

[illegible]

The example of recent emigration by sea from the coast of Senegal

Following the dramatic events in Ceuta and Melilla in October 2005<sup>1</sup>, the sheer number of those attempting to emigrate by sea, leaving from the Senegalese coast heading for the Canary Islands, is of concern to politicians and has stirred public opinion, in the light of continued shipwrecks and the dramatic conditions under which the crossing is made.

Consequently, against a backdrop where both a reduction in emigration by air, due to increasingly stringent measures adopted by European countries in particular, and a redeployment of land routes, this recent

This recent emigration by sea  
raises the question of  
*"Europe's new borders in Africa"*.



emigration by sea raises the question of *"Europe's new borders in Africa"*<sup>2</sup>.

In a quarter-century, Senegal switched from an immigration country to an emigration country, but is now assur-

edly a transit country, and one of the main gateways from Africa to "northern countries". From October 2005 to May 2006, possible crossing points between Africa and the EU shifted 3,000 kilometres, from Melilla and Ceuta to La'Youn then Nouadhibou, and from Saint-Louis to Dakar and then to Casamance. A total of 30,000 potential immigrants reportedly arrived in the Canaries over the course of 2006 and according to Spanish authorities, 75 to 90% of them were Senegalese nationals<sup>3</sup>.

There is a great lack of statistical data for analysing these recent developments. Work carried out since 2000 by the *Institut de Recherche pour le Développement* (IRD), in partnership with the Senegalese authorities, to develop new instruments able to deal with the diversity of migratory dynamics in West Africa, gave access to a previously under-used resource: the *Senegal public prosecutors' offices' register of charges and proceedings*. Strange as it may seem, this data provides valuable information, less for measuring the scale of the phenomenon than for understanding the processes at work and the responses from southern countries, often faced with political pressure from European countries.

On this basis, the aim is to understand the implementation modalities and the development of penal policy in a country of origin which then, after demonstrating the political will to crackdown, relaxes through the strict application of the law in line with the legislation in force.

## Penal policy or dissuasive approach?

Measures taken against migrants referred to as “clandestine” are regularly analysed in immigration countries; it is much rarer to undertake such research in a country of origin. Since January 2002, such an exercise has been possible in Senegal thanks to the computerisation and networking of criminal case management procedures<sup>4</sup>, the first stage in computerisation of the legal system<sup>5</sup>.

Before beginning any analysis of the criminal justice system’s response to the first large-scale departures by sea from the Senegalese coast in 2006, it should be noted that these legal decisions were adopted in a climate of heavy national and international political pressure, encouraging a quick, harsh clampdown in the face of such a large-scale phenomenon.

### *The pre-eminence of the ‘flagrante delicto’ procedure*

Data from the register of charges and proceedings, commonly known as “RP”, can be used to assess penal policy on the basis of two key moments during the procedure, i.e. *the decision to prosecute* and the *choice of prosecution procedure*. Article 32 of Senegal’s criminal procedure code<sup>6</sup> states that “*The Republic state prosecutor receives details of the alleged charges and statements and assesses whether or not to prosecute (...)*”. Consequently, the prosecution rate provides one element to assess the degree to which the public prosecutor’s office is cracking down, evaluated on the basis of the number of cases dropped because prosecution is inappropriate. When the decision is to prosecute, the public prosecutor’s office chooses the procedure, i.e. *direct summons* before the court, the ‘*flagrante delicto*’ procedure (immediate summary trial [with no investigation required, as the accused is alleged to have been ‘caught in the act’ – known as *flagrant délit* under French-based legal systems]) or referral to an *examining magistrate* by opening a pre-trial judicial investigation<sup>7</sup>.

**A need for speed:** Looking at cases relating to emigration by sea, for all public prosecutors’ offices combined, in 2006, 97% of those accused were prosecuted, which is a high prosecution rate.

The main committal procedure adopted is the ‘*flagrante delicto*’ (*immediate appearance*) procedure. However, variations can be seen from one prosecutor’s office to another (→ [Figure 8.1](#)):

- Only the Thiès public prosecutor’s office decided to discontinue certain cases, these being two cases totalling 36 accused individuals, one of these cases alone accounting for 35 accused individuals. The cases were presented to the Thiès public prosecutor’s office by the police in Joal-Fadiouth, a fishing port on the “Petite Côte”, to the south-west of Dakar, and prosecuted for “attempted unlawful emigration”. The accused were Senegalese from the regions of Dakar, Diourbel, Louga, St Louis, Tambacounda and Ziguinchor; just one was Guinean

and living in Guinea-Conakry. This case was in fact dealt with under unusual circumstances, it being the first relating to emigration by sea after a breakout from Thiès prison, attributed to prison overpopulation, which itself was ascribed to an increase in those held on remand for “clandestine emigration”. Instructions were then issued by the relevant authorities to limit incarceration of those attempting to leave who are presented to public prosecutors’ offices. There is therefore a direct cause-and-effect relationship on the handling of cases.

- The Thiès and the St Louis public prosecutors’ offices requested the largest number of pre-trial judiciary investigations to be opened by referral to an examining magistrate, this applying to approximately 39% and 29% respectively of those accused. This seems to indicate that questions were arising, since the investigation by the magistrate, to whom all individuals arrested were presented, can only in these individual cases be viewed as an attempt to find the organisers, meaning the migrant smugglers. At this point, these prosecutors’ offices thus seem to want to crack down on national or transnational organised crime.
- The Ziguinchor and Dakar public prosecutors’ offices have for the most part preferred the ‘flagrante delicto’ procedure, for 90 to 97% of those accused.

Other than these slight differences between jurisdictions, overall 88% of those prosecuted were dealt with under the ‘flagrante delicto’ procedure (→Figure 8.2).

**... regardless of the description of events:** However, names given to offences vary from one place to another – the same events are described differently by different public prosecutors’ offices. In Dakar, prosecutions are mainly for “*unlawful immigration*”, and in Thiès, for “*unlawful emigration*”. In both cases, these descriptions are used for individuals who left or intended to leave by sea.

Likewise, the label “*migrant smuggling*” does not necessarily influence the choice of prosecution procedure. For example, before the St Louis public prosecutor’s office, the opening of a pre-trial investigation was requested for seventeen individuals accused of smuggling and twenty four individuals were prosecuted using the ‘flagrante delicto’ procedure for the same offence.

Thus, the prosecution procedure does not appear to be directly linked to the description of events. Moreover, alongside the wide range of names given to offences depending on the place, the prosecution procedure may also vary depending on the timing. In Thiès, only some cases in August 2006 gave rise to the opening of a pre-trial investigation and, only in September 2006, was one of them dropped.

Figure 8.1

Distribution of committal procedure by regional public prosecutors' offices in 2006

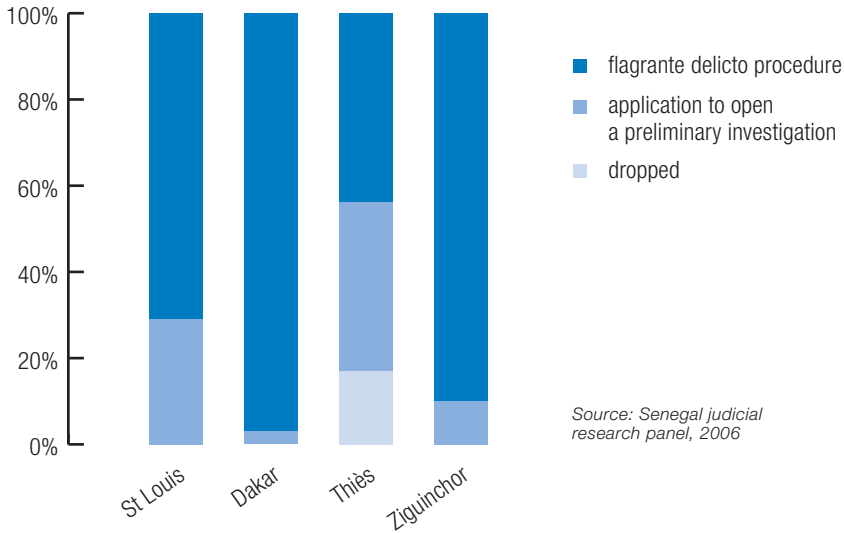
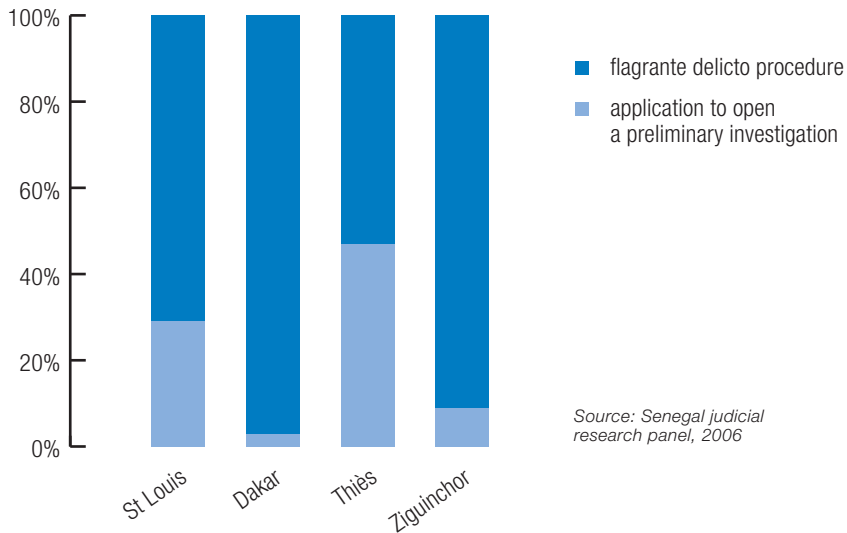


Figure 8.2

Distribution of those prosecuted by the regional public prosecutors in St Louis, Dakar, Thiès and Ziguinchor by prosecution procedure – 2006



In St Louis, in all cases bar one presented to the public prosecutor's office between July and December 2006, the prosecutor requested the opening of a pre-trial judicial investigation. Conversely, from March to May 2006, all cases were handled under the 'flagrante delicto' procedure. Within a single public prosecutor's office, the year 2006 is therefore split in two, featuring two separate prosecution policies, irrespective of the nature of the chosen offences.

This dual variation in prosecution procedures for a given offence, varying with locality and timing, results in an imbalance in how legislation is applied across the country as a whole.

**Near-systematic detention:** In 2006, 84% of those prosecuted before the regional prosecutors' offices in St Louis, Dakar, Thiès and Ziguinchor were remanded in custody (→Figure 8.3). In fact, irrespective of the prosecution procedure adopted, it is almost always combined with being placed in custody. Only 17% of the individuals prosecuted by the Dakar public prosecutor's office were not remanded in custody prior to the trial. This is linked to a special situation, since out of 121 individuals prosecuted under the 'flagrante delicto' procedure and not remanded in custody, 110 relate to the same case, presented to the Dakar public prosecutor's office by the Environment Department, and prosecuted for "unlawful immigration", "unlawful embarkation" or "inciting Senegalese to unlawful immigration".

In addition, before the regional public prosecutor's office in Dakar, thirteen minors<sup>8</sup> were prosecuted under the 'flagrante delicto' procedure for "*attempted unlawful immigration*" "*attempted unlawful embarkation*" and "*unlawful immigration*". Out of the thirteen, one was not detained on remand, an interim custody order for a minor (ICOM), was granted for five of them, and seven were remanded in custody. In fact, the minors under the interim custody order were entrusted to the stewardship of Fort B<sup>9</sup>. In total, fifteen minors were brought before the prosecutor's office of which thirteen were prosecuted and twelve were imprisoned<sup>10</sup>.

Six minors were foreign nationals: one from The Gambia, one from Pakistan, one from India, and three from Congo. Out of the three Congolese minors, one was a girl aged 16. The Congolese minors stated they were residing in Dakar in the Parcelles Assainies district.<sup>11</sup> The other foreign minors indicated they were in transit and residents of their countries of origin.

This situation raises several issues and warrants special attention. With minors, foreign minors moreover, involved in some cases, should this not have encouraged the opening of a pre-trial investigation rather than being dealt with summarily under the 'flagrante delicto' procedure? Under such circumstances, securing a correct description of events and accurately determining the criminal liability of each individual should have been more important than quickly dealing with the case.

*“Consequently, case X1/2006 involves five Congolese women (from the DRC) between 18 and 33 years of age, students, housewives, computer workers and seamstresses, and one Congolese man (from DRC) aged 37, all residing in Senegal at the same address.*

*The next case, X2/2006, involves three Congolese (DRC) minors, a girl and two boys, students living at the same address as the adults in case X1/2006. Case X2/2006 results from being taken apart from case X1/2006 due to some of the accused being minors 12.*

*All were presented to the public prosecutor’s office by the Parcelles Assainies police in mid-September 2006.*

*Case X3/2006 involves one man of Congolese nationality (DRC), presented to the public prosecutor’s office by the Investigations Department in early August 2006.*

*Should not the link between these three cases warrant some consideration? Those accused in cases X1/2006 and X2/2006 were prosecuted for ‘attempted unlawful immigration’, the individual accused in case X3/2006 was prosecuted for ‘organising unlawful immigration’.*

Under the circumstances, should the accused in cases X1/2006 and X2/2006 be considered as victims, as defined in the *Supplementary Protocol to the United Nations’ Convention against Transnational Organised Crime, to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000)<sup>13</sup> and Senegal’s law number 2005-06 on combating human trafficking and similar practices and protecting victims<sup>14</sup>, rather than as offenders, prosecuted and imprisoned?

Are these comments perhaps also applicable to another case involving Pakistani and Indian minors in transit through Senegal, since they stated they lived in Pakistan or India?

Overall, out of the 1,232 individuals presented before the regional prosecutors’ offices in St Louis, Dakar, Thiès and Ziguinchor in cases involving leaving Senegal by sea, more than eight out of ten were prosecuted under the ‘*flagrante delicto*’ procedure and remanded in custody.

These figures testify to quick and harsh treatment of those attempting to leave by sea, whether they are adults or minors. Their conduct is described as “unlawful” and as a result, migrants implicitly become offenders.

## **Semantic and legal confusion detrimental to migrants’ rights**

This first finding involves in-depth analysis of the description of events. With reference to the names of the offences shown in the registers of charges for the regional public prosecutors’ offices of St Louis, Dakar, Thiès and Ziguinchor in 2006 (→ [Figure 8.4](#)):

- 7% of individuals were prosecuted for *unlawful migration*<sup>15</sup>
- 47% of individuals were prosecuted for *unlawful immigration*<sup>16</sup>; 96% of them were Senegalese nationals, born in Senegal and resident in Senegal
- Approximately 18% of individuals were prosecuted for *unlawful*

*emigration*<sup>17</sup>; 72% of these were Senegalese nationals, born in Senegal and resident in Senegal, and 27% were foreign nationals, born abroad and resident either in Senegal or their country of birth (Guinea-Bissau, DR Congo, The Gambia, Ghana, Guinea, India or Pakistan)

- 17% of individuals were prosecuted for *unlawful embarkation*<sup>18</sup>; 93% of them were Senegalese nationals, born in Senegal and resident in Senegal
- Approximately 11% of individuals were prosecuted for *smuggling migrants or emigrants or organising migration or emigration*<sup>19</sup>; 91% of these were Senegalese nationals, born in Senegal and resident in Senegal, and 6.5% were foreign nationals, born abroad and resident either in Senegal or their country of birth (DR Congo, The Gambia, Ghana, Guinea-Bissau, or Liberia).

Without dwelling on the often terse names of the chosen offences, which are a matter of the officials responsible for keeping records and which differ from the charges as set out by the prosecutors, these observations demand some semantic and legal deliberation, which can be introduced by two questions:

- etymologically, what is the meaning of the words used to describe the chosen offences against those wishing to leave by sea?
- what are the reference legal instruments, international or national, used to describe events and to determine the criminal liability of those wishing to leave by sea?

Beforehand, let us reiterate that migration is a basic human right, enshrined in particular:

- by the Universal Declaration of Human Rights (1948), Article 13: “Everyone has the right to leave any country, including his own, and to return to his country”. As René Cassin himself acknowledges, the Declaration *does not totally sanction the principle of free movement of persons from one country to another because it says nothing of the right of emigration’s implied reciprocity which is that of immigration, nor of free establishment outside of the perimeters of a determined State*. On the other hand, the second line of Article 13 clearly establishes the right for every person to leave any country including his own”.<sup>20</sup>
- by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (2002), Protocol No. 4, §2 of Article 2: “Everyone shall be free to leave any country, including his own”.
- by the *United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* (ratified by Senegal in 1999 and entering into force in July 2003) which stresses the “right to enter and leave the country of origin” (Part III, Art 8).



Figure 8.3

Penal situation of those prosecuted by the regional public prosecutors' offices in 2006

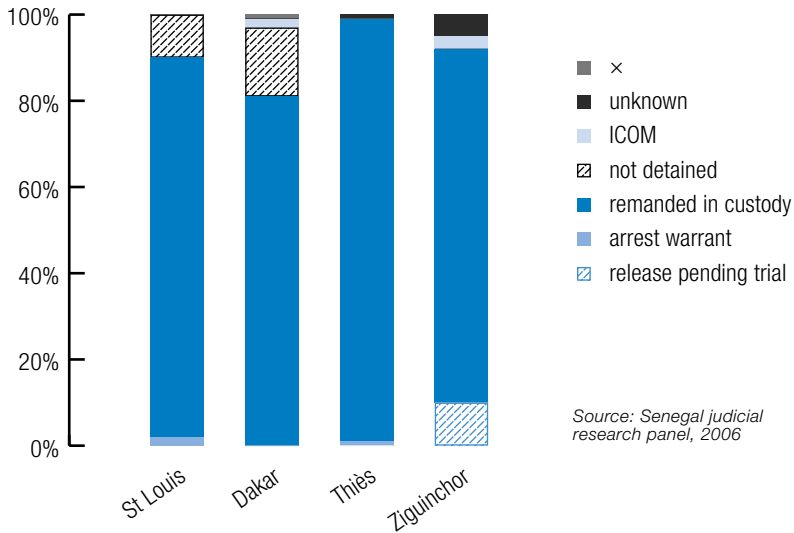
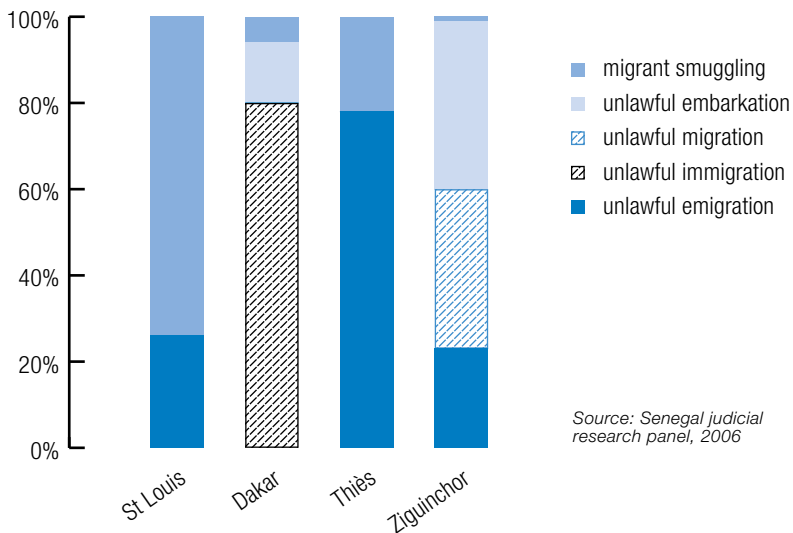


Figure 8.4

Distribution, according to the offence, of those prosecuted by the regional public prosecutors' offices in 2006



### *Semantic misinterpretation at the root of unjustified prosecutions*

The word immigration comes from the Latin *immigrare*, meaning “to move into”. From an etymological point of view, immigration is therefore migration as seen from the destination country.

From a legal point of view, the *Protocol Against the Smuggling of Migrants by Land, Air and Sea*<sup>21</sup> describes immigration as the entry “of a person into a State Party of which the person is not a national or a permanent resident” (Article 3). By the same token, Senegal’s law 71–10<sup>22</sup> deems an immigrant to be “a foreigner coming to Senegal with the intention of establishing residence or to engage permanently in gainful activity or to pursue a profession in the country” (Article 4).

Moreover, for the public prosecutors of Senegal, prosecuted immigration is described as “unlawful”, implying illegal; however, the *Protocol Against the Smuggling of Migrants by Land, Air and Sea*, Article 3 again, paragraphs a and b, states that:

- “illegal entry (means that) of a person into a State Party of which the person is not a national or a permanent resident”.
- “the expression ‘illegal entry’ shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving state”.

In other words, the fact of entering foreign territory by illegally crossing a border could possibly be described as “unlawful immigration”.

Does this offence apply to those wishing to leave by sea who were prosecuted in 2006 by Senegalese public prosecutors?

To answer this question, two comments must be made:

- Senegal is the country of origin for the individuals prosecuted by Senegal’s regional public prosecutors, and Spain, via the Canary Islands, the planned destination country. Their intention is therefore not to “move into” Senegalese territory, but to leave it. Consequently, the term ‘immigration’ is inappropriate to describe their attempted or actual conduct. If these individuals are to be prosecuted for *unlawful immigration*, it is surely on arrival, i.e. when they illegally ‘move into’ or attempt to illegally ‘move into’ Spanish territory (or any other foreign territory).
- If there is any illegality, this cannot possibly involve Senegalese nationals (96% of those prosecuted for *unlawful immigration*) who are in the country of their birth and residence and have crossed no border. Conversely, it could possibly apply to foreign nationals, if they previously entered Senegalese territory by crossing a border without complying with the necessary legal requirements. It should be recalled that the majority of foreigners prosecuted are nationals of ECOWAS member countries for whom, in practice, a national identity card alone is required to enter Senegal. All foreigners, ECOWAS nationals or

otherwise, who legally entered Senegalese territory could nonetheless be in an irregular situation at the time they are presented to the public prosecutor, if they failed to comply with the conditions of stay<sup>23</sup>; under these circumstances, their criminal liability is not that they illegally entered Senegalese territory but that they illegally stayed; “overstay” being an offence under Article 11 of Senegal’s law 71–10<sup>24</sup>.

Article 1 of the same law states that “*for the purposes hereof, any individual who does not have Senegalese nationality, being either of foreign nationality or of no nationality, is deemed a foreigner*”.

Moreover, liability to criminal penalties only applies to foreigners who:

- “*enter or return to Senegal despite a prohibition of which they have been notified*
- *stay or settle in Senegal without receiving the appropriate permission or after expiry of a period stipulated by such permission*” (Article 11).

On the basis of all these observations, for none of the individuals prosecuted before Senegal’s public prosecutors in respect of leaving Senegal by sea can the offence of *unlawful immigration* apply to the events (or presumed events) on record. As a consequence, where Senegalese nationals are concerned, they cannot be prosecuted. But in 2006, several hundred were prosecuted. As far as foreign nationals are concerned, if they are to be prosecuted, it is for other conduct, possibly linked to previous illegal entry (irregular immigration) or overstay on Senegalese territory.



The fact of entering foreign territory by illegally crossing a border could possibly be described as “*unlawful immigration*”.

### ***“Unlawful emigration”, two antinomic terms with no legal foundation***

“Emigration” is a noun formed from the following two Latin elements:

- Ex-, a prefix meaning “out of”
- Migr- which equates to the idea of “moving”.

Etymologically, the word means “moving to live outside one’s land”. Emigration (extended internationally) therefore means the act of leaving one country to go into another. This implicitly leads to crossing a border.

Does this definition apply to the conduct of the individuals prosecuted for *unlawful emigration* before Senegal’s courts?

The prosecuted events on record occurred on Senegalese territory or Senegalese territorial waters.

Those of Senegalese nationality had therefore not left their country, and thus had crossed no borders (like the foreigners, moreover). As a result, the events on record cannot be described as either emigration or attempted emigration. In other words, individuals have been charged

and prosecuted on the basis of an erroneous description of the events on record.

In broader terms, can the act of emigrating (or attempting to emigrate) from one's own country be described as unlawful emigration, i.e. viewed as an unlawful (irregular or illegal) act? Is it not antinomic to use the adjective "unlawful" with the term "emigration"?

In the situation that interests us, two questions arise:

- with which legal requirements must Senegalese nationals comply in order to leave their own country?
- in the description of events, is there not confusion between the two stages of border crossing?

Any Senegalese national shall carry some national identity document and this is equally true at border crossings as it is anywhere else in the territory. Anywhere on Senegalese national territory, when Senegalese nationals are unable to present such a document, they are not prosecuted for illegality, an offence that does not exist in the Senegalese penal code, but for lack of national identity card or failure to produce a national identity card, which are the summary offences stipulated by the summary offences code<sup>25</sup>.

Thus, for Senegalese nationals, migrating can only become illegal if they cross the border of a foreign country while failing to comply with the conditions for legal entry; nonetheless, even under this scenario, they are not illegal emigrants, but rather illegal immigrants relative to the destination country.

Furthermore, questions could be raised about the suitability of the adjective "unlawful", a notion which implicitly refers to the notion of crime with its link to illegality, discarding the notions of both legitimacy and freedom enshrined in international instruments.

Borrowing the concept of illegalism, developed by Foucault in *Discipline and Punish*<sup>26</sup>, Denis Duez develops the following idea: *"it is the State which, in wishing to control all population movements, entirely creates in one fell swoop both the legal immigrant and the opposite, the illegal*

*[immigrant]. The appearance of the latter on the political stage as an issue is the direct consequence of a process of standardising migration. The same applies, he continues, for the illegal*

*immigrant as for the criminal, to the building of a condemned policy and to the building of a special illegalism"*<sup>27</sup>. That is certainly what it is when individuals are prosecuted for unlawful "immigration", "emigration" or "migration" when they have at no time left their country or crossed the border of another country.

Do we not discard the notions of both legitimacy and freedom enshrined in international instruments?



***“Smuggling of migrants” or “organised unlawful migration”, ambiguous terminological substitution”***

Two legal instruments, one under international law and one under national law, have been drafted by legislators to describe and, if appropriate, prosecute the “smuggling of migrants” in Senegal:

- *The Protocol Against the Smuggling of Migrants by Land, Air and Sea, supplementary to the United Nations Convention Against Transnational Organized Crime*
- *Senegal’s law number 2005-06 on combating human trafficking and similar practices and on protecting victims*<sup>28</sup>.

**International conventions to protect migrants and combat smugglers:** According to the terminology of the United Nations Convention Against Transnational Organized Crime (2000), the expression “organized criminal group” means:

*“A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” (Article 2).*

At the same time, the Protocol Against the Smuggling of Migrants by Land, Air and Sea defines the smuggling of migrants in these terms:

*“The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident.” (Article 3).*

The scope of application, criminal liability of migrants and criminalisation are described under Articles 4 and 5:

- Article 4: *“this Protocol shall apply (...), where the offences are transnational in nature and involve an organized criminal group”*
- Article 5: *“migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol”<sup>29</sup>*

The Protocol adds that *“each State Party shall adopt legislative and other measures as may be necessary to establish [the following] as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit” (Article 6).*

**Paradoxical effect of vaguely drafted legislation:** Senegal’s law number 2005-06 is intended to implement the *Protocol Against the Smuggling of Migrants by Land, Air and Sea*. However, section II, entitled “migrant smuggling”, starts with Article 4: *“organised unlawful migration by land, sea or air is punishable by 5 to 10 years imprisonment and a fine of FCFA 1 million to 5 million”*. The expression “organised unlawful migration”,

implicitly deemed to be an offence, is not defined in the text. This omission makes the application of the law complex and encourages criminalising migrants in their own home countries. However, Article 4 of the *Protocol Against the Smuggling of Migrants by Land, Air and Sea* clearly states that the offences in question are “*transnational in nature*”.

Shortcomings in law 2005-06 therefore create a paradox. In a country where those entering the territory illegally are not subject to criminal prosecution but are subject to an administrative measure of being expelled<sup>30</sup>, the first criminalisation of migration is applied to actual nationals of the country, in the country itself.

This situation properly illustrates the whole incongruity of pushing back border control and management for northern countries, not only to the borders of southern countries, but over the entire territory of southern countries. Prosecutions are no longer just for “*proof of committing certain physical acts ensuing from the offence*” but on the basis of presumed intent.

In fact, law 2005-06 replaces the notion of “*migrant smuggling*” with the notion of “*organised unlawful migration*”. This terminological substitution is due to the lack of a clear definition of events or conduct likely to lead to prosecutions, and there has been a switch from one category to another, mixing up irregular migrants and smugglers. A migrant in an irregular situation is not a smuggler, and a smuggler is not necessarily an irregular migrant. This semantic blending has led to the possible criminalisation of the intention to emigrate or the act of emigrating.

Following the legislators, the prosecutors then deviated from the key objective of the *Protocol Against the Smuggling of Migrants by Land, Air and Sea* which is to distinguish *smugglers* and *migrants*, with the latter “*not liable to criminal prosecution under this Protocol for the fact of having been the object*” of migrant smuggling (Articles 5 and 6).

Consequently, migrants and smugglers alike, once presented to the public prosecutor, are usually prosecuted under the ‘*flagrante delicto*’ procedure and remanded in custody. In 2006, only 31 individuals were prosecuted under an application to open a preliminary investigation for offences related to *migrant smuggling* compared to 102 for offences related to *unlawful emigration/immigration*.

There are two drawbacks to this penal policy:

- It runs counter to Article 16 of the *Protocol Against the Smuggling of Migrants by Land, Air and Sea*, whereby “*each State party shall take (...) legislative measures to preserve and protect the rights of persons who have been the object of conduct set forth in Article 6 of the Protocol*”. To comply with this provision, migrants must not *prima facie* be treated as offenders;
- It offers little or nothing in the way of effective measures against migrant smuggling; indeed, it barely makes an attempt. A case dealt with under the ‘*flagrante delicto*’ procedure is tried quickly and the

case closed. Conversely, an application to open a preliminary investigation may provide the judge with an opportunity to investigate much further and establish each party's real criminal responsibility, the aim being to move up the chain of command to identify the people truly coordinating the "smuggling of migrants". That is the real purpose behind the *Protocol*



The semantic blending has led to the possible criminalisation of the intention to emigrate or the act of emigrating.

*Against the Smuggling of Migrants by Land, Air and Sea*. Under no circumstances is this legal instrument likely to allow a migrant to be deemed an offender; quite the opposite, in fact, it is primarily intended to protect migrants, willing victims or otherwise, but victims nonetheless when exploited by criminal organisations.

### **A legislative body inappropriate to Senegal's particular situation:**

In fact, the hesitation observed as regards penal policy is probably linked to the distinctive feature of the local situation, namely that the recent departures from the coast of Senegal have been supported by village, family, social or professional networks and not run by criminal networks.

This reality calls into question several concepts, including:

- That of **smuggler**. The captain and various crew members who take turns at the helm may be viewed as smugglers, in the sense that they enable migrants to be smuggled from the coast of Senegal to the shores of Spain. But at the same time, they are also, maybe even mainly, individuals attempting to leave, just like the others on board. The sole difference is that instead of contributing financially, they are contributing their skills. Can these sailors, deeply affected by the crisis in the fishing sector, be viewed as smugglers or members of a criminal organisation? Are they not economic migrants in the same way as other individuals wishing to leave? They all share one hope – reaching Europe and working there.
- That of **organised criminal group**, in the sense meant in the *Protocol Against the Smuggling of Migrants by Land, Air and Sea*. In Senegal, if there is any organisation, it is usually limited to a boat owner and the individual or individuals who put that owner in touch with people wishing to leave, all in exchange for a certain sum of money. Can such a system be described as the "smuggling of migrants" and is it a matter of transnational organised crime, as defined by the United Nations Convention? Is this type of operation so very different from traditional emigration networks, where previous migrants or key individuals (local traders or leading community figures) used their knowledge, skills and sometimes even their financial resources to help new individuals wishing to leave? This system is based more on trust than on a purely commercial relationship.





## Emigration by sea condemned politically, decriminalised legally

All of the above issues lead to one overriding question: is the sudden increase in emigration by sea enough to justify its criminalisation?

Opting for a crackdown, a response suggested to – or even imposed on – the Senegalese authorities by their European counterparts, results in treating migration, a demonstration of great social demand, as a legally wrongful act and migrants being treated as offenders. This erroneous treatment of the migration issue has resulted in a shift in the departure point, from St Louis to Casamance, and organising departures has now become more complicated. At the same time, awareness campaigns initiated by European countries have highlighted the difficulties and dangers of emigrating by sea. These two initiatives have done little to weaken the resolve of those wishing to leave, and conversely, they have encouraged a rise in the cost of making the trip, which may make organising them more attractive to commercial transporters, likely to be linked to criminal groups.

The scope of our analysis is Senegal. However, this is not the only country affected by the points raised here. Morocco and Mauritania face comparable situations, and their responses have been different:

- In 2003, Morocco adopted law 02-03 on *foreigners entering and staying in Morocco, and irregular emigration and immigration*;
- In 2006, the Mauritanian authorities reinforced land and sea border controls and surveillance of territorial waters and arranged temporary accommodation and transit sites for unlawful immigrants. According to the Mauritanian immigration department, “63 police roadblocks and 37 gendarmerie roadblocks have been deployed along the borders with Mali and Senegal”.

The drafting of such legal instruments and the establishment of land or sea control mechanisms express the European countries’ wish to ‘outsource’ their border controls; and to encourage southern countries to subscribe to this new way of managing migration. Development aid is implicitly dependent on their performance in combating “clandestine” immigration. This is the source of all the ambiguity in the legislation and its application – from a legal point of view, how is it possible to crack down on irregular immigration into European countries, indiscriminately called “*unlawful immigration*” or “*unlawful emigration*”, from the territory of the countries of origin? This equates to recognising that both migrants and source country authorities are ubiquitous because the migrants are judged as entering European territory while they are still on African territory and the Senegalese authorities register migrants who are on African territory as entering European territory.

Morocco's law 02-03 and Senegal's law 71-10 alike may be applied to controls on foreigners entering and staying on national territory. Conversely, under the inalienable right *"to leave any country, including one's own, and to return to his country"*<sup>34</sup>, they should not regulate foreigners leaving and still less their own nationals.

Senegal's law 2005-06 itself predates the rise in migration by sea and has another target entirely, *"combating human trafficking and similar practices and protecting victims"*. In that sense, it differs fundamentally from

Recent emigration by sea is primarily a social issue that should question development aid policies while not inciting a repressive attitude.



Morocco's law 02-03 on *"foreigners entering and staying in Morocco, and irregular emigration and immigration"*, the underlying justification for which is described as follows in the white paper introducing the bill: *"to*

*enable Morocco to fully fulfil its commitments towards its main partners, in particular as regards combating unlawful cross-border migration, of both Moroccan nationals and foreigners"*<sup>35</sup>.

Nonetheless, against a backdrop of strong political pressure, unlike the law, legal practice is able to vary based on new realities, which fosters the application of individual rights far removed from the principle of strict interpretation of criminal law. Consequently, in 2006, the commitment asked of the Senegalese authorities to demonstrate their desire to combat an unexpected wave of emigrants fostered the application of individual rights.

Yet in 2007, penal policy reverted to the strict application of criminal law, based on the various texts defining unlawful immigration, staying unlawfully and migrant smuggling.

This development demonstrates that setting up a coastal control system, possibly justifiable by the risk undertaken (1,600 km to travel and several thousand lost at sea), does not force migrants to be viewed as offenders or emigrating to be criminalised. While the naming of offences is still somewhat confusing, Senegal's current penal policy falls within this approach whereby migrants are distinguished from smugglers thereby enabling the smuggling of migrants to be combated without criminalising migrants. This approach penalises organisers of smuggling and tends to dissuade those wishing to leave.

Yet over and above the legal aspect, all these national and international texts ignore one key piece of information that is a feature of recent migration, *whereby one location has more than one function*. A single country may be a place of immigration, transit and emigration all at the same time. One departure hub may equally be used as a transit location and be a source area for migrants; both nationals and foreigners may be emigrants from any given territory.

Moreover, *recent emigration by sea* is primarily a social issue that questions development aid policies. Criminalising and punishing migration, i.e. adopting a “*fundamentally repressive attitude*”<sup>36</sup> is a serious error of policy and human judgement.

Senegal seems to have broken through that dimension. One year after the first wave of departures by boat, the strict application of national legislation in terms of unlawful immigration allowed legal practice to free itself from political pressure from northern countries and revert to asserting individual rights, in keeping with migrants’ freedoms and human rights.

Changes in Senegal’s penal policy between early 2006 and today emphasise that irrespective of outside political pressure, application of the law remains an issue of national sovereignty.

The restoration of every individual’s prerogatives reiterates that it is not that easy for a government, regardless of its “*submission to the requirements of European interests*”<sup>37</sup> in particular, to ignore international law and individual rights. The reduction in and criminalisation of people leaving by sea cannot be determined by international agreements. Regardless of the desire that drives it, more than just politics is involved. It is a tripartite process – governmental authorities, restricted to a greater or lesser degree by the attitude of international politics, citizens determined to leave (and return home), and the prosecutors acting as guarantor for the state of law and respect for individual freedoms.

Consequently, decriminalisation of migrants by Senegal’s legal authorities undermines the strategy of “*European and African governments in the process of imposing a concept with no legal foundation solely for the purposes of combating illegal immigration*”<sup>38</sup>. This approach, presented as unavoidable, is here called into question.

To this end, the example provided by Senegal warrants some consideration, under the deliberations recently initiated by ECOWAS to define a common migration policy for all member states<sup>39</sup>.

One question nevertheless remains – how can men and women adhere to development policies that consider them as development actors before leaving, as co-development actors upon returning (voluntarily or repatriated) and as criminals while attempting to migrate? Their plans were stigmatised and they are left with social trauma.

**Mandiogou NDIAYE**, International expert, Principal State Prosecutor, Dakar Court of Appeal, Senegal.

**Nelly ROBIN**, geographer and researcher at IRD (Institut de recherche pour le développement), has worked on West African migration for many years. Previously based in Dakar, she now has joined the Migrinter laboratory (migrations internationales et relations inter-ethniques).

**E-mail** nelly.robin@ird.sn

**Internet** www.mshs.univ-poitiers.fr/migrinter

#### NOTES

- 1 In October 2005, more than fifteen people died attempting to cross the only land border between Africa and Europe, in the Spanish enclaves of Ceuta and Melilla in northern Morocco.
- 2 Gonin, P. and N. Robin (2006), "Les routes du transit par le Sénégal". Immigration, Transit Retention, Irenam, Marseille, November, 22p.
- 3 These estimates were based on the language spoken by those attempting to immigrate during interviews conducted in Spain by Senegalese police.
- 4 The criminal case management procedure includes the regional and departmental public prosecutors' offices (45), the courts of appeal (Dakar and Kaolack) and departments in the Ministry of Justice (2).
- 5 National Good Governance Programme, "Judicial governance" component, 9<sup>th</sup> EDF. In this regard, IRD is providing technical support for "Modernisation of legal services by computerisation and networking of all justice departments in Senegal". The triangular partnership of Senegal's Ministry of Justice, France's Institut de Recherche pour le Développement (IRD) and Cheikh Anta Diop University in Dakar has led to the design and development of criminal case management software (Chaîne Pénale, CPI-1) to gather and process data.
- 6 Code de procédure pénale du Sénégal (Senegal's criminal procedure code), pub. by Editions juridiques africaines (EDJA), Paris, 1 May 2000, 417 p.
- 7 This is mandatory for major crimes and optional for minor and summary offences, if the needs of the investigation do not require it.
- 8 The Senegalese criminal code considers individuals under 18 years of age as minors.
- 9 Juvenile prison in Dakar, the capital of Senegal.
- 10 Ndiaye, M. and N. Robin (2006), Les mineurs en conflit avec la loi au Sénégal. Une réalité à redécouvrir. Co-publication IRD-Senegalese Ministry of Justice.
- 11 Neighbourhood of a Dakar suburb.
- 12 Article 572 of the criminal procedure code (para.4) stipulates that prosecutions are split where minors are involved and the case referred to the juvenile court: "(...) If the Republic state prosecutor is prosecuting adults under the 'flagrante delicto' (flagrant délit) procedure or direct summons, a separate case is compiled for the minor (...). If a pre-trial investigation is opened in the course of which it appears that minors are accused along with adults, the examining magistrate (...) compiles a separate case for the minor and passes the entire matter over to the examining magistrate responsible for juveniles at the regional court."
- 13 Protocol in force since 2003.
- 14 Section I "Human trafficking" and Section IV "on protecting victims and witnesses".
- 15 Including aiding and abetting, and attempted unlawful migration.
- 16 Including aiding and abetting, and attempted unlawful immigration.
- 17 Including aiding and abetting, and attempted unlawful emigration.
- 18 Including aiding and abetting, and attempted unlawful embarkation.
- 19 Including aiding and abetting, and attempted smuggling, etc.

- 20 Bettati, M., O. Duhamel, L. Greilsamer (2008), *La Déclaration universelle des droits de l'homme*, Gallimard, Collection Folio Actuel, p. 82.
- 21 *Supplementary Protocol to the United Nations Convention Against Transnational Organised Crime*, United Nations (2000), entered in force in 2004.
- 22 Law 71-10 of 25 January 1971 on the conditions for admission, temporary residence and settling for foreigners in Senegal.
- 23 Law 71-10 of 25 January 1971 on the conditions for admission, temporary residence and settling for foreigners in Senegal.
- 24 (...) "temporary residence or settling in Senegal without the appropriate permission is punishable by a term of imprisonment between 2 months and 2 years or a fine of between 20,000 and 100,000 francs or both". Article 11, law no. 71-10.
- 25 1997.
- 26 Foucault Michel (1993), *Surveiller et punir, naissance de la prison*, (Trans. by Alan Sheridan as "Discipline and Punish: The Birth of the Prison"). Collection Tel, number 225, Gallimard, Paris, 364 p.
- 27 Quoted in Jean-Paul Engélibert (2006), "Le réveil de la politique", *Acta Fabula*, August-September, Vol.7, num.4.
- 28 Law of 29 April 2005, officially adopted 10 May 2005. There are four sections. The first deals with human trafficking and exploitation of other's begging, the second migrant smuggling, the third defines procedures and the fourth addresses the issue of protecting victims and witnesses.
- 29 Article 6, *Criminalisation*: 1 Each State Party shall adopt legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit: (a) The smuggling of migrants; (b) When committed for the purpose of enabling the smuggling of migrants: (i) Producing a fraudulent travel or identity document; (ii) Procuring, providing or possessing such a document; (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.
- 30 Law 71-10 of 25 January 1971, Section II Article 32: foreigners failing to meet the conditions required to enter Senegal are returned at the expense of the carrier which accepted them as a passenger (...) Article 33: where foreigners have entered Senegal by their own means, they are taken back to the border entry point.
- 31 Senovilla Daniel, lawyer, Universidad de Comillas, Madrid.
- 32 In 2007, the Senegalese government commissioned research by the International Organization for Migration on the situation and treatment of foreign unaccompanied minors in various European countries. Although the results of this research have not yet been published, the Senegalese authorities have recently started a series of visits to Spain and the Canaries in order to obtain more information before ratifying this instrument.
- 33 The agreement was published in Spain's official gazette (*Boletín Oficial del Estado*) on 18 July 2008, No. 173, pages 31413-31415.
- 34 Article 13 of the *Universal Declaration of Human Rights*, 1948.
- 35 Belguendouz, Abdelkrim, *Immigration et émigration : la nouvelle loi marocaine*, *Migrance*, 24, 2005, pp 11-15.
- 36 Op. cit. Belguendouz A., p 14.
- 37 Migreurop, *Livre Noir de Ceuta et Mellila*, Paris, 2006, p105 (online document).
- 38 Op. cit., Migreurop, p105 (online document).
- 39 During the 33<sup>rd</sup> ordinary session of the Conference of heads of state and government, the ECOWAS Common Approach on Migration was adopted by all member states, in Ouagadougou on 18 January 2008.



**West African Studies**

# **Regional Challenges of West African Migration**

**AFRICAN AND EUROPEAN  
PERSPECTIVES**



West African Studies

# **Regional Challenges of West African Migration**

AFRICAN AND EUROPEAN PERSPECTIVES

Edited by Marie Trémolières



# ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

*The opinions expressed and arguments employed in this publication are the sole responsibility of the authors and do not necessarily reflect those of OECD or of the governments of its member countries, those of SWAC or the French Ministry of Foreign and European Affairs.*

Also available in French under the title:

*Cahiers de l'Afrique de l'Ouest*

**Les enjeux régionaux des migrations ouest-africaines**

PERSPECTIVES AFRICAINES ET EUROPÉENNES

Corrigenda to OECD publications may be found on line at: [www.oecd.org/publishing/corrigenda](http://www.oecd.org/publishing/corrigenda).

© OECD/SWAC 2009

---

OECD freely authorises the use, including the photocopy, of this material for private, non-commercial purposes. Permission to photocopy portions of this material for any public use or commercial purpose may be obtained from the Copyright Clearance Center (CCC) at [info@copyright.com](mailto:info@copyright.com) or the Centre français d'exploitation du droit de copie (CFC) [contact@cfcopies.com](mailto:contact@cfcopies.com). All copies must retain the copyright and other proprietary notices in their original forms. All requests for other public or commercial uses of this material or for translation rights should be submitted to [rights@oecd.org](mailto:rights@oecd.org).

---



# Regional Challenges of West African Migration

## AFRICAN AND EUROPEAN PERSPECTIVES

Over the last few years, the international agenda on migration has been particularly intense. Regular meetings between Africa and Europe, such as in Rabat (July 2006), Tripoli (November 2006) and Paris (November 2008) exemplify this. Within this context, the Economic Community of West African States' (ECOWAS) Common Approach on Migration, adopted in January 2008, confirmed the need for a coordinated regional response. Indeed, 90% of West African migration is intra-regional.

This publication presents contributions by international experts on various aspects of West African migration. It provides a contrasting perspective to current debates which essentially focus on security issues. This rather non-institutional approach promotes a constant dialogue based on analyses of the actual situation: the authors encourage "win-win" mobility for all parties involved (Europe, North Africa and West Africa), whether it be a host, transit or departure country.

The full text of this book is available on line via these links:

[www.sourceoecd.org/emergingeconomies/9789264055933](http://www.sourceoecd.org/emergingeconomies/9789264055933)

[www.sourceoecd.org/socialissues/9789264055933](http://www.sourceoecd.org/socialissues/9789264055933)

Those with access to all OECD books on line should use this link:

[www.sourceoecd.org/9789264055933](http://www.sourceoecd.org/9789264055933)

**SourceOECD** is the OECD online library of books, periodicals and statistical databases.

For more information about this award-winning service and free trials, ask your librarian, or write to us at

**SourceOECD@oecd.org.**