The War against Illegal Immigration: State Crime and the Construction of a European Identity

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Introduction

> We will tackle the organised criminals who cynically and systematically attempt to evade the controls and we are determined to prevent, detect and deal with illegal working within the UK by those who slip through the net.
>
> The vast majority of people who arrive in the UK illegally are brought here by organised crime groups ...
>
> There are no reliable estimates of the scale of organised immigration crime within the UK or EU as a whole. One indication of the scale of the problem is the number of people detected trying to evade border controls ... It is estimated that organised criminals were behind around 75 percent of these cases.
>
> (Home Office 2002:75-76)

The trafficking or smuggling of humans across borders has been propelled to the centre of the official discourse on refugees. Nowhere was this more apparent than in Britain when, following the discovery of the bodies of 58 Chinese nationals[1] in the back of a lorry in Dover in June 2000, the Home Secretary, Jack Straw, immediately announced a raft of new security measures, declaring:

> Let no-one be in any doubt that this is a profoundly evil trade whose perpetrators have no regard for human life. We are determined to crack down on this trade. I am afraid this terrible tragedy must serve as a stark warning to others who might be tempted to place their fate in the hands of organised traffickers. Those who died last night are the victims of those traffickers. (*Guardian*, 20 June 2000)

For the UK Government, and all its counterparts in the 'developed world', enforcement is the central issue in relation to refugees. The assumption that state sanctions against 'illegal immigration' must be enforced and that the state has a right to do so is a seductive one (see the otherwise excellent accounts by Morrison & Crosland 2001; Kyle & Koslowski 2001), but it is an assumption that leaves unchallenged the repressive role of the state and

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1 It is not known whether the individuals involved were planning on claiming asylum. However, sections of the media freely referred to them as asylum seekers and the UK Government response focused largely on the need to deter future 'asylum seekers' from smuggling/trafficking arrangements

it must be challenged. This paper, in challenging the 'right' of states to control 'illegal immigration', suggests that in the enforcement of immigration, states are systematically involved in the commission of organised crime (see Tilly 1985).

While recognising that the ideas proposed here require further development, we want to raise three main points for discussion in the hope of establishing a critical framework in which to understand the dynamic between refugees and state policies of control and surveillance.

First, we argue that the failure by states to positively embrace the right to asylum and attempts by states to systematically minimise any responsibilities they hold in relation to those seeking asylum, have resulted in the systematic and organised breach of human rights (see Webber 1995; Hayter 2000:95-133), which can usefully be defined as state crime.

Second, the so called 'war' against organised crime/the traffickers itself results in systematic crimes/excesses perpetrated by state agents policing borders.

Third, at the same time this 'war' forces many seeking asylum into the hands of exploitative organised crime networks, which increasingly offer the only hope of escape for those fleeing repression, terror, discrimination or civil conflict, it ensures such organised crime networks expand and flourish.

By focusing on the illegality of entry and the means by which people seek to enter or breach the escalating borders, states are able to de-humanise, criminalise and stigmatise as the 'alien other' those who flee persecution, war and crisis. Terms such as 'illegals', 'clandestines' and 'bogus' form the core of the official lexicon. Moreover, it is refugees who become responsible for their own plight and whose motives for seeking entry invariably are portrayed as dishonest, self-gratifying and unjustified.

In this paper, we use the term 'refugee' in the general sense of someone seeking refuge or as the subject of a process of forced migration. We do not adopt the legal distinction between an asylum seeker and a refugee but argue there is an urgent need to begin analysing and understanding the process of forced migration as an inevitable by-product of a world system in which disjuncture and disorder increasingly are the norm.

Implicitly, we reject the notion that legal or nationalist frameworks provide an adequate starting point for analysing this process, or that trends towards 'globalisation' offer a future of increasing development and harmony capable of reducing substantially the causes of forced migration.

Instead, we argue that over the past 20 years, accelerating and taking on an identifiable national character alongside the construction of a 'new world order' in the past decade, we have witnessed the construction of three broad zones of exclusion — the southern and eastern borders of Europe ('Fortress Europe'); the US/Mexico border; and the Australasian/ south-east Asian rim.

These zones mirror broadly the major trading blocs and spheres of 'western influence' which have asserted themselves within this period. While they are based largely on established borders, and have their own domestic peculiarities and local historical origins, these zones represent a common strategic response to instability and crisis and a means by which to identify, control and exclude those who are deemed to be a threat to social order or economic prosperity, particularly refugees or other categories of 'illegal immigrant'.

Although we will concentrate on the European Union, we suggest these zones can be defined by a number of common characteristics:

- increasingly restrictive immigration policies which exclude refugees;
- a policy emphasis on 'border protection';
- an increased use of the armed forces or military methods of policing the border;
- increasing levels of co-operation between different state agencies;
- a focus on trafficking/smuggling as an aspect of transnational organised crime, analogous to drugs or terrorism; and
- a desire to 'externalise border control' by imposing and enforcing restrictions on entry before there is a physical possibility of crossing the border, including the creation of buffer zones in neighbouring states.

In particular, we seek to highlight the way in which refugees are marginalised and excluded through an increasing focus on organised crime by key institutions of the European Union, a significant component of which is a declared war on human trafficking and smuggling. Moreover, this 'war' is being prosecuted on an international level by the major western powers through the auspices of the United Nations, with the support of a number of key NGOs committed to the fight against the exploitation of those who are vulnerable to modern forms of slavery and sexual exploitation.

We argue that in the guise of protecting the human rights of the victims of trafficking, the fight against transnational crime has become a central element in the construction of 'Fortress Europe'.

Within this context, there is common ground amongst the major states of Europe that they wish to participate at a national and pan European level in the development of state institutions and enforcement agencies devoted specifically to border protection/control and the exclusion of refugees.

The apparently common 'human rights' agenda of the major western states and transnational civil society (see Risse et al 1999; Green & Ward 2000) highlights the limitations of analysing the phenomenon of trafficking/smuggling within a human rights framework. Instead, the whole process is better understood in terms of the political economy of 'globalisation'.

The International Context

While 'neo-liberalism'[2] has become the common economic agenda of the major economic powers, and 'globalisation' 'an idea whose time has come' (Held et al 2000:1), it is necessary to examine critically claims that there is an international trend (or even the prospect of one) towards development and the elimination of inequality.[3]

As Held et al (2000) make clear in their extensive summary of globalisation literature, there has not been a systematic process of integration within the world economy nor much unanimity as to what this means. We share the view of Callinicos (2001:19) that, 'it is perfectly coherent to believe both that global economic integration has qualitatively increased...and that the probable outcome will be greater rather than less economic instability.'

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2   The project of developing all aspects of the free market and described by George (2001.11) as a programme which demands 'freedom of investment, freedom of capital flows; freedom of trade in all goods and all services including living organisms and intellectual property' This is overseen by the major developed countries, operating through bodies such as the World Trade Organisation and International Monetary Fund

3   A link made explicitly by the UK Government with the publication of its white paper (December 2000), *Eliminating World Poverty: Making Globalisation Work for the Poor.*

Underpinning this analysis is an understanding drawn from Marx that capital takes different forms: finance capital, trade and productive capital; and that to generalise from the developments in relation to finance capital, for example, to all of the workings of the world economy, is methodologically untenable and therefore misleading. The system is not integrated in this way.

Thus, while there has been an unprecedented growth of global finance capital flows (which nevertheless left the poorest countries on the margins of international finance and reliant on aid flows), the growing networks of trade have not spread evenly across the globe. Instead, there has been a process of regionalisation centred on the core zones of north America, western Europe and south-east Asia; and marginalisation in most of Africa and much of south and central Asia and Latin America (Ellwood 2001:33; Harman 1996:7; Held et al 2000:177-182; Hirst & Thompson:1996).

This pattern is replicated in relation to foreign direct investment, which in the developing world, has tended to be in countries with a relatively skilled and well paid workforce.[4] Most of Africa and the poorer parts of the third world have been bypassed.[5]

As a result, social inequality has increased, and is made worse by recession and the debt crisis. By 1999, third world debt had reached nearly $3000 billion, representing approximately $400 per person in the developing world, where average income is less than $1 per day (Ellwood 2001:48). Between 1960 and 1990, the ratio of the income of the richest fifth of the world's population to that of the poorest fifth increased from 30 to 1 to 60 to 1; and to 74 to 1 by 1997 (Human Development Report 1999:3).

Cold war rivalry in the decolonised world meant that many regimes were heavily reliant on aid and military hardware from their superpower sponsors in order to maintain a degree of control over their populations. Brutal civil wars were sustained in central and sub-Saharan Africa by outside intervention. However, the end of the cold war did not bring a new era of prosperity and peace.

By 2000, there were already signs that the world economy was slowing down.[6] This sharpened the level of crisis internationally. Western military intervention in the Gulf, the Balkans and Afghanistan illustrates the extent to which the major imperialist powers are prepared to use force, particularly if oil or other multinational interests are at stake.[7] The 'War on Terrorism' has become the key strategic device through which the United States plans to enforce its hegemony through a series of military incursions in some of the world's most unstable regions.

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4   For example, parts of India and newly industrialising countries such as Malaysia.
5   In absolute terms, the figures are stark. Between 1990-1998. foreign direct investment in 'low income' countries rose from $2201 million to $10,674 million; in 'middle income' countries from $21,929 million to $160,267 million; and in 'high income' countries from $169,252 million to $448,316 million (see World Bank 2000·315).
6   Average annual growth rates were either stable or in decline. Europe and Central Asia fell by 0.1%; Latin America and the Caribbean by 2.4%; and Sub-Saharan Africa by 0.3%. There were some spectacular individual falls Angola 37 4%; Ecuador 14 2%, Sierra Leone 9 8% and Turkey 7.8% (see World Bank 2000·274-275) The combination of Europe and Central Asia into a single category probably paints a rosier picture of Central Asia than is deserved For example, there are no individual statistics for Afghanistan There is also an absence of data for other refugee producing countries or regions such as Iraq, East Timor, Kosovo, Somalia and Sudan.
7   For an account of how oil and imperialism underpin the current crisis in Afghanistan, see Rashid 2001.

Moreover, the state apparatus in the poorest countries has become more militarised and fragmented. Between 1985 and 1999, the total number of armed forces in the least developed countries rose by 81 percent (Human Development Report 2001:207).[8] This is in the context of a substantial change in the pattern of warfare, resulting in much higher rates of civilian casualties (Kaldor 2002). Children are especially vulnerable in this situation. Over the past decade, an estimated 2 million children have been killed; 6 million wounded; and 1 million orphaned, while 10,000 per year are the victims of land mines (Wilkinson 2001:7).

Against this background, for an increasing percentage of the world's population, daily life is characterised by economic marginalisation, social conflict, war and flight. Forced migration, often as a result of a complex of social and economic factors has become a matter of survival for millions.

Official estimates of the numbers affected by this process generally are based on definitions derived from the 1951 Convention Relating to the Status of Refugees (the 1951 UN Convention).[9] This is a limiting mechanism, requiring that individuals make themselves available to be counted, and allowing individual forced migrants to be categorised in a hierarchy of legitimacy. Legal distinctions between 'refugees', 'asylum seekers', 'displaced persons', 'illegal entrants' and 'economic migrants' serve to conceal the sheer scale of human movement and can lay the basis for quite diversionary debates about statistics.

Nevertheless, the World Refugee Survey (2001) estimates there are 14.5 million refugees.[10] In 1999, the United Nations High Commissioner for Refugees (UNHCR 2000) had 'a population of concern' of 22.3 million,[11] approximately 10 million of whom were children under the age of 18, including up to 100,000 separated children at any one time in western Europe (Wilkinson 2001:7).

The overwhelming majority of the world's refugees remain close to the immediate regions from which they flee: 'In 1998 only 0.9 million of the 22.4 million of the people of concern to UNHCR were within the asylum systems of mainly industrialised countries' (Morrison & Crosland 2000:21).

Defining the New Borders

The three border zones outlined above are defined principally by their role in the regulation of migration. This is in the context of dramatically reduced formal migration programmes, which previously had played a significant part in the post-war development of the economies 'protected' by the borders.[12] In a study for the Organisation for Economic Co-operation and Development (OECD), Tapinos and Delauney conclude that despite some concerns about long-term labour shortages in Europe,

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8   There were rises in key refugee producing regions: Arab States 12%. South Asia 5% and Sub-Saharan Africa 57% These figures exclude private and non-state armies

9   Under Article 1, a refugee is a person who 'owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former residence . is unable or, owing to such fear, is unwilling to return to it '

10 Using the Convention definition above.

11 This excludes substantial numbers of 'unregistered' persons and all Palestinians Approximately 65% of the figure are 'Convention refugees'

12 For example, assisted passage in Australia, guest-workers in west Germany and workers from former colonies in Britain and France; and Mexican labour in southern United States

> International migration now seems to be excluded from the new process of globalisation.
> This exclusion constitutes the single greatest difference distinguishing the new trends of the
> world economy from the two previous major historical periods of globalisation (2000:48).

The restrictions on immigration date back to the early 1970s, particularly after the onset
of a generalised economic slump triggered by the 1973 'oil crisis'.

The concept of 'Fortress Europe' also developed at this time. Beginning with the
formation of the Trevi Group in 1975, with its declared aim of 'combating terrorism, drug
trafficking and illegal immigration', the key building blocks of 'Fortress Europe' were put in
place. The 1990 Schengen Convention, the 1990 Dublin Convention, the 1998 Amsterdam
Treaty and the 1999 EU Justice and Home Affairs Summit (Tampere Summit) succeeded in
bringing together the major European governments around the common programme of
seeking to harmonise border controls as a central pillar of a law enforcement agenda.

Combating organised crime is a central part of this strategy. The Tampere Summit
declared its commitment to '... reinforcing the fight against serious organised and
transnational crime', on the basis that '... the high level of safety in the area of freedom,
security and justice presupposes an efficient and comprehensive approach in the fight
against all forms of crime' (Presidential Conclusion no. 41).

Included in the proposed measures were the:

*   establishment of joint investigative teams to combat trafficking in drugs and human
    beings as well as terrorism (Conclusion 43);
*   establishment of European Police Chiefs task force to exchange, in cooperation with
    Europol, experience best practices and information on current trends in cross border
    crime and contribute to the planning of operative actions (Conclusion 44);
*   strengthening of Europol by the provision of necessary support and resources and by
    means of receiving operational data from member states and authorising it to ask mem-
    ber states to initiate, conduct or coordinate investigations or to create joint investigative
    teams in certain areas of crime (Conclusion 45);
*   establishment of a unit, EUROJUST, composed of national prosecutors, magistrates
    and police officers with the task of facilitating the proper coordination of national pros-
    ecuting authorities and of supporting criminal investigations in organised crime cases
    (Conclusion 46); and
*   establishment of a European police college (Conclusion 47).

The Summit concluded that '... international law efforts to agree on common
definitions, incriminations and sanctions should be focused in the first instance on a limited
number of sectors of particular relevance, such as financial crime, drugs trafficking,
trafficking of human beings, particularly exploitation of women, sexual exploitation of
women, high tech crime and environmental' (authors' emphasis) (Conclusion 48).

Particular emphasis was placed on the integration of 'justice and home affairs' concerns
with other Union policies and activities (Conclusion 59). Law enforcement clearly was
envisaged as a binding element of EU policy, both internally between the member states and
in its relations with countries and regions bordering the union, particularly the Baltic Sea
region and the Balkans (Conclusion 62).

Following Tampere, the European Council approved an EU strategy for the prevention
and control of organised crime. Following a further Council meeting in 2001, the EU
Council published a proposed 'Comprehensive Plan to Combat Illegal Immigration and the
Trafficking of Human Beings in the European Union'.

These key documents place the development of Europe-wide border controls as central in the fight against transnational organised crime. The underlying premise of both documents is that transnational organised criminal networks bear primary responsibility for 'illegal immigration' into Europe. Refugees are 'disappeared' into this category where their status is further mystified by the artificial legal distinction between human trafficking and human smuggling (see below).

The documents reflect a solidification of the trend toward joint state activity in operational terms and represent an unchallenged uniformity of understanding and purpose. They also illustrate the way in which the formation of a unified European identity is, to a significant degree, a conscious project. The fight against organised crime thus becomes a pedagogical device for cohering popular support for a vision of Europe defined by the leading actors at state, government and institutional level.

Central to the EU strategy for the prevention of organised crime is the notion of '... mobilising all segments of a society in order to decrease the demand for illegal goods and services and to prevent the infiltration of organised crime into society'. Thus there is a call for the strengthening of the fight against organised crime through 'partnerships' between the criminal justice system and civil society (EC 2000:chapter 2.3).

A key element of this ideological process is a definition of the 'enemy within' and the 'enemy without'. According to the EU,

> Although the threat from organised crime groups from outside the territory of the European Union appears to be increasing, it is the groups which originate and operate throughout Europe, composed predominantly of EU nationals and residents, that appear to pose the significantly greater threat' (EC 2000:3).

The domestic agenda is therefore driven by the need to police and punish all those implicated in the activities of organised crime. Member states are urged to 'explore ways to ensure that committing crime is made more difficult, that committing crime involves greater risk to the offender ... and that the possible benefits to the offender of committing crime are decreased or eliminated' (EC 2000:9).

Those assisting refugees to enter Europe place themselves as a central target of the law enforcement effort. It is implicit that this will include existing refugee support networks and those with family and social links to those seeking entry. Proposed measures such as a central register of 'aliens' (EU Comprehensive Plan 2002:12) complement the ideological impact of this drive to define and eliminate those who would seek to undermine the 'area of freedom, security and justice'. Within this framework, distinctions between the 'enemy within' and the 'enemy without' begin to collapse and be replaced by the notion of 'if you are not with us, you are against us'.

Wars of Justification

'It appears abundantly clear that the crux of the matter is a policy of shutting out aliens (Mathiesen 2000:174).

Europe has declared *war* against illegal immigration as a central component of its war against transnational crime. The war against illegal immigration grew out of, and remains integrally linked to, the war against drugs and other state-sponsored moral crusades, including since September 11th, the 'war against terrorism'. This is especially true for the United States and Europe (Green 1998; Parenti 1999; Andreas 2000; Nevins 2002).

The war on drugs has been especially important in establishing the current framework of border control and surveillance as well as creating an ideological environment hostile to perceived 'border threats'. It re-vitalised agencies such as Interpol[13] and paved the way for regional equivalents such as Europol, formed in 1996 out of the European Drugs Unit. Europol now plays an important role in establishing extensive systems of surveillance on all those moving in and out of Europe. It operationalises the key intent of the Schengen Convention of promoting public order and security through the monitoring of movements of individuals.

Schengen authorised the development of extensive forms of covert police action and 'cross border police collaboration' as well as allowing for the development of two comprehensive surveillance and registration systems — the Schengen Information System (SIS) and the Supplementary Information Request at the National Entries. Mathiesen (2000) describes these developments as a 'plethora of further systems' which leaves no space for refugees to be perceived as anything other than a hostile force. In this Byzantine surveillance network, the Dublin Convention[14] has particular application to refugees and has as its aim the harmonisation of asylum policies. Out of Dublin came Eurodac — a system of registration designed, inter alia, to store the fingerprints of all asylum seekers over the age of 14 on a central European register.

Mathiesen (2000:180) shows in practice how these elaborate systems are overwhelmingly used to target refugees:

> A minority of persons will be registered because they have demonstrably committed crimes, and another minority because they are concretely suspected of crimes. A large majority will consist of people in an extremely wide circle around such persons, as well as persons who in a diffuse sense are viewed as threats to public order and state security and *unwanted aliens*. The system will be future oriented, geared towards presumed or possible future acts (emphasis added).

This is borne out in an analysis of the 2.3 million German entries to SIS. Of the 700,000 records relating to persons, 86 percent concerned 'aliens' who were reported on the basis of being refused entry, while an analysis of SIRENE illustrates very clearly that the majority of 'aliens' recorded were in fact asylum seekers refused entry to Germany. Similarly, 62 percent of the 4.2 million German requests for information through Schengen cooperation in 1996 concerned 'unwanted aliens' or identification papers; 20 percent related to motor vehicles and only 4 percent of such requests concerned weapons (Mathiesen 2000:174).

Despite the justification of these measures as necessary to combat organised crime, it seems that the overwhelming majority of those who are detained or otherwise subjected to these powers are not involved in smuggling or trafficking. The Schengen Annual Report, 1998[15] devotes its largest section to 'police cooperation', including a reference to the 'project on the routes used for illegal immigration and immigrant smuggling'. However, despite the emphasis on tackling organisations or individuals aiding or abetting illegal immigration, fewer than 500 out of a total exceeding 5000 who were detained for 'illegal entry', 'attempting illegal entry' or when 'illegally resident' were shown to be smuggled in (Statewatch 2001).

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13 In 1996, Interpol conducted *Operation Marco Polo*, 'a study of the routes, modus operandi and organised crime groups involved in illegal immigration from any country to Western Europe' (Morrison & Crosland 2000.45).

14 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities.

15 The last Schengen Annual Report to be publicly disclosed. See <www.statewatch org/news/2001/mar/07accountab.htm>

Nevertheless, enforcement agencies continue to promote smuggling as an activity they are struggling to contain. According to Andreas, Germany's federal border police (the BGS) 'has estimated that only one in five clandestine entrants are apprehended'. However, tighter border controls have meant:

> The migrant-smuggling business has boomed. "Each year we are finding [that] more and more illegal entrants have been getting help from professional smugglers," according to BGS officers. "We create the business for the smuggler. We remove 100 aliens, and the smugglers bring 100 back in." (2000:120).

Whatever doubts may exist as to the actual numbers of people using smuggling/trafficking networks, the trend has been to extend the scope of the Schengen Information System and the powers of Europol. Arrangements are now in place for SIS II to include new additional identification material such as photographs, fingerprints, DNA profiles as well as 'intelligence markers' based on police supposition, biometrics records such as facial/iris recognition, number plate recognition and fingerprint identification. Moreover, Europol is to be allowed to amend and add to the records on this system, having previously been expressly forbidden to do so by article 6(2) of the 1995 Europol Convention.

While significant tensions remain between the various European states in relation to the general question of the European Union, there is a growing unity around a programme of surveillance and exclusion. All EU countries except the UK and Ireland participate in SIS, although both are now about to join SIS II.

The concept of the 'legitimate European' is being generated from the top down. As Mathiesen (2000:186) puts it,

> On the horizon we may envisage the contours of a vast, increasingly integrated multinational registration and surveillance system, with information floating more or less freely between sub-systems, at any time covering large population groups.

Traffickers/Smugglers and Human Rights

In order to understand how these developments contribute to the construction of 'Fortress Europe', it is necessary to appreciate the extent to which the fight against organised crime is able to incorporate the legitimate concerns many have about the human rights of those who are smuggled/trafficked.

Using clandestine means to cross borders clearly is very dangerous. The individuals seeking to cross are not only exposed to immediate physical risks but are vulnerable to ongoing exploitation and abuse on arrival. This will often involve coerced prostitution and other forms of abuse, or even slavery, which take advantage of the victim's illegality and vulnerability (Morrison 1998; Morrison & Crosland 2000; Kelly & Regan 2000).

It should be emphasised that the phenomenon of trafficking is not limited to crossing national borders into Europe and the west. There is substantial evidence to show that in South Asia in particular, there is a growing level of child exploitation and virtual enslavement largely driven by the impact of 'globalisation' (Seabrook 2001).

However, it is in relation to its manifestation in the west that trafficking, particularly for the purposes of sexual exploitation, has become a focus of official concern at an international level. Although there is some consensus that trafficking raises important issues of human rights, by embracing a human rights discourse, albeit to a limited degree,[16] the United Nations, the International Organisation for Migration (IOM) and other related NGOs assert normative standards which help legitimise state activities against refugees.

In December 2000, the United Nations Convention against Transnational Organised Crime was adopted. Two separate protocols also came into force — the Protocol Against the Smuggling of Migrants by Land, Sea and Air; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

This separation between 'smuggling' and 'trafficking' sets up a false division between those who are taken across borders against their will (trafficking) and those who voluntarily participate in such arrangements (smuggling). Even within the limits of these definitions,[17] refugees will often satisfy the criteria for both at different points in their journey, or equally will be unable to be pigeon-holed neatly into either category. Moreover, those who are trafficked sometimes will be deserving of sympathy (although still subject to return), while those who are smuggled are unambiguously undeserving.

The strategy underpinning the Trafficking Protocol ultimately is one of exclusion. Thus, there is an emphasis on strengthening co-operation between 'source' and 'receiver' states with signatories required, inter alia, to:

- criminalise trafficking and related conduct as well as impose appropriate penalties;
- facilitate and accept the return of their trafficked nationals and permanent residents with due regard for their safety;
- exchange information aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers; and
- strengthen border controls as necessary to prevent and detect trafficking.

There are a number of *optional* measures states can take in order to protect victims of trafficking but these go no further than 'consideration of adopting legislative or other measures permitting victims of trafficking to remain in their territories temporarily or permanently in appropriate cases with consideration being given to humanitarian and compassionate factors'.

The Smuggling Protocol does not even go that far. Its emphasis rests on strengthening border controls and, while there is a prohibition on an individual from being prosecuted for the simple fact of being smuggled, this does not alter the fact that illegal entry remains a criminal offence in all European states and a justification for indefinite detention.

Anti-trafficking has been embraced as a legitimate cause by, amongst others, the UN,[18] the EU,[19] the Organisation for Security and Co-operation in Europe (OSCE),[20] the G8 Group[21] and a number of inter-governmental organisations. In their detailed analysis of trafficking/ smuggling in Europe, Morrison and Crosland (2000:5) point out that over 30 inter-government fora have been established on this issue in Europe over the past five years, but emphasise:

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16   An example of the limited emphasis on human rights by prominent international bodies is the IOM, whose Director-General recently wrote. 'Irregular migration, including human trafficking, has emerged in recent years as a major international challenge ... the illicit trafficking of migrants consumes an estimated $US7 billion a year, constituting an enormous diversion of resources to unproductive and anti-social activities. The close ties between human trafficking, forced prostitution and smuggling of illegal arms and drugs makes irregular migration a multi-faceted menace. It cries out for an early and effective solution' (Ghosh 1998:xiv).

17   For an outline of how these distinctions developed, see IOM 2001.

18   Spearheaded by the United Nations Global Programme Against Trafficking in Human Beings and the United Nations Interregional Crime and Justice Research Institute, at the initiation of the United Nations Office for Drug Control and Crime Prevention.

19   In addition to the measures associated with 'Fortress Europe', co-operation 'in the fight against the traffic in illegal immigrants' is a key component of the Joint European Union-United States Action Plan. See <www.eurunion org/partner/actplan.htm>

20   In particular, through its Office for Democratic Institutions and Human Rights. See <www.osce.org/odihr/ democratization/trafficking/>.

> The vast majority, but not all, of these agencies stress the terrible consequences of human trafficking in countries of transit and in country of destination. Less attention has been given to explaining why refugees engage with traffickers and smugglers in the first place.

The reasons why refugees take such risks are obvious. With the borders of Europe increasingly closed, and the extent of crisis and instability internationally showing no sign of decline, forced migrants have little choice. It comes as no surprise that Interpol research into the operation of organised crime groups 'indicated that the largest number of illegal immigrants coming to Western Europe between 1992 and 1997 were from Iraq, China, Pakistan, India, Nigeria, Rwanda and Somalia' (Morrison & Crosland 2000:45).

Morrison and Crosland (2000) and Gallagher (2002) make compelling cases for the human rights of both trafficked and smuggled refugees to be a principal consideration in the development of European asylum policy (see also Koser 2001). In particular, Morrison and Crosland emphasise the need for a positive application for a refugee's right to asylum to be inscribed in European law, whether or not a refugee has entered illegally, as opposed to merely an obligation on the part of EU member states not to return refugees to their countries of origin in the event of there being a risk to their safety.

However, these authors fail to link the measures against trafficking/smuggling with the broader issues of the construction of the state and European identity outlined above. Instead they argue for a 'comprehensive approach' which has 'to balance the interests of states, (sovereignty and control) against the rights of individuals (all citizens of Europe as well as refugees) ...' (Morrison & Crosland 2000:68).

We question whether this is a balance that can ever be struck. The drive toward European unity is on the one hand fuelled by the economic and military interests of the main European states and on the other, by the need to base the common European identity on existing traditions of nationalism. The strategic importance of the refugee in this process cannot be underplayed. Asylum seekers have emerged as a key defining 'other' in the European project.

The Construction of Identity

As we explain above, the development of pan-European surveillance and policing mechanisms is an important element of the development of a European state apparatus. One by-product of this is the expansion of local police services on the basis that they are defending a wider European interest.

> Thus, the German BGS had its funding tripled between 1993 and 1998, with the number of guards on the German-Polish border increasing from 400 in 1990-1991 to 3300 by mid 1996 (Andreas 2000:119-120).

However, Andreas (2000:122) highlights how the German-Polish border is not characterised by the re-building of physical walls dividing east and west, an 'electronic iron curtain'. Recent history makes that too difficult:

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21 At its summit in Birmingham, UK, in May 1998 the G8 Group declared itself 'deeply concerned by all forms of trafficking of human beings including the smuggling of migrants' and pledged its support for the forthcoming UN Convention on Transnational Organised Crime. See <www.g7.utoronto.ca/g7/summit/1998birmingham/drugs.htm>.

> Historical sensitivities also mean that German officials have been careful to explain and justify the tightening of the eastern border ... as part of a broader European policy on common external border controls, as outlined in the Schengen Accords. Embedding the tightened German controls in a larger European framework dampens the appearance of a unilateral re-assertion of German territorial sovereignty.

Most significant is the way in which border protection becomes a vehicle for incorporating 'eastern states' into the European project.[22] For example, Poland's potential entry into the EU is dependent on its co-operation in creating a central European buffer zone:

> The carrot of future entry into the EU has helped to assure Poland's co-operation in stemming the smuggling of migrants through its territory ... Poland now takes back those who attempt to enter Germany illegally, while Germany provides funds as compensation. Germany has also helped Poland beef up the policing of its own 774 mile eastern border ... Polish border guards ... now use resources from their former Western foes to guard against threats from former Eastern allies ... "It is hard to expect that history would turn this way," observed one Polish border officer. "But we have always been part of Europe." (Andreas 2000:123-124).

It is the notion of 'always being European' that we wish to tackle here. As an entity, Europe is an invention, as are the nation states which comprise it. Arguably its modern shape was formed by a confrontation with Islam and the creation of colonial empires from the late 15th century. More importantly, as Delanty (1995:86) argues, 'In order to define itself, Europe needed an Other against whom it could construct an identity of its own.'

Following the collapse of the Soviet Union and its satellite states, European identity could no longer be cast in cold war terms. The emerging 'Fortress Europe' had to define itself in a different way. The construction of a new economic bloc around the core states of the old western Europe had to be given an ideological and cultural identity. Delanty (1995:150,155) suggests that this is done in terms of 'opposition to the Muslim world and the Third World' and is built on nationalist and xenophobic traditions (see also Marfleet 1999, 2000). There is much force in this argument but we suggest that a significant component of this 'Other' is the refugee (often Muslim and from the Third World), a walking symbol of the disorder and crisis the 'area of freedom, security and justice' wishes to shut out.

A Question of State Crime

By way of conclusion, we make one final argument: the new Europe is not just a fortress, but a bastion of state crime.

According to Green and Ward (2000), state crime should be defined as state organisational deviance which involves violation of human rights. State organisational deviance is deviant activity in pursuit of the organisational goals of a state agency. From a criminological point of view, what is distinctive about the state is its claimed entitlement to engage in conduct which would constitute violence and extortion if performed by 'individual citizens'.

In extending this framework of state crime to the European Union's response to 'illegal immigration' it is useful to employ Tilly's (1985) analysis of state making and war making as forms of organised crime. From this perspective the prosecution of the war against 'illegal immigration' has been central to the formation of an ideologically coherent

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22   Particularly through the OSCE 'Action Plans'

European Union. Tilly (1985:169) argues that '... coercive exploitation played a large part in the creation of European states' essentially through the organised criminal activity of states'. Moreover, 'War makes states ... Banditry, piracy, gangland rivalry, policing and war making all belong on the same continuum' (Tilly 1985:170).

As Koslowski (2001:338) illustrates, the policies of criminalisation deployed against 'illegal immigrants' and the repressive border strategies employed by western states have only served to reinforce and expand the business of smuggling as '... increased restrictions drive up the costs of illegal migration and increases the profits of human smuggling.'

The expansive policing and surveillance of Europe's borders, the demonisation of the trafficker (and by extension as we have shown, the refugee) and the positive encouragement of organised trafficking networks by European states through ever restrictive immigration controls, creates a self-reinforcing cycle of state-organised crime.

In the European context, as we have illustrated, the institutionalised cooperation between member states on Justice and Home Affairs consciously conflates migration policy, asylum and the security of external borders with drugs, fraud and terrorism. The impact is, as Tilly (1985:181) would argue, war making for the purpose of state making — 'eliminating or neutralizing' external and internal threats to the creation of European state (1985:181).

This paper has sought to reverse traditional notions of the state as protector and punisher of crimes with respect to immigration, asylum and border controls. We argue that the state in both its national and regional forms, has engaged in organised criminal activities (around questions of policing and surveillance) which result in the whole-scale victimisation, criminalisation, punishment and detention of people who for reasons of internal repression, civil war, racism or poverty seek asylum in western liberal democracies.

Moreover, as we have seen above, the state has actively encouraged the growth of organised trafficking by restricting all legitimate means of seeking asylum. These activities do not result in increasing the security of the national state or regional organisation but rather create domestic and regional divisions and polarisations which contribute to violent patterns of scape-goating and racism. More importantly these criminal strategies on the part of states play the defining role in what and *who* is European.

The response to illegal immigration is *not* a law enforcement issue, despite the persistent rhetoric and investment in border surveillance and control. The response to 'illegal immigration' is primarily an issue of state identity. It is about the cultivation of a hegemonic European character built upon principles of exclusion. The excluded are reconstructed as threats to that character/identity and their demonisation through the largely ideological device of the 'trafficker' justifies increasingly punitive, covert and extra-legal measures of deterrence.

The construction of the new European state is thus being formed on the basis of state sanctioned criminal behaviour.

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