

The Condition of Foreigner as a Contact between Illegal Immigration and Trafficking in Human Beings/Smuggling of Migrants: a Report about Italian Legislation.

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Abstract

The article will point out the relationship between the illegal immigration and the trafficking in human beings and smuggling of migrants, as a global phenomenon which affects both industrial and developing countries and as a national emergency which involves people in organized crime towards Lampedusa and Pantelleria, throughout the methodological analysis of the foreigner's status. The authors will examine the national laws about the offences, comparing with the European and International juridical instruments and proposing predictable solutions in order to prevent and to fight these figures of organized crime.

Keywords: Foreigner, Illegal Immigration, Trafficking in Human Beings, Organized crime, National Law.

1. Social and Political Evolution about Migrant's Phenomenon in Italy: Where, Why, How

Basically migration represented a social and political problem, which has been growing up for the last 20th years. A relevant driving force behind migration in Europe was the economic development that has taken place. Economic growth has created strong labour demand in multiple countries and has led to large-*scala* migration of workers from poorer nations. During the economic recession caused by oils crisis some destination countries have closed own boundaries and have become hostile towards migrants. These flows of people towards European Nations had transformed migrations into illegal immigrations. National protectionism had spurred the illegal immigrations in the lack of international legislation that provided for migrants regulation. These social changes have been facilitated by the post-industrial and the technological revolution in information and communication technologies, together with the subsequent changes in employment and organization patterns. One of the main effects of economic globalization is "to work as a unit in real time on a planetary scale" (Castells, 1996). This global mutation caused by post-modern and network society had lead to the spread of capitalism across the world (Franko Aas, 2007).

The factory has been replaced as main unity of production, creating a new production and labour models such as "subcontracting, the decentralization of production, outworking, job sharing, part-time work, self employment and consultancy" (Borja, Castells, 1997). Consequently flows of people (money, information, items, etc.) have gone across national boundaries.

The problem of migration has been really considered in the Schengen Agreement (1985). Article 27 establishes "1. The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens. 2. If a Contracting Party is informed of actions as referred to in paragraph 1 which are in breach of the law of another Contracting Party, it shall inform the latter accordingly. 3. Any Contracting Party which requests another Contracting Party to prosecute, on the grounds of a breach of its own laws, actions as referred to in paragraph 1 must specify, by means of an official report or a certificate from the competent authorities, the provisions of law that have been breached". In European context migration already meant organized crime.

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The criminal organizations dealt with illegal and irregular immigrations. The passage from national to transnational criminality has been formally ratified by UN Convention against Transnational Organized Crime in Palermo (2000). In Italy legal scholars have identified different forms of migration as global movements of people: economic, political, demographic, social migrations. After the Second World War the migratory flows were mostly directed from the Southern Italy to the industrialized North such as from the global South to the global North. However the academic studies on migration have witnessed the change in the nature of migration processes. As Tinebra and Centonze commented (2004), we can class migration throughout the formal requirements of distance, length, legality and cause.

The first element of the analysis we can indicate is the distance between the place of origin and the place of destination covered by migrants. In the modern State the people goes into the national boundaries. In the post-modern State people traverse the national boundaries. Johnston and Shearing (2003) evaluate the position of travellers, who move "in a world of safety"; on the other hands the position of travellers, who move as clandestine. This is a primary mechanism for distinguishing "good" and "bad" mobilities', tourist and vagabond, as Bauman (1998) considered. The borders between the inside and outside disappear. The role of national State changes, the maintenance of order on a certain territory is put in question. Bauman (1998) wrote about the importance of understanding the mutual reinforcement of globalization and mobility and, at the same time, of renewed territoriality.

The second element defines time's and ways migrations. So we can point out the periodic, lasting and temporary migrations. In the periodic form people goes in another place daily, weekly, seasonally. On the opposite it is more difficult to understand when migration is permanent or transitory. The principal reason for this controversy is the lack of sources and universal law defining the limits and conditions of migrations. Basically we can figure out temporary migration as a movement of people towards diverse places or cities or States, which may last quite one year, and permanent migration as a movement of people towards diverse places or cities or States, which may last quite five years.

The third element regards the legality of migration. The law drafts when a migration is legal. It is the case, for instance, of polical refugee, who does not make a voluntary choice to leave his country. An official refugee, as defined by the United Nations' High Commission for Refugees, is "a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership [in] a particular social group, or political opinion is outside the country of his nationality".

Finally we can explain why the people leave the native country to other countries.

The reasons of migration are multiple: the lack of work, the hope to change the social and financial, professional conditions, natural catastrophic events (earthquakes, hurricanes etc.) civil wars, the search of better life's conditions. One of these is the political factor. Governments and their policies have caused large numbers of people to emigrate. Where and when populations are politically suppressed and the violence is spread in the nation, the (illegal) migration is really considered the one possible solutions, taking the (illegal) services offered by migrant smugglers. One example is a civil war that it is going on in Northern African Nations in 2011.

The main reason is essentially the socioeconomic circumstances of many people in the underdeveloped countries, who know and suffer from crisis at the economic level. This factor, (we can called as precarious economic conditions) leads the people to immigrate abroad in order to gain money and to look for a job. On the other side, a large number of people is attempting to leave the devastation of their own country caused by the current form of globalization and other political and economic policies, which, as well as creating winners, is creating a large number of losers, and increasing inequality. Tackling poverty and addressing issues of development and opportunity are important aspects of tackling this type of immigration. Also, poverty leads individuals and pushes them to forsake their native countries after weather disasters, as earthquakes, bushfires, flooding (Tsunami in 2004 in Easten Asian Nations). This is an environmental factor.

The migrants move into a State by land, by sea, by plane or cross the frontiers and go to the customs showing false or counterfeited passports. This illegal passage can be realized by individuals, but we will point out the manner in which a migrant entered in the country with a total or partial involvement of third parties (criminal organization or others) on the following paragraphs (see above 4).

The massive growing of migratory flows in Italy is determined by its geographic location. Despite European Nations, the peninsular form and the presence of multiple natural and artificial harbours allow the migrants and the traffickers in human beings to arrive in Italy. In Europe Italy is above all the place in which the *unauthorized undocumented migratory routes* to Asian, African, European countries go on. The main road is by sea, with the exception of Italic-Slovene frontier. The good weather and the sea make difficult the national policies and fights against trafficking and smuggling of human beings. Sicily is the favourite destination. According to the National Statistics Office (ISTAT) and the Department of Public Security, in 2002 the official series data provides a high growing of illegal landings in Sicily, which represents the 231 per cent increase of migrants as regards to the presence of illegal migrants in Puglia and Calabria regions, because of the 60 per cent lowering of migrants by Albania and Former Yugoslavia (Tinebra, Centonze 2004).

We can draw a sketch-plan of migratory routes to Italy (Pinto, 2004, Lanza 2011):

the illegal/ clandestine route that links up North Africa and Sicily. Particularly Tunisians and Maghrebians move into Pantelleria and Lampedusa;

the illegal/ clandestine route that links up Sri Lanka and Sicily and Calabria Regions, crossing the Suez Canal. The Shi Lanka people leave their country with small boats to avoid the national customs. So the migrants join the high seas to be collected in big, illegal boats. These ships would have gone to the Southern Italy, circumnavigating the Arabic Peninsula and across the Suez Canal;

the illegal/ clandestine route that links up Albania and Puglia Region (and *vice versa*). This is a very simple passage for the relative close of involved countries. Mostly during the 90s the collapse of the Former Yugoslavia and Albania put Puglia Region even more under pressure of illegal flows. All these migrants initially entered as asylum seekers, but, after few time, despite of a medium average of accepted applications, Albanians were repatriated as illegal migrants (Del Boca, Venturini, 2003);

the illegal/ clandestine route that links up Greek and Turkish and Adriatic Sea through the ferry-boats lines;

the Italic-Slovene frontier, the main illegal route by land that links up the Eastern and Western European countries. Part of Turkish and Kurdish populations, Iranians cross the boundaries by woods, by cars and heavy means of transport;

finally the European boundaries that links up Italy, France, Switzerland and Austria.

Countering the illegal migrants who live, work, in Italy is impossible. One commentator, Kaczyński (2006), numbered 500.000 to 800.000 units in Italy, almost the third part of foreigner population. The rise of migrants is the collateral effect of Italian regulation we will discuss in the following paragraph.

2. The Italian Legislation on Illegal Immigration: Past, Present

Moving into a State could happen differently, complying with or without the law.

“A basic definition is an individual who is present on Italian sovereign territory without the relevant travel documentation or a residence/work permit. These individuals travel or are transported or smuggled into Italy. However, 65–75% of persons subject to removal are ‘irregular’ as a result of overstaying valid residence permits (Andrijasevic 2006; Parliamentary Assembly 2007)” (Coluccello, Massey 2007). This is the fundamental difference between illegal and irregular migrant. We will introduce the normative evolution on immigration in Italy. Substantially migration is illegal if one or more borders are crossed in defiance of national laws and regulations. This may include regulations or immigrations laws, emigration restrictions and criminal codes.

In Italian criminal law, regulation of growing volume of migrants has required legislative measures, provided for many subsequent provisions, as the 1986/943 Law regarding the regulation of undeclared work; the 1990/39 Law, known as Legge Martelli, first attempt to regulate the illegal immigration, if we consider in Italy there has been any penal provision on resident/work permit since 1990; the 1993/97 decree never ratified; the 1993/107 decree, known as Decreto Conso, never ratified; the 1995/489 decree, known as Decreto Dini, regarding the emergency of illegal immigration and the regulation of extra-European migrants entry and residence in Italy, with five- time amendments; the 1998/40 law, known as Legge Turco- Napolitano, regarding the regulation of immigration and the foreigner's conditions.

The policing on immigration, passed by Italian Parliament in 1998, were expressed in very broad terms. This was a unitary corps of norms that provided for rights and obligations of foreigners. There were specific requirements for entering and staying in Italy that covered a checked, inspected management of migrant flows: a foreigner would move into Italy only if he were to live as Italian citizen. This has been characterized as controlled migratory flows. Mass migratory flows could not be legally managed. In Italian law the foreigner has been considered as protected individual from injustice and discrimination; he has been designed for human rights, established by ratified international conventions. Italy had also adopted the basic respect of foreigners. The Italian Law had established the principle of graduate assimilation for all migrants present in Italy when the foreigner accepted and complied with Italian provisions

In particular, according to article 3, Italian institutions should aid and abet migrants in family reunions, social and cultural integration for regular foreigners present in the domestic territory, fulfilling the Schengen Agreement and the obligations closed to international convention. This was the inestimable quality of the 1998/40 law. On the opposite an evident limit regarded the absence of policies on illegal migrants. The provision, in fact, correctly enacted the regular condition of migrants, without spending any word on national policing of illegal immigration. One exception has been the rectified settlement for irregular migrants: an extraordinary system how to allow the ratification of illegal migrations.

Significant changes to the politics and law on immigration followed few years later: the 1999/113 decree, the 1999/394 President decree; the 2002/51 decree; the 2002/189 law, called as Legge Bossi-Fini, known as Testo Unico sull'Immigrazione, that vested repression policing on illegal immigration; the 2002/195 decree on legalization of foreigner undeclared work; the 2003/34 law that ratified international convention on terrorism; the 2003/87 decree; the 2004/241 decree, after the law n. 271; the 2004/334 President decree, the 2005/155 Law on international terrorism; the 2006/146 law that ratified the UN Convention against Transnational Organized Crime and its additional Protocols; the 2007/5 decree; the 2007/68 decree that vested the short visiting of foreigners for business, period of study, vacation (Lanza, 2011).

The main law is the Legge Bossi-Fini. The law is a complex system, which narrows the criteria for entering in Italy and introduces different expulsions proceeding for illegal migrants. In the text multiple penalties are provided for particular offences as the smuggling, or for the irregular presence of foreigners in national territory. This legislation clarified many administrative obscurities and prescribed those immigrants without valid entry or temporary permits and committed a crime, as men, who protected illegal or irregular migrants, are subject to safety measure, detention and removal. The main features of the 2002 reform, introduced by the Legge Bossi-Fini, included the tightening of immigration and borders controls (mostly on the sea) and stricter provisions with respect to illegal entrants.

In 2008 Italian government has approved the 2008/125 law on illegal immigration emended in 2009. The consequent provision is known as Pacchetto sicurezza and presents multiple innovative prescriptions. It repeals article 235 Italian criminal code that vested the expulsion and removal of foreigners as safety measure; it foresees the crime of smuggling as criminal association; it provided for a new offence. In fact any person who gained entry or resided in Italy without any valid immigration document or with false passport automatically committed a crime and became subject to fine and removal (reato di immigrazione clandestina).

Finally the law 2011/129 has ratified the Directive 2008/115/EC of the European Parliament and of the Council of 16th December 2008 on Common Standards and Procedures in Member States for returning illegally staying third-country nationals, called *Direttiva Rimpatri*, which has unified the measures against foreigners following the decision of Court of Justice of European Union (Judgement in case C-61/11). According to European Directive the Italian law has precluded national judges imposing a prison term on an illegally staying third-country who does not comply with an order to leave the national territory.

A penalty (removal and repatriation) such as provided for by Italian legislation would be liable to jeopardise the attainment of the objective policy in keeping with fundamental rights.

We can harshly criticize the last Italian immigration policies for many reasons. In the respect of the legality principle the law should be emended and approved in public discussion as in Parliament. As usually it happens in Italy we witness the laws approval by Government in despite of article 1 Italian criminal code.

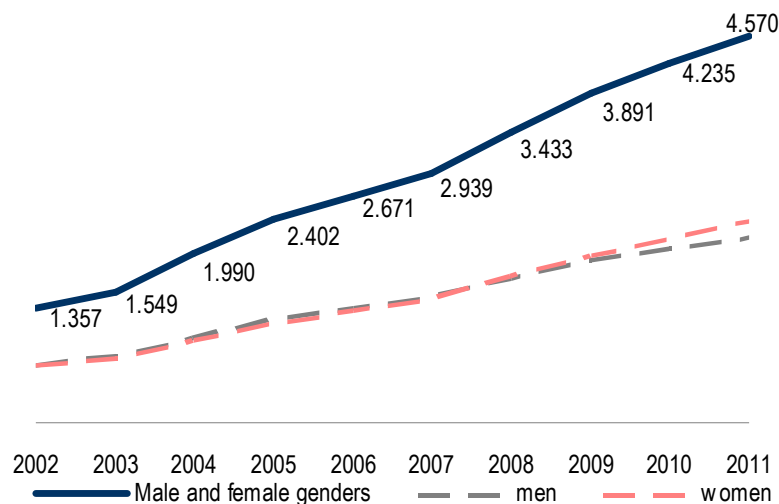
The provided fines are not effective (from 5.000,00 up 10.000,00 euro) to avoid the detention. This is an inefficient plan to cover the real problem we know as overcrowded prisons.

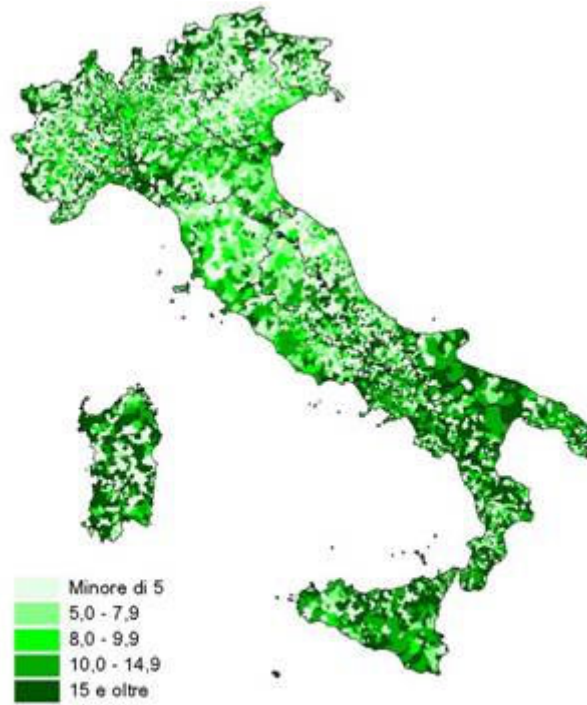
Looking through the law we can not distinguish irregular migrant, criminal migrant, illegal migrant. The law is special provision for all foreigners creating a specific offence for their basic status: “a person who chose to move from country to another for some period of time, crossing an international border with the intention of temporarily or permanently establishing him - or her to another country” (Schloenhart, 2003). We can argue the foreigner is appointed for criminal and administrative laws or proceedings or measures against him only for his status. This condition allows discrimination and does not guard the foreigner rights and duties, throwing back any kind of pacific integration. The liberal character of Italian democracy, supported by political parties, should encourage the multiculturalism factor that expresses integration policy of migrants. So it is evident to examine the recent statistical data on the immigrant presence in Italy.

These critical issues have been adopted by Constitutional judgment (2010/250), for which a penalty or a forced removal could be applied only after migrant’s illegal entry or a criminal conducts by foreigners, not for being a foreigner.

According to the National Statistics Office (Report ISTAT 22nd September 2011), there are 4.570, 317 legal immigrants present in Italy, 335.000 more than 2010, who account 7, 9 per cent of the Italian population. Foreigners concentrate in the urban areas of the centre and of the north of Italy, where work opportunities are greater especially in the informal labour market and in the tertiary sector.

Number of foreigners present in Italy (2002- 2011)





The growing up was mostly dealt with the temporary administrative measure and special legal provision - so called *amnesties*- directed to regularize migrants who had already settled in Italy.

With growing number of unauthorized arrivals in Italy and the report of Lampedusa case the Government continued to increase border surveillance and immigration controls to prevent illegal and out of proportion migrants from entering Sicily and Southern Coasts.

Although Italy has legitimate grounds to maintain control over the flows of migrants and to establish who does and who does not move into the State, the increasing criminalisation of immigration could not the right way to reduce illegality and select people.

On the opposite tightening the boundaries and outlawing migrant's arrival can push the number of people who seeking to enter Italy illegally and can increase the development of organized crime as we intended as trafficking in human beings and smuggling.

2.1. The Italian Legislation on Trafficking in Human Beings and Smuggling: an International Perspective

In Italy the TOC Convention that introduces the legal provisions on organized crime at transnational level has ratified since 2006 (the law n. 146). The description of the concept by an international approach might be helpful in comprehending the meaning of offences as trafficking in human beings and smuggling. The common elements are: the commission of crimes in more than one state; in one state but a substantial part of its preparation, planning, direction and control takes part in another state; in one state but involves an organized criminal group that engages in criminal activities in more than one state; in one state but has substantial effects in another state.

Trafficking of persons or smuggling could present eventual criteria as a certain level of organization, needed to commit these offences, without creating necessarily a criminal organized group; as the involvement of the interests of more than one state for the presence of foreigner individuals; as the involvement of multiple states for the subsequent problems and solutions beyond national borders.

According to the UN Trafficking Protocol *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, which provide for a standard definitions, Italy has based its legislation to describe the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or the other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of 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; or to describe the cases where migrants enter a transaction with full consent and are free to leave at the end of the (illegal) process.

We can distinguish between the two crimes in the first place for the protection and help, which must be given to victims. In trafficking of human being the passive person is correctly considered a victim of crime, needed to be protected; in smuggling the person who is smuggling basically consents to the illegal transport, even if he/she pays exorbitant sums of money and is in a terrible, vulnerable condition. Goddey (2005) argued that “in case of trafficking it becomes particularly obvious how the concerns of crime control clash with those of victimology and the protection of victims, treated as tools through which criminal justice agencies might be able to secure convictions of traffickers”.

On the other hand the coercion is a fundamental element of trafficking in human being (without it there is not a crime), not required for smuggling. In trafficking there is always a victim, who does not exist in smuggling from a legal point of view. The gender of crimes is a basic factor: the women are the victims of forced recruitment, transportation and explorative activities, or slavery practices also in the national country. For smuggling both men and women are illegally transported crossing a border. Trafficking is a permanent crime, in spite of smuggling that takes place within a limited period of time (Salt, 2000).

Italian law is primarily concerned with the criminal aspect of trafficking in human beings and migrant smuggling, using the criminal law as a tool to prevent and combat the activities that constitute and accompany the two offences. On the basis of the criminal elements, resulting in the final Council Framework Decision (19th July 2002), we have enacted the law 228/2003, called *Misure contro la tratta di persone*, that reforms the previous articles 600, 601, 602 Italian criminal code, introducing necessary measures to protect the victims of crime and to save the human rights. The victims of crime could use a money funds to have home, food, new clothes or a protection system during the criminal proceedings.

It is difficult to translate the Italian provisions regarding the complex phenomenon of trafficking in human beings. We can point out that the recruitment, transportation, transfer, or every ways to control over person is radically prohibited and strongly punishable where the use is made of coercion, force or threat, including abduction or is made of deceit or fraud, or there is an abuse of authority or of a position of vulnerability, or payment or benefits are given or received to achieve the consent of person having a control over another person for the purpose of exploitation of that person’s labour or services, including slavery and similar practices, or for the purpose of the exploitation of prostitution or other forms of sexual exploitation, including pornography.

Related offences are still used to prosecute some trafficking cases. For instance, the offence of “sexual exploitation”, “soliciting of prostitution” or pandering are often used to prosecute cases of trafficking for sexual exploitations. The offences of slavery or trade of slaves are used to prosecute cases of trafficking for forced labour.

On the basis of the criminal elements, resulting in the so-called Palermo Protocols, we have enacted and amended the law that provides for all illegal conducts regarding migrant smuggling (*Testo Unico sull’Immigrazione clandestina*). In Italy the migrant smuggling offences have been identified with the mobilization and preparation of migrants; the organization and the facilitation of illegal migration, the transport of illegal migrants, the harbour and conceal of illegal migration; the immigration fraud by false statement, producing and providing fraudulent documents.

Finally the Italian criminal code codifies a relevant form of trafficking in human beings and smuggling as mafia-type association according to the article 416 *bis*, which includes the Calabrian ‘Ndrangheta, the Sicilian Mafia and other criminal organizations presents in Southern Italy.

In this case we have to emphasize the group organization to commit crime; the hierarchical links or familiar relations which enables leaders to control the criminal organizations; the use of violence, intimidation and corruption to earn profits or control territories and markets; the laundering of illicit profits to further criminal activities and to infiltrate the legitimate economy; cooperation with other organized transnational criminal groups.

According to DIA Report (2010 Source Ministry of the Interior, 461) there is pacific coexistence between the local criminal organizations and the international/transnational networks involved in the trafficking and smuggling. The emergency of migrants in Italy necessarily requires the criminal factors for which trafficking in persons must be considered a transnational crime. A certain level of organization is needed to commit trafficking and smuggling. The first offence presents two phases (recruitment/transport and exploitation). These criminal conducts needs persons that participate in the illegal activities as falsification of documents, transfer from one place to another, illegal purchase of tickets, accommodations. As logical consequence it would be almost impossible to realize the crime without a criminal organization which can consist of multiple contacts to execute parts of offence. Moreover the transfer from one place to another affects the interests of more States, creating a relationship between not developing countries and countries with strong economy. The transnational requirement is included the nature of crime. The involvement of more states aggravates the prosecution of crime. International instruments must be applied for investigating and collecting evidences. For that effective solutions must be sought beyond national borders.

As far as concerns the offence of smuggling international doctrine has already regarded the crime as transnational business (Salt & Stein, 1997; Savona 1998). Migrant organizations operate as providers of illegal migration service between origin and destination countries. The studies by criminologists have described various models of organized criminal groups. We think the network model could be linked to the structural patterns of migrant smuggling. The network model provides for horizontal organizations that engage in dynamic illegal markets with multiple competitors (prostitution and sex industry, for instance) and operate at transnational level.

An interesting debate which involves researchers and human rights activist focuses the approaches to combat trafficking: if we consider trafficking as a form of illegal migration and organized crime, we risk to threat migrant women as illegal migrants or criminals rather than victims entitled to protection and to expose them to additional hardship as testifying in a trial, being exposed to danger, facing the risk of being sent back to their native country and being re-trafficked (Franko Aas 2007).

This is the partial truth. The law enforcement is a concrete attempt to determine basic categories within the missy field of legal/illegal migrations (Davidson, 2005). The legislators and the judges need to evidence nature, scope and rationale of crimes. The witnesses and the other evidences help to establish a legal (not moral) distinction between *innocent* and *guilty* migrants to protect the victims and justice the strict controls on the boundaries (Sanghera et al., 2005). Without law and without categorizing trafficking or smuggling it could became hard to discern criminal behaviours and recognize the problems. On the opposite, as we have in the previous paragraph, the state-imposed restrictions have created favourable conditions for the growth of trafficking and smuggling.

Aronowitz (2003) affirms that “human trafficking and smuggling can be seen as a result of the supply and demand for certain services” intended as “global business”. So illegal migratory processes are sustained not only by the demands of guest countries for cheap labour and sex, but also by the globalization of economy, with this effect, as Ruggiero explains (1997) how “the official economy benefits from good and services provided by conventional organized crime and *viceversa*”.

Without law we could not impose limits to illegal economy, based on smuggling trafficking and slavery; we could not enforce the question regarding the consequences of market economies that attract migration and increase the employment of migrants in the underground economy.

Article 9 Italian law 146/2006 foresees the undercover operations which aim at gathering evidences on trafficking in human beings and smuggling. These are actions in which the police can investigate by victim reports or criminal events and focus on gathering evidence on past behaviours of offenders. Of course the risk to commit a crime is high. For this reason policing methods are increasingly subjected to formal statutory regulation. In Italy the exercise of police powers requires a formal basis in national police law and code of criminal procedure and limits the actions: the agents just collect information without committing any offences.

3. The Status of Foreigner as a Criminal Condition: a Theoretical Approach

In many countries the foreigner is normally considered as enemy. We will ask who the “deviant immigrant” is (Melossi, 2003). Many answers are possible but the final concept is unambiguous: the migrant is often criminal; the foreigners appear to have a great inclination towards deviance attitude. The studies on foreigner’s *status* have risen from an evident prejudice: migrant is the same as saying that offender. Foreigner and criminal are words with the same meaning.

Multiple theories have been worked out for knowing the migrant’s behaviours and for underpinning the strategies to understand how and why the foreigners commit crimes.

The *Culture Conflict Theory* identifies the cause of foreigner’s deviance in the lack of social integration. Rather than conceptualizing deviance as a problem of the stress and strain related to a weakening of social control, within the Conflict perspective, deviance is conceptualized not as abnormal behaviour, brought on by faulty socialization or normative ambiguity, but as a normal, political process brought about by inter-group struggle for dominance. The migrants identify the cultural diversity of post-modern society. Criminal law embodies the normative structure of the dominant cultural/ethnic group (Sellin, 1938). The criminal law contains the “crime norms,” inappropriate behaviour and its punishment, reflecting the values and interests of the groups successful in achieving control of the legislative process. For this reason the foreigners are outside the system. This leads to the production of deviant or criminal definitions surrounding the everyday behaviour of the individual members of these less powerful groups. Sellin indicated that as society diversified and became more heterogeneous, the probability of growing and more frequent conflicts, therefore deviance, would increase. In our society this theory is evidenced by the growing, almost absolute, presence of migrants in prisons (Cavallo, 2002).

Another theory, recognised as *Frustration-Aggression Theory*, indicates the link between frustration (being prevented from attaining a goal or engaging in behaviour) and aggression. Some even view it as a “master explanation” for understanding the cause of human violence. The basic premise of the frustration-aggression hypothesis is twofold: aggression, intended as a crime committed by foreigners, is always produced by frustration, and frustration always produces aggression. When subjected to empirical scrutiny, however, research has shown that frustration does not inevitably lead to aggression. Sometimes, for example, it results in problem solving or dependent behaviours. And aggression is known to occur even in the absence of frustration. Thus it is not reasonable to view frustration alone as a necessary and sufficient causal factor. In an important reformulation of the FA hypothesis, Barbagli (2008) posited that it was only “aversive” frustration that would lead to aggression. The newly proposed progression was that frustration would lead to anger, and that anger – in the presence of aggressive cues – would lead to aggression. While subsequent research findings have, at times, been inconsistent or contradictory, “it is reasonable to conclude that aversive stimuli do facilitate, but probably not instigate, aggressive behaviour” (Tedeschi & Felson, 1994, p. 688). In Southern Italy, for instance, the migrants are more integrated than in Northern Italy.

Finally, Becker's approach to the labelling of deviance, as described in *Outsiders: Studies in the Sociology of Deviance* (1963), views deviance as the creation of social groups and not the quality of some act or behaviour. According to Becker, studying the act of the individual is unimportant because deviance is simply rule breaking behaviour that is labelled deviant by persons in positions of power. The rule breaking behaviour is constant; the labelling of the behaviour varies. Italian criminal law describes rules as the reflection of certain social norms held by the majority of a society, whether formal or informal. Enforced rules, the focus of labelling approach, are applied differentially and usually facilitate certain consequences for those who apply the label. In short, members of the rule-making society may label rule breaking behaviour deviant depending on the degree of reaction over time.

The common effects by the theories are multiple: the migrants commit crimes more than Italians or local people; the high level of repression and criminalization of migrants increase the commission of crimes by foreigners; the prejudice misrepresents the statistical data.

4. The Status of Foreigner as an Illegal Migrant: a Practical Approach

Looking at the statistical data about the presence of migrants in Italy and their incidence on the qualitative and quantitative level of criminality we can observe how these elements spoil the analysis. There is a *dark datum* represented by undeclared crimes or offences committed by unauthorised or unknown perpetrators. We try to show a complete statistical portrait.

Reporting the criminal statistics regarding the period between 1990 - 1999 (ISTAT 2003) e relative research (Marotta, 2003), the number of foreigner prisoners was trembled: in 1990 there was 16 percent of migrants in jails; in 1999 there was 33 percent of migrants in jails, considering the basic growing of foreigners as well as 35 percent.

In the period from 1996 to 2006 the number of strictly corrected foreigners was redoubled: in 1996 prisoner migrants make up 19 percent of population compared to 30 percent of population in 2006.

In 2006 Italian criminal law n. 241 had provided for amnesty's program which concerns reduction or removal in imprisonments (*indulto*). While the average of prisoners was reduced, the average of foreigners was unchanged. According to the recent data by Ministry of Justice at 31st of 2010 there were 24.954 foreigner prisoners compared to the overall 67.961 jailed populations in Italy. The migrants represent 37 percent of prisoners. In 2003 the sentenced foreigner prisoners made up 40, 9 percent of population, while the indicted foreigner prisoners made up 58, and 8 percent of population and the juvenile foreigner offenders made up 70 percent under preventive detention.

The probation or other alternative measures to detention are strongly limited. At mid-2005 less than 6 percent of migrants had been assigned to Probation Service. With reference to the issue of the poor access of non-nationals to measures alternative to detention, it must be noted that the Supervisory Court, body of the ordinary Magistracy, orders the relevant provisions, which is independent and autonomous from the Penitentiary Administration. This situation prevents the Supervisory Magistracy from granting them measures alternative to detention, since those prisoners do not fulfil one or more requirements provided for by the law (for instance, a permanent address or a permanent job). The effect of probation service has been migrant's recidivism. The judges would rather imprisonment than local integration policies or alternatives measures to detention.

Regarding juvenile criminal justice data, the information pertained to the 1991 – 2000 period. The juvenile foreigner delinquency had been increasing: the number of prisoners grew from 726 (1991) to 1170 (2000). On 1997 migrants exceeded in number Italians. In the first part of 2005 the juvenile migrants were 63 percent of prisoners, compared to 37 percent of Italians juvenile prisoners. Regarding female foreigner delinquency, the female migrants were highly above average of local female prisoners (27 Italians vs. 354 foreigner female migrants).

As far as concern the offence of trafficking in human beings the statistical data regard the period between 2004 and 2007 (DIA). The first picture shows the persons convicted of trafficking in human beings in Italy (article 601 criminal code); the second picture shows the persons convicted of trafficking in underage in Italy (article 601, 2nd § criminal code); finally the third picture shows the persons convicted in trafficking of human beings for gender (sexual exploitation and soliciting of prostitution).

Fig. 1 Persons convicted of trafficking in human beings

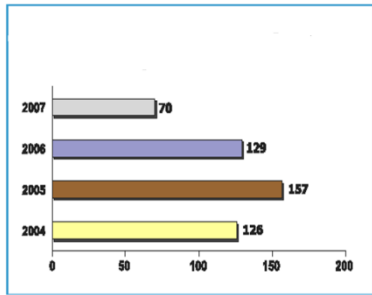


Fig. 2 Persons convicted of trafficking in juvenile beings

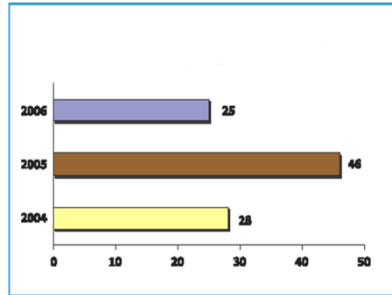
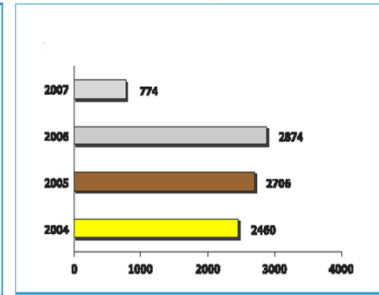


Fig. 3 Persons convicted in trafficking in human beings for gender (sexual exploitation and prostitution)



Source: Ministry of the Interior, Department of Public Security, 2007

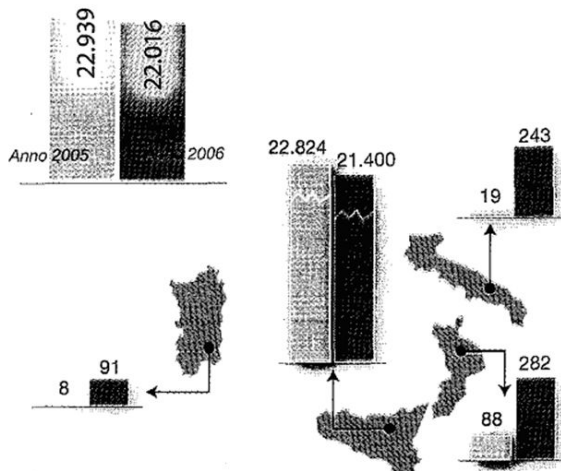
The following schedules pertain the period between regard the period between 7th September 2003 and 31st May 2005 and the period between 1st January and 31st December 2006/1st January and 31st March 2007 and shows the persons convicted of trafficking in human beings and in underage in Italy.

Data about trafficking of human beings in Italy (7 th September 2003 and 31 st May 2005)	
Number of criminal proceedings (art. 600)	320
Persons convicted	947
Victims	369 (111 underage)
Number of criminal proceedings (art. 601)	86
Persons convicted	339
Victims	126 (10 underage)

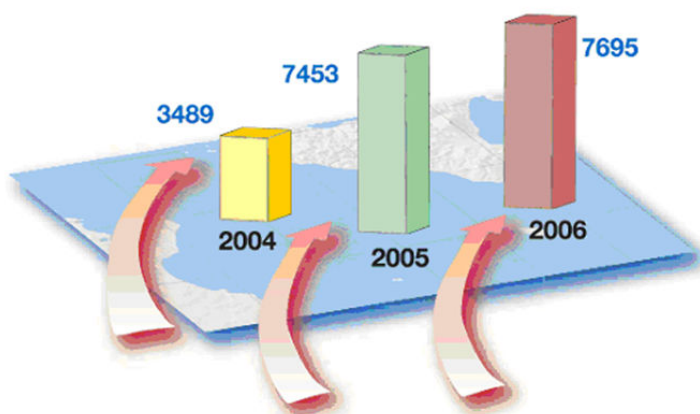
Data about trafficking of human beings in Italy (7 th September 2003 and 31 st May 2005)	
Number of criminal proceeding (art. 602)	35
Persons convicted	120
Victims	10 (4 underage)

Other lists indicate the victims of trafficking in human beings and the number of migrants smuggling in Italy regarding the period between 2005 and 2006 and the period between 2006 and 2007.

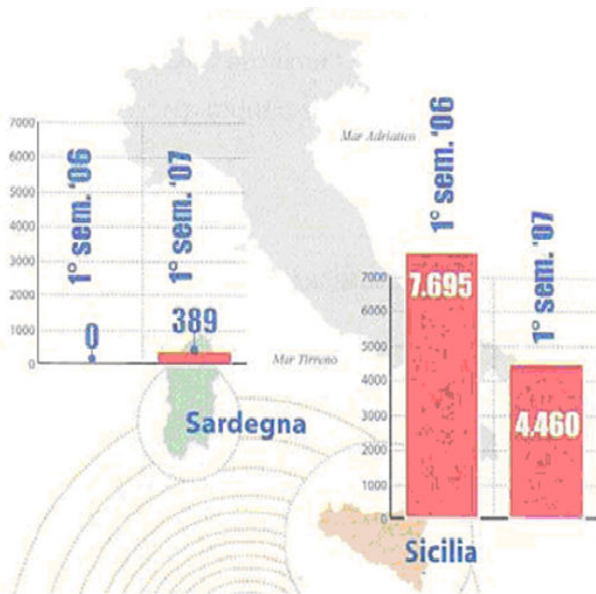
Number of illegal migrants in Italy (2005 – 2006)



Number of illegal migrants in Sicily (2004- 2005- 2006)



Source. Ministry of the Interior, Department of Public Security



Number of illegal migrants in Sardinia and Sicily (2006-2007)
Source: Ministry of the Interior, Department of Public Security

5. Final Remarks

After this survey of Italian law enforcement on migration, it seems justified to raise the question whether the issues could be pointed out in many policy documents and legal instruments adopted by formal European institutions. With the dismissing of old pillar structure, with the entering in force of Lisbon Treaty on 1st December 2009, police and judicial cooperation, which previously worked on international law basis, has been incorporated in the new united EU framework.

Judicial cooperation in criminal matters is placed in articles 82-86 TFEU. Article 82 directly states the objective of judicial cooperation in criminal matters and sets its goal in the *harmonization of criminal laws in the field of organized crime, terrorism and drug trafficking* with the main purposes of *mutual recognition of judgements and judicial decisions and approximation of laws and regulations*.

Article 82 § 2 specifies the areas which should be regulated by Directives according to ordinary legislative procedure as the *mutual admissibility of evidence between Member States; the rights of individuals in criminal proceeding, the rights of victims* and other specific aspects of criminal procedure.

European Union obliges the Member States to change their national criminal provisions to ensure that a certain conduct is a criminal offence.

This could happen if the harmonised criminal offence has a transnational nature. These crimes, such as trafficking in human beings and organized smuggling, have a cross-border dimension and prove necessary for an effective protection of legal interests. We can try to ask whether it needs the establishment of the European Criminal Court.

The increase of transnational organized crime, with the huge illegal profits it takes, creates a significant obstacle to the development of any area which it is present. In order to achieve the prevention and repression of this form of organized crime it is required a good knowledge of its structure, transnational movements. Directions of the Treaty of Lisbon impose significant novelties on state sovereignty with the aim of creating supranational criminal law of the European Union without internal borders as Article 2 proclaims.

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