making it not automatically trafficking but rather a violation of labour law as the Dutch decriminalised prostitution in 2000. In these cases some of them were in depriving and dangerous situations which they wanted to escape, but in the end they felt unable to so due to different circumstances ranging from a lack of knowledge to extortion and the threat of violence. Most of the women however were under the assumption not to have fallen victim to trafficking as they felt to have started in prostitution voluntarily, which in turn can be discussed as this is part of the applied modus operandi within the crimp of women, and they perceive the situation they are in as acceptable as they are able to make enough money to support not only themselves but also family back home. The women perceive themselves, and the circumstances surrounding their position within Dutch society, as socially integrated which in turn makes it difficult to recognise exploitation. All perpetrators who do not uphold the legal standards of any Dutch or European law need to be dealt with on by criminal/penal law. They need to be punished for their abusive behaviour, but this involves more than simply depriving them of their freedom by sending them to prison as it also means establishing a change in attitude etc. This enforcement of legal standards by the proper authorities must also include an economic factor as this is predominantly the reason for people to start and conduct their criminal activities. The illegal profits must be taken away and given to the victims of the exploitation in order for them to have sufficient means to start a new life after and free of exploitation and abuse while at the same time the perpetrator must also be given the opportunity to learn from the mistakes made and rehabilitation, under set conditions, must be made possible.

Concretised and completed the points of interest are:

---

<sup>88</sup> E. Snajdr, *Beneath the master narrative: human trafficking, myths of sexual slavery and ethnographic realities*, in *Dialect Anthropol*, accessed via Springerlink.com, 2013; J. Lindquist, *Beyond anti-anti-trafficking*, in *Dialect Anthropol*, accessed via Springerlink.com, 2013.

	Primary prevention (General)	Secondary prevention (Risks)	Tertiary Prevention (Problems)
Perpetrator	Recognition of general indicators that show proof of the possibility of crime and act accordingly to the situation.	Individual risk indicators reveal themselves and so-called early life interventions need to be deployed. These actions need to address all single determinants.	Perpetrators are active and action by the authorities is required. These actions need to address both punishment and rehabilitation in line with individual needs.
Situation	Make use of innovative measures for the universal implementation of preventive measures to reduce opportunity.	Dutch policy towards prostitution creates a legal option for exploitation. As the boundaries between sex work and sexual exploitation are diffuse and hard to distinguish.	Prostitution areas usually have weak social control and poor planning to increase both formal and informal social control.
Victim	Raising awareness with the public and informing on the risks and their actuality. By doing so the public opinion can be altered and indifference avoided.	Victimisation is imminent. Women with elevated risks i.e. low SES, self-esteem issues etc. should be made aware and helped to avoid victimisation.	Victimisation is a fact. Victims need to be helped out of the exploitative situation and need to be kept safe and be prepared for a life after victimisation

In order to be more successful in the protection of (future) victims of human trafficking it is necessary decisions with far going consequences are made. These changes should be guided by the EU and enforced by legislation on a national level. One of the possible first steps could be to have a European approach towards prostitution policy under the condition this consensus for a single European policy is based upon data out of validated scientific research. A second step would be to increase cooperation with Europol and perhaps let Europol become a more proactive organisation with a specialised task force on human trafficking composed out of national experts who work solely on data gathering using to be developed more preventive tools. Finally the aim of the actions should always place the victim at the centre providing her or him with the help and support needed in the present, near and further future. This includes psychological help, financial and legal support, a safe referral and the acceptance of the entitlement of lost income which was taken from the victim by the trafficker which is guaranteed and provided by the government of the country the person fell victim in.



in Hungarian prisons to an extent that could be considered a violation of ECHR art. 3 (corresponding to Article 4 of the EU Charter of Fundamental Rights). The Bremen Court decided to ask the Luxembourg Court if it was possible to read article 1(3) of the EAW Framework Decision (the ‘human rights’ clause) as an opportunity to refuse the surrender in case of strong indications of detention conditions insufficient to satisfy ECHR art. 3. The Bremen Court also asked if it was possible to request assurances concerning the prison conditions from the requesting state before surrender was allowed. Due to Aranyosi’s connections with Bremen, the judge decided to release Aranyosi while the case was pending.

Caldararu is also a young man. He was sentenced to 8 months in prison by a court in Romania for driving without a driver’s license. The case was heard *in absentia*. However, Caldararu left Romania before the sentenced time could be served and Romania issued a European Arrest Warrant for Caldararu. He was arrested in Bremen, Germany, on 8 November 2015, and his surrender to Romania was then allowed on 20 November 2015. He refused however to consent to the surrender with reference to the detention conditions in Romania. The Bremen Court decided to keep Caldararu in custody as the Bremen Court also sent a request for a preliminary ruling in this case. The request was sent on 9 December 2015.

So, two cases from the same court, basically concerning the same question: Can a judge refuse surrender if it is feared that detention facilities in the requesting state are inadequate?

But the reply to these questions touches upon a number of arguments, and the day turned out to be very intense as these arguments involves fundamental rights, the principle of mutual recognition, the relationship between Member States and not least what to do if surrender is denied. The parties were far from a common understanding of how these arguments should be used, and the hearing turned out to be a very interesting and well-spent day in Luxembourg.

Let us have a look at some of the major arguments.

## 2. The First Argument – Mutual Trust Means Blind Trust!

One could argue that mutual trust means blind trust to such a degree that the executing Member State must execute the European Arrest Warrant without any checks for anything else other than the grounds for refusal to execute an EAW mentioned in Articles 3 and 4 of the Framework Decision (such as double jeopardy, or age of a child).

The Bremen judge of course opposed this view as this would make his request for a preliminary ruling obsolete.

Especially Spain supported this argument, saying that the evaluation of the protection of fundamental rights is a privilege for the court in the issuing State as the court in the executing State is not empowered to make abstract evaluations of the prison conditions in another Member State. The prior CJEU judgment in *Melloni*<sup>5</sup> was mentioned as an example of a situation, where Spain was denied the possibility to make the surrender conditional upon specific guarantees. Spain had difficulties aligning the conclusions of *Melloni* with a possibility to make evaluations of foreign prison systems prior to deciding surrender and then perhaps condition the surrender on guarantees regarding detention conditions. Spain therefore held, that the executing State had to surrender unless Article 3 or 4 of the Framework Decision were applicable

---

5

[http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%25CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&parties=melloni&jge=&for=&cid=874772](http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%25CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&parties=melloni&jge=&for=&cid=874772) (20 March 2016).

and it would then be for the courts of the requesting state to evaluate whether prison conditions would amount to a violation of ECHR Art. 3/Charter Art. 4.

Lithuania presented a similar argument, arguing that the principle of mutual trust would fall apart if Member States were given the power to check each other in regard to prison conditions. Lithuania further referred to TEU art 7 (on the possible suspension of a Member State from the EU on human rights grounds) as the procedure prescribed by the treaties in case a Member State is found not to respect fundamental rights. Lithuania also expressed concern whether the issuing State would be able to make its arguments before the court in the executing State deemed the prison conditions in the issuing State insufficient in regards to fundamental rights, and it could lead to a situation where the issuing State would be denied the possibility to use the EAW as such. This would make it impossible to prosecute absconded criminals and would thus threaten the idea of AFSJ as such.

The remaining States together with the Commission were in opposition to Spain and Lithuania. The parties argued in general in favor of understanding mutual trust as a general trust in opposition to a blind trust. The Bremen judge reported his difficulties when reading about the prison conditions in Hungary, and how he had asked the German Government in vain to obtain guarantees concerning the prison conditions for Aranyosi. He argued that it would be unacceptable to demand that a judge should ignore obvious reasons to fear for violations of fundamental rights and the possibility of denying the execution of the EAW had to be present in such a situation. Being a judge himself, he called upon the Luxembourg judges not to put this burden on him.

The German Government along with Ireland, France, Hungary, The Netherlands, Romania, UK and the Commission presented various arguments in favor of understanding mutual trust as a general trust which only is rebuttable in very exceptional circumstances.

Germany argued that the executing state cannot be making assessments of the respect for fundamental rights in other Member States, except when under very exceptional circumstances. Such circumstances could be several reports from the Council of Europe, CPT, judgments from the ECtHR, reports from NGOs and even from the American Secretary of State. Germany further read recital 13 in the preamble together with art. 1(3) of the EU Framework Decision in such a way that a risk of violation of fundamental rights is a general reason for denying execution of the EAW in supplement to the specific reasons mentioned in Articles 3 and 4 of the law. Ireland supported this argument with a reference to recital 12, while Hungary supported the argument with reference to recital 10. The UK also argued in favor of reference also to recitals 5 and 6, together with recital 10, 12 and 13 and Article 1(2) and 1(3).

The Commission argued for the need of a balance between mutual trust and the protection of fundamental rights, requiring Member States to have a general trust in each other with a possibility to test the protection of fundamental rights if there seems to be a real risk for a violation of fundamental rights. The Commission found support for this in Art. 19(2) of the Charter (non-removal from a Member State to face torture et al), as the Commission supported the Bremen judge by finding it unacceptable to force a Member State to surrender to a known risk of violation of fundamental rights without taking action to protect fundamental rights. The Commission further stressed that if the principle of mutual recognition would prevail over the protection of fundamental rights, then a principle had been given more weight than fundamental rights. Fundamental rights, being a part of primary law and the reason for the Union as such, could not be set aside by a general principle within EU law.





#### 4. How will the Member States Examine a Claimed Risk of Violation of Fundamental Rights?

The problem of how a court in one Member State can obtain information on the detention system in another Member State in order to establish whether or not these detention facilities may be seen as a violation of fundamental rights were also included in the submissions of the parties.

Germany referred to reports from the CPT and the Council of Europe, together with the case law of the ECtHR, reports from NGOs and even the American Secretary of State. Germany stressed that these sources had to be published within a reasonably short time before the national court was to decide on the question of surrender. The UK also supported the use of reports from international organs, the case law of the ECtHR, individual claims and testimonies and reports from national experts. Ireland and The Netherlands also argued for the use of reports from the CPT and the case law of the ECtHR, while France considered especially the case law of the ECtHR as relevant. Hungary elaborated on the fact that reports from the CPT are at least one year underway, while a judgment of the ECtHR refer to facts as they were at the time of the claimed violation. That could be several years prior to the judgment were handed down. These sources thus had to be used with great care.

Romania did not elaborate on the question of how to make an examination. Also Spain and Lithuania opposed the general idea of letting foreign courts examine domestic prison conditions, but did not elaborate on how this may be done in case the Luxembourg Court would allow it.

The Commission supported the use of the case law of ECtHR, reports from international organizations, statistics on the over-crowding of prisons in the requesting State and even any other relevant source. The Commission was thus in line with especially Germany and UK.

#### 5. The Importance of Dialogue between Member States – the Concept of Guarantees

Several parties stressed the importance of dialogue between the requesting Member State and the executing Member States.

The Bremen judge, Germany and France argued in favor of giving the judge of the court in the executing Member State the possibility to call for guarantees from the issuing Member State. The guarantees would be able to remove the fear for a violation of fundamental rights, and the surrender should therefore be denied if the required guarantees were not provided.

Ireland and The Netherlands found no basis for refusing to surrender due to the lack of diplomatic guarantees. The executing Member State had to make its mind up whether or not there would be a real and present risk for a violation of fundamental rights and handle the request for surrender in accordance with this.

Spain argued against the use of guarantees, as the judge calling for the guarantees may be setting the criteria that have to be met before he or she will allow surrender. This would generate a risk of huge variations in the way the Member States use this possibility, and would therefore threaten the uniformity of Union Law. Lithuania also argued against the use of guarantees by elaborating on the fact that the guarantee is not worth much if the requesting Member State decides not to fulfill its obligations in accordance with the guarantee after the surrender has taken place.

Especially Hungary stressed the importance of Article 15(2) of the Framework Decision. If a Member State is afraid of surrendering due to the fear of violation of fundamental rights, then the two involved states must engage in a dialogue for the purpose of removing the reasons for this fear. Hungary saw the risk of violations as a specific and concrete problem, which could be handled with specific and concrete solutions. Such solutions could be alternative detention measures, a decision to keep the surrendered person in custody in another prison or perhaps show the executing court that the reasons are obsolete due to for instance the constructions of new prisons following e.g. a judgment from the ECtHR. This line of arguments was supported by the UK as well as Ireland and The Netherlands. These arguments were also supported by Romania by stating that the risk for a violation of fundamental rights may be real and present but nevertheless possible to eliminate in the specific case. The Commission also supported this view.

Especially Romania also raised another issue concerning equal treatment, as Romania mentioned that if certain inmates were kept under custody under more beneficial conditions due to guarantees while other inmates were kept in custody under normal conditions. Romania pointed to the simple fact that if prisoners with guarantees were to be given more space, then the remaining prisoners would have even less space. This motivated the referring judge to ask Romania, Germany and France to elaborate on this risk concerning unequal treatment. Romania found this risk to be non-acceptable, while France argued that the risk of unequal treatment were a less evil than the risk of violating fundamental rights. Germany stated, that Germany did not want unequal treatment, but appropriate prison conditions. The risk of unequal treatment was however the only way to respect the *Soering* judgment of the ECtHR.

Thus, there were different views on whether surrender could be conditioned upon guarantees or whether guarantees should be seen more as a dialogue comforting the executing judge in the removal of a risk of violation of fundamental rights. However, there seemed to be general consensus when it came to how guaranties should be issued, as the parties found this should be regulated in national law of the specific Member State.

## 6. The Consequence of Denying Surrender

The last major issue touched upon by the parties was the question of what should happen if surrender were refused.

The Bremen judge explained how German law made it possible to let Germany continue the criminal proceedings if surrender was denied, but practical problems in regards to witnesses etc. made this theoretical possibility an illusion in real life. In regards to Aranyosi, a decision not to surrender would therefore in real life also be decision to discontinue the criminal proceedings. In regards to Caldararu, who was sentenced in Romania, a decision to not surrender could provide the basis for letting Caldararu serve the sentence in Germany, but this would also result in a number of practical problems as Caldararu only had stayed a very short time in Germany. He therefore does not speak the language nor would any initiatives to rehabilitate him into the German society have any likelihood for success. So it was also questionable whether it would be relevant to transfer the sentence to Germany in the present case. The Bremen judge made it clear that it would not be satisfactory if a denial to surrender the sought person would mean crimes would go unpunished.

The German government shared this view, while France noted that it was for each Member State to decide whether they would let their courts have jurisdiction in cases in which surrender had been denied. Romania also made it clear, that it would be unacceptable if criminal activities were going un-punished

because of a decision to deny surrender. If the executing Member State denies surrender, then the executing Member State must bear the responsibility to see justice fulfilled. Lithuania pointed to the fact that a decision not to surrender due to unsatisfactory detention facilities would in practice create areas within the AFSJ in which it would be impossible to punish crimes as the criminals would be able to commit their crimes in such areas and then flee to other parts of the AFSJ without risking surrendering afterwards.

A number of parties also underscored this as the major difference between asylum law and the test used in the *N.S.* case against criminal law and the test that may be used in the present cases. If the return of an asylum seeker is impossible, then the Member State in which the asylum seeker is at the moment will be able to process the application for asylum. It is of lesser importance for the asylum seeker whether one or the other Member State processes the application for asylum as asylum law is almost fully harmonized. The consequence of not surrendering a suspect in a criminal case could very well be that crimes would go unpunished, which is a rather different result and of course not acceptable.

## 7. What Next?

The Advocate General promised to announce within 24 hours when his opinion will be submitted to the Court. The cases were heard on 15 February 2016 but the Curia-webpage still do not contain any new information by the end of the 17 February 2016. Nonetheless, *Caldararu* is a PPU-case as *Caldararu* is kept in custody, and we must therefore expect the opinion of the general advocate within few days. The decision of the Court will then be expected within a few weeks or perhaps a month, so the excitement will soon be released.

It seems apparent that especially Spain and Lithuania were very skeptical as to whether one Member State should be allowed to examine the detention facilities in another Member State at all. The other seven Member States seemed to find it appropriate to have the possibility in very exceptional circumstances. France, Romania and Hungary seemed to limit the possibility to cases with systemic problems, while the remaining Member States also wanted to be able to conduct an examination in cases with individual problems. Germany wanted to let the executing Member State demand guarantees from the issuing Member State so surrender could be denied if the requested guarantees were not delivered. The remaining Member States seemed to agree that the two Member States had to engage in a dialogue to establish whether there was a problem in the specific case at all and whether a problem could be solved by for instance alternative detention measures. It is also worth noticing the position of the Commission as a rather pragmatic approach, where the Commission supported the need to make investigations in even individual cases, using a variety of sources.

# Policy in a Time of Fear: Blinded by Safety and Security

Annemieke van Es

*Independent legal advisor*

*After the attacks on New York, Madrid and London, various types of legislation have been implemented to combat and prevent terrorism. Although such measures are necessary to protect society, it is also essential that criminal legislation especially is limited by the boundaries set by the values in a democratic society. When those lines are crossed, legal protection can't be guaranteed. The proposal to criminalize the glorification of terrorist acts is criticized in accordance with the freedom of expression (ECHR Art. 10).*

*Keywords: Criminal Law, Instrumentalism, Terrorism, Legislation, Freedom of Expression*

## 1. Introduction

Criminal law as an instrument is restricted by boundaries set by the values of a democratic society and inextricably entwined with legal security – at least that is how it ought to be according to the Western (classical) idea<sup>1</sup>. However, with the increase of criminal activity, such as organised crime, international crime and terrorism, those boundaries are no longer always clearly defined.

Over the years, criminal law has changed its course. With the public's growing fear of unknown risks and crime and the lack of trust in criminal law and the government it seemed time for vigorous measures. Those measures appeared necessary from the governments point of view, in order to serve the public interest. This meant that over the years, criminal law became more and more preventive, to exclude any form of risk and to prevent any sense of unsafety and insecurity felt by the public.<sup>2</sup> In the classical view on criminal law it is considered a last resort, a so-called '*ultimum remedium*'<sup>3</sup>, only used when all other less intrusive measures are no longer sufficient and when guarantees are intended to protect the individual against governmental power and societal vigilantism.<sup>4</sup> With the development of risk society, the guarantees that should protect the individual are increasingly threatened. The main political focus became the

---

<sup>1</sup> Kelk, C., *Studieboek materieel strafrecht*. Deventer: Kluwer, 2005.

<sup>2</sup> Buruma, Y., *De dreigingsspiraal. Onbedoelde neveneffecten van misdaadbestrijding*. Den Haag: Boom Juridische uitgevers 2005.

<sup>3</sup> Kelk, C., *Studieboek materieel strafrecht*. Deventer: Kluwer, 2005.

<sup>4</sup> Emmen, A.M.C. & Stolk, R. Het recht in het tijdperk van *big data*. De toekomst bezien vanuit het redelijk vermoeden van schuld en de privacy. In: D.C. van Beelen, C.I.J. Klostermann, G. Noordeloos, P.L.F. Ribbers (Red.), *Privacy en gegevensbescherming (congresbundel Mordenate College)*, Apeldoorn-Antwerpen: Maklu 2015, p. 73-89

protection of collective safety, even though criminal science stresses that the laws on terrorism infringe the individual legal protection.<sup>5</sup>

Criminal law is considered to be an instrument of policy and a miracle cure to solve all society's problems, a development Fokué and 't Hart *describe as criminal instrumentalism*. In their view criminal instrumentalism can be defined with '*when criminal law is only seen as a specific means of coercion in order to reach a certain public goal: a goal that, external to criminal law, is politically determined and is developed in a more extensive policy*'.<sup>6</sup>

This article will address the ideas of democratic society and its boundaries, as well as the instrumental use of criminal law. After that a short overview of developments in criminal justice over the past decades within Dutch society will follow and insight will be given on how criminal justice became harder and increasingly an example of criminal instrumentalism. Onwards, to illustrate the danger of instrumentalism for legal protection of the individual, a recent proposal that aims to criminalize the glorification of terrorism will be discussed. Finally description will be given on how criminal law relates to the boundaries set by democratic society, particularly Art. 10 ECHR, and whether this proposal can be considered an example of criminal instrumentalism.

## 2. Values of a Democratic Society and the Development of Criminal Justice in the Netherlands in a Nutshell

### 2.1. The social contract of Beccaria

The principles of Western Europe's democratic society derive from the views of Beccaria and Montesquieu. Beccaria held the idea to create a social contract in order to guaranty public safety. This social contract should be a ground structure for an ordered, stable and secure society. The social contract is an imaginary situation, which does not follow from a previous social situation, but is the starting point from which society can be formed and a legal system can be developed to sustain and protect the community. Although Beccaria believes that the situation prior to the contract is unsafe as men are constantly at war with one another, he is however convinced that when people do decide to enter into a social contract, that this is on a voluntary basis and with the knowledge that equal participation in the community is to be established in order to succeed. To create this society, it would be necessary to give up 'small parts of freedom' in favour of the public good, in order to enjoy the remaining freedom. The total sum of the passed on small parts of freedom forms the so called 'sovereignty of the nation', with the sovereign as legal guardian and manager of this public good.<sup>7</sup> If the decisions of the sovereign subsequently do not benefit the public good or if they would endanger the freedom of the 'contractors', according to Beccaria, the sovereign would be overthrown because his

---

<sup>5</sup> Woude, M.A.H. , *Wetgeving in een veiligheidscultuur. Totstandkoming van antiterrorismewetgeving in Nederland bezien vanuit de maatschappelijke en (rechts)politieke context*, Den Haag: Boom Juridische uitgevers 2010.

<sup>6</sup> Fokué, R. en Hart, A.C. 't, *Instrumentaliteit en rechtsbescherming*. Arnhem/Antwerpen: Gouda Quint/Kluwer, 1990.

<sup>7</sup> Beccaria, C., *Over misdaden en straffe*, vertaling J.M. Michiels. Kluwers Nederlandse uitgave van 'Dei delitti en delle pene'. Deventer: Kluwer 1982. p. 43

actions would be damaging to goal and purpose of the contract.<sup>8</sup> The social contract creates a legal foundation, a model that considers the people within society who are committed to the social contract and subsequently are bearers of rights and obligations, to be legal entities.

## 2.2. Checks and Balances

Montesquieu in his work *De l'Esprit des Lois* introduced the doctrine of the separation of the legislative, executive and legal powers (better known as the *trias politica*), meaning that the power of one should always be checked by counterforce of the other. According to Montesquieu this is a fundamental condition which should create freedom. According to Montesquieu laws should set rules for what man can and cannot be forced to.<sup>9</sup> Although a strict separation had to be altered for it to work in a modern society, the fundamental idea that the governmental powers should be divided to prevent arbitrariness and suppression was in fact maintained by institutions that balance each other out (checks and balances), and also by decentralisation.

## 2.3. Criminal Instrumentality

In line with the ideas of Montesquieu, 't Hart claimed that law in a democratic society has a specific function where it should fulfil the conditions to make a democracy function not only procedurally, but also substantively. Where democracy should ensure an equal input for everyone in the public system, law provides chances to realize one's potential and to emancipate. A judicial system of 'checks and balances' should be formed to guarantee an equilibrium between the freedom of the individual on the one hand and on the other a restriction of that same freedom, in order to constrain and punish any violations of law.<sup>10</sup>

The government, with its almost absolute power to punish the individual also needs to be legally restricted in order to protect the individual as a legal subject against the abuse of power (Rule of Law). Within the classic-liberal constitutional state, the government and thereby the criminal justice system, are limited by the boundaries formed by the values of the democratic constitutional state. The principle of legality can therefore be seen as the guiding principle of the rule of law and therefore has two functions. The principle is both normative, in relation to the governmental power which restricts that power, as well as normative towards the individual who can take notice of what is considered to be social unacceptable behaviour and what legal consequences this behaviour will have. This gives criminal law a certain instrumental value.<sup>11</sup> As criminal law is a major infringement on a person's freedom, the character of criminal law as protector of the peoples' rights has always been an key factor in criminal law in order to

---

<sup>8</sup> Blad, J.R., Hoofdstuk 1, 'Strafrechtelijke rechtshandhaving', In J.R. Blad & J. van der Hulst (Eds.) *Strafrechtelijke rechtshandhaving: aspecten en actoren belicht voor het academisch onderwijs*. Den Haag: Boom Juridische uitgevers. p. 21-43 (2007)

<sup>9</sup> Montesquieu, C. de, *De l'Esprit de Lois* 1748. Ned. vert. *Over de geest der wetten* (selectie), vertaling en annotatie J. Holierhoek, Inleiding E. Snel. Meppel: Boom 1998.

<sup>10</sup> A.C. 't Hart, *Hier gelden wetten! Over strafrecht, Openbaar Ministerie en multiculturalisme*, Leiden: Gouda, Quint, 2001

<sup>11</sup> J.R. Blad, *Herstelrecht en civilisering van de strafrechtspleging*, in Marie-Claire Foblets, Mireille Hildebrandt & Jacques Steenbergen (Red.), *Liber amicorum René Foqué* (pp. 169-188). Gent/Den Haag: Larcier/Bju, 2012.

protect the person considered to be a suspect of committing a criminal act. This side of legal protection of criminal law is safeguarded *i.e.* by the principle of individual culpability, the already mentioned principle of legality, proportionality, subsidiarity and criminal law as *ultimum remedium*, where it should only be used as a last resort.<sup>12</sup>

Criminal law however can only function as an instrument when it equally protects the rights and freedoms of every individual within the concept of rule of law against both vertical infringements by the government, as well as horizontal infringements by other persons. In other words, the aim of rules and regulations is to define the reciprocal rights and duties of citizens or those applicable in the relationship between citizens and government. This criminal instrumentality as well as the legal protection of individual legal subjects should be cited, as Foqué and 't Hart put it, as two sides of the same coin, therein legal protection should be inherent to criminal law as an instrument.<sup>13</sup>

## 2.4. Criminal Instrumentalism

Until the eighties of the previous century, criminal law in the Netherlands was considered an instrument to punish perpetrators and also, to some extent, to prevent future criminal behaviour. Because of the 'pillar' system, wherein the public was divided and organised in confessional/ideologically-based groups (pillars), the crime rate was low and frequently misbehaviour was settled within the group without governmental interference. However, when the pillar system came to an end because of secularism, the upcoming trade in drugs in the seventies and consequently the rise of organised crime, the ideas on how to effectively fight crime changed. The increase of the social and political discussion on fighting organised crime, the sense of insecurity of the public and the threat of terrorism pressured criminal law and its role which it is supposed to play in solving the experienced problems. The Bill Society and Crime of 1985 as presented by the Dutch government<sup>14</sup>, forms the turning point in criminal justice with regard to criminal law as an instrument and the ways in which law enforcement should operate. From that time on, the leading political thought was to use criminal law as an instrument to create a more systematic and targeted system in order to prevent crime. This resulted in a tougher and more commercialised law system, created to be effective in controlling society and combating crime. Criminal law is mainly aimed at general prevention but subsequently also at tough punishment if general prevention should fail.<sup>15</sup> This led to a certain use, or rather *abuse* of criminal law, which Foqué and 't Hart have called *criminal instrumentalism*. Criminal law then is considered to be: *'Merely a specific coercive instrument*

---

<sup>12</sup> Woude M.A.H. van der & Sliedregt, E. van (2007), De risicosamenleving: overheid vs. strafrechtswetenschap? Aanwijzingen voor het debat rondom veiligheid en risico's, *Proces, Tijdschrift voor strafrechtspleging* 6: 216-226

<sup>13</sup> Foqué, R. en Hart, A.C. 't, *Instrumentaliteit en rechtsbescherming*. Arnhem/Antwerpen: Gouda Quint/Kluwer, 1990.

<sup>14</sup> Kamerstukken II 1984/85, 18 995, nr. 13-14.

<sup>15</sup> Hart, A.C. 't, *Mensenwerk? Over rechtsbegrip en mensbeeld in het strafrecht van de democratische rechtsstaat*. Amsterdam/New York/Oxford/Tokyo, 1995.



*to reach a certain social aim: an aim that, external to criminal law, is politically dictated and will be developed in a comprehensive policy*<sup>16</sup>

Criminal law as an instrument is within the vision on criminal instrumentalism no longer inextricably linked to the legal guarantee of the protection of individual citizens, which simultaneously limits society and the government; consequently, criminal law does not recognize this connection and deems legal guarantees to be a separate subsidiary objective.

The thing that defines criminal instrumentalism, according to Blad, is that one looks upon the limitations that are inextricably connected to legal certainty as inefficient obstacles that stand in the way of maximum effect. In the eyes of the political leaders these obstacles need to be removed as much as possible.<sup>17</sup>

What remains is a criminal paradox. Law that merely focuses on public safety and security, will ultimately lead to a total lack of privacy. Moreover, because of the extended use of criminal law, the individual will nearly be withheld from all its rights and freedoms for the good of the public. The question that can be posed is whether these governmental Orwellian Big Brother actions can really make individuals feel safe and secure. Is it fair to sacrifice individuals' freedom for public safety?

## 2.5. Policy in a Security State from 1995 onwards

After the Note of 1985 the government, supposedly driven by the by the public experienced perceptions of unsafety, in order to reach a more effective policy on criminal justice, conducts a security policy which is becoming more and more a form of instrumentalism in nature.<sup>18</sup>

Criminal justice becomes a system that is based on the publics' feelings, uneasiness and insecurity. The fearful citizen demands the best possible protection against all sorts of collective risks, such as organised crime, international crime and terrorism. Because of technical developments new dangers have sprung and the critical consumer and citizen expects a proactive approach to limit and/or exclude every form of risk. Criminal law, which isn't suitable from the classic reactive model point of view, is expected to force security. This resulted in what is called 'risk orientated criminal justice' and 'risk orientated criminal law'<sup>19</sup>. The criminal act of an individual perpetrator is no longer the main focus, but risk profiling becomes one of the governments key instruments to control safety risks. Prevention of crime, even before criminal activities have begun, so to speak.

Politicians, with a view to re-elections, felt the need to stop the peoples' feelings of concern and unsafety. Faith in the government needed to be restored as well as faith in criminal law as

---

<sup>16</sup> Foqué, R. en Hart, A.C. 't, *Instrumentaliteit en rechtsbescherming*. Arnhem/Antwerpen: Gouda Quint/Kluwer, 1990.

<sup>17</sup> Blad, J.R. , 'Strafrechtelijke rechtshandhaving', in: J.R. Blad e.a. (red.) *Strafrechtelijke rechtshandhaving. Aspecten en actoren voor het academisch onderwijs belicht*, Den Haag: Boom Juridische Uitgevers, 2007.

<sup>18</sup> Woude M.A.H. van der & Sliedregt, E. van (2007), De risicosamenleving: overheid vs. strafrechtswetenschap? Aanwijzingen voor het debat rondom veiligheid en risico's , *Proces, Tijdschrift voor strafrechtspleging* 6: 216-226

<sup>19</sup> Koppen, P.J. (2008) , De beschaving van risicostrafrecht: Tussen goede opsporing en prima gevaarspredictie, *Proces, Tijdschrift voor strafrechtspleging* 2:36-46.

an instrument. The lack of public faith and feelings of safety paved the way for populism. Fear of losing the vote of the public caused politicians to adjust the political agenda to the needs of society. The collective sense of unsafety and insecurity calls for direct measures. Although criminal law from the classic point of view should be an '*ultimum remedium*', the general consensus of the people is that crime can only be fought by 'significant criminalization and hardening of the criminal justice system.'<sup>20</sup>

## 2.6. Terrorism

After the attacks in New York in 2001, Madrid in 2004 and London in 2005, fear of victimisation took control of our lives, minds and voices of reason. The rise of terrorism on religious grounds resulted in fear becoming the leading factor in policy-making, even more so than before, in order to restore safety and stability. It resulted in a global war on terrorism and from a safety perspective, under the influence of the European Union,<sup>21</sup> as in most European States, it led to adopting more radical legislation on terrorism. These events and the fear and insecurity already felt by civilians have raised much attention for collective safety in the social and political debate. In order to 'secure' public safety, it was thought necessary to create a firm policy on safety. This policy, which supposedly aimed to restore the balance between the protection of society as a whole and its potential victims opposed to the individual rights and protection of potential perpetrators, was heavily criticized by scholars as well as by the council for the judiciary, for disrupting the balance between criminal law as instrument of policy and criminal law as a means to protect rights.<sup>22</sup> In the modern concept of terrorism, the enemy is unknown and most of the time quite invisible, making negotiations impossible. Also, since 'new' terrorism is based on religious grounds, reaching an agreement would be unthinkable. It also aims to make as many civilian victims as possible. The attacks focus on creating chaos, arouse fear and by doing so creating mass public fear.<sup>23</sup>

Terrorism calls for firm actions and criminal law offers possibilities as it is used to track down persons who might consider committing a terrorist act. Because of this change in purpose and use, criminal justice had a complete turnaround: it went from tracking down and prosecuting offenders and tracking down risks by collecting and processing as many information as possible. This resulted yet again in crossing the boundaries of criminal instrumentality and making policy that ignored legal protection of the individual citizen. This politicisation of safety and security caused a decline in legitimacy of the government and the police.<sup>24</sup>

---

<sup>20</sup> Kelk, C., Enkele strafrechtelijke ontwikkelingen en de volkswil. Vijf jaar na Pim Fortuyn. *Justitiële verkenningen* nr. 2, 2007.

<sup>21</sup> Council Framework Decision [2002/475/JHA](#) of 13 June 2002 on combating terrorism

<sup>22</sup> Woude M.A.H. van der & Sliedregt, E. van (2007), De risicosamenleving: overheid vs. strafrechtswetenschap? Aanwijzingen voor het debat rondom veiligheid en risico's, *Proces, Tijdschrift voor strafrechtspiegeling* 6: 216-226.

<sup>23</sup> Woude, M.A.H., van der. Voorzorgstrafrecht: zorgen voor inzichtelijke keuzes. Een eerste aanzet tot een ex post- en ex ante-evaluatiemodel voor de wetgever. In Hildebrandt, M. & Pieterman, R. (Eds.) *Zorg om voorzorg* (p. 77-106). Den Haag: Boom Juridische Uitgevers, 2007.

<sup>24</sup> J. Terpstra, *Het veiligheidscomplex. Ontwikkelingen, strategieën en verantwoordelijkheden in de veiligheidszorg*. Den Haag: Boom Juridische Uitgevers, 2010.

### 3. The Legislative Proposal to Criminalize the Glorification of Terrorism

#### 3.1. Introduction

After the beheading of American journalist James Foley by ISIS, in the summer of 2014, some of the responders on social media sympathised with this terroristic group and glorified this act, openly supporting ISIS. The leader of the Dutch Christian party (CDA), Buma, expressed his concern for the lack of power majors will have in case they need to act against those who sympathise with ISIS and who condone terroristic violence.<sup>25</sup> More recently, Buma stated in January this year that after the attacks in Paris last November he believes that there is ground for legislation to criminalize the glorification of terrorism.<sup>26</sup>

The concern of Buma led to a legislative proposal, submitted by Mona Keijzer of the CDA and send to the Council of the Judiciary for approval on 17 December 2015. According to the explanatory memorandum the proposal aims to introduce a new article; 137ga into the criminal code which criminalizes the glorification of the armed struggle and terroristic acts when the person knows or reasonably should suspect that this glorification seriously disrupts or may disrupt public order. The proposal stems from the concern about extensive coarsening of the public debate in the Netherlands and is motivated by the need to protect society against statements that have exceeded the permissible limits by far.<sup>27</sup>

The question that needs to be answered in this chapter is whether the criminalization of the glorification of terrorist acts is a justified instrument that conforms to the boundaries set by the values of a democratic society.

#### 3.2. The Historical Background of the Proposal

This wasn't the first time this proposal was submitted. In 2005, right after the first series of terrorist attacks, the former minister of justice: Donner, also consulted the Council on a similar proposal.<sup>28</sup> At the time the minister aimed to criminalize glorifying, trivialising or denying terrorism and large international crimes (*i.e.* genocide, war crimes and crimes against humanity), 'of which one knows or reasonably should suspect that it will or can disturb public order.'<sup>29</sup>

---

<sup>25</sup> <http://www.volkskrant.nl/politiek/-verbod-verheerlijken-terrorisme-juridisch-niet-houdbaar~a4266808/> (3 May 2016).

<sup>26</sup> <https://www.cda.nl/actueel/toon/buma-roept-opnieuw-op-tot-straftbaar-stellen-van-verheerlijking-terroristisch-geweld/> (3 May 2016).

<sup>27</sup> Advies Raad voor de rechtspraak <https://www.rechtspraak.nl/SiteCollectionDocuments/20160309-Advies-initiatiefwetsvoorstel-straftbaarstelling-verheerlijking%20terrorisme.pdf> (3 May 2016).

<sup>28</sup> Concept legal proposal to alter the criminal code concerning to criminalize the glorify, play down, trivialize and denial of very serious crimes and disqualification from the practice of certain professions. Advice of the council was published on [www.rechtspraak.nl](http://www.rechtspraak.nl) with number 2005/26.

<sup>29</sup> *Ibid*

The proposal was ill-received and there was a lot of critique on its vagueness and the large infringement on the freedom of expression.<sup>30</sup> Afterwards, the government stated that the delict sedition (Art. 131 Criminal Act) was already sufficient to meet international obligations.<sup>31</sup> Furthermore, it was not very likely that the judiciary would accept the criminalization of 'apologie'. Also, according to the government's statement, it would be too difficult to make the criminalization sufficiently precise and meet the criteria of the ECHR, and to comply with the requirements of the principle of legality and still holds its value.<sup>32</sup>

Because of the latest attacks in France and Belgium, the ongoing debates on the growing threat of terrorism, Buma's believes that the public debate has coarsened and that this has exceeded the permissible limits extensively, Buma believes now is the time to criminalize the glorification of terrorism. He claims that there is a relation between positive statements on the acts of terrorism in social media and the violent attacks as a result.<sup>33</sup> In December of 2015 the initiative-proposal was submitted by Buma's colleague Keijzer and send for approval to the Council for the Judiciary.<sup>34</sup>

### 3.3. Argumentation regarding the Proposal

In accordance with the critique on the proposal of 2005, Buma attempted to specify the new proposal by narrowing it down to only criminalizing the 'glorification of the armed battle and terrorist acts when the person knows or reasonably should suspect that this glorify seriously disturbs or may disturb public order.'<sup>35</sup> But further changes to the former proposal were not noticeable to the Council of the Judiciary or others. Since the current proposal or the explanatory memorandum has not been made public, I consider it to be permissible to use the content of the 2005 proposal in order to discuss the current one.

The proposal states that the freedom of expression (ECHR Art. 10) is an important freedom of humanity in a democratic society. The public debate in the Netherlands is consequently of great importance and it is of great value that everyone in society can equally participate in that debate and feels free to express themselves, regardless of origin, sex, sexuality, religion. Freedom of expression and religion therefore hold a prominent position within the public debate. However, public expressions can also have a counterproductive effect. When statements or expressions are hurtful, relations between groups in society can become worse and it can encourage radicalisation, which can ultimately lead to terrorism.

In the proposal it is stated that it is acceptable to criminalize the glorification of terrorist acts when it is of great importance for public safety and/or protection of public order, when the used

---

<sup>30</sup> Advies Raad voor de rechtspraak, [www.burojansen.nl/terrorisme/apologie/advieverheerlijkingrv.pdf](http://www.burojansen.nl/terrorisme/apologie/advieverheerlijkingrv.pdf) (3 May 2016).

<sup>31</sup> RvE Verdrag ter Voorkoming van Terrorisme, CETS nr. 196; EU-Kaderbesluit 2008/919/JBZ van de Raad van 28 november 2008 tot wijziging van Kaderbesluit 2002/475/JBZ inzake terrorismebestrijding, L330/21.

<sup>32</sup> M. van Noorloos, Verheerlijking van terrorisme, NJB 2014/907.

<sup>33</sup> <https://www.cda.nl/actueel/toon/buma-roept-opnieuw-op-tot-straftbaar-stellen-van-verheerlijking-terroristisch-geweld-1/>

<sup>34</sup> <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Tal-van-onduidelijkheden-in-wetsvoorstel-dat-verheerlijken-terrorisme-straftbaar-maakt.aspx>

<sup>35</sup> Advies Raad voor de Rechtspraak <https://www.rechtspraak.nl/SiteCollectionDocuments/20160309-Advies-initiatiefwetsvoorstel-straftbaarstelling-verheerlijking%20terrorisme.pdf.pdf> (3 May 2016).

statements and expressions seriously disrupt or may disrupt public order. According to the former minister and now Buma, it is justified to criminalize such statements under those circumstances, because these cases satisfy the constraints that are permitted by the ECHR. The promotion of equal participation in the public debate of different groups in our society therefore would justify the limitations of fundamental rights by criminalizing this glorification.<sup>36</sup>

Buma further states, that even though there wasn't enough support to criminalize the glorification of terrorist acts in the past, now there is enough ground to do so. Although the criminalization is criticised for being in conflict with the freedom of expression, Buma claims that the glorification is also criminalized in France and the UK where the freedom of expression is also highly appreciated. The difference being these countries in the recent past both fell victim to terrorist attacks by Islamic fundamentalist. According to Buma there is a great difference between expressing thoughts and expressing joy over terroristic violence, which inclines towards terrorism.<sup>37</sup> The arguments expressed by Buma actually suggest certain causality between the glorification and the terrorist acts that might follow. In other words: in the opinion of Buma, the potential terroristic perpetrators feel encouraged and strengthened by the glorification to commit the terrorist acts. The criminalization would in this thought be necessary in order to prevent terrorist acts.<sup>38</sup>

### 3.4. Criticism on the Proposal

The Council on the Judiciary criticised the proposal, by stating that the new proposal is very similar to the previous one of 2005. Although, according to the Council, there are many ambiguities in the proposal, the main objection is that it is not clear how the proposal relates to the freedom of expression. There is no clarity on which expressions would be considered glorification and so should be criminalized. The proposal lacks an explanation from which follows that boundaries have been crossed or that there is a general sense of necessity for criminalizing the glorification.<sup>39</sup> Without any evaluation criteria, there's a danger that 'the criminal judge has to decide on historical, religious and political controversies'.<sup>40</sup> It is most likely that many convictions in the light of this criminalization would be in contravention of article 10 ECHR.

The other difficulty with the proposal is that the requirement of intent on disturbing public order is missing. The memorandum indicates that it was intended to punish those who make public statements that aim to cause public disturbance. If the requirement of intent is not added to the

---

<sup>36</sup> Concept legal proposal to alter the criminal code in order to criminalize the glorification, playing down, trivialization and denial of very serious crimes and disqualification from the practice of certain professions.

<sup>37</sup><https://www.cda.nl/actueel/toon/buma-roept-opnieuw-op-tot-straftbaar-stellen-van-verheerlijking-terroristisch-geweld/> (3 May 2016).

<sup>38</sup> M. van Noorloos, Verheerlijking van terrorisme, NJB 2014/907

<sup>39</sup> Advies Raad voor de Rechtspraak <https://www.rechtspraak.nl/SiteCollectionDocuments/20160309-Advies-initiatiefwetsvoorstel-straftbaarstelling-verheerlijking%20terrorisme.pdf.pdf> (3 May 2016).

<sup>40</sup> Advies Raad voor de Rechtspraak <http://docplayer.nl/15619324-1-inleiding-aan-de-minister-van-justitie-t-a-v-de-heer-mr-j-j-wiarda-postbus-20301-2500-eh-den-haag.html> (3 May 2016).

proposal, every journalistic or scientific publication could be pursued.<sup>41</sup> It is obvious according to the Council that the scope of these legal provisions is at odds with the freedom of expression.

### 3.5. Jurisprudence of the European Court on Article 10 of the ECHR: Conditions of the Freedom of Expression

In order to conclude whether the criminalization of the glorification of terroristic acts is in breach with the freedom of expression from article 10 ECHR, it is necessary to compare to what is decided on the conditions for a breach of the freedom of expression by the European Court.

According to the Court, the freedoms hold a special position within ECHR. They are necessary to help secure other rights and freedoms in a democratic society and facilitate in spreading opinions, thoughts and information, without which pluralism, tolerance, broadmindedness and social cohesion are hardly possible. The freedoms try to accomplice that social matters with all sorts of opinions, are solved by interaction and dialogue and not by violence. They are vigilant for the position that the majority holds and that it does not abuse its dominant position against the minority.<sup>42</sup>

The European Court it is determined that the freedom of expression can be limited when three conditions are fulfilled. The interference of the government needs to be:

- provided by law, meaning that interference needs to come from a norm of internal law , that is accessible, sufficiently precise formulated, and provides with sufficient ground to prevent arbitrariness (principle of legality);
- based on one of the in article 10 paragraph 2 ECHR mentioned grounds (legitimacy); and
- “necessary in a democratic society, where needs to be considered whether the interference complained of corresponded to a ‘pressing social need’, whether it was proportionate to the legitimate aim pursued<sup>43</sup> and whether the reasons given by the national authorities to justify it are relevant and sufficient” (Necessity)<sup>44</sup>

The latter requirement comes with a certain but not unlimited ‘margin of appreciation’. Under certain circumstances the intensity of the test of necessity (also the extent of the ‘margin of appreciation’) can be wider or smaller. To determine its width, the next conditions are of importance.<sup>45</sup>

First, the nature of the expression. The ECHR seldom limits participation in the public debate (‘public speech’ or ‘debates on questions of public interest’) that takes place on democratic grounds. However, these expressions can be inadmissible, when there’s a call for use of

---

<sup>41</sup> <http://www.volkskrant.nl/politiek/-verbod-verheerlijken-terrorisme-juridisch-niet-houdbaar~a4266808/> (3 May 2016) en Advies Raad voor de Rechtspraak <http://docplayer.nl/15619324-1-inleiding-aan-de-minister-van-justitie-t-a-v-de-heer-mr-j-j-wiarda-postbus-20301-2500-eh-den-haag.html> (3 May 2016).

<sup>42</sup> ECLI:NL:PHR:2013:2379

<sup>43</sup> Handyside v. the United Kingdom judgment of 7 December 1976, § 49.

<sup>44</sup> ECLI:NL:PHR:2013:2379

<sup>45</sup> ECLI:NL:PHR:2013:2379

violence against a certain part of the population or when rejection of the democratic principles is otherwise promoted.<sup>46</sup> In some cases a complaint is declared inadmissible, because certain expressions and behavior would be incompatible with the text and the spirit of the ECHR and protection of that expression or behavior would lead to destruction of those rights and freedoms incorporated in the Convention.<sup>47</sup> In other words, expression that is incompatible with the values of the Convention is not protected by article 10. The by the Court mentioned examples are ‘negation of the Holocaust, the justification of pro-Nazi policy, associating all Muslims with a serious act of terrorism, calling Jews “the source of all evils in Russia” (*Lehideux and Isorni v. France*, 23 September 1998, §§ 47 and 53, Reports 1998-VII; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI; *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005, and *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007). “(...) like any other remark directed against the Convention’s underlying values ..., the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10 (there is a) category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.”<sup>48</sup>

The statements of the Court mentioned above in *Lehideux and Isorni* show that acts that do not comply with democracy and human rights are without a doubt the aim of prohibition by Art. 17 of the Convention.

The second category of circumstances that defines the intensity of the necessity test, is the intention with and the consequences of certain expressions and behaviour. The intent of the impact of the remark or behaviour is what justifies the breach of the rights of the ECHR. That a certain expression or behaviour arouses aversion of the public, does not justify that breach. The interference of the government is considered more necessary when the expression aims for violence or damage to certain persons. On the one hand, the consequences that interfering has on the freedom of expression will be regarded. On the other, the relation between the (seriousness of the) expression and the taken measures will be viewed. When the scope of a measure is limited, the interference will be found legit sooner.<sup>49</sup>

Now there’s clarity on the possibility that limitations to the freedom of expression are allowed when there is a ‘pressing social need’, it is necessary to see when the Court believes there is a matter of ‘pressing social need’ when it comes to the glorification of terrorist acts.

In *Sürek*, the Court decided that it was a matter of ‘pressing social need’ when the applicant was fined for spreading ‘separatist propaganda’, calling for ‘bloody vengeance’<sup>50</sup> In a similar case, *Leroy v France* (no. 36109/03, 2 October 2008), the Court ruled that the dignity of victims was offended by the praise of an act of violence, namely the attacks of September 11 2001, by publishing a drawing that not only criticised US imperialism, but also glorified the

<sup>46</sup> *Ibid*

<sup>47</sup> ECHR 14 march 2013, App. nr. 26261/05 and 26377/06 (*Kasymakhunov and Saybatalov/Russia*) par. 113.

<sup>48</sup> Council of Europe/European Court of Human Rights, *Internet: case-law of the European Court of Human Rights*, 2015. p. 55.

<sup>49</sup> ECLI:NL:PHR:2013:2379

<sup>50</sup> Council of Europe/European Court of Human Rights, *Internet: case-law of the European Court of Human Rights*, 2015.

deconstruction of it by violence. The caption expressed moral solidarity with the terrorists. The Court decided that the conviction of the applicant pursued several legitimate goals, especially because of the sensitive nature of the war on terrorism. These legitimate goals were: ‘maintaining of public safety, prevention of disorder and crime.’<sup>51</sup>

In the case of *Féret v. Belgium* the Court decided that there had been no violation of Art. 10, since the applicant’s comments were a message in electoral context and were clearly racial, aimed for foreigners, to arouse feelings of distrust, rejection and even hatred against them. The Court decided that conviction was justified to prevent disorder and protecting the rights of others, namely immigrants.<sup>52</sup>

In *Le Pen v. France* it was the Courts opinion that the application was inadmissible and that the interference with the applicant’s enjoyment of the right to freedom of expression had been necessary in a democratic society, since the reasons given by the domestic courts for conviction were considered relevant and sufficient. Applicant’s statements were placed in the context of general debate, which normally requires a non-interfering government in order for a person to enjoy his right to freedom of expression. In this case, however, the applicant tried to create a gap between by placing the French on one side and the Muslim community on the other, shedding a disturbing light on the latter.<sup>53</sup>

## 4. Conclusion

At the end of this article we need to deliberate how the proposal on criminalizing the glorification of armed battle and terrorist acts relates to the instrumentality of criminal law and whether it is sufficiently defined by the boundaries set by democratic society, in particular by the freedom of expression of Art. 10 of the European Convention, or whether this proposal can be judged as a form of instrumentalism.

In chapter two it was emphasised that criminal law can only function as an instrument when it equally protects the rights and freedoms of every individual within the rule of law against both vertical infringements by the government, as well as horizontal infringements between citizens. In other words it needs to protect both society as well as the individual suspect. Criminal law should be bound by the principles set by democratic society and it should always be considered the *ultimum remedium*, or last resort. Crossing that line causes criminal law to become an instrument that is merely used to ‘reach a certain social aim: an aim that, external to criminal law, is politically dictated and will be developed in a comprehensive policy’<sup>54</sup> The limitations are politically viewed as being nuisances that stand in the way of the desired goal.

In this particular proposal, the instrument could be limited by Art. 10 ECHR. To evaluate whether there is a breach of Art. 10, a comparison needs to be made to the case-law of the

---

<sup>51</sup> *Ibid.*

<sup>52</sup> European Court of Human Rights, *Factsheet Hate speech*. 2016.

<sup>53</sup> *Ibid.*

<sup>54</sup> Fokué, R. en Hart, A.C. ‘t, *Instrumentaliteit en rechtsbescherming*. Arnhem/Antwerpen: Gouda Quint/Kluwer, 1990.



European Court of Human Rights. The Court stated in multiple cases that the freedom of expression can in fact be limited, if the three conditions (legality, legitimacy, necessity) are met.

In the case of the proposal, there are already questions (by the Council of the Judiciary) whether the proposal on criminalization is sufficiently described and defined. The current proposal does not describe clearly what expressions would be criminalized and also the necessary element of 'intent' towards disturbing the public order is not included. This leads to uncertainty which endangers the principle of legality. This condition, however, can be fixed quite easily by altering the text of the proposal.

A more interesting question is to see consider it is legitimate to limit the freedom of expression, in other words, whether the proposal meets the conditions of paragraph 2 of Art. 10 ECHR and, if so, whether the interference is necessary in a democratic society and if there is a pressing social need that corresponds with that interference. The interference needs to be in proportion in relation with the legitimate goal pursued and the reasons for interference need to be relevant and sufficient. This last condition comes with a limited 'margin of appreciation.'

Further, the scope of the 'necessity' (in a democratic society) needs to be determined. In order to do so, the following conditions are of the utmost importance.

First, when expressions in a public society call for the use of violence against a certain part of the population or when rejection of democratic principles are otherwise promoted, the expressions can be inadmissible. In some cases a complaint is declared inadmissible, because of the incompatibility of the expressions or behaviour with text and spirit of the ECHR. Protection of that particular expression or behaviour would lead to destruction of the rights and freedoms incorporated in the Convention and would therefore not be protected by Art. 10 ECHR.

Secondly, of importance for the intensity of the test of necessity is the intention with and the consequences of certain expressions and behaviour. Interference is considered more necessary when the expression or behaviour aims for violence or aims to damage certain persons. Of importance is what consequences the interference has on the freedom of expression and what the relation is between the expression and the interfering measures. When the scope of the measures taken is limited, the interference will sooner be considered legit.

The final step is to determine when the Court believes there is a matter of 'pressing social need.' Based on the Court's rulings, I believe that there is a matter of pressing social need when a person's remarks can be regarded as a call to violence or as hate speech based on religious intolerance. Merely deliberating on ideas that may be offensive to society, without however calling for violence or seemingly calling for violence is not considered hate speech. In most cases the Court believes the public debate must be continued in order for people to grow and to exchange thoughts.

The question now is, whether the proposal meets the requirements posed by Art. 10 ECHR and those set by the European Court of Human Rights.

In my opinion, the proposal is not necessary, since there already are several articles in the Criminal Code which criminalize similar issues. Furthermore, the proposal does not meet the

requirements of legality. But most of all I believe that criminalizing the glorification of terrorist acts deals with a fine line between sincere glorification and the freedom of the right to expression. States hold a certain margin of appreciation when it comes to the necessity to limit the freedom of expression, however, to in opinion there is no pressing social need to restrict the opinions of people who support terrorist actions on the internet.

Although it is repulsive to me that those acts are glorified by some people, it would be wrong, not to mention useless to create an ineffective instrument and to criminalize every opinion or thought that deals with terrorism. It would be like creating a thought-police, judging people on thoughts, what makes it impossible for the judges to rule on evidence. Moreover, in a democratic society it would be wrong to shutdown the public debate only because it's not ones opinion. A pressing social need will only be accepted by the Court, when the goal of the expression is to inflict violence and to harm others directly. In my view Twitter messages and 'likes' on Facebook cannot be considered such.

Buma's proposal therefore is a disproportionate interference with the freedom of expression and it would therefore provide with an instrument that merely is being used to reach a certain social aim: an aim that, external to criminal law, is politically dictated and will be developed in a comprehensive policy.

## Review

# D. Moeckli – S. Shah – S. Sivakumaran (eds.): International Human Rights Law

Veronika Greksza

*PhD candidate, University of Pécs, Faculty of Law*

*International Human Rights Law*<sup>1</sup> is a well structured comprehensive textbook written by leading experts that proves essential if learning about, working with, or simply being interested in this field of international law.

Thinking about current internationally relevant events in Europe, Asia and Africa, it is not hard to see that international human rights law is one of the most topical segments of international law – if not of law in general. The belief of the international community that free human beings should enjoy freedom from fear and want nowadays faces numerous challenges. The 1<sup>st</sup> Article of the Universal Declaration of Human Rights says that all human beings are born free and equal in dignity and rights. However, one might think it's more a goal to reach than a status as “*we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.*”<sup>2</sup> The universality of the human rights which constitute the equal moral status is not a given case, the international community has to fight continuously for it. The individuals as part of the international community and subjects of international human rights law thus have the same obligation. Human beings not only have human rights but also the obligation to respect the human rights of others. To make individuals believe in the effectiveness of human rights is one step for reaching the universality of equal moral status in the practice. To believe in their effectiveness, knowledge about human rights and their system of protection is necessary. To support individuals – be they students, practitioners, or simply interested ones – a comprehensive understanding of human rights law is achieved: that is the goal of *International Human Rights Law*.

Comprehensiveness is one of the greatest qualities of *International Human Rights Law*. The substantial part is divided into six chapters. Before the first part one can find three short personal reflections on what human rights are for. As an ‘appetiser’ three different points of view are shown: the point of view of international organisations,<sup>3</sup> NGOs,<sup>4</sup> and that of the national level<sup>5</sup> on human rights protection. The first part<sup>6</sup> sets the scene: it starts with the history of the human rights movement, continues with the justifications of human rights and concludes with the description of the six most intense and perceptive

---

<sup>1</sup> *International Human Rights Law*, second edition, edited by Daniel Moeckli & Sangeeta Shah & Sandesh Sivakumaran, consultant editor: David Harris, Oxford University Press, United Kingdom, 2014. ISBN 978-0-19-965457-4.

<sup>2</sup> Hannah Arendt, *The Origins of Totalitarianism*, Penquin, 1951, p. 147. Cited by Samantha Besson in D. Moeckli & S. Shah & S. Sivakumaran (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, 2014. p. 46.

<sup>3</sup> Navanethem Pillay – UN High Commissioner for Human Rights.

<sup>4</sup> Kenneth Roth – Executive Director of Human Rights Watch.

<sup>5</sup> Hina Jilani – Director of AGHS Legal Aid Center and Advocate of the Supreme Court of Pakistan.

<sup>6</sup> Part I – Foundations.

critiques on human rights such as the realist, utilitarian, Marxist, particularist, feminist, and post-colonial theoretical perspectives. This last chapter of the first part distinguishes *International Human Rights Law* from other textbooks on this topic, as the ‘other side’, the critical points of view are quite rarely included in such textbooks.

The second part<sup>7</sup> describes the basics: the sources of international law, the nature of human rights obligations, and the scope of human right applications. This part makes *International Human Rights Law* a great lecture book for university studies, as it gives an overview, a ‘handbook’ for human rights in general, which makes the third part easy to follow.

The third part<sup>8</sup> presents a general view of diverse human rights. The logical structure of this chapter is also worth mentioning. The introductory part ( 7 – Categories of rights) describes the several categories of rights such as economic, social, cultural/civil, political rights, individual/collective rights and one-dimensioned/composite rights, core rights and other human rights and the question of ‘new human rights’ (i.e. whether new human rights are emerging). Consequently, the topics of equality and non-discrimination are discussed as these principles are in play regarding each and every human right. Only after these basic topics the book commence with the presentation of particular human rights. This editorial technique definitely serves the aim of ensuring a better understanding.

Getting familiar with the described human rights – rights and freedoms regarding the integrity of person, adequate standard of living, thought, expression, association, assembly, education, work, detention, trial, culture, sexual orientation and gender identity, women’s rights and group rights – the fourth part<sup>9</sup> treats the three levels of human rights protection, namely the international level (*United Nations*), the regional level (*America, Europe, Africa*) and the national level.

The fifth part<sup>10</sup> places the human rights law into the system of international law and describes the linkages between international human rights law and international humanitarian, criminal and refugee law. The last part<sup>11</sup> illustrates the most urgent problems to be solved regarding human rights protection such as terrorism, poverty or environmental degradation.

Giving a comprehensive overview, the reviewed book strikes an appropriate balance between academic profoundness and usefulness for daily practice. It presents all essential details one might need to be up to date in the given topic. One of the most interesting and sometimes also challenging chapters is the chapter entitled ‘Justifications’ and written by Samantha Besson. While discussing questions like: *why justification of human rights is needed, what it means to justify them, what the different justifications for human rights may be, and what some of the implications of the justifications of human rights could be*, the reader gets a very logical positivist explanation of the question of what human rights are from a legal point of view. Even though this chapter or even the whole topic may seem somewhat abstract, this chapter can dissolve the intangibility of the philosophy behind human rights and translates it into the language of law, with explanations such as the following: “*Political equality is indeed the kind of equality that matters in a legal order, accordingly, in the context of human rights law. The passage from equality to political equality corresponds to that from basic moral rights to human rights.*”<sup>12</sup>

---

<sup>7</sup> Part II – International Law.

<sup>8</sup> Part III – Substantive Rights.

<sup>9</sup> Part IV – Protection.

<sup>10</sup> Part V – Linkages.

<sup>11</sup> Part VI – Challenges.

<sup>12</sup> Samantha Besson, *Justification*, in D. Moeckli & S. Shah & S. Sivakumaran (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, 2014. p. 45.

Well-known experts – academics as well as practitioners – are among the authors, with different regional, theoretical, and professional background.<sup>13</sup> This was a conscious decision on behalf of the editors as stated in the preface: the diversity of what human rights mean to different people should be reflected. The textbook reached this aim without a doubt and achieved even more: the contributors created an exhaustive, but still basic textbook/handbook which is a must for everybody who would like to get familiar with the never settled, often criticized topic of international human rights law.

---

<sup>13</sup> *History* – Ed Bates; *Justifications* – Samantha Besson; *Critiques* – Marie-Bénédicte Dembour; *Sources* – Christine Chinkin; *Nature of Obligations* – Frédéric Mégret; *Scope of Application* – Sarah Joseph & Adam Felcher; *Categories of Rights* – Theo van Boven; *Equality and Non-Discrimination* – Daniel Moeckli; *Integrity of the Person* – Nigel S Rodley; *Adequate Standard of Living* – Asbjørn Eide; *Thought, Expression, Association, and Assembly* – Kevin Boyle & Sangeeta Shah; *Education and Work* – Fons Coomans; *Detention and Trial* – Sangeeta Shah; *Cultural Rights* – Julie Ringelheim; *Sexual Orientation and Gender Identity* – Michael O’Flaherty; *Women’s Rights* – Dianne Otto; *Group Rights* – Robert McCorquodale; *United Nations* – Jane Connors & Markus Schmidt; *The Americas* – Jo Pasqualucci; *Europe* – Steven Greer; *Africa* – Christof Heyns & Magnus Killander; *Within the State* – Andrew Byrnes & Catherine Renshaw; *International Humanitarian Law* – Sandesh Sivakumaran; *International Criminal Law* – Robert Cryer; *International Refugee Law* – Alice Edwards; *Non-State Actors* – Andrew Clapham; *Terrorism* – Martin Scheinin; *Poverty* – Stephen P Marks; *Environmental Degradation* – Malgosia Fitzmaurice.