CONCLUSIONS: THE VARIABLE POLITICAL AND LEGAL GEOGRAPHY OF PEOPLE SMUGGLING AND TRAFFICKING IN EUROPE

This book began with a question about the intersection of administrative and criminal law as regards the treatment of foreigners. By looking at the field of trafficking and smuggling of people, we sought to understand how, in six EU Member States and at the EU level itself, the casting of the act of crossing borders as a criminal activity is taking place and how it is perceived. Among the central questions have been: what kind of offence is this and who is the victim and what is the nature of the debate around the offence both in the society and in the legal field.

The concepts of smuggling and trafficking of persons can, however, only be understood within a context of borders and border controls. Both these activities (smuggling and trafficking of persons) depend on the existence of an international border. Further, passage over that border (or the attempt to do so) must be a rationed resource in order for either activity to make any sense economically. People normally do not pay for activities which they enjoy freely. In order to make people pay for an activity it must otherwise be unavailable to them. Where borders are not controlled or controlled very lightly the activities of smuggling and trafficking can only rarely occur. Of course the criminal offences of forced labour etc. can and do still exist but they are not tied to the international border but rather to the immigration status of the individual who is on one or other side of the border.

Nationality and immigration status render the individual vulnerable to exploitation on the territory of a foreign country. If the individual is not a national of the state or does not have an immigration status which permits him or her to work on the territory then should he or she do so, the economic activ-
ity will be irregular (if not illegal) and the individual carrying it out at risk of exploitation on account of this fact. The border, though, is not central to that equation. The border becomes central when the act of crossing a border without the permission of state authorities is made an administrative or criminal offence. The more elaborated the offence is – and in some of the Member States considered here there appear to be dozens of offences around border crossing – the more the point of entry becomes the focus of state surveillance.

This fact then raises a number of curious issues. As is apparent from all the chapters, the Member States considered have advanced much legislation over the past few years to criminalise the crossing of borders. These offences have become more and more complex, extending beyond the border of the state into activities carried out in other states (for instance preparation for smuggling) and also including the protection of the borders of other states – for instance laws which make the act of smuggling or trafficking persons into other Member States than the one where the law has been passed also criminal offences in that state. This emphasis on the border as the place where a crime takes place sits unhappily with the abolition among some of the Member States (all considered in this study with the exception of the UK) of border controls amongst themselves. Thus the border of sovereignty remains the place where a crime takes place even where that border is not subject to control.

In all the Member States considered the crimes of smuggling and trafficking raise difficult questions both about perpetrators and victims. Where the victim is the state, as in the case of smuggling, its protection is by way of criminal prosecutions. The smuggled person will always be complicit with the smuggler and depending on the Member State may be criminally liable either as an accomplice or separately for incitement of the crime (whether or not the crime took place). However, smuggled persons are those most closely connected with the asylum process for the simple reason that refugees are likely to seek the services of smugglers in order to get out of their country of origin and into another country. Thus the smuggled person may not be the victim of the smuggler but may well be the victim of the state of origin (I will return to this shortly below). In any event, offences against the state require careful justification if they are to be politically and socially legitimate.

Trafficked persons are by and large defined in the legislation of the states considered here as victims of the crime of trafficking which includes an element of coercion and threat of violence. The criminalisation of acts which harm other persons, ie where there is a human victim, require a clear definition of the victim. If the criminal offence is to be credible it must have as its objective the protection of the victim. As is apparent in all of the chapters, protection of victims of trafficking lags far behind the enthusiasm of the Member States to criminalise traffickers. Indeed, as is apparent in a number of chapters, victims will have better rights within the criminal justice system as victims of an offence than they can hope to have either before or after the end of the criminal procedure when they