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Magdalena Perkowska

CRIMINALITY BY FOREIGN NATIONALS
IN SWITZERLAND
– CRIMINOLOGICAL APPROACH



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Table of contents

List of abbreviations	7
Introduction.....	9

Chapter I

Migration policy of Switzerland (p. 21)

1. Migration policy of Switzerland after World War II	23
2. Migration policy in the 1970s and 1980s.....	28
3. Migration policy at the end of the 1980s and in the 90s	32
4. Migration policy at the end of the 20 th century	37
5. Migration policy at the beginning of the 21 st century	43

Chapter II

Demography of Switzerland

1. Foreigners' immigration in the structure of Swiss population.....	49
2. Social situation of foreigners in Switzerland	63

Chapter III

The principles of criminal liability of foreign nationals in Swiss law (p. 73)

1. Territorial jurisdiction principle.....	75
2. Protective principle	79
3. Universal jurisdiction principle.....	81
4. Active and passive personality and residual jurisdiction.....	85

Chapter IV
**Phenomenon of criminality by foreigners
in Switzerland** (p. 91)

- 1. Suspect foreigners – statistical overview 92
- 2. Foreign organized criminal groups in Switzerland 118

Chapter V
Swiss criminal policy towards foreigners

- 1. Criminal convictions of foreign nationals 137
- 2. Penitentiary policy towards foreigners 148

Chapter VI
**Criminal law aspects in preventing
and combating the criminality of foreigners in Switzerland** (p.155)

- 1. Combating and preventing criminality of
foreigners through substantive law 156
- 2. Combating and preventing criminality of foreigners
through penal measures 174

Conclusions 183

Bibliography 195

LIST OF ABBREVIATIONS

- AFMP – Agreement Between the European Community and its member States, of the One Part and the Swiss Confederation, of the Other, on the Free Movement of Persons
- ATF – Decisions of the Federal Tribunal (*fr. Arrêt du Tribunal Fédéral Suisse*)
- EFTA – European Free Trade Association
- EU – European Union
- FDFA – Federal Department of Foreign Affairs
- FDJP – Federal Department of Justice and Police
- FG – Federal Gazette (*fr. Feuille fédérale, FF*)
- FNAI – Federal Act on Foreign Nationals and Integration
- FSO – Federal Statistical Office's
- NA – Federal Act on Narcotics and Psychotropic Substances
- O.J. – Official Journal
- OC – Official Compilation of Federal Legislation (*fr. Recueil officiel du droit fédéral, R.O.*)
- SCC – Swiss Criminal Code
- SECO – State Secretariat for Economic Affairs
- SLFS – Swiss Labour Force Survey
- U.N. – United Nations

INTRODUCTION

Criminality is a constantly evolving phenomenon and its dynamics and structure are conditioned by a number of factors. In every country, crime has a distinct shape, which is largely influenced by its social, demographics and socio-economic status. The structure of crime can be analysed according to a number of variables – the characteristics of prohibited acts or of the perpetrators of those acts. In considering the perpetrator as a variable, it is possible to analyse the criminality of women, minors, older people, recidivists and foreign nationals.

Switzerland, a small country in the middle of Europe, not a member of the European Union but bound to it by bilateral agreements, has a unique demographic structure. At the moment, over 25% of its population are foreign nationals. This situation is unique in Europe, influenced in particular by the movements of migration in Europe but also by the country's immigration policy. From a criminologist's point of view, the structure and the dynamics of crime in this country are fascinating; in particularly crime committed by foreign nationals.

The spur to tackle the subject came from a three-month research placement of the author of this article with the Department of Penal Law, Institute for Penal Law and Criminology at the Faculty of Law, University of Bern, in 2009. This placement, augmented by personal library searches in 2012, 2013 and 2015, enabled essential literature material and statistical data to be gathered. As author conducts the research on criminality of foreign nationals in Poland, she aimed to analyse the same phenomenon in Switzerland. This will result in comparison in the forthcoming research on Swiss and Polish criminal policy towards the foreigners. That is why this book is a starting point presenting the phenomenon of criminality of foreign nationals in Switzerland (country that has different migration history, is not an EU member, has different criminality rates than Poland). Research concerning the criminality of foreign nationals in Switzerland was

undertaken mainly in the 1980s and 1990s by M. Killias¹ and by K. L. Kunz² and it was this research that became the main inspiration to undertake the project. An important publication on the subject of this research was a joint work, containing papers from the Swiss Group of Criminology³ 1993 conference. It is worth noting that, against the backdrop of a wide ranging social debate on the risk posed by foreign nationals, initiated by a populist campaign “For expulsion of foreigners”, the Swiss Group of Criminology has, once more, made this issue the topic of its conference. This resulted in another publication: “Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité”⁴ which tackled a broad scope of links between criminality and migration in Switzerland. It is a series of articles on the conditions of life for foreign nationals in Switzerland, integration and social control, the structure of crime committed by foreign nationals and the criminal justice

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- 1 M. Killias, H.J. Hoffmann-Nowotny, Die Ausländerpolitik in der Schweiz, (in:) E. Gehmacher (ed.), *Ausländerpolitik im Konflikt*, Bonn 1978, pp. 169-186, M. Killias, *Abweichendes Verhalten bei Fremdarbeiterkindern*, (in:) Komitee Schweiz 80 (ed.), *Ausländerkinder in der Schweiz*, Zürich 1980, pp. 24-30, M. Killias, H.J. Hoffmann-Nowotny, *Switzerland* (in:) Daniel Kubat (ed.), *The Politics of Migration Policies*, New York: Center for Migration Studies 1979, pp.193-206, M. Killias, *La délinquance juvénile des migrants de la deuxième génération. Essai de bilan des recherches européennes*, (in:) J. Schuh (ed.), *Jeunesse et délinquance*, Grösch 1988, pp. 223-284, M. Killias, *Criminality among Second Generation Immigrants in Western Europe: A Review of Evidence*, *Criminal Justice Review* 1989, No. 14/1, pp. 13-42, M. Killias, A. Kuhn, C. Berry, *Les étrangers victimes et auteurs d'infractions selon le sondage suisse de victimisation*, (in:) S. Bauhofer, N. Queloz (eds.) *Ausländer, Kriminalität und Strafrechtspflege. Etrangers, criminalité et système penal*, Zürich 1993, pp. 239-263, M. Killias, *Immigrants, Crime, and Criminal Justice in Switzerland, Crime and Justice, Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives* 1997, Vol. 21, pp. 375-405, M. Killias, *Diskriminierendes Anzeigeverhalten von Opfern gegenüber Ausländern? Neue Aspekte der Ausländerkriminalität aufgrund von Daten der schweizerischen Opferbefragung*, *Monatschrift für Kriminologie und Strafrechtsreform* 1998, No. 71/3, pp. 156-165, M. Killias, *Kriminalität von und gegen Ausländer laut den Daten der schweizerischen Opferbefragung von 1998*, (in:) J.-M. Jehle (ed.), *Raum und Kriminalität, Sicherheit der Stadt, Migrationsprobleme*, Godesberg 2001, pp. 327-332, M. Killias, *Paradise lost? New trends in Crime and Migration in Switzerland*, (in:) W.F. McDonald (ed.), *Immigration, Crime and Justice. Sociology of Crime, Law and Deviance* 2009, vol 13, p. 34.
 - 2 K.L. Kunz, *Criminalité des étrangers en Suisse. Problematique et tentative d'explication*, (in:) *Procédure pénale et exécution des peines: la questions des étrangers*, Caritas Suisse, *Compte-rendus* 1989, No. 1, pp. 3-29. K.L. Kunz, *Ausländerkriminalität in der Schweiz – Umfang, Struktur und Erklärungsversuch*, *Schweizerische Zeitschrift für Strafrecht* 1989, No. 106, pp. 373-392.
 - 3 S. Bauhofer, N. Queloz (eds.) *Ausländer, Kriminalität und Strafrechtspflege. Etrangers, criminalité et système penal*, Zürich 1993, p. 428.
 - 4 D. Fink, A. Kuhn, C. Schwarzenegger (eds.), *Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité*, Berne, 2013, p. 278.

system's reaction to that crime, as well as penitentiary aspects of the issue. The latest monograph is "Ausländerkriminalität in der Schweiz. Zusammenhang zwischen Migration und Kriminalitätsentwicklung"⁵ which analyses the issue of criminality of foreigners mostly in years 2009-2011. Author also describes the phenomenon of immigration to Switzerland, the criminological theories explaining the criminality of foreign nationals and the social background of the phenomenon.

Not without importance were the ideas of populist campaigns, aimed at limiting the number of foreigners in Switzerland. The campaign "For expulsion of foreigners" assumed the expulsion of foreign nationals who had committed criminal acts on Swiss territory. Its initiator (the Democratic Union of the Center Party) pointed to the large scale of crime involving foreign nationals and consequently the risk they pose to public safety and security.⁶ An Inter-party Committee Against Mass Immigration was the author of another populist campaign "Stop mass immigration" which called for quantitative limits and quotas for controlling migration to Switzerland. One of the basic arguments for limiting migration into Switzerland was the threat of crime posed by foreign nationals.⁷ Against the background of these campaigns, Swiss society was provided with a constant stream of information indicating the high level of risk posed by foreigners arising from their criminal tendencies.

Collectively, it was these determinants that formed the basis for undertaking research in terms of the criminological analysis of foreign crime in Switzerland in the years 2009-2015.

The aim of the research was to explore and present the phenomenon of immigration into Switzerland. The factor which helped shape the issue was Swiss migration policy. Establishing the scale, the causes and the structure of migration into Switzerland was a starting point for presenting the current demographic structure of society. This was

5 A. Kozlova, *Ausländerkriminalität in der Schweiz, Zusammenhang zwischen Migration und Kriminalitätsentwicklung*, Hamburg 2015, pp. 306.

6 Union démocratique du centre, *Oui à l'initiative populaire pour le renvoi des étrangers criminels (initiative sur le renvoi)*, Berne 2010, p. 6 ff.

7 Comité interpartis contre l'immigration de masse, *Argumentaire Initiative populaire "contre l'immigration de masse"*, 2013, pp. 30-32.

deemed necessary to enable subsequent criminological analysis of the negative impact of migration, namely crime committed by foreign nationals. The latter became the subject of this research.

The work involved qualitative research in order to describe the issue of foreign crime. Descriptions are based on variables in relation to a criminal act - that being the nature of the act itself and its legal classification. Also, in respect of variables characterising an offender; that is the foreign national's legal status and citizenship. Qualitative research was a starting point for explanatory research to indicate the underlying causes of foreign crime, as well as the conditions, structure and dynamics of the phenomenon. Criminological theories, explaining the causes of foreign crime in Switzerland, were also referenced.

The research involved a number of research methods. A literature review was the first method deployed in the course of the work. Before undertaking further research, it was necessary to establish the present state of knowledge on the issue of foreign crime in the country. The assembled academic literature helped establish the starting point for further research as it confirmed the perceived need for criminological analysis in this area. The literature review was mainly used in the preparation of the first, second and fifth chapters.

Qualitative research also made use of legal-dogmatic research. An analysis of legal acts enabled, in particular, the establishment of current legal status in terms of the principles of criminal liability of foreign nationals under Swiss law. This method was used in constructing the last chapter, concerning foreign crime prevention. Legal acts, containing provisions of criminal law aimed at preventing negative behaviour among foreign nationals, were analysed.

Statistics is one of the basic research methods deployed in criminology. Criminal statistics supply criminology with data that enable the analysis of the dynamics of disclosed offences, convicted persons and penal measures administered.⁸ It also allows one to establish the level of dependency between the different factors, the incidence of

8 W. Świda, *Kryminologia*, Warszawa 1977, p. 25, B. Hołyst, *Kryminologia na świecie*, Warszawa 1979, p. 32, 65 ff.

crime.⁹ Therefore this method was also used in the research in order to obtain vital information on the scale and the dynamics of detected foreign crime which resulted in trial. This method was also used in the second chapter, which describes the demographics in Switzerland in order to demonstrate the scale of the foreign population, the dynamics of migration movements and social conditions within which this group functions.

Statistical data on crime is passed on to the Federal Statistical Office. This office has at its disposal all data on detected crime, suspected crime, criminal convictions and custodial sentences *sensu largo*. In 2009 police statistics in Switzerland were unified. The aim was to consolidate the data gathering systems in individual cantons in order to make them compatible for the whole country.¹⁰ Therefore, in terms of police statistics,¹¹ only post-2009 statistical data was available. This had an impact on the timespan for the analysis, which was limited to the period 2009-2015. The year 2015 was the last year of research made in Switzerland by author.¹² In the interests of consistency and compatibility, the same timespan was adopted for all data included in the research.

The conviction statistics show all convictions of adults recorded in the register of convictions presented on the basis of felony or misdemeanour. Contraventions are not taken into account as these are only rarely entered in the register of convictions. The conviction statistics have existed in their present form since 1984.¹³ Unfortunately the personal data of convicted individuals does not include information

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- 9 J. Bafia, *Problemy kryminologii (dialektyka sytuacji kryminogennej)*, Warszawa 1978, p. 33.
- 10 Office fédéral de la statistique, *Statistique policière de la criminalité (SPC). Rapport annuel 2009*, Neuchâtel, 2010, p. 5.
- 11 The police crime statistics since 2009 have provided information on the number, structure and growth of recorded offences, as well as on victims and defendants. They focus on the offences recorded by the police: offences against the Swiss Criminal Code (SCC), the Narcotics Act (NA) and the Foreign Nationals and Integration Act (FNAI). The police crime statistics also provide detailed information on specific subjects (for example violence in general, theft). <https://www.bfs.admin.ch/bfs/en/home/statistics/crime-criminal-justice/police.html> access 1.03.2018.
- 12 However author plans to continue the research on criminality of foreigners in the nearest future.
- 13 <https://www.bfs.admin.ch/bfs/en/home/statistics/crime-criminal-justice/criminal-justice.html> access: 01.03.2018.

on citizenship. Therefore the analysis was limited to indicating the legal status of a foreign national only.

The last set of statistical data is the data concerning persons who have received a custodial sentence in the course of criminal proceedings. The data is not very detailed; the set contains only an indication of the number of foreign nationals in the prison population. As with the data concerning convictions, the available sets did not, at the time of acquisition, contain information concerning citizenship of the detained persons or even, in this instance, the legal status of their stay in the country.

The main research question was: how was foreign crime in Switzerland shaped in the years 2009-2015?

The main hypothesis of the research assumes that foreign crime in Switzerland is the result of the pro-immigration policy of this country, resulting in the increase of the foreign population in Switzerland, including suspects.

The research problem is complex, as is the hypothesis. Individual issues need to be identified, with appropriate hypothesis attached. The individual issues established are as follows:

1. What are the countries of origin of foreign offenders in Switzerland?
2. What is the legal status for the stay of foreign offenders in Switzerland?
3. What crimes are most often committed by foreign offenders in Switzerland?
4. To what extent do measures under Swiss criminal law facilitate the effectiveness of foreign crime prevention?

Individual hypothesis were formulated thus:

1. Foreign offenders in Switzerland come predominantly from neighbouring countries bordering the Confederation.
2. Foreign offenders in Switzerland predominantly have the status of a Swiss resident (a valid residence permit).

3. Foreign offenders in Switzerland mainly commit common offences.
4. Swiss criminal law measures facilitate the effectiveness of foreign crime prevention to a limited degree.

In terms of the research topic area, the research was divided into phenomenological research, etiological research and research on outcomes (effectiveness).¹⁴ Phenomenological research is limited to the description of the phenomenon, in this case to the indication of the scale, characteristics and the forms of foreign crime in Switzerland. The analysis concerned the structure and the dynamics of crime committed by foreign nationals in the period of 2009-2015, based on the Federal Statistical Office data. The aim was to establish its scale and temporal variations. This allowed the risk level posed by the phenomenon to be estimated in real terms.

Etiological data was used to determine the factors conditioning and facilitating the growth of foreign crime. The analysis mainly concerned socio-political factors which, according to the hypothesis, could influence the etiology of foreign crime. Those elements of criminal justice policy that concern the analysis of the Swiss prison population and factors influencing the sentences handed down to foreigners were also analysed.

Research on the outcomes, which are typical for the analysis of the effects of the various crime prevention measures, included analysis of the criminal justice system for the prevention and management of foreign crime in Switzerland. An evaluation of the effectiveness of these measures was also attempted.

In undertaking the analysis of foreign criminality in Switzerland in 2009–2015, under the above three areas, different evaluation methods were employed.

In the phenomenological research on the issue of border crime the following criteria were utilised: the foreign national's status, citizenship, the number of offenders, the type of offence committed and

14 L. Tyszkiewicz, *Kryminologia: zarys systemu*, Katowice 1986, pp. 59–60.

the legal classification of the act. The above criteria allowed to present the specificity of foreign crime in Switzerland and also to verify the scale of the risk within the timespan adopted.

Etiological research of crime committed by foreign nationals in Switzerland adopted the criteria of milestones in migration policy which helped shape the country's current social structure. Socio-economic factors were also used as these were regarded as significant etiological factors for crimes committed by foreign nationals. This allows the current make up of foreign nationals in Switzerland to be shown, which co-relates with the structure of criminality by citizenship. Moreover, the analysis of socio-economic factors enabled crime inducing factors to be identified.

Research on the effectiveness of foreign crime prevention in Switzerland was based on the analysis of criminal measures penalising the behaviour of foreign nationals, as well as those aimed at preventing their reoccurrence. Here, the aim was to evaluate the effectiveness of the system of measures aimed at preventing and combatting the criminality of foreigners.¹⁵

The timespan encompassed by the research covered the years 2009–2015; this was dictated by the reform of the system for assembling statistical crime data. Nevertheless, this was also an important period from the point of view of the migration situation in Europe, as well as from the viewpoint of Swiss immigration and criminal policy towards foreign nationals. From the European perspective, the period was marked by the migration crisis caused by the 2010-2012 Arab Spring as well as the events that occurred three years later. The result was an unprecedented influx of immigrants into Europe which peaked in 2015.¹⁶ Switzerland, as a country renowned for its positive policies towards those seeking international protection, was within the geographical range of this influx which affected the extent of immigration into Switzerland and consequently led to an increase in immigration-related offences.

15 See: M. Perkowska, *Przestępczość graniczna cudzoziemców*, Warszawa 2013, pp. XIX – XX.

16 See M. Perkowska, *Nielegalna migracja w Europie – aspekty prawne i kryminologiczne*, TEKA Komisji Politologii i Stosunków Międzynarodowych 2017, No. 12/3, p. 59 ff.

An important factor in criminal justice policy, closely linked to immigration policy, was the previously mentioned populist campaign “For expulsion of foreigners”. Its end result was an amendment to Article 21 of the Federal Constitution introduced in 2015, assuming the expulsion of foreign nationals who had committed certain offences. The consequence of this amendment was the introduction of a new measure into the criminal code: mandatory and non-mandatory expulsion.

In order to achieve the aims and objectives of this treatise, the following structure was devised, consisting of five chapters.

This single-topic publication assumes that the scale of crime committed by foreign nationals in Switzerland is influenced by the demographic structure of the society, which was mainly shaped by the country’s migration policy. Therefore the aim of the first chapter is to present Swiss migration policy from the second part of the twentieth century until the present. This policy has evolved in recent decades. It was strongly influenced by the economic need of workers on the one hand and by xenophobic views that made this policy stricter on the other. Those factors have strongly influenced the demographic composition of Swiss society. An important part of the chapter relates to recent actions such as the popular initiative voted on 9 February 2014, when the Swiss nation decided to limit the free movement of people between Switzerland and the European Union.

Chapter Two, presents the demographic structure of Swiss society and the social situation of foreign nationals living in Switzerland. It contains, therefore, quantitative analysis of the share of foreigners in the population of Switzerland. Statistical data formed the basis for the discussion on the country and the region of origins of different groups of foreign nationals, that is, residents and asylum-seekers. The second part of the chapter is focused on the social situation of foreign nationals, based on factors including unemployment, poverty and education level.

Chapter Three, outlines the principles of the criminal liability of foreign nationals as defined in the Swiss Criminal Code. Based on current legislation, the doctrine and case law, the following principles are discussed: territorial jurisdiction, protective principle,

universal jurisdiction, active and passive personality principle, residual jurisdiction.

Chapter Four, contains quantitative analysis of crime committed by foreign nationals in Switzerland. The issue is presented statistically, based on the Federal Statistical Office data on the number of suspects and the type of acts as well as their legal classification. This chapter contains general statistical data on the share of foreigners in the population of suspects as well as a more detailed analysis based on the data on the legal status of foreign nationals, their citizenship and the structure of crime through the indication of the offence with which they were charged. A special reference is made to organised crime, which is specifically the domain of foreigners.

Chapter Five, discusses elements of criminal justice policy towards foreign nationals through the presentation of statistical data on the number of convictions as well as the number of custodial sentences. An attempt has also been made to explain why foreigners are overrepresented in this regard.

Chapter Six, in accordance with criminology taxonomy, has been devoted to crime prevention. It contains the most significant elements of the criminal justice system for the combatting and prevention of foreign crime. Crime prevention in the form of criminalising acts that can only be committed by foreign nationals is discussed, along with those introduced into the criminal code in order to prevent negative actions by foreign nationals, but are common in their nature. Prevention in the shape of the controversial measure of expulsion is also addressed. This element of crime prevention is aimed exclusively at foreign nationals.

Considering the factors presented above, M. Killias can be considered fully justified in saying that Switzerland is an interesting case in which to study the impact of migration on crime and criminal justice, because the size of the immigrant population relative to native population, is larger than anywhere else in Europe. Moreover, the migrant population is relatively varied and shows somewhat different patterns of adaptation, and the long tradition of migration allows

changes in its relation to crime and criminal justice to be seen over time.¹⁷

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17 M. Killias, *Paradise lost...*, *op. cit.*, p. 34.

MIGRATION POLICY OF SWITZERLAND¹

Migration policy² is set in the political and legal systems of the state, yet its normative and functional grounds are primarily influenced by the external (international) environment. Nevertheless, it is the state that is the fundamental creator and executor of migration policy. The policy is treated here as a process, or as a development continuing over time which can be divided into four basic stages: initiation, conceptualisation, implementation, and evaluation of outcomes. These stages should logically follow one another and they frequently overlap. The first stage, initiation, is of fundamental significance to every political action as it determines the further direction, course and final outcome of the action. A specific issue is politicised, in other words it becomes of interest to political decision-makers/stakeholders and is regarded as a “political issue” which requires reaction from the state – thus it is incorporated into the political system. Hence, it becomes the subject of political debate and subsequently the subject of a decision. Immigration, as a subject of state policy, requires conceptualisation, i.e. a thorough analysis and a formulation of general strategy based upon the evaluation of this phenomenon in the context of the state’s interests. This stage should result in the formulation of a state migration strategy in the form of a collection of guidelines (as complete as possible) related to the implementation of migration policy in the context of

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- 1 This is the revised, extended and brought up to date version of article M. Perkowska, *The Migration Policy of Switzerland*, *Przegląd Politologiczny* 2015, No. 3, pp. 41-54.
 - 2 H. Labayle, *Vers une politique commune de l'asile et de l'immigration dans l'Union Européenne*, (in:) F. Julien-Laferriere, H. Labayle, Ö. Edström (eds.), *La politique européenne d'immigration et d'asile: bilan critique cinq ans après le traité d'Amsterdam*, Bruxelles 2005, pp.11-12, K. Oellers-Frahm, *National immigration policies in comparative perspective*, (in:) B. Von Hoffmann (ed.) *Towards a Common European Immigration Policy*, Frankfurt am Main 2003, pp. 33-34.

national interests.³ As M. Ziółkowski emphasises, migration policy is grounded in two components. The first component is interests – those aspects which seem to be beneficial to us or to others. The second is values defined as rules which are perceived as fair and which we are ready to protect.⁴

Actual Swiss migration policy is expected to come to terms with a wide range of diverse issues. It deals with a Portuguese construction worker as well as with a family of Kurdish refugees, with a top manageress from Germany and with second-generation foreign nationals born in the country – and, unfortunately, also with foreign drug dealers and illegal residents.

The Swiss migration policy pursues three aims:

1. A good migration policy grants protection to people who are really persecuted, therefore they may benefit from the Switzerland's humanitarian tradition. People who must escape from war, persecution and torture should be able to find refuge here. However, by no means all those who apply for asylum are recognised as refugees or are provisionally admitted. Rejected asylum-seekers must leave this country again, and their return should be supported.
2. A good migration policy aims at a situation whereby both natives and immigrants feel safe in Switzerland. This is why everyone must accept the Swiss fundamental rules of living together. Often – but unfortunately not always – immigrants succeed in becoming integrated. Switzerland pays particular attention to the fight against crime, abuse and racism.
3. A good migration policy safeguards and advances this country's prosperity. For this purpose, Switzerland needs employees from other countries. Without these, many industries such as construction, tourism and health care, as well as Switzerland

3 M. Lesińska, *Polityka migracyjna jako przedmiot analizy – uwagi wstępne*, (in:) A. Górny, I. Grabowska-Lusińska, M. Lesińska, M. Okólski (eds.), *Transformacja nieoczywista. Polska jako kraj imigracji*, Warszawa 2010, pp. 69-70.

4 M. Duszczek, *Dokąd zmierzają migracje? Debata na temat polskiej polityki migracyjnej* (skrół z panelu dyskusyjnego), (in:) M. Duszczek, M. Lesińska (eds.), *Współczesne migracje: dylemata Europy i Polski*, Warszawa 2009, p. 221.

overall as a financial centre and a workplace, would be unable to preserve their current level of prosperity. It is for this reason that Switzerland depends on controlled immigration.⁵

From the early 20th century to the present day, Switzerland has transformed from an emigrant state into an immigrant state,⁶ whose current foreign population represents 23% of the country's population as a whole.⁷ Such a significant change is the result of migration policy that led to an influx of foreigners. It has had an undeniable influence upon the structure and dynamics of criminal activity in Switzerland, especially the structure and dynamics of criminal activity among foreign nationals.

Therefore, it is justifiable to analyse Swiss migration policy starting from the end of the Second World War up to the present. The 70-plus years that this represents can be divided into five different periods of Swiss migration policy defined as following:

1. Migration policy of Switzerland after World War II.
2. Migration policy in the 1970s and 1980s.
3. Migration policy from the end of the 1980s to early 1990s.
4. Migration policy at the end of the 20th century.
5. Migration policy at the beginning of the 21st century.

1. Migration policy of Switzerland after World War II

A tight labour market is a traditional feature of the Swiss economy. For this reason, the situation in the labour market has been strongly linked with the policy on foreign nationals throughout most of the twentieth century. Before the First World War and as the result of a very liberal policy in the context of industrialisation, the number of

5 Federal Office of Migration, access 18.02.2014 https://www.bfm.admin.ch/content/bfm/en/home/themen/migration_analysen/weltweite_migration/migrationspolitik.html

6 K. Oellers-Frahm, National Immigration policies in comparative perspective, (in:) B. Von Hoffmann (ed.) *Towards a Common European Immigration Policy*, Frankfurt am Main 2003, p. 34.

7 Federal Office of Migration, *Migration Report 2013*, Bern 2014, p. 12.

foreigners present in Switzerland topped 15 percent of the population.⁸ In the inter-war years, this number continuously fell as a result of more stringent policy. In 1931, the Law on the Residence and Settlement of Foreigners⁹ came into force and remained valid until 2008. It can be regarded as a police law aimed at border control and the defense of national territory, profoundly inspired by the international political context of the time, economic crisis and widespread xenophobia directed against the so-called *overforeignisation* (*de Überfremdung, fr surpopulation étrangère*)¹⁰ of Swiss society.¹¹

When the Second World War ended in 1945, Switzerland, in common with all other countries in post-war Europe, urgently needed to restructure and secure its economic development. The Federal Council, under pressure from entrepreneurs in need of a cheap workforce, introduced a control system for foreign workers based on statutory regulations that established contingents for specific regions or enterprises. In addition, a recruitment programme for foreign seasonal workers was also introduced. An example of such initiatives is agreement concluded in 1948 between the Federal Council and Italian authorities – a convention that regulated the immigration of Italian guest workers to Switzerland.¹² The status of seasonal worker was beneficial to the authorities. Such an employee could not settle in Switzerland, as they were legally bound to leave Swiss territory for three months in each year. The Federal Office of Industry, Art, Trade and Labour introduced recommendations to issue temporary work permits only.¹³ The non-

8 T. Liebig, *Switzerland's Immigration Policy: Lessons for Germany?* Reihe Diskussionspapiere des Forschungsinstituts für Arbeit und Arbeitsrecht an der Universität St. Gallen 2002, No. 76, p. 4.

9 La loi fédérale du 26 mars 1931 sur le séjour et l'établissement des étrangers, OC 142.20.

10 This concept refers to a situation in which the society had become 'foreign' to its own members because of immigration, while establishing a causal link between the number of foreigners and the threat to Swiss identity.

11 P. Ruspini, *Switzerland*, (in:) M. Baldwin-Edwards, A. Kraler (eds.) *REGINE Regularisations in Europe Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU*, Vienna 2009, p. 96.

12 Y. Flückiger, *Le changement du contexte économique international et les transformations du marché du travail* (in:) H. Mahnig (ed.) *Histoire de la politique de la migration, d'asile et d'intégration en Suisse depuis 1948*, Zurich, 2005, pp. 377-404, for more on Italian immigration see: M. La Barba, C. Stohr, M. Oris, S. Cattacin, *La migration italienne dans la Suisse d'après-guerre*, Lausanne 2013, pp. 390.

13 M. Cerutti, *La politique migratoire de la Suisse 1945-1970*, (in:) H. Mahnig (ed.) *Histoire de la politique de la migration, d'asile et d'intégration en Suisse depuis 1948*, Zurich 2005, p. 92.

permanent immigrant status became an instrument of amortization. In the event of an increase in the unemployment rate in Switzerland, such an employee could leave the country and return again when a new employment opportunity occurred.¹⁴ This mechanism could easily lead to settlement migration and accordingly the mobility of such employees became somewhat deceptive.¹⁵

The Swiss economy began to emerge from crisis in 1949 and an economic boom, generated by the conflict on the Korean Peninsula, resulted in the need for a greater number of workers. This led to the situation where, by 1960, 9.1% of the Swiss population was of foreign origin whereas in 1950 it had been 5.8%.¹⁶

In the early 1960s the Swiss government, faced with a massive influx of foreign workers, mounting migration pressure, protests from trade unions and more frequent references from the populace to “*overforeignisation*” policy, undertook measures to limit migration. Here it is crucial to mention five decrees issued by the Federal Council aimed at achieving this goal. The first decree of 1 March 1963, stated that a permit allowing a foreign national to stay in the Swiss Federation for the purpose of undertaking employment in a given enterprise, may only be issued in cases where such employment does not increase the number of employees engaged by that enterprise at the end of 1962 (excluding agriculture and health services). Perhaps not surprisingly, the 1963 decree failed to deliver the anticipated decrease in number of immigrants. Therefore, on 21 February 1964, a new decree was issued. This called for a reduction of employment in enterprises of 3% (both Swiss and foreign employees) but, for reasons which will be all too apparent to the reader, the measure was flawed and in relation to immigration had a reverse effect. Indeed, in 1964 the number of foreign employees increased to 4.5% compared to the previous year. This resulted from the fact that enterprises took on foreign workers to fill

14 H.-R. Wicker, Introduction: migration, politique, de migration et recherche sur la migration (in:) H.-R. Wicker, R. Fibbi. W. Haugh (eds.), *Les migrations et la Suisse*, Zurich 2003, p. 40.

15 *Ibidem*, p. 25.

16 H. Mahnig, E. Piguet, La politique d'immigration de 1948 à 1998: évolution et effets, (in:) H.-R. Wicker, R. Fibbi. W. Haugh (eds.), *Les migrations et la Suisse*, Zurich 2003, p. 66.

posts vacated by Swiss employees (a product of reshuffling the labour force).¹⁷

The third decree of 26 February 1965 was the next step. This introduced the “double ceiling” system which obliged enterprises to lower the number of foreign workers employed by 5%, and to do so by 30 June 1965, while simultaneously forbidding them to increase the overall level of employment. This directive did have an effect and resulted in the reduction of some 40,000 jobs held by foreigner workers (both seasonal and permanent employees). The fourth decree of 4 March 1966 introduced a further reduction in the employment rate of foreigners by an additional 5% but which specifically excluded “borderers” (*fr. frontaliers*) – people that daily cross the border to go to work but who reside outside Switzerland in neighbouring countries. Notwithstanding the protestations of entrepreneurs, who accused the authorities of impeding industry development, the Federal Council issued the fifth and last decree on 10 February 1967, thereby introducing an obligation to decrease the number of foreigners employed by a further 2% by the end of July of that year.¹⁸

In spite of the limitations introduced, the number of foreigners employed Switzerland continued to rise. This led to societal tensions and to the introduction of a second popular initiative against the excessive number of foreigners in the country. This initiative was submitted on 20 May 1969 by “Nationale Aktion” (formerly the “*Mouvement national contre la surpopulation étrangère du peuple et de la patrie*”). It became known as the Schwarzenbach initiative after its orchestrator James Schwarzenbach, a member of the Swiss National Council representing Nationale Aktion and a predominant right-wing publisher. The Schwarzenbach initiative was even stricter and more demanding than the 1st initiative¹⁹ which it replaced, requiring that the

17 M. Cerutti..., *op. cit.*, pp. 125-126.

18 *Ibidem*, p.128-129.

19 The previous initiative assumed an introduction of the following entry to the Federal Constitution: “The number of foreigners residing or staying in the Federal territory shall not exceed 10% of the entire domiciled population. To prevent a dangerously excessive number of foreigners, the number of foreigners staying in Federal territory, until this regulation comes into force, shall be reduced by at least 5% annually until the allowed maximum is reached, taking into account humane considerations. Economic needs are also to be considered. Each year the Federal Council shall decide the reduction to be executed in each canton. The federal insti-

number of foreigners in each canton be limited to 10% of the population, with the one exception being the Canton of Geneva, where the number of foreigners allowed amounted to 25%. The Schwarzenbach initiative was submitted to public vote on 7 June 1970. The vote aroused considerable public interest which reflected in the electoral turnout of 74.7%. However, despite the efforts of National Aktion, the proposal was rejected – 654,844 votes “Against” (54%) compared with 557,517 votes “For” (46%). In fact it was accepted by only six cantons and two half-cantons.²⁰

Swiss migration policy in the 1950s and 1960s is regarded as having been liberal, mostly so to satisfy the country’s economic needs. Nevertheless, from the perspective of national policy, the possibility to integrate foreigners should have been limited mainly by strict regulations related to naturalisation. From the long-term aspect of events, which span more than half a century, with the benefit of hindsight it can be stated that this liberalism, regardless of the motives that lay behind it, was an important factor in laying the groundwork that led to the explosive increase in the number of foreigners in Switzerland in the decades to follow. It is worth reminding that in 1950 approximately 6% of Switzerland population consisted of foreign nationals, while in 1970 it had risen to as much as 17%.²¹

The unprecedented scale of immigration that ensued aroused considerable anxiety among the Swiss. The presence of such a large number of “aliens” who were nationals of large and powerful countries surrounding Switzerland, seemed to confront this small pluralistic nation with grave potential danger.²²

tution appointed by the Council shall revoke residence permits as the need arises.” However, this particular initiative was never submitted to referendum.

20 H. Mahnig, E. Piguet, *op. cit.*, pp. 29-31.

21 The statistical data of the Swiss Federal Statistical Office access 20.02.2014 <http://www.bfs.admin.ch/bfs/portal/fr/index/themen/01/07/blank/key/01/01.html>

22 K.B. Mayer, Post-war migration to Switzerland, *International Migration 1965*, Vol. 3 (3), p. 122.

2. Migration policy in the 1970s and 1980s

In the early 1970s the population of Switzerland, for the first time in the country's history, was host to over one million foreign nationals, half of whom were Italians; less numerous were nationals of Germany and France.²³ Under those circumstances, the initiative of Schwarzenbach presented a highly dangerous political crisis in Switzerland, one that is deemed to be the most serious the country has had to face in its post-war history. Failure of the initiative would not be significant, but its success would have resulted in the expulsion of over 200,000 foreigners from the Confederation and would have exposed Switzerland to allegations of serious breach of the European Convention on Human Rights, especially in relation to family reunification.²⁴

In those circumstances, the Federal Council undertook further actions to limit the influx of foreigners. The first was the Order of 16 March 1970²⁵ which, for the first time, introduced quotas that placed an annual upper limit on the number of foreigners allowed to enter the country. A primary means of entry, the one with by far the largest quota, was the so-called seasonal permit. Seasonal permits allowed foreigners to be employed in a classified seasonal occupation for a maximum of nine months, after which they then had to leave the country.²⁶

The Order of 16 March 1970 was worded in the following terms: This Order instructs employers to announce to municipalities' population offices the end of all work contracts with foreign employees and landlords to do the same in respect to foreign tenants. Based on the number of foreigners who left the country during the preceding year and following informal contacts with business and cantons' representatives, the federal administration first identifies the annual quota for new permits. In a second phase, the allocation of these permits across the country is organized through consultations and negotiations with social partners and political parties. Every November 1, the Government announces

23 E. Piguet, *L'immigration en Suisse. Cinquante ans d'entrouverture*, Lausanne 2004, pp. 29-31.

24 M. Cerutti, *op. cit.*, p. 132.

25 Government Order on Announcing the Departure of Foreigners.

26 L. Becker, T. Liebig, A. Souza-Poza, *Migration Policy and Industrial Structure: The case of Switzerland*, Migration 2008, Vol. 46 (2), p. 83.

the number of work permits to be available for the next 12 months and its geographical distribution. Initially, a number of permits are allocated to enterprises in cantons, which suffer from an acute shortage of labour and have filed a request. Then, another allocation is made to the cantons proportionately to the population with the distribution of these permits organized by local authorities. By managing the allocation mechanism closely and exempting some industries from the quota system (public health, teaching and agriculture), the Government once again tries to reconcile the needs from a booming economy which in the three preceding years (1967-1969) has been growing at an average of 5.2%, and pressures from organisations commonly referred to as *xenophobic groups* which regularly threaten to use the initiative right to generate a popular consultation on the issue of “overcrowding by foreigners”. In the first two years, 1970/71 and 1971/72, around 20,000 new annual work permits were allocated, a sharp drop from the preceding years before quotas were introduced²⁷.

This solution, being an autonomic action of the government, was little more than a compromise between the interests of employers and cantonal governments, and increasing hostility towards foreigners among a growing majority of the population.²⁸ Given the prevailing circumstances, the order seemed a logical action; in the event it was to shape migration policy in Switzerland until the present day. It was based on achieving a workable balance between the interests of enterprises in need of a skilled and cheap labour force, and mitigating the demands of xenophobic groups expressing their opinions via the instrument of direct democracy – the referendum. Parliament in this regard stands aside from migration policy, which remains exclusively the concern of government.²⁹

27 D. M. Gross, S. Fraser, *Immigration Policy and Foreign Population in Switzerland*, 2006, pp. 10-11, access 20.02.2014 <http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-3853>
H. Mahnig, E. Piguët, *op. cit.*, p. 73-75, E. Piguët, *L'immigration en Suisse. Cinquante ans ...*, *op. cit.*, Lausanne 2004, pp. 78-79.

28 H. Mahnig, *Between economic demands and popular xenophobia: the Swiss system of immigration regulation*, (in:) A. Böcker, (eds.) *Regulation of Migration, International Experiences*, Amsterdam 1998, pp. 174-190.

29 H. Mahnig, *La politique migratoire de 1970 au milieu des années 1980*, (in:) H. Mahnig (ed.) *Histoire de la politique de la migration, d'asile et d'intégration en Suisse depuis 1948*, Zurich 2005, p. 137.

Despite efforts to introduce some changes, the policy was maintained until the mid-1980s. During this period three distinct phases can be identified. The first phase, from the beginning of the 1970s (based on the order of 16 March 1970), was highly politicised with the migration issue becoming the subject of three consecutive xenophobic initiatives. However, those initiatives did not lead to any material change in migration policy as it stood. The second phase resulted from the economic crisis in Europe that reached Switzerland in 1974. This changed the situation dramatically with many migrants returning to their respective homelands. The third phase began in the late 1970s and was characterised by the wave of criticism levelled at Switzerland's excessively repressive migration policy, expressed not only by left wing politicians but also by the immigrants themselves, and by some efforts to introduce subsequent reforms.³⁰

The economic crisis that reached Switzerland with some delay, was the first factor to cause a significant decrease in the number of employed foreigners. In the industrial sector alone 15.8% of employees were dismissed between 1974 and 1977. In total, the reduction of employment in all sectors amounted to 10%. However, due to restrictive provisions on the legalisation of foreigners' stay, Swiss nationals were largely saved from unemployment. Dismissed foreigners were not granted renewed stay permits and thus were forced to leave the country. Therefore, and unlike other European countries, Switzerland "exported" the unemployment resulting from the economic crisis, this way saving the workplaces for the Swiss³¹ (in this period unemployment increased from 0% to 0.7%).³² According to the statistical data of the Federal Office of Industry, Art, Trade and Labour 340,000 people lost employment, including 228,000 foreigners (i.e. 67%). Hence, in five years, the number of foreigners resident in Switzerland fell from 18% to less than 16%.³³ Swiss policy in this regard raised numerous controversies; also ethical ones from the standpoint of affected individual's who, having lost their job, could not stay in Switzerland

30 *Ibidem*, pp. 137-138.

31 H. Mahnig, E. Piguet, *op. cit.*, pp. 81-82.

32 H. Mahnig, La politique migratoire de 1970..., *op. cit.*, p. 154, E. Piguet, L'immigration en Suisse. Cinquante ans..., *op. cit.*, p. 39.

33 H. Mahnig, E. Piguet, *op. cit.*, pp. 82-83.

to look for another. Likewise it impacted on other countries affected by the crisis, that had to cope with a large number of their own citizens returning home.³⁴

The third and final phase of this period was characterised by numerous initiatives of the people aimed at further implementation of the policy against *overforeignisation*, however, those initiatives turned out to be ineffective and all were rejected by the society. Nevertheless, in that period, there was a political turn of events in which the foreigners themselves produced their initiative. This initiative, “*Etre solidaire*”, was presumed to be a counterweight to xenophobic concepts and the policy against *overforeignisation*, and it was strongly supported by Christian and social circles as well as by left-wing politicians. The idea of stabilising policy for foreigners was submitted to a referendum. The idea assumed that foreigners who obtain a stay permit would have equal rights to Swiss citizens (excluding political rights) because integration should mean equal social and civil rights (e.g. freedom of speech or association). The initiative was rejected by a crushing majority of votes in the referendum of 1981 (84% of the electorate voted against it). However, the the defeat was not taken lightly. The issue continued to be pressed and a further two referenda were held, the first in 1982 and the other in 1983. Amendments to the provisions which aimed to facilitate the naturalisation of the so-called second generation of immigrants, was put to the last vote.

It may be concluded that until the mid-eighties the *status quo* of Swiss migration policy formed in the era of crisis was maintained.³⁵ In the aforesaid period there was a decrease in the number of foreigners staying in Switzerland – slightly below 15%.³⁶

34 See: H. Mahnig, *La politique migratoire de 1970....*, *op. cit.*, Zurich 2005, p. 154.

35 *Ibidem*, pp. 158-159.

36 Statistic data from Swiss Federal Statistic Office, access 20.02.2014 <http://www.bfs.admin.ch/bfs/portal/fr/index/themen/01/07/blank/key/01/01.html>

3. Migration policy at the end of the 1980s and in the 90s

The second half of the 1980s brought significant political changes to Europe that affected the shape of new migration policy. This was the period in which a significant influx of people applying for refugee status occurred. Many were not treated properly by the respective receiving authorities and the situation as a whole was badly managed, which raised negative attitudes in the society. In Switzerland, despite the fact that the authorities continued to pursue the state's restrictive migration policy, hosting refugees became a political issue in the context of migration. Moreover, at that time Switzerland was not party to the integration process in Europe and therefore beyond the regulations relating to the free movement of people. Different opinions on Switzerland drawing closer to the European Union divided both politics and society alike, and the question of migration, viewed by many as central to the issue, became one of the greatest concerns. Moreover, the migration policy grounded in encouraging the immigration of low-skilled workers, was criticised as being detrimental to national economic interests. The development of international law on asylum and counteracting racism (the International Convention on the Elimination of All Forms of Racial Discrimination) was regarded as the last straw, and one which would affect the structuring of Swiss migration policy significantly.³⁷

In the course of the 1980s, the traditional emigration countries of Southern Europe experienced a marked economic upturn, which served to reduced the number of people willing to work abroad. This placed those countries in a good position to negotiate with the competing immigration countries, and as a result they managed to substantially improve the conditions of employment for their respective nationals working abroad. In 1989, under pressure from the Spanish government, the minimum length of stay necessary to obtain a long-term residence permit for Spanish workers in Switzerland was reduced from ten years to five years (in line with the Italian agreement of 1964). A year later

37 H. Mahnig, *La politique migratoire du milieu des 1980 jusqu'à 1998*, (in:) H. Mahnig (ed.) *Histoire de la politique de la migration, d'asile et d'integration en Suisse depuis 1948*, Zurich 2005, p. 160.

the same dispensation was granted to the Portuguese, who were then treated in the same way as their Spanish and Italian counterparts. This accelerated the phenomenon of stabilisation in the foreign population, which had already started in the 1970s. During the 1970s and 1980s, the foreign population in Switzerland climbed to one million.³⁸ In 1970, the share of permits limited to one year was 70% in the active resident foreign population with 30% of permits being long-term. By 1990, the issue of long-term permits risen to 75%. Additionally, as the foreign population as a whole is now qualified to receive unemployment benefits, the ability of government to adjust foreign population levels to fit economic constraints by not renewing annual permits disappears. These changes significantly stiffen the whole immigration system.³⁹ Equally the practice of using foreign manpower levels as a buffer against prevailing economic circumstances becomes no more than a souvenir. Thus, the economic interest of strong immigration in a period of growth decreases heavily due to the risk of a surge in unemployment coinciding with an economic downturn.

A second change linked to the international context, was the growing isolation of Switzerland regarding the European integration process. It was a contentious issue but one that politically was perceived as being of crucial importance to determine conclusively. According to the pro-European advocates, Switzerland should strengthen its links with Europe and conclude a free-movement agreement. Such an agreement would put an end to the guest and seasonal workers system still supported by a large share of the economy. Conversely, those who were anti-immigration feared that such an agreement would lead to a massive inflow of foreign workers due to Switzerland's exceptionally low level of unemployment. As H. Mahnig claims that many authors reject this last hypothesis, but it heavily influences political and popular debates and gives a new strength to xenophobic and national movements. Thus, Switzerland's relationship with the EU became one

38 Population résidante permanente selon la catégorie de nationalité et le sexe, à la fin de l'année, Federal Statistical Office, access 27.04.2014 <http://www.bfs.admin.ch/bfs/portal/fr/index/themen/01/02/blank/data/01.html>

39 E. Piguet, Economy versus the people ? Swiss immigration policy between economic demand, xenophobia and international constraint, (in:) M. Giugni, F. Passy (eds.) Dialogues on Migration Policy, Oxford 2006, p. 79.

of the most polarising questions of national policy during the 1990s. Immigration was central in a debate that did not follow the traditional divisions of the past. For the first time the economy was divided between those who favoured more openness toward Europe and those who preferred to retain the flexibility afforded by the guest-worker system.⁴⁰

A third change has to do with the influence of international law on the margin for action by the Swiss government regarding migration. This factor had only played a minor role in the past. However, it takes more and more importance as shown by three examples as following:

1. Freedom of movement : The Fourth Protocol to the European Convention of Human Rights provides that everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.⁴¹ Such liberty was not granted by Switzerland to seasonal and annual workers, which placed the country in the difficult situation of being one of the few nation states unable to sign the protocol.
2. National preference: The U.N. International Convention on the Elimination of All Forms of Racial Discrimination, ratified by Switzerland in 1994, gives more strength to claims concerning the selectivity of Swiss immigration policy.
3. Asylum: International norms concerning asylum and especially the “non-refoulement” provision embodied in many declarations ratified by Switzerland compel the country to accept a new form of immigration whose economic advantages appears weak, the asylum seekers.

Because of the evolving international context, Swiss immigration policy loses much of the flexibility it enjoyed in the past. It also loses specificity and has to adapt its choices to common international norms.

40 H. Mahnig, La politique migratoire du milieu des 1980..., *op. cit.*, pp. 160-161.

41 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg, 16.09.1963.

Not only the international context but also the evolution of immigration motives affected Swiss migration policy. It has to be remembered that annual quotas of immigration refer only to workers and have no direct influence on other forms of immigration. At the beginning of the 1970s, the large majority of immigrants were indeed workers, but the proportion of non-occupied persons (pensioners and people arriving through family reunification) has grown progressively since that time. Since 1991, the share of non-occupied immigrants entering Switzerland each year exceeds 50%. This evolutionary process undermines the effectiveness of the quota policy. It also disassociates the volume of migrant flows derived from the needs of the economy because these new forms of immigration continue during economic downturns. From migration mainly determined by manpower demand (pull migration), Switzerland is gradually evolving towards migration determined by supply (push migration) that is disconnected from the country's economic needs.

A new category of immigrant, not subject to the quota system, takes on additionally more and more weight: the asylum seeker. Starting from a few thousand a year, at the beginning of the 1980s, the number of asylum requests climbed to more than 35,000 in 1990 and 41,000 in 1991. The government faced significant difficulties in dealing with this rapid growth. It denounced the existence of "false refugees", while at the same time failing to speed up the processing of asylum requests and execution of decisions. This situation led to a loss of credibility in asylum policy and of all immigration policy in the opinion of the public, offering xenophobic movements a new battleground. Although many reforms of the asylum policy in the following years aimed to restrict access to the asylum procedure, the issue has become central to all debate on immigration policy.⁴²

The third evolution, which tends to alter the context of development of immigration policy, is the growing impression of an "integration problem" among the foreign population. This perception is not empirically sound and is mainly disseminated by the popular media and opportunistic political movements. One of the few documented truths

42 E. Piguet, *L'immigration en Suisse. Soixante ans d'entrouverture*, Lausanne 2013, pp. 78-79.

of the phenomenon is the growing difficulty faced by several foreigner groups on the labour market. The unemployment rate among nationals grew rapidly during the economic downturn of the mid-1990s. In December 1996 the unemployed rate of Swiss citizens was 3,7% while for the foreign contingent it reached a mean of 10.8%. It varied from 1.6% for Northern European citizens to 7.8% for Italians, 11% for Portuguese, 17.3% for Turks, and 21.3% for people originating from former Yugoslavia.⁴³ This situation reinforced a growing sentiment of dissatisfaction towards immigration policy.

The three evolutions that were just traced, sent Swiss immigration policy into turmoil. The quota set each year seems unable to offer a suitable compromise between the aim of containing the foreign population and providing sufficient flexibility to the economy. The interests of the economy, clearly oriented in the past toward an open-door policy, are becoming more complex. Several sectors still ask for the immigration of low-skilled low-paid foreign workers, but these workers meet growing difficulties on the labour market as soon as they attempt to change their activity or region of work. The increasing share of the foreign population entitled to a long-term residence permit has the consequence of increasing the welfare and unemployment cost of immigration for the whole economy. Numerous enterprises would therefore prefer to target high-skilled immigrants. Several scientific studies go in the same direction and strongly criticise past immigration policies. According to these studies, the inflow of low-qualified foreign workers imposes a burden on the economy and, in the long run, constitutes a bad choice for the national economic interest as a whole. As Thomas Straubhaar remarks: “All in all, the economics, the economic benefits of the Swiss labour-market immigration policy remained insignificant”. The arrival of new actors, the immigration experts, in the political arena, is relatively new in Switzerland and will have an influence on the balance of power by increasing the weight of national economy as a whole against sectoral and regional interests.⁴⁴

43 E. Piguet, *Economy versus...*, *op. cit.*, p. 81, see more: Le chômage en Suisse dans les années sonante, Thème du mois 9 La Vie économique, Revue de politique économique 2001, No. 6, p. 6.

44 See: H. Mahnig, *La politique migratoire du milieu des 1980...*, *op. cit.*, p. 184.

Attempting to answer these new challenges, the Swiss government explored three directions of reform, two were experimented with and then partially abandoned, and the third chosen for future immigration policy.

4. Migration policy at the end of the 20th century

Since the mid-1990s, in reaction to the growing flow of asylum requests, several actors made the proposal to merge the traditionally distinct asylum and immigration policies. In January 1989, a governmental working group had already made that proposal under the title “Strategy toward a refugee and asylum policy for the nineties”.⁴⁵ Their central argument was that the reasons for migration were now too complex to distinguish between economic and politically motivated migration. Predicting that migration toward Europe was bound to increase in the not too distant future, they proposed to establish, once and for all, the total number of foreign nationals who could live in Switzerland. To achieve this, a migration balance would be calculated every two years. In the event of an influx of refugees or an upsurge in family reunifications, the number of workers admitted would be decreased to maintain the *status quo* and *vice versa*.

This proposal can be seen as an attempt to generalise the old model of a global ceiling by applying it not only to foreign workers but to the foreign population as a whole. It was viewed as adding more weight to the objective of fighting “overforeignisation” against economic aims.

It failed to be implemented for two reasons: First, it could not guarantee to satisfy the needs of the economy, particularly in terms of meeting required manpower levels (e.g. the trade-off in numbers between productive and non-productive immigrants). Second, the policy imposed a quota on refugees and family reunifications that might conflict with international commitments that Switzerland is party to. The failure of the proposal illustrates the growing importance of the international context, this time in association with economic interests.

45 See: Groupe de réflexion interdépartemental, DFJP, DFAE, DFEP, Rapport pour une stratégie pour la politique des années 90 en matière d’asile et de réfugiés, Berne 1989.

The Swiss authorities were quick to realise that the implementation of a global migration balance is impossible. In another report, the “Report on policy towards foreigners and refugees” published in 1991, representatives of the federal administration once more attempted to conciliate two contradictory aims: liberalising migration within the EU while at the same time putting to rest the fear of “overforeignisation” expressed by a large proportion of the country’s population. Their proposal was referred to as the “three circle model”. A first geographical circle includes the EU and the European Free Trade Association countries and should benefit from the free circulation model with Switzerland. A median circle includes the United States, Canada and Eastern European countries. These countries are considered “culturally close” and should benefit from immigration opportunities according to the needs of the economy. Finally, the citizens of an “eternal circle” grouping all other states should not be able to migrate to Switzerland except in very specific cases. This proposal is based on the idea that the number of immigrants alone does not lead to xenophobic sentiment among the national population, whereas the “cultural distance” between immigrants and the native population does. It is, therefore, possible to admit more EU nationals provided that the number of people coming from more distant regions is strictly limited.⁴⁶ This proposal is reminiscent of the old ethnic selection policies practised by the United States and Australia but was accepted by a large proportion of Swiss political forces and implemented immediately at the beginning of the nineties. It can be considered a new compromise between the demands of economy, the pressure of anti-foreigner groups, and the international context.⁴⁷

Within a very short period of time, the three circles model had a direct impact on immigration patterns. In September 1991, the Federal Council relegated Yugoslavia – a traditional immigration country of

46 E. Piguet, *L’immigration en Suisse. Soixante ans...*, *op. cit.*, pp.78-79. See C. Amarelle, *Les migrations économique sans statut légal: l’environnement normatif des sans-papiers*, (in:) C. Amarelle, M. S. Nguyen (eds.) *Migration et économie. L’accès des étrangers à la vie économique: les normes et leur application*, *Pratiques en droit des migrations*, Berne 2010, p. 127 ff., J. Krepelka, *Politique migratoire: le retour nécessaire au réalisme*, Institut Libéral 2009, p. 10. <http://www.libinst.ch/publications/IL-Krepelka-Immigration.pdf> access 20.11.2014.

47 E. Piguet, *Economy versus...*, *op. cit.*, p. 83.

the 1980s – to the third circle. The citizens of Yugoslavia were thus no longer allowed to immigrate to Switzerland, even though at the time 50,000 of their number were still in active employment as seasonal workers. They were required to leave Switzerland by the end of the year and would not be allowed to return. This decision met with strong but unsuccessful opposition from the trade unions (protesting in support of the Yugoslav workers), as well as from the hotel and catering industry in which the majority of them were employed – the fact that this industry was unable to exert influence on the decision is a symptom of how much power this economic actor had lost. In contrast with the 1960s, activities with low levels of added value and capital intensity were no longer considered representative of the interests of the Swiss economy as a whole.⁴⁸ However, this new policy could not, and did not, prevent unwanted migrants from arriving. During this period, the third wave of migrants appeared, mostly refugees from the former Yugoslavia, accompanied by a lesser number from Africa. Concurrently, there was also an influx of high-skilled workers, mainly from neighbouring countries.⁴⁹

The three circles model operated for several years but quickly came under attack from two new fronts. The first was from multinational corporations, industry, and high-tech sectors of the country's economy. These very internationalised activities required to recruit highly qualified manpower from the global labour market not just from within defined geographical circles. The second critique came in 1996 from the Federal Commission against racism created after the ratification by Switzerland of the U.N. Convention on the Elimination of Racial Discrimination in 1994.⁵⁰ The report, "New conception of migration policy" of 1997, was based on the future implementation of free movement of people between Switzerland and the EU. It was recommended therein to withdraw from the three circles concept and to grant immigrants points depending on their level of education,

48 See R. Fibbi, *Politique d'asile et questions migratoires*, *Annuaire Suisse de politique de développement*. Faits et statistiques 2005, Vol. 24, No. 1, p. 187 ff. E. Piguët, *Economy versus...*, *op. cit.*, p. 87.

49 P. Kohler, *Cultural Integration in Switzerland*, (in:) Y. Algan, A. Bisin, A. Manning, T. Verdier (eds.), *Cultural Integration of Immigrants in Europe*, Oxford 2012, p. 215.

50 E. Piguët, *Economy versus...*, *op. cit.*, p. 87.

professional experience, age, language knowledge, and possibility of professional adjustment (the so-called “points system”).⁵¹ In 1998 the government agreed upon the recommendations of the Committee of Experts on Migration, accepting the two circles model and rejecting the points system. This was the basis for integration with the European Union.⁵²

In the summer of 1999, the member states of the European Union and Switzerland signed seven bilateral agreements including the Agreement on the Free Movement of Persons, which came into force on 1 June 2002.

The first package of agreements, known as *Bilaterals I*, was composed of seven sectoral agreements covering: free movement of persons,⁵³ technical barriers to trade, public procurement markets, agriculture, research, civil aviation and overland transport.⁵⁴ The eye-catcher here was the Agreement on the Free Movement of Persons as requested by the EC.⁵⁵ More than one million EU citizens live in Switzerland (amid a population of slightly more than 6 million Swiss citizens) along with over 200,000 EU nationals, “*les frontaliers*”, who daily cross the border to work in the country. This agreement was the sole “mixed agreement” of the package; from the EU’s side, an agreement that the EC *and* its member states sign. As a consequence of the agreement, EU enlargement after the entry into force of *Bilaterals I*, required Swiss approval for the application of the Agreement on the Free Movement of Persons to new EU member states. For the EU enlargements of 2004 and 2007, Switzerland agreed to extend the Free

51 Commission d’experts en migration, *Une nouvelle conception de la politique en matière de migration*, Berne 1997. See R. Fibbi, S. Cattacin, *Vers une internationalisation de la politique migratoire suisse?*, *Revue européenne des migrations internationales* 2000, No. 16, pp. 125-146.

52 H. Mahnig, *La politique migratoire du milieu des 1980...*, *op. cit.*, pp. 185.

53 See: A. Afonso, *The Domestic Regulation of Transnational Labour Markets: EU Enlargement and the Politics of Labour Migration in Switzerland and Ireland*, (in:) L. Bruszt, R. Holzacker (eds.) *The Transnationalization of Economies, States and Civil Societies: New Challenges for Governance in Europe*, New York 2009, pp. 83-106, A. Balch, I. Fellini, A. Ferro, G. Fullin, U. Hunger, *The political economy of labour migration in the European construction sector*, *IMIS-Beiträge* 25, 2004, pp. 179-200.

54 For text of these agreements, see 2002 O.J. (L 114) 1 [hereinafter *Bilaterals I*].

55 Agreement Between the European Community and its member States, of the One Part and the Swiss Confederation, of the Other, on the Free Movement of Persons, June 21, 1999, 2002 O.J. (L 114) 6 [hereinafter Agreement on the Free Movement of Persons AFMP].

Movement of Persons Agreement through common referendum. The various agreements encompassed by *Bilaterals I*, notwithstanding their great diversity, were interconnected through the famous “guillotine clause”, which stipulated that all agreements had to enter into force simultaneously and all would be collectively terminated should any one agreement be terminated.⁵⁶

Freedom of movement of employed persons was introduced in a *stepwise manner* with continuing liberalisation. In particular, five years after ratification of the agreement, Switzerland abolished all quotas for EU nationals. In case of a massive influx of EU nationals, safeguard clauses allow Switzerland a unilateral cancellation of the treaty for up to twelve years after the agreements came into force. However, should such measure be implemented this would automatically end all of the agreements included in *Bilaterals I* under the provisions of the guillotine clause.⁵⁷

Its continuation was confirmed in the referendum of 8 February 2009. As a result of the EU’s enlargement of ten new member states on 1 May 2004, the agreement was supplemented by an additional protocol containing provisions for the gradual introduction of free movement of persons in those states. The protocol came into force on 1 April 2006.⁵⁸ Following the accession of Bulgaria and Romania into the EU on 1 January 2007,⁵⁹ the agreement was supplemented with a similar protocol which entered into force on 1 June 2009.⁶⁰

The beginning of the 21st century was an important period from the point of view of migration policy insofar that a new Foreign Nationals

56 M. Maresceau, EU – Switzerland: QUO VADIS?, Georgia Journal of International and Comparative Law 2010-2011, Vol. 39:727, pp.733-734.

57 T. Liebig, *op. cit.*, p. 14, P. Koch, S. Lavenex, The (contentious) human face of Europeisation. Free movement and immigration (in:) C.H. Cluve (ed.), Switzerland and the European Union, London and New York 2007, pp. 155-157.

58 The additional protocol regarding the 2004 EU enlargement was approved on September by a majority of 56%. Swiss Confederation, <http://www.admin.ch/ch/fi/pore/va//20050925/index.html>, access 22.01.2013.

59 On February 8, 2009, the extension of the Agreement on Free Movement of Persons to Bulgaria and Romania was approved in a referendum by a majority of 59.6%. Swiss Confederation, <http://www.admin.ch/ch/fi/po re/va//20090208/index.html>, access 22.01.2013.

60 Federal Department of Foreign Affairs FDFA, Federal Department of Economic Affairs FDEA, Integration Office FDFE/FDEA, Integration Office FDFE/FDEA, European Nationals in Switzerland. Information on the Free Movement of Persons, Berne 2011, p. 4.

Act came into force.⁶¹ The three main reasons for introducing the new act need to be mentioned. First, the previous Federal Act on the Residence and Permanent Settlement of Foreign Nationals of 1931 was obsolete and over 70 regulations had been added since its introduction. The Act only provided for the general framework of the law on foreigners with specific provisions being covered by the regulations. Moreover, the new Federal Constitution of the Swiss Confederation⁶² in Art. 164 (1) (b) and (c) states that “All significant provisions that establish binding legal rules must be enacted in the form of a federal act. These include in particular fundamental provisions on: (...) the restriction of constitutional rights, (...) the rights and obligations of persons”. Therefore, the then binding law in the scope of the law on foreigners *sensu largo* did not satisfy the constitutional requirement of being a federal act.

An initiative of the Federal Council was the second reason. It aimed at undertaking legislative steps which would regulate the issues of migration comprehensively in Switzerland. In the event, however, no uniform legislative act was adopted in that regard.

The actions of the Federal Council against the popular initiative of 2000 “For the regulation of immigration” which assumed a reduction in the immigrant population of Switzerland by 18%, was the third reason for enacting the new legislative act. On the basis of another xenophobic initiative and further social debate on the limitation of immigration, Parliament found it necessary to revise the act. The supported bill would limit migration from third countries (non-EU and non-EFTA states), eliminate the abuse of immigration procedures, and allow Switzerland to expel illegal residents. Simultaneously, the aim was to create an instrument for the integration of foreigners, therefore,

61 The Federal Act on Foreign Nationals of 16 December 2005, came into force on 1 January 2008, amended by No. 1 of the Federal Act of 16 December 2016 by adding regulations on integration. In the result the current title is Federal Act on Foreign Nationals and Integration (Foreign Nationals and Integration Act, FNAI) of 16 December 2005, OC 142.20, hereinafter referred to as FNAI.

62 Federal Constitution of the Swiss Confederation of April 18 1999, SR 101.

the legislative works on the new act regulating foreigners' stay also included amendments to the Citizenship Act.⁶³

On 16 December 2005 the FNAI was adopted and entered into force on 1 January 2008. The act mainly regulated the entry and stay of third country citizens. It also introduced new solutions in three areas. The free movement of persons between Switzerland and EU and EFTA member states was introduced in 2002 by way of an admission system. Citizens of third countries would be permitted to work but only where it can be demonstrated that no suitably qualified domestic employee or citizen of an EU or EFTA state could be found to fill the vacancy. In the area of integration, the FNAI assumes the improvement of the situation of foreigners staying legally for a longer period. The possibility to change profession or place of residence was facilitated. At the same time, it mitigated the conditions for family reunification. The possibility to obtain a permit to stay after 5 years (reduced from 10 years) was introduced in cases where a foreign national makes an effort to integrate and has attained a sound working knowledge of a Swiss national language.

The last area concerns the legal solutions directed at public order protection. Provisions aimed at combating crimes and abuse under the FNAI have been introduced, including severe penalties for trafficking persons, illegal employment and marriages of convenience.⁶⁴

5. Migration policy at the beginning of the 21st century

The constellation of factors, which characterizes Swiss immigration policy at the beginning of the twenty-first century, are quite different to those at the close of the previous one. From a clear opposition between the interests of the economy and the popular fear of “overforeignisation”, the situation has eased away from confrontation toward compromise and the creation of a new alliance. The dominant

63 G. Malinverni, Le projet de loi fédérale sur les étrangers, Semaine judiciaire 2000, No. 12, pp. 410-412.

64 Access 01.05.2014 https://www.bfm.admin.ch/bfm/fr/home/dokumentation/rechtsgrundlagen/abgeschl_gesetzgebungsprojekte/auslaendergesetz.html

sectors of the economy, as well as the majority of the population previously hostile to extensive immigration, have agreed to a new policy of free circulation in Europe, but with strict controls being applied to immigration from third countries. This trade-off should allow most of the economic needs of the country to be met, while protecting against the uncontrolled flow of migrants from beyond the EU and EFTA states. Several sectors of the economy and the extreme right-wing of anti-immigration groups have lost out in this compromise but their influence has greatly diminished and they now lack the strength to counteract.⁶⁵

However, while the long-standing problems associated with immigration in Switzerland have largely been laid to rest domestically, that is not to say that the new policy is free of threat. The evolution of international law imposes, to a growing extent, policies which neither the national economy nor a majority of the population would have chosen. Anti-immigration groups were quick to recognise this both as a weakness and as a threat. Thus, more so than immigration policies *per se*, nowadays it is Switzerland's participation in the international system that is their target.⁶⁶

The thesis of E. Piquet, is that governments trying to formulate an immigration policy are caught between economic demands and populist xenophobia,⁶⁷ a fact confirmed by Swiss experience in this regard. The evolving economic interests remain dominant, although somewhat losing strength during the period. The old antagonism between these two dimensions has been narrowing constantly and the new important determinant of Swiss policy is now the international context. It imposes a margin of autonomy on the country that, although still substantial, is becoming smaller. His hypothesis is that these main features and trends are common to many other immigration countries. In that sense,

65 E. Piquet, *L'immigration en Suisse. Cinquante ans...*, *op. cit.*, pp. 70-71.

66 E. Piquet, *Economy versus...*, *op. cit.*, p. 87.

67 See: H. Mahnig, A. Wimmer, *Country-Specific or Convergent? A Typology of Immigrant Policies in Western Europe*, *Journal of International Migration and Integration*, 2000, Vol. 1, No. 2, pp. 198-199.

Switzerland, contrary to its frequent auto-definition, is no longer *ein Sonderfall*^{68 69}

The Swiss nation took a very important decision on 9 February 2014, when the people adopted a popular initiative aimed at stopping mass immigration. It thereby expressed its support for a further change of system in Switzerland's immigration policy. The new constitutional provisions stated that: "immigration should be restricted by means of quantitative limits and quotas."⁷⁰ The Federal Council will set to work on implementing these without delay. Until the relevant implementing legislation comes into force, the free movement of persons between the EU and EFTA member states and Switzerland applies as before".⁷¹

As we look back over the history of Swiss migration policy, the 2014 Initiative is not surprising. It was the 8th of its kind on anti-immigration since 1968:

1. 1968: Initiative "Anti-foreign penetration" – abandoned;
2. 1970: Initiative "Anti-foreign empire (Schwarzenbach)" – refused by 54%;
3. 1974: Initiative "Anti-foreign empire and Switzerland overpopulation" – refused by 65,8%;
4. 1977: Initiative "To protect Switzerland" – refused by 70,5%;
5. 1977: Initiative "To limit the number of naturalizations" – refused by 66,2%;
6. 1988: Initiative "Against overforeignisation" – refused by 67,3%;
7. 2000: Initiative "For regulation of immigration" – refused by 63,8 %⁷²;

68 German term frequently used in Swiss political discourse to describe a supposed irreducible specific attribute of the country.

69 E. Piguet, *L'immigration en Suisse. Cinquant ans...*, *op. cit.*, p. 71.

70 For more on Swiss quota systems see: E. Piguet, H. Mahnig, *Quotas d'immigration: l'expérience Suisse*, *Cahiers de Migrations Internationales* 2000, No. 37, pp. 1-42, S. Hurst, *Comment définir des chiffres maximaux admissibles*, (in:) *Immigration sous contrôle, Avenir Suisse – Avenir spécial* 2014, pp. 7-9.

71 <http://www.admin.ch/aktuell/00726/00727/index.html?lang=enhttp://www.admin.ch/aktuell/00726/00727/index.html?lang=en> access 01.05.2014.

72 E. Piguet, *Economy versus ...*, p. 78. See also U. Windisch *Suisse-immigrés, quarante ans de débats 1960-2001*, Lausanne 2002, pp. 125-141.

8. 2010: Initiative “For expulsion of foreign criminals” – accepted by 52,9%.,
9. 2014: Initiative “Stop mass immigration” accepted by 50,3%.
10. 2014: Initiative “Stop overpopulation. Yes to the sustainable conservation of natural resources” – refused by 74,1%.

Nine months later on 30 November 2014 another popular initiative “Stop overpopulation. Yes to the sustainable conservation of natural resource” was voted on and rejected by 74,1%. This initiative aimed to conserve natural resources. To this end, any increase in Switzerland’s permanent resident population growth attributable to migration should be limited to 0.2% (of the permanent resident population) per year and voluntary family planning should be encouraged as part of international development cooperation programmes.⁷³

On 11 February 2015, the Federal Council took various decisions on the implementation of the new constitutional provisions accepted on 9 February 2014. It approved the draft of the new legislation on foreign nationals and additional measures to make better use of the potential workforce within Switzerland. It also made a final decision on negotiating a mandate with the EU regarding the Agreement on the Free Movement of Persons.

The new article 121a of the Federal Constitution contained two assignments: introducing a new immigration system and negotiating with the EU on an amendment to the Agreement on Free Movement of Persons (AFMP), both requiring to be completed by February 2017.⁷⁴

The immigration system that the Federal Council devised contained annual quantitative limits and quotas for all foreign nationals and the provision that Swiss residents should be given priority when recruiting new staff. The admission of EU citizens would be regulated by the AFMP as before but with the Agreement amended in line

73 See <http://www.parlament.ch/f/wahlen-abstimmungen/volksabstimmungen/volksabstimmungen-2014/2014-11-30/ecopop/Pages/default.aspx> access 16.02.2015.

74 Département fédéral de l'économie, de la formation et de la recherche DEFR, Rapport explicatif. Projet de modification de la loi fédérale sur les étrangers. Mise en œuvre de l'art. 121a Cst., Berne 2015, p. 6.

with the constitutional requirements. The results of the negotiations being sought with the EU were therefore key to the draft legislation. For citizens of third countries, the draft legislation submitted for consultation provided for quotas and prioritisation of existing Swiss residents, as was previously the case.

Under the Federal Council proposals, the quantitative limits would apply to any persons staying in Switzerland for a period of four months or more in order to work, i.e. to both standard residence permits and to short-term residence permits. Cross-border commuters, family members, persons who are not working, refugees and temporarily admitted persons were also subject to the quantitative limits. The draft legislation required the Federal Council to stipulate the quantitative limits and quotas. In the general economic interest, no rigid advance target for reducing immigration would be set. The Federal Council based its decision on a survey of cantonal needs and on the recommendations of an immigration commission.

The draft further provided that the decision to prioritise existing residents must be assessed in each individual case. However, exceptions were to be made in professions where there is a proven shortage of qualified workers: in such cases, a detailed assessment is not required. This solution takes account of differences in the jobs markets in the various sectors.⁷⁵

The Federal Council also approved the mandate to negotiate with the EU on amendments to the AFMP. The mandate assigns the task of adapting the Agreement so that Switzerland will be able to control immigration levels autonomously, and limit immigration while safeguarding general economic interests. At the same time, Switzerland will maintain the bilateral path as the basis for its relations with the EU. Under the mandate, both objectives must be pursued equally.

The mandate was welcomed in the consultations by the foreign affairs and political institutions committees of the Federal Assembly and by the Conference of the Cantonal Governments, employers' associations and trade unions. The FDJP and FDFA will conduct

75 *Ibidem*, p. 28.

detailed consultations with the EU over the coming weeks and months. The agreement of the EU and its member states is required before negotiations can begin.⁷⁶

The fear of foreign “overpopulation” is a constant of Swiss immigration policy and constitutes probably its most specific feature. Direct democracy gives it a concrete impact as populist parties have at all times the opportunity of trying to block the government action by putting to the vote a maximum ceiling of foreign population or any other policy measure. Such attempts have been made seven times during the period, the 8th time was successful. It is, therefore, clear that the grassroots movements and xenophobia had a major influence on the formulation of Swiss political discourse in general and that immigration would have been stronger if the government had not constantly monitored the level of xenophobia and simply followed the open-door policy suggested by the economy.⁷⁷

76 https://www.bfm.admin.ch/bfm/en/home/aktuell/news/2015/ref_2015-02-110.html access 16.02.2015 Département fédéral de l'économie, de la formation et de la recherche DEFR, Rapport explicatif. *op. cit.*, pp. 43.

77 E. Piguet, *Economy versus...*, *op. cit.*, p. 85-86.

DEMOGRAPHY OF SWITZERLAND

This chapter presents those aspects which are important for criminological analysis of the criminality of foreigners. This includes the size of the foreign population, its ethnic structure, material status and labour market situation. To successfully analyse the dynamics and structure of criminality among Switzerland's foreign population, it is first necessary to first discuss the demographic situation of the country.

1. Foreigners' immigration in the structure of Swiss population

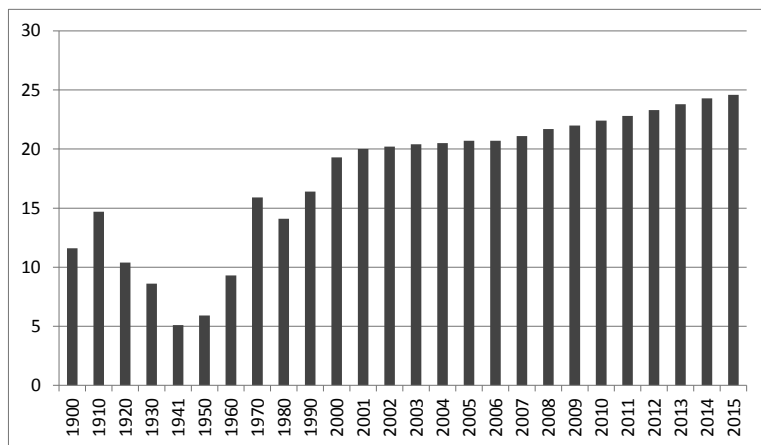
The period from the end of World War II until contemporary times is marked by the mass movement of people in Europe.¹ Many of the migratory and political factors described in the preceding chapter resulted in the fact that, among the European countries, Switzerland now has one of the highest ratios of foreign nationals making up its resident population. Only in Luxemburg and Cyprus is the ratio higher.² If we take absolute figures into account, the number of immigrants in Switzerland is not that considerable when compared with say

1 See: M. Morokvasic, *Rapport de tendances migrations en Europe. Introduction*, *Current Sociology* 1984, Vol. 32, No. 24, p. 1, A. Sakson, *Migracje – fenomen XX i XXI wieku*, *Przegląd Zachodni* 2008, No 2, p. 15, J.E. Zamojski, *Migracje doby współczesnej: geneza charakterystyka, wyzwania i odpowiedzi* (in:) P. Korcelli (ed.), *Przemiany w zakresie migracji ludności jako konsekwencja przystąpienia Polski do UE*, *Biuletyn Komitetu Przestrzennego Zagospodarowania Kraju PAN* 1998, No. 184, pp. 157-158, M. Okólski, *New migration trends in Central and Eastern Europe in the 1990s. How significant, how stable?*, *Prace Migracyjne* 1997, No. 4, p. 16, M. Szonert, *Migracje w Europie Środkowej i Wschodniej*, (in:) S. Golinowska, E. Marek (eds.), *Studia o procesach migracyjnych, Tom I, Charakterystyka procesów migracyjnych*, Instytut Pracy i Spraw Socjalnych Warszawa 1992, Vol. 3, pp. 101-102.

2 Information provided on the basis of Eurostat data, access 13.09.2014 http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics/pl

neighbouring France, nonetheless, in the context of Switzerland's population as a whole the number is significant.

Figure 1. Population of foreigners holding permanent residence permits in the Swiss population 1900-2015 (%)



Source: Federal Office for Migration: *Statistique des étrangers et de l'asile, Vol. 2 résultats rétrospectifs*, Berne-Wabern 2013, p. 45, *La population de la Suisse 2015*, Neuchâtel 2016, p. 7.

Following the cessation of hostilities in Europe in 1945, the number of foreigners residing permanently in Switzerland progressively increased and by 1960 it stood at 495,638. By 2013 it had reached 1,937,447. Throughout that period changes in the number of foreigners showed a consistent upward movement with the exception of one five-year period (1975-1979) in which, when compared with the figures for 1974, the number decreased by 181,000 (c. 17%).³ This reduction coincided with the economic crisis affecting Europe at the time which did not spare Switzerland and which resulted in a significant fall in the number of foreign workers employed.⁴ Nowadays, foreigners

3 Office fédérale de migrations, *Statistique des étrangers et de l'asile. Volume 2: résultats rétrospectifs*, Berne 2012, p. 18 and <http://www.pxweb.bfs.admin.ch/Dialog/Saveshow.asp>

4 H. Mahnig, *La politique migratoire de 1970 au milieu des années 1980*, (in:) H. Maignig (ed.) *Histoire de la politique de la migration, d'asile et d'intégration en Suisse depuis 1948*, Zurich

constitute 24.6%⁵ of the Swiss population a number that has been growing consistently since 1980.

At the beginning of the 20th century, 96% of all foreigners residing permanently in Switzerland were citizens of neighbouring countries. In 1991 they constituted only 44%, and by 2013 this had further reduced to 38%. This results from the fact that citizens from over 190 countries now reside in Switzerland, a demographic change occasioned by numerous factors. The most important of these, stemmed from amendments made to the provisions on acquiring Swiss citizenship. First, some of the provisions which enabled a foreign national to legally acquire Swiss citizenship by concluding a marriage with a Swiss national were repealed. Second, a simplified model of naturalisation for foreigners having a Swiss national as a spouse was introduced. These two factors in combination have resulted in a significant increase in the number of mixed marriages since 1992. The number of marriages in which one spouse possessed Swiss citizenship increased from 10% in 1970 to 40% in 2012. Another factor to affect the national diversity of citizens in Switzerland was the possibility to issue a residence permit on the territory of Switzerland in extreme cases (*fr. Cas individuels d'une extrême gravité*) by virtue of Article 31 of the Regulation on Admission, Residence and Gainful Activity.⁶ Among others, this particular act allowed to issue a permanent residence permit particularly to persons who in the past had applied for refugee status. Therefore, it can be said that the growing national diversity of the foreign population in Switzerland is a consequence of Swiss migratory policy which is reflected mainly in normative regulations but also in the ever-increasing mobility of persons on a global scale.

2005, p. 154, E. Piguet, *L'immigration en Suisse. Cinquante ans d'entrouverture*, Lausanne 2004, p. 39.

5 Data from Swiss Federal Statistical Office "Population – Key figures", access 02.12.2016 <http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/01/key.html>

6 Ordonnance relative à l'admission, au séjour et à l'exercice d'une activité lucrative (OASA) from 24.10.2007, CO 142.201.

Table 1. Foreign permanent⁷ population in Switzerland by nationality from 1980 to 2015

Nationality	1980	1990	2000	2015
All countries	913 497	1 127 109	1 424 370	2 048 667
Germany	87 389	84 458	109 785	300 691
France	48 002	51 759	61 688	122 970
Italy	423 008	381 493	321 795	311 742
Austria	31 986	29 123	29 191	41 145
Spain	98 098	16 987	84 266	82 334
Portugal	10 863	86 035	135 449	267 474
Serbia and Montenegro	-	-	190 940	-
Serbia	-	-	-	71 260
Montenegro	-	-	-	2 536
Kosovo	-	-	-	106 879
Croatia	-	-	43 876	29 355
Bosnia and Herzegovina	-	-	45 111	31 905
Macedonia	-	-	56 092	64 448
Yugoslavia	44 094	141 397	5 507	-
Turkey	38 353	64 899	80 165	69 215
Europe	859 054	1 036 760	1 261 975	1 733 255
Africa	10 539	20 291	37 618	93 814
America	20 838	29 149	49 687	78 773
Asia, Oceania	22 829	40 649	74 831	141 019

Source: Federal Office for Migration.⁸

7 According to the Swiss Statistical Office, the permanent resident population includes foreigners residing in Switzerland throughout the year (annual or long-term residence permits), persons who have been recognized as refugees, officials of international organisations and diplomatic staff and their families. The permanent resident population excludes asylum-seekers, trainees, seasonal workers and persons making a short stay.

8 Bilan de la population résidante permanente étrangère selon la nationalité par pays, <https://www.bfs.admin.ch/bfs/fr/home/statistiques/population/migration-integration/nationalite-etran->

In the years 1990-2015, the national composition of the foreign population in Switzerland was affected by significant geopolitical events, not least the dissolution of the USSR, Czechoslovakia, Yugoslavia and the reunification of Germany. The evolution of the European Union, which set out with 10 member states and by 2014 had expanded to 28, also played its part in this regard. The decreasing trend in the number of foreigners who come from the EU, visible since 1995, was reversed after 1 June 2002, when the Agreement on the Free Movement of Persons (AMFP) between the European Union and Switzerland came into force.⁹ Also, citizens of other states immigrated to Switzerland, *inter alia* on grounds of the provisions for family reunification and on grounds of asylum law.¹⁰ Immigrants coming from the EU and EFTA countries, until 1990, constituted the majority of Switzerland's foreign population. The 90s witnessed a predominance of migrants from third countries which effectively came to an end in 2002 when the AFMP took effect. Nowadays migration from the EU and EFTA states constitutes the majority of migrations to Switzerland, and the continuous expansion of the EU has not been without consequence in this regard. Currently the European Union consists of 28 member states with more being considered for inclusion. The migration of EU citizens is of heterogenic character. While Switzerland remains an attractive country for French and German citizens, the number of immigrants from Italy and Spain has progressively declined. Migration from the former Yugoslavia (that is from those states that have not joined the EU after the breakup of Yugoslavia) has also declined but for a different reason.¹¹

gere.assetdetail.206138.html access 2.12.2016.

9 See: I. Kraśnicka, M. Perkowska, I. Wrońska, Free movement of persons between Switzerland and European Union and state security, *Przegląd Politologiczny* 2014, No. 3, pp. 59-75.

10 Office fédéral de migrations, *Statistique des étrangers et de l'asile*. Volume 2..., *op. cit.*, pp. 22-25.

11 *Ibidem*, p. 30.

Table 2. Foreign permanent and non-permanent population in Switzerland by nationality 1991-2015 in the context of the Agreement on Free Movement of Persons (in thousands)

	Before AFMP										
	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
EU17/EFTA	823	827	832	841	841	833	822	812	810	812	821
EU8	10	10	9	9	15	15	15	15	16	16	17
EU2	3	3	3	3	3	3	3	4	4	4	5
Third countries	338	386	433	466	487	500	512	526	549	564	591
Total	1174	1225	1277	1320	1347	1351	1353	1357	1379	1397	1434
Germany	86	87	88	90	92	94	96	99	104	111	119
Portugal	105	117	127	136	141	143	142	140	139	140	142
France	51	52	53	54	55	55	56	57	59	61	63
Great Britain	17	18	18	18	19	18	18	19	20	21	22
Austria	29	29	29	29	29	29	29	29	29	30	31
Spain	116	110	107	105	102	98	95	91	87	84	82
Italy	378	373	369	366	361	352	344	336	329	322	316

	Transition regime of AFMP						AFMP							
	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
EU27/EFTA	882	906	927	951	979	1013	1070	1105	1143	1192	1239	1301	1344	1380
EU17/EFTA	857	881	900	923	948	978	1030	1060	1092	1132	1169	1219	1248	1274
EU8	19	20	20	21	25	29	33	36	40	47	55	64	73	82
EU2	6	6	6	6	6	7	7	9	11	13	15	18	19	21
Third countries	613	623	628	626	619	619	622	623	628	635	640	648	660	670
Total	1495	1529	1554	1577	1598	1632	1692	1728	1771	1827	1879	1949	2004	2050
Germany	138	150	163	180	200	223	250	265	277	291	297	305	311	314
Portugal	151	164	173	180	186	193	205	212	220	232	247	262	269	274
France	67	70	72	74	78	81	88	93	98	102	106	113	120	126

Great Britain	24	25	26	27	29	31	34	36	38	41	41	42	43	44
Austria	34	34	35	35	35	36	37	38	39	40	40	41	42	43
Spain	80	78	75	72	69	66	65	65	65	68	72	78	82	84
Italy	314	310	306	302	297	294	293	292	293	294	298	307	314	319

Source: Federal Office for Migration.¹²

Immigration constitutes an important contributory factor to the growth of Switzerland's population over the past decades. In the years 1982-1991 net immigration resulted in an average annual growth rate (among foreign nationals) of 0.43%, whereas the nation's natural growth rate over the same period amounted to 0.28%, year-on-year. Hence, Switzerland's overall population grew at the rate of 0.71% year-on-year. In the years 1992-2001 population growth decreased by 0.1% reducing the overall annual growth rate to 0.59%. This decline was mainly the consequence of a debit balance in migration, which served to reduce population growth by 0.33% year-on-year. An increase in population growth reoccurred in the years 2002-2013, this time causing the country's overall growth rate to rise to 0.96% year-on-year, the product of net immigration being at an even higher level than in 1980. During this period the average growth rate among foreign nationals amounted to 0.77% year-on-year, while that of the Swiss population had fallen to an average of 0.19%; so therefore, in real terms, the gap in population growth between the two groups had widened even further.

The conclusion to be drawn here is that the demographic evolution of Switzerland over the last three decades has quite clearly been strongly influenced by immigration, largely fuelled by a demand for workers to meet the requirements of industry and commerce. Thus, it can be stated that population growth in Switzerland is a derivative of economic conditions with the highest population growth rates being recorded at the apogee of economic upturns (the beginning of 1980s,

12 Répercussions de la libre circulation des personnes sur le marché suisse du travail, Dixième rapport de l'Observatoire sur la libre circulation des personnes entre la Suisse et l'UE, Bern 2014, p. 26, Douzième Rapport de l'observatoire sur la libre circulation des personnes entre la Suisse et l'UE, Répercussions de la libre circulation des personnes sur le marché du travail en Suisse, Bern 2016, p. 104.

the beginning of the 1990s and in the years 2001-2002 and 2007-2008), whereas in periods of economic downturn (e.g. in 1982 and the second half of the 1990s), net immigration decreased significantly as too did the population growth indicator.¹³

In December 2013, the foreign contingent of the population (permanent and nonpermanent) numbered 1,949,000. Of these: 1,219,000 (63%) were from the EU17; 82,000 (4%) came from the EU8+2 and 640,000 (33%) were third country citizens. Italians and Germans comprised the largest foreign national groups (each with 16%), followed by the Portuguese (13%).

By December 2015, the permanent and non-permanent foreign population had risen to 2,050,000. This growth was mostly generated by an increase in the number of UE27/EFTA citizens. As in 2013, Italians and Germans remained the largest foreign national groups (each with 16% as before), the third group was the Portuguese (still with 13%), the fourth group was French (6%) and the fifth Spanish (4%).¹⁴

If we compare the ten-year period preceding the entry into force of the AFMP it can be stated that during the period from 2001 to 2013 the foreign permanent and non-permanent population in Switzerland grew from +26,000 to +40,500 per year. Moreover, the foreign population at that time consisted mostly of nationals from non-EU countries. Conversely, since 2012, nationals of the EU27 have constituted 89% of the foreign population in Switzerland (German 36%, Portuguese 23%, French 10% and British 4%), with 12% being from EU8 countries. Strong growth in the EU8 population has been observed since 1 May 2011,¹⁵ which in particular includes migrant workers from Central and Eastern European member states.¹⁶

13 Secrétariat d'Etat à l'économie, Dixième rapport de l'Observatoire sur la libre circulation des personnes entre la Suisse et l'UE, Répercussions de la libre circulation des personnes sur le marché suisse du travail, Bern 2014, p. 24.

14 Secrétariat d'Etat à l'économie, Douzième Rapport de l'observatoire sur la libre circulation des personnes entre la Suisse et l'UE, Répercussions de la libre circulation des personnes sur le marché du travail en Suisse, Bern 2016, p. 20.

15 Secrétariat d'Etat à l'économie, Dixième rapport..., *op. cit.*, p. 25.

16 Secrétariat d'Etat à l'économie, Huitième rapport de l'Observatoire sur la libre circulation des personnes entre la Suisse et l'UE, Répercussions de la libre circulation des personnes sur le marché suisse du travail, Bern 2012, pp. 21-22.

On the basis of the figures gathered over the last fifty years, it is possible to put together a demographic profile of a statistical immigrant in Switzerland. In the 1960s the statistical immigrant was a single male, aged 21-29, typically a national of Italy migrating to take up work in construction or some other blue-collar sector of industry. In the 1990s the statistical immigrant was a Yugoslav national who had migrated for one of two reasons; to obtain indefinite “leave to remain status” in order to pursue permanent (as opposed to seasonal) employment or, to join a family member already living and working in Switzerland under the family reunification process (in this latter respect the statistical age span widened from 15-34 years). Due to the nature and prevalence of migration under the family reunification process, this period is characterised by an overrepresentation of women. Today, the statistical immigrant is again a single male, aged 25-39, from a neighbouring country – typically Germany. The main reason for migration is still employment but this time in white-collar sectors such as commerce, banking, IT, health and education. Young Europeans also migrate for educational purposes.¹⁷

Analysing the reasons for migration to Switzerland it needs to be highlighted that in the period 1993-2012, family reunification dominated, a consequence of many years of labour migrations, mainly of males¹⁸ whose wives and children joined them after their financial situation had improved. Therefore, women head the group who chiefly migrate under the family reunification process. By 1990 they had mostly been citizens of EU member states and they now represent a sizeable proportion of the migrant female population resident in Switzerland. However, that proportion has diminished in recent years compared to the number of migrant women from third countries in Europe and from other continents.

From the foregoing it can be said that the predominant reason for migration has always been employment and this again was underlined

17 Office fédéral de migrations, *Statistique des étrangers et de l'asile*. Vol. 2..., *op. cit.*, p. 28.

18 See: A. Piekutowska, *Labour immigration in the European Union*, Warszawa 2012, pp. 125-148, A. Piekutowska, *Status pracowników migrujących i ich rodzin w Unii Europejskiej*, (in:) F. Lempa (ed.), *Uomo e ambiente: dissertaciones II Incontro ionico-polacco*, Taranto, 17-20 settembre 2007, Taranto 2008, pp. 143-156.

when the Swiss labour market opened up for citizens of the EU and EFTA member states. A further reason for migration is education, not just academic but also in the form of professional development.¹⁹

As further analysis concerning the criminality of foreigners will refer to their status it is important to describe the population of asylum seekers in Switzerland (table 3 and 4). Today, the largest number of asylum-seekers come from Eritrea, Syria, Somalia and Afghanistan. This corresponds with the general trend in Europe, especially with regard to the current immigration crisis (table 3).²⁰

Table 3. Foreigners in the procedure of refugee status in 2005-2014

Country	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Eritrea	1016	1357	2249	3956	3812	2965	3260	5786	5943	9851
Turkey	2686	2316	2094	1768	1559	1402	1518	1517	1295	991
Sri Lanka	2505	2266	2356	3101	3964	4201	4037	3560	3653	2950
Iraq	3416	3624	3501	3575	3266	2831	2650	2432	2128	1926
Bosnia & Herzegovina	3423	2720	2250	1660	1454	1048	993	915	751	671
Syria	579	598	793	1002	1145	1290	1779	2554	4010	7041
Somalia	3713	3489	3329	4757	4532	4094	4041	4307	4031	3907
Afghanistan	1299	1350	1323	1383	1780	2108	2795	3656	3995	4071
Kosovo	0	0	0	128	648	709	974	1123	1129	1177
Serbia	10942	9507	7810	6900	5431	4390	4188	3085	2238	1940
Angola	2708	2523	2288	1939	1721	1489	1324	1231	1101	993
Other countries	16125	15399	13069	10625	-18933	10261	13118	14697	13287	12562
Total	48412	45149	41062	40794	10379	36788	40677	44863	43561	48080

Source: *Secrétariat d'Etat aux migrations, Statistique des étrangers et de l'asile 2014 Berne-Wabern 2015, p. 77.*

19 Office fédéral de migrations, *Statistique des étrangers et de l'asile. Vol. 2...*, *op. cit.*, p. 30.

20 Frontex, *Annual Risk Analysis 2015*, Warsaw 2015, p. 12.

Even though it is not an EU member state, this crisis does not bypass Switzerland. The numbers of asylum seekers from the countries referred to has been increasing since 2005, while the number of asylum seekers from the former Yugoslavia continues to decline (except Kosovars who, after the proclamation of independence in 2008, still seek international protection). A significant number of asylum-seekers also come from Turkey, Iraq and Sri Lanka.

Table 4. Foreigners with admitted refugee status in 2005-2014

Country	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Eritrea	28	380	822	1764	2894	5137	7659	8985	10748	12889
Turkey	4717	4656	4548	4404	4116	3836	3564	3335	3130	3123
Sri Lanka	549	582	262	782	915	1084	1116	1195	1294	2356
Iraq	2385	2370	2388	2415	2393	2380	2281	2171	2122	2058
Bosnia & Herzegovina	4010	3622	3262	2922	2607	2448	2257	2115	1979	1860
Syria	114	147	158	205	247	281	374	535	695	1667
Vietnam	2062	1939	1834	1696	1579	1473	1386	1334	1247	1187
Somalia	279	275	265	237	259	410	548	639	786	980
Afghanistan	932	891	839	813	780	752	711	689	716	941
Kosovo	1254	1186	1097	30	111	227	289	308	374	436
Serbia	-	2635	1379	2154	1875	1303	887	734	524	374
Other countries	7247	4596	7046	5854	5864	6011	6034	6082	2810	6853
Total	23577	23279	23900	23276	23640	25342	27106	28122	29825	34724

Source: *Secrétariat d'Etat aux migrations, Statistique des étrangers et de l'asile 2014 Berne-Wabern 2015, p. 36.*

The structure of foreigners granted refugee status in 2005-2014 does not differ from the structure of foreigners in the procedure of international protection. The largest group was Eritrean. Its number started to grow sharply from 2008, and continued its upward spiral until 2014. A similar growth pattern can be seen in relation to Afghan and

Sri Lankan refugees. The number of refugees coming from Iraq and Vietnam stabilised during this period, while the number of refugees from Bosnia and Herzegovina and from Turkey exhibited a downward trend.

In international discussions on immigration and integration, the term “population with a migration background” (also known as “population with foreign background” or “population with an immigrant background”) is being used with growing frequency.²¹ This concept is increasingly replacing the simple distinction between citizens (or nationals) and foreign citizens (or non-nationals), which is exclusively based on citizenship and ignores whether individuals immigrated themselves or have a connection to immigration through their family. Many continental European countries officially classify persons of “foreign origin” or “foreign background” through their population registers. These are usually defined as persons born abroad originally of foreign citizenship, together with persons born in the host country whose parents were themselves born abroad and were foreign citizens.²²

As in many other countries, the Federal Statistical Office (FSO) in Switzerland established a typology of the population by migration status. An individual’s migration status is determined on the basis of a combination of the following variables: “country of birth”, “citizenship at birth” and “current citizenship”, as well as each parent’s “country of birth”. The Swiss Labour Force Survey (SLFS) makes it possible to identify the population with a migration background and to disaggregate it.

In Switzerland, the term “population with a migration background” covers, regardless of their citizenship, people whose parents were both born abroad; people who were naturalised i.e. foreigners born abroad,

21 See K. Salentin, Sampling the Ethnic Minority Population in Germany, The Background to “Migration Background” methods, data, analyses 2014, Vol. 8(1), pp. 25-52, DOI: 10.12758/mda.2014.002., M. Heining, „Schweizer“, „Ausländer“ und „Personen mit Migrationshintergrund“, Terra cognita 2013, No. 23, pp. 58-61, F. P. Mileti, “Issue de la migration”: classification légitime ou stigmatisante?, Terra cognita 2013, No. 23, pp. 66-68.

22 D. Coleman, Immigration, Population and Ethnicity: The UK in International Perspective, The Migration Observatory 2013, p. 3. <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Briefing%20-%20Immigration%20Population%20and%20Ethnicity.pdf> access 20.11.2014.

who have at least one parent who was born in Switzerland and people under the procedure of naturalisation i.e. foreigners born in Switzerland who have at least one parent who was born abroad.

The following categories of people who immigrated to Switzerland can be distinguished as: first generation immigrants and people affected by their parents' migration (descendant of immigrants, second-generation immigrants). The first generation includes three groups: 1) foreigners born abroad who came to Switzerland, 2) Swiss people born abroad whose parents are foreigners, 3) people born abroad but naturalised. The second generation encompasses 1) Swiss people born in Switzerland whose parents were born abroad, 2) foreigners and naturalised people who were born in Switzerland but who have at least one parent who was born abroad.

People without an immigration background covers: 1) Swiss, born in Switzerland or abroad who have at least one parent who was born in Switzerland, 2) naturalised Swiss, born in Switzerland of parents who were born in Switzerland 3) foreigners of third²³ and further generations.²⁴

According to the Federal Statistical Office, in Switzerland in 2015 35% of the population (over the age of 15) were people with an immigration background (2,445,000). This group includes all people whose parents were both born abroad and who were of foreign nationality, and naturalised people, who have at least one parent who was born abroad. Most of the people in this group comprised first generation immigrants (80%), whereas the remainder were second generation immigrants (20%).²⁵

The permanent population without an immigration background (4 397 000 people over the age of 15 (64%)) mainly covers Swiss born

23 The third generation includes naturalised people and foreigners born in Switzerland whose parents were also born in Switzerland but whose grandparents and further ancestors were born abroad.

24 Office fédéral de la statistique, Un tiers de la population est issue de la migration, Communiqué de presse N° 0351-1500-30 access 23.01.2015 <https://www.bfs.admin.ch/bfsstatic/dam/assets/39036/master>.

25 Office fédéral de la statistique, La population de la Suisse 2015, Neuchâtel 2016, p. 20.

nationals (4,375,000), naturalised Swiss (16,000) and foreigners of third-generation and over (6,000).²⁶

That portion of the population in Switzerland with an immigration background totalled c.1.7 million people and that number grew by 6%²⁷ in a single decade. 75% of this growth was a direct consequence of immigration. Here, 71% of first-generation immigrants are classified as foreigners and 29% as Swiss, whereas among second-generation immigrants 61% were classified as Swiss. The majority of foreigners are mostly represented by citizens of Italy, Germany and France.

Those with an immigration background constitute a relatively young social group in which people of 25-50 years of age are overrepresented. The mean average age in the group as a whole is 44 and 16 people out of 100 are over 65. Conversely, in the population without an immigration background the mean average age is 49 and 26 out of 100 people are people over 65.

From analysis of the geographical distribution of persons with an immigration background it can be seen that it is not homogenous. In the Geneva canton 61% of the population over 15 years of age has an immigration background (the highest rate), whereas in the Bâle-Ville canton it is 51%. The lowest rates occur in the cantons of Nidwalden (20%), Appenzell Innerrhoden (16%) and Uri (14%).

90% of the 1,212,300 minors (children below the age of 15) in Switzerland were born in the country and of these, 1,094,200 have an immigration background or are considered second-generation immigrants. 75% of all minors possess a Swiss passport.²⁸

The FSO study on the migration status of the permanent resident population shows that in 2013, 2.4 million of the 6.8 million people over the age of 15 in Switzerland, had an immigration background. Of these, 80% were born abroad with the remaining 20% being born in Switzerland but to parents who were born abroad. Slightly over a

26 Office fédéral de la statistique, *Un tiers...*, *op. cit.*

27 Office fédéral de la statistique, *La population de la Suisse 2015*, *op. cit.*

28 *Ibidem*. See also E. Piquet, *Quelques éclairages sur les jeunes issus de l'immigration en Suisse*, Migrations Société 1999, No. 62, pp. 77-86.

third (35%) held a Swiss passport. Worth mentioning here, is that the introduction of this younger element into the population as a whole is in effect serving to lower (in proportionate terms) Switzerland's ageing population.

It has been estimated that over the next four decades the population of Switzerland will continue to increase and by 2060 will amount to 9 million people, with the foreign population exceeding 2 million. At first glance this growth may not appear to be significant but it is worth highlighting that its extent will reduce year-on-year by, among others, the process of foreigners acquiring Swiss citizenship.²⁹ In this regard, 35,000 foreigners are expected to acquire Swiss citizenship each year, which will result in the Swiss population growth up to 2 million in 2060. Within the structure of foreigners residing in Switzerland, it is estimated that the number of citizens from EU member states will grow while the number of third-country citizens will decrease.³⁰

As we have seen, the number of legal immigrants in Switzerland has grown rapidly since the AFMP was introduced and especially so following its expansion to include all EU27 member states. The consequences of immigration in terms of state security are actually difficult to verify in a way that is credible. The number and structure of crimes committed need to be very carefully analysed in this regard. It is also important to examine whether the growth of Switzerland's immigrant population directly affects the level of criminality in the country.

2. Social situation of foreigners in Switzerland

In 2015 there were 67,014 unemployed foreigners in Switzerland, representing 47% of the total number of registered unemployed.³¹ In the years 2003-2015 the percentage of unemployed foreigners

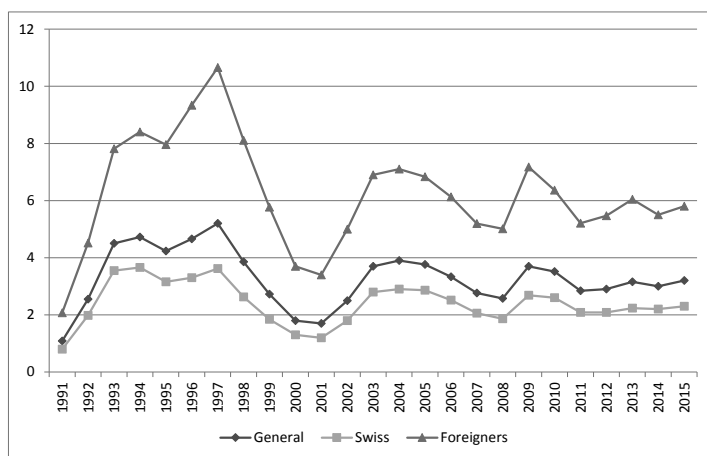
29 The process of naturalisation apart from returns and deaths is a factor which determines the decline in the immigrant population. See: P. Wanner, *Migration et devenir des flux migratoires en Suisse*, (in:) P. Wanner (ed.), *La démographie des étrangers en Suisse*, Zurich 2012, p. 30 ff.

30 R. Kohli, *La population étrangère en Suisse va-t-elle changer à l'avenir?*, *Terra cognita* 2013, No. 23, pp. 26-27.

31 Secrétariat d'Etat à l'économie, *Marché du travail et assurance-chômage, Chômeurs inscrits selon les groupes de nationalités et les pays d'origine*, Berne 2016, p. 1 <https://www.news.admin.ch/newsd/message/attachments/42483.pdf> access 21.12.2016.

fluctuated from 39% to 47%.³² In 2015, the unemployment rate among professionally active foreigners was 5.8%, which was higher than for the Swiss (2.3%) and the average unemployment rate (3.2%). Among the foreign population, those most likely to be unemployed were mainly women and young people. Moreover, the risk of unemployment was higher for people from Turkey, the western Balkans and European countries that were not EU member states. The main reason for this high unemployment rate among foreigners relates to education level: the lower the level the higher the risk of unemployment.³³

Figure 2. Unemployment rate among Swiss and foreigners in 1991-2015 (%)



Source: Federal Statistical Office.³⁴

In 2006, the unemployment rate among foreigners was higher for women than for men – 9.4% and 5.5% respectively. A similar tendency

32 *Ibidem*, Secrétariat d'Etat à l'économie, La situation sur le marché du travail en août 2003, Berne 2003, p. 7. Secrétariat d'Etat à l'économie, La situation sur le marché du travail en août 2014, Berne 2014, p. 8,

33 Office fédéral de la statistique, La population étrangère en Suisse, Neuchâtel 2008, p. 44.

34 Office fédéral de la statistique, Taux de chômage selon le sexe, la nationalité et l'âge. Moyenne annuelle <https://www.bfs.admin.ch/bfs/fr/home/statistiques/catalogues-banques-donnees/tableaux.assetdetail.7146836.html> access 04.04.2019.

was present among the Swiss but the rate was much lower – 3.3% for women and 2.1% for men. However, the ratio between women and men in both groups was almost identical.

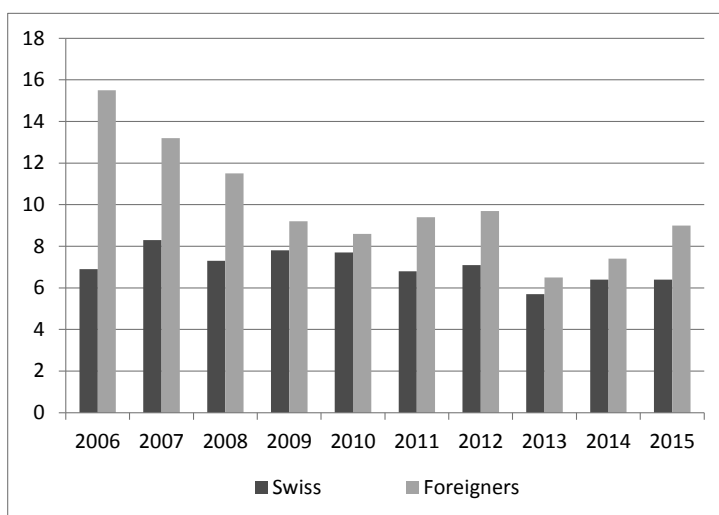
For some number of years people between the age of 15 and 24 represented the largest group of unemployed, both among the foreigner population and the Swiss. However, in 2006 the unemployment rate among the Swiss was 5.5%, whereas it was as high as 13% among foreigners. In this same age group, the unemployment rate for women amounted to 15%, while for men it equalled 12%.

Analysing the unemployment issue from the perspective of a foreigner's place of origin, some regularities may be indicated in relation to specific ethnic groups. The unemployment rate for Turks and for people from the western Balkans was the highest and amounted to 11%. The rate for the citizens of EU member states was 4%, and the lowest level was for foreigners coming from the north and west of Europe c. 3% (close to the unemployment rate for Swiss citizens), and slightly higher for foreigners from southern Europe 4.5%. This disparity mainly results from differences in the educational level of foreigners originating from various regions of the world. Those who received only an elementary education are the ones most likely to be unemployed (foreigners 9.3%, Swiss citizens 5.2%). The unemployment rate was lower for foreigners who possessed a university degree, and amounted to 4.3% (1.6% for Swiss citizens). The factors that determined the unemployment level in ethnic groups, apart from education, related to their over-representation in sectors that are particularly sensitive to economic change, deskilling and problems with social integration. The duration period of unemployment is also a vital factor. More than 48% of unemployed foreigners had been without work for more than a year (36% for unemployed Swiss citizens), which adds a further impediment to finding a place on the labour market.³⁵

35 *Ibidem*. See also M. Perkowska, Status społeczny cudzoziemców w Szwajcarii jako grupy zagrożonej wykluczeniem społecznym (in:) E.M. Guzik-Makaruk, E.W. Pływaczewski (eds.), Wybrane prawne, kryminologiczne i medyczne aspekty wykluczenia społecznego, Białystok 2016, p. 109 ff.

An additional consideration here is that foreigners, more so than Swiss citizens, are employed in sectors that pay low wages and offer little if anything by way of job security.³⁶ Equally, they are often employed in sectors which are at risk of high unemployment due to insufficient linguistic competences and/or, as previously remarked, a low level of education. It needs to be highlighted that the unemployment rate for foreigners is three times higher than for the Swiss, and the participation of both groups in the job market is almost identical.³⁷

Figure 3. Poverty rate among Swiss and foreigners in 2006-2015 (in %)



Source: Federal Statistical Office.³⁸

In 2012, the disposable household income of 7.7% of Switzerland's population fell below the absolute poverty line, meaning that one in

36 For example, the average wage of a foreigner is around 14% lower than that of a Swiss citizen. Office fédéral de la statistique, Rapport social statistique suisse 2015, Neuchâtel 2015, p. 20.

37 Stratégie globale de la Suisse en matière de lutte contre la pauvreté. Rapport du Conseil fédéral en réponse à la motion (06.3001) de la Commission de la sécurité sociale et de la santé publique du Conseil national (CSSS-N) du 13 janvier 2006, 2010, p. 66.

38 Federal Statistical Office, access 21.12.2016 <https://www.bfs.admin.ch/bfs/fr/home/statistiques/situation-economique-sociale-population/bien-etre-pauvrete/pauvrete-et-privations-maternelles.assetdetail.329896.html>

every thirteen persons (c. 590,000 in total) was affected by income poverty. Compared with the previous year (7.4%), the poverty rate had not significantly changed. However, from data collected for the period 2007-2014, poverty in Switzerland fell by 2.7 percentage points and, during the same period, the poverty rate among employed persons showed a reduction of 1.3 percentage points – from 4.8% to 3.5%.³⁹

The poverty rate for Swiss households with children was slightly higher than for those without children. Those who suffered the most (26.7%) were single-parent families; the second largest group were nuclear families with three or more children (24.3%). The poverty rate for couples with one or two children amounted to 9.5% and 11% respectively. Foreign families fared worse. In 2006, 24.3% of families in this group suffered the effects of poverty, as much as 17.1% of families with one child and 22.4% of families with two children.⁴⁰

The risk of poverty is high among families with an immigration background mainly because employment is sourced from within the lower paid sectors of industry and commerce and also, statistically, because they generally have more children to support than their Swiss counterparts.⁴¹

The poverty rate⁴² is also higher for foreigners than for the Swiss but the rate is not uniform, it varies depending on the place of origin of immigrants. It is lower for people coming from northern and western European countries, and higher for people from southern Europe and

39 Federal Statistical Office, Poverty in Switzerland. Results from 2007 to 2012, Neuchâtel 2014, p. 2.

40 Stratégie globale de la Suisse en matière de lutte contre la pauvreté..., *op. cit.*, p. 52.

41 *Ibidem*, p. 53.

42 The poverty rate is based on an "absolute" threshold: people are considered poor if they do not have financial means to buy goods and services that are necessary for a socially integrated life. A poverty rate defined in this way is suitable as a socio-political target value as financial support for poor people or households is directly translated into a measurable reduction of poverty. The poverty line used is based on the guidelines issued by the Swiss Conference for Social Welfare (SKOS) which are widely used in Switzerland as the assessment basis for social assistance. It consists of a fixed amount to cover living expenses, individual housing costs as well as 100 Swiss francs per month per person aged 16 or over for additional expenses. In 2012, the poverty line for an individual was around 2200 Swiss francs per month on average and around 4050 Swiss francs for two adults with two children. See: Poverty in Switzerland. Results from 2007 to 2012, *op. cit.*, p. 2-3, Federal Statistical Office, Poverty Measurement in Switzerland, Neuchâtel 2013, p. 4.

other countries.⁴³ In 2012 the difference was only 3 percentage points, while in 2006 it had widened to as much as 8 percentage points. The rate is particularly high amongst people from the former Yugoslavia and Turkey, amounting to 20%-30% over the past years.⁴⁴ The people most at risk are those coming from countries outside Europe.⁴⁵

It is worth highlighting that the risk of poverty depends on many factors. Among others they include: size of household, number of children, employment sector, conditions of employment, occupation and education level. Of these the two most significant determinants of in-work poverty, the so-called “working poor”, are employment sector and conditions of employment.⁴⁶ Here, foreigners are again overrepresented. In 2006, 8.5% of all immigrants were subject to in-work poverty, whereas for the entire Swiss population it was 4.5%. However, as before the rate is widely varied for different groups of people. For those coming from northern and western Europe the number of people affected by in-work poverty relative to their total number in Switzerland, is quite low (1.8%). It is almost twice as high for the Swiss themselves (3.2%), and close to four-times as high (7%) for people from southern Europe. The highest rate is among the immigrant population from Turkey and the former Yugoslavia, which amounts to as much as 14.8%.

The overall poverty rate is relatively uniform for the citizens of EU member states and in 2006 it amounted to 9.4%, while the in-work poverty rate was 4.5%. These results differ little from the same rates among the Swiss, which also in 2006 amounted to 9.0% and 4.5%, respectively.

Most of the working poor are employed in low-income sectors such as the hotel, catering, retail and domestic work industries. Moreover, working nights and at weekends as well as being subject to fixed-term

43 Office fédéral de la statistique, La pauvreté en Suisse. La pauvreté monétaire de la population résidente de la Suisse de 2008 à 2010, Neuchâtel 2012, p. 5.

44 Office fédéral de la statistique, La population étrangère ..., *op. cit.*, p. 54.

45 Federal Statistical Office, Poverty despite gainful activity, Results from 2007 to 2011, Neuchâtel 2013, p. 3.

46 “Working poor” are people who have jobs but are unable to meet their basic needs with their incomes.

low-wage employment contracts, serve to increase the risk of falling into the poverty trap. These are the areas and conditions in which mainly foreigners are employed hence why they are overrepresented in the poor or working poor population of Switzerland.⁴⁷ Furthermore, it is significant that a large group of foreigners are people with only a basic level of education (in 2009 they constituted 27.8% of all employed foreigners⁴⁸). Regardless of household size, employment sector and working conditions, foreigners are often badly paid in comparison to the Swiss. For example, in 2008 the average gross wage of a foreign worker was around 13% lower than that of a Swiss worker on a like-for-like basis (5,315 Swiss francs per month compared to 6,093 Swiss francs per month respectively).⁴⁹ It is also worth emphasising that the number of long-term unemployed and socially excluded foreigners is also above the average when compared to the total number of unemployed people in Switzerland.⁵⁰

Foreigners who fall into this category are also significantly dependent on social assistance.⁵¹ In Switzerland, 21% of the population as a whole receives social welfare assistance, of which 43.9% are foreign nationals.⁵² In 2013, the percentage of foreigners who received social welfare assistance were as follows: families with children 35%, single people 30%, single-parent families 26% and couples without children 9%. Summarily, this group of people are exposed to poverty due to an accumulation of factors not least their over-representation in low income sectors of the economy, the high rate of unemployment among their number and, as previously touched upon, a predominant low level of education.⁵³

47 Office fédéral de la statistique, *La population étrangère...*, *op. cit.*, p. 54.

48 Office fédéral de la statistique, *Rapport social statistique suisse 2011. Rapport du Conseil fédéral du 18.05.2011, en réponse au postulat "Législature. Rapport social" (2002 P 01.3788), Neuchâtel 2011*, p. 20.

49 *Ibidem*, p. 18.

50 Office fédéral de la statistique, *La population étrangère...*, *op. cit.*, p. 54.

51 The purpose of social assistance is to: 1) ensure that basic necessities are met; 2) help people to help themselves by encouraging them to take charge of their own lives and stand on their own feet; 3) keep people in society and help them find jobs.

52 Office fédéral de la statistique, *La statistique de l'aide sociale 2007. Résultats nationaux, Neuchâtel 2009*, p. 20.

53 Conseil fédéral, *Stratégie globale de la Suisse en matière de lutte contre la pauvreté...*, *op. cit.*, p. 18.

In this latter respect, the largest gaps in education exist among people from southern Europe; citizens of Portugal in the southwest, and of Turkey and the former Yugoslavia in the southeast.⁵⁴ In the 1960s more than 80% of foreigners residing in Switzerland had received only basic education. This number decreased to 52% in 2000 and to 35% in 2011 but, despite the decreases, it still remains 20% higher than the rate for Swiss citizens. Equally, many second-generation immigrants are also poorly educated, which largely results from their parents' poor education.⁵⁵

In 2009 some 35% of Swiss citizens as well as some foreign nationals, possessed a university degree. However, in the case of the foreign population, this rate mainly increased due to the inward flow of migrants from EU member states. More than 60% of the people from southern, western and central Europe over the age of 22, had by that time earned a university degree. This is a new phenomenon that has been observed in Switzerland for over a decade and which is appropriately referred to as *brain-gain*.⁵⁶ According to the research carried out by *Avenir Suisse*, on the one hand this is the outcome of changes in the requirements of the Swiss labour market (an increased need for highly qualified staff), while on the other, it is a consequence of the free movement of people from the European Union, reinforcement of the provisions on granting refugee status and, meeting the provisions of the Foreign Nationals and Integration Act.⁵⁷

Depending on country of origin, young foreigners are often poorly equipped to further their education in order to pursue a vocational or professional career. Many experience difficulties learning due to language barriers, often accompanied by problems associated with motivation and integration. These factors alone serve to impede access to the labour market which is frequently exacerbated by prejudices present

54 Office fédéral de la statistique, La population étrangère... *op. cit.*, p. 50, P. Wanner, Intégration professionnelle des populations d'origine et de nationalité étrangères en Suisse, Revue européenne des migrations internationales 2004, Vol. 20, No. 1, p. 34.

55 E. Piguet, L'immigration en Suisse. Cinquante ans..., *op. cit.*, p. 796.

56 Office fédéral de la statistique, Rapport social statistique suisse 2011..., *op. cit.*, p. 30.

57 See: La nouvelle migration. La Suisse entre immigration des cerveaux et crainte d'une perte d'identité (résumé du livre original publié en allemand) access 10.03.2015 http://www.avenir-suisse.ch/wp-content/uploads/2011/05/70414_zusammenfassung_f.pdf

in the host society. It is estimated that 15%-20% of young foreigners do not complete any form of vocational training or professional education, which translates to a high risk of unemployment and the subsequent necessity to seek social welfare assistance.⁵⁸

Migration to Switzerland is occasioned by a number of factors but the two which predominate relate to obtaining employment (immigration of labour) and family reunion; hence immigrants are generally young (mostly in the 20-30 age group). The time spent in Switzerland may be relatively short, a mere phase in the foreigner's life cycle, which is particularly true for the Portuguese, many of whom arrive in their mid-twenties and return home fifteen or so years later. However, the stay may also become permanent, sometimes resulting in naturalisation.⁵⁹ The demographic characteristics of foreigners are largely influenced by their country of origin, place of birth and their length of stay in Switzerland, factors which are also determinants in relation to their ability to adapt. First – generation immigrants usually retain fertility, nuptiality and divorce patterns similar to those of their native country, whereas subsequent generations gradually adjust the size of their families and the timing of births as they assimilate to the cultural pattern of that practiced by the Swiss. Foreigners may come from countries where the style of living is completely different from that present in Switzerland and may also exhibit highly specific demographic characteristics as a result. In particular, there is a very clear distinction between foreigners from west European countries, who have fewer children and produce them later in life, and those from some other parts of the world, who typically have large families and start producing children at a young age.⁶⁰

The analysis of social and particularly economic indicators of foreigners' living conditions in Switzerland clearly indicates that, those at the lower end of the social scale, are an "at-risk" group. In each of

58 Conseil federal, *Stratégie globale ...*, *op. cit.*, p. 43.

59 See: G. D'Amato, *Switzerland*, (in:) C. Joppke, F.L. Seidle, *Immigrant integration in federal countries*, Montreal 2012, pp. 179-181.

60 P. Wanner, *The demographic characteristics of immigrant populations in Switzerland*, (in:) W. Haug, P. Compton, Y. Courbage, *The demographic characteristics of immigrant populations*, Population studies, No. 38, Council of Europe Publishing 2002, p. 491.

the three areas focussed upon (unemployment, poverty and education), the situation of this social group is worse than that of the Swiss, which results from numerous and diversified factors. Of these, Swiss migration policy comes to the fore. The search for a cheap labour force to satisfy the requirements of specific sectors of the economy, led to an influx of migrants of low social status. It was not until the introduction of free movement of people between Switzerland and the European Union came into being, that migrants of higher social standing and better education adopted Switzerland as their workplace of choice.

One needs to bear in mind that the worse the socio-economic situation of the foreigner becomes, the more it places them at risk of social exclusion, which in turn raises the risk of their turning to crime.

THE PRINCIPLES OF CRIMINAL LIABILITY OF FOREIGN NATIONALS IN SWISS LAW

The state has full jurisdiction within its territory and any exemptions (or its limitation) must be grounded in the state's act of will. The principle that foreign nationals fall under the jurisdiction of the state they are staying in is laid down in the sources of international law (binding both locally and universally) and is the standpoint of the judicature. The extent of civil jurisdiction, however, is not as broad as that of administrative and criminal jurisdiction due to the fact that the personal status of a foreigner is commonly acknowledged.¹

According to contemporary doctrine of criminal law, the rule stating that a foreign national bears criminal liability for prohibited acts committed in the territory of a particular country, in the same way as a national of that country or any other person who is not exempt from criminal liability due to specific exceptions (immunities), seems to be prevailing. It is also commonly accepted that foreign nationals may be convicted for some offences committed abroad.²

The moment when the civic status of a foreign national is being assessed is fundamental to establishing the status of a foreigner in the procedures before the prosecution authorities and administration of justice. The adopted definition of "foreign national" requires the time periods in which this civic status is assessed to be fixed. This status might affect both the direct and indirect consequences of being a foreign national. As far as direct implications are concerned, it will only be important to establish whether the offender was a citizen of the

1 J. Białocerkiewicz, *Jurysdykcja państwa wobec cudzoziemców. Wybrane aspekty*, Studia Prawnicze No 1/2007, p. 26.

2 J. Piskorski, *Odpowiedzialność karna cudzoziemców w Polsce*, Warszawa 2003, p. 79.

country at a particular time or a foreign national. The issue of national or ethnic origin of the offender will only be crucial in relation to the possible subsequent consequences of being a foreign national.³

The status of the offender's citizenship may have changed at one of the stages of committing an offence or while committing a single sustained offence or while committing a series of offences. The following criteria should be adopted to apply a personal principle. The time of committing an offence is of essence to establish whether or not the Criminal Act should be applied, if the offence was committed by a national of the country or by a foreign national (the issue of their criminal liability). The fact that the nationality may have later changed is immaterial.⁴ The criterion of the time of committing an offence has not been precisely stated in the Swiss Criminal Code⁵ (SCC). Art. 2 SCC entitled "Time conditions" (fr. *Conditions de temps*, de. *Zeitlicher Geltungsbereich*) states that "this Code applies to any person who commits a felony or misdemeanour following the date on which it comes into force. Any person who commits a felony or misdemeanour prior to this Code coming into force is only subject to its terms in the event that the penalty hereunder is reduced than the penalty that would otherwise apply". As G. Heine stresses while deciding on *lex mitior* the court takes into consideration the system of sanctions and the extent to which rights and freedoms included therein are restricted, however, it is not permissible to apply partially both the act which has just been introduced and the one which was formerly in force.⁶ S. Trechsel and P. Noll remark that the time of committing an offence is of essence to the application of Art.2 (1) SCC because this is the only way that the principle of criminal liability can be guaranteed. In cases when more than one act constitutes the offence, the time when the last act (action

3 *Ibidem*.

4 See: A. Wąsek, Zakres obowiązywania ustawy karnej polskiej wobec cudzoziemców, (in:) A. Szwarc (ed.), *Przestępczość przygraniczna. Postępowanie karne przeciwko cudzoziemcom w Polsce*, Poznań 2000, p. 27. K. Buchała, A. Zoll, *Polskie prawo karne*, Warszawa 1995, p. 93. M. Cieślak, *Polskie prawo karne*, Warszawa 1995, p. 109.

5 Swiss Criminal Code of 21 December 1937, OC 311.0, hereinafter referred to as SCC.

6 G. Heine, *Fragenkatalog AT–StGB – neu für in dubio 01/07*, p. 8, access 10.02.2014 http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e723/e1299/e1302/files1304/Fragenkatalog_indubio_1.2.07_ger.pdf.

or omission to act) was committed by the offender will be deemed the time when the offence was committed.⁷

The Swiss Criminal Code stipulates the following principles of criminal liability of both foreign and Swiss nationals who commit an offence within or outside the territory of the Swiss Confederation:

- Territorial jurisdiction (Art. 3),
- Protective principle (Art. 4),
- Universal jurisdiction (Articles 5 and 6),
- Active and passive personality principle (Art. 7 (1)),
- Residual jurisdiction (Art. 7 (2)).

The provisions of Articles 3-8 SCC are described as “norms” which form the Swiss “international criminal law” despite the fact that they constitute the provisions of internal law.⁸ Every country possesses autonomy in terms of stipulating the principles of criminal law which is grounded in the possible use of coercion. There are, however, some limitations to sovereignty of the state which result from public international law. Thus, criminal law of a particular country applies to foreign nationals, provided that the foreign national has links with that country.⁹

1. Territorial jurisdiction principle

Territorial jurisdiction is regulated by Art. 3 SCC.¹⁰ It is essential to define the term “in Switzerland” i.e. the territory of Switzerland. The

7 See: E.M. Guzik-Makaruk, Czas popełnienia przestępstwa i wiek odpowiedzialności karnej w kodeksach karnych Republiki Federalnej Niemiec, Konfederacji Szwajcarskiej i Austrii, (in:) C. Kosikowski, Czas w prawie, Białostockie Studia Prawnicze 2010, No. 7, p. 172.

8 See: J. Hurtado Pozo, Droit pénal général, Zurich 2011, p. 61.

9 M. Dupuis, B. Geller, G. Monnier, L. Moreillon, C. Piquet, C. Bettex, D. Stoll, Code pénal, Bâle 2012, p. 27.

10 1. Any person who commits a felony or misdemeanour in Switzerland is subject to this Code. 2. If the person concerned has served a sentence in full or in part for the offence in another country, the Swiss court must take the sentence served into account when determining the sentence to be imposed. 3. If the person concerned has been prosecuted in a foreign country at the request of the Swiss authorities, then unless the offence involves a gross violation of the principles of the Federal Constitution or the Convention from 4 November 1950 for the protection of Human Rights and Fundamental Freedoms (ECHR), he is not prosecuted in Switzerland

territory of Switzerland means the area within its delineated external borders,¹¹ the interior of the earth beneath this area and the airspace over it as well as internal waters.¹² The boards of vessels and aircrafts under the flag principle are deemed to be an area which falls under the jurisdiction of the Swiss Confederation.¹³ Some scholars, however, do consider this area as the territory of the country.¹⁴

To attribute criminal liability, it is important to establish where an offence was committed. Art. 8 (1) SCC states that “A felony or misdemeanour is considered to be committed at the place where the person concerned commits it or unlawfully omits to act, and at the place where the offence has taken effect”. This provision allows to establish if an offence was committed in the territory of Switzerland. Additionally, it allows to separate the territorial competences stipulated in Art. 3 as well as other forms of competences which are stipulated in Articles 4-7. The legislator made use of the theory of relative ubiquity proving that this is the place or places where features of a prohibited act were met. The Federal Tribunal stated that there is a necessity to counteract negative conflicts of jurisdiction between states, giving the example of a Swiss jurisdiction whose territorial jurisdiction prevails, even if there is no direct relationship with the Confederation. In this light, the Federal Tribunal indicates the possibility to apply this principle, even if all indicators of a prohibited act were met abroad.¹⁵

Art. 3 (2) SCC contains the principle of imputation which states that the conviction of the offender for an act committed in the territory of Switzerland by foreign justice does not exclude the

for the same offence if: a) the foreign court has acquitted him and the judgment has taken full legal effect; b) the penalty to which he had been sentenced in the foreign country has been served, suspended or has prescribed. 4. If the person prosecuted abroad at the request of the Swiss authorities has not served the sentence or has only served it in part, the whole sentence or the remainder shall be served in Switzerland. The court decides whether a measure that has not been executed abroad or has only been served in part must be executed or continued in Switzerland.

11 In the years 1854–2008 the Swiss Confederation concluded precisely 40 international agreements with neighbouring countries which determined the state borderlines.

12 J. Hurtado Pozo, *Droit pénal général*, Zurich 2011, p. 68.

13 M. Harari, M. Liniger Gros, Titre 1. Champ d'application, (in :) R. Roth, L. Moreillon (ed.), *Commentaire Romand. Code pénal I. Art. 1-110 CP*, Bâle 2009, p. 33.

14 M. Killias, A. Kuhn, N. Dongois, M.F. Aebi, *Précis de droit pénal général*, Bern 2008 p. 264.

15 ATF 133 IV 171 c. 63, ATF 124 IV 241.

possibility of conducting proceedings concerning the same action in Switzerland. In this case the foreign court's judgment is not an obstacle to conducting proceedings concerning the same act against the same person. Nevertheless, the principle of imputation should be applied here to prevent an unjustified accumulation of penalties. The Swiss court must take the sentence served into account in determining the sentence to be imposed i.e. the sentences fully served.¹⁶ Therefore, suspended sentences, sentences of acquittal as well as expiration of sentence, power of pardon or placement on probation, are not taken into consideration.¹⁷ Fines should be paid completely for the penalty to be deemed fully discharged.¹⁸ Only the same kinds of penalties are taken into consideration in determining the sentence to be imposed, in other cases the judge can, to a large extent, adjudicate at his/her discretion. Nonetheless, given the amendment to the general part of the Swiss Criminal Code which introduced daily tariffs on fines, it is now possible to convert financial penalties into a custodial sentence.¹⁹

The Swiss doctrine states that the provisions of Art. 3 (2) SCC do not infringe the principle *ne bis in idem* as this principle should be applied to national (internal) laws, not to international law.²⁰ Nevertheless, the principle *ne bis in idem* is applied under international law, for example under the Schengen Agreement,²¹ which Switzerland is party to. The Swiss Confederation, did make a reservation to Art. 54 of the Schengen Agreement²² stating that this article would not apply

16 See: M. Harari, M. Liniger Gros, *op. cit.*, p. 36.

17 ATF 105 IV 225, see: M. Dupuis, et. al., *op. cit.*, p. 32.

18 AFT 105 IV 225.

19 M. Harari, M. Liniger Gros, *op. cit.*, p. 37.

20 M. Dupuis, et. al., *op. cit.*, p. 28, M. Harari, M. Liniger Gros, *op. cit.*, p. 37.

21 The bilateral "Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*" was signed on 26 October 2004 in Luxembourg within the framework of Bilateral Agreements II. Subsequently, the agreement was approved by the Federal Assembly on 17 December 2004 and approved by the people in a referendum on 5 June 2005 (54.6% of Swiss citizens voted in favour). The agreement finally entered into force on 1 March 2008. However, operationally it entered into force on 12 December 2008, and a few months later at Swiss airports (29 March 2009).

22 Art. 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, states: A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed

to adjudicated offences which were completely or partially committed in the territory of Switzerland (excluding offences which were partially committed in the territory of another state that is party to the Schengen Agreement).²³ This same reservation was made as regards to acts against the security and/or other important interests of Switzerland,²⁴ or which have been committed by a Swiss official and which arise from an infringement of professional duties.

A different case applies when an offender is sentenced abroad and the proceedings were instigated on the motion of Switzerland, and where the foreign court has acquitted the defendant and the judgment has taken full legal effect, or the penalty to which the offender had been sentenced by the foreign court has been served, suspended or has prescribed. This provision is in compliance with the *ne bis in idem* principle as a recurrent conviction of an offender in Switzerland is inadmissible. Apparently, this principle is excluded under the protective principle contained in Art. 4 SCC, and also in cases where an offender's behaviour is seen to be in gross violation of the principles of the Federal Constitution or the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR). A similar reservation concerning Swiss public order is also included in Articles 3 (4), 5 (2) and 6 (3) SCC. This restriction aims to prevent the handing down of sentences considered too lenient for serious offences when it comes to the protection of interests of the Swiss Confederation. Thus, the protection of public order takes precedence over the security of law.²⁵ Some doubts arise in the doctrine as to whether these solutions comply with the principle of legalism and indeed, whether it is possible to put them into practice.²⁶

sed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

23 Message relatif à l'approbation des accords bilatéraux entre la Suisse et l'Union européenne, y compris les actes législatifs relatifs à la transposition des accords ("accords bilatéraux II") FG 2004 5593, p. 5787. See: L. Moreillon (ed.), *Aspects pénaux des accords bilatéraux Suisse/Union européenne*, Bâle 2008, pp. 812.

24 These are: Felonies and Misdemeanours against the State and National Security articles 265-278 SCC, and offences against national defense and against the defensive power of the country articles 86-107 of the Swiss military criminal code.

25 M. Dupuis, et. al., *op. cit.*, p. 34.

26 U. Cassani, R. Roth. *Le juge suisse au service de la communauté des peuples. Réflexions à propos de nouveaux articles 3 à 8 CP*, (in:) A. Donatsch (ed.), *Strafrecht, Strafprozessrecht und*

It is worth mentioning here that under Art. 3 (3), the term “person” was replaced by the term “foreign national” in the amended version of the general part of the Swiss Criminal Code. This amendment was to enable the prosecution and conviction of Swiss nationals on the request of the Swiss Confederation who are prosecuted abroad for more serious offences than those listed in the request. By virtue of Art. 88 of the Federal Act on International Mutual Assistance in Criminal Matters,²⁷ Switzerland may submit an application for prosecution to another country regardless of the offender’s nationality. It would be unreasonable not to recognize verdicts concerning Swiss nationals.²⁸

Art. 3 (4) SCC regulates cases when an offender is handed over to Switzerland to serve the entirety or part of the sentence there. With regards to penal measures, the court has to decide whether the measure determined abroad that has either not been executed or which has only partly been served, must be executed or continued in Switzerland. It needs to be stressed here that the reservation concerning public order included in Art.3 (3) does not refer to Art. 3 (4), where it would have been justifiable to do so.²⁹

2. Protective principle

The protective principle determined in Art. 4 SCC³⁰ refers to the application of the Swiss Criminal Code in relation to offenders who commit felonies and misdemeanours against the State and National Security, i.e. Articles 265-278 SCC. This category encompasses such offences as: Art. 265 high treason, Art. 266 attacks on the independence of the Confederation, Art. 266^{bis} foreign operations and activities directed against the security of Switzerland, Art. 267 diplomatic treason, Art. 268 moving of national boundary markers, Art. 269 violation

Menschenrechte, Festschrift für Stefan Trechsel zum 65. Geburtstag, Zurich 2002, p. 449-475.

27 Act on International Mutual Assistance in Criminal Matters of 20 March 1981, RS 351.1.

28 M. Dupuis, et. al., *op. cit.*, p. 35.

29 *Ibidem.*

30 Felonies or misdemeanours against the state committed abroad 1. This Code also applies to any person who commits abroad a felony or misdemeanour against the state or its national security (Art. 265-278). 2. If the person concerned has been convicted of the offence and has served the sentence in full or in part in another country, the court shall take the sentence served into account when determining the sentence to be imposed.

of Swiss territorial sovereignty, Art. 270 attacks on Swiss national emblems, Art. 271 unlawful activities on behalf of a foreign state, Art. 272 political espionage, Art. 273 industrial espionage, Art. 274 military espionage, Art. 275 attacks on the constitutional order, Art. 275^{bis} subversive propaganda, Art. 275^{ter} unlawful association, Art. 276 disruption of military security, Art. 277 forgery of military orders or instructions, and Art. 278 disruption of military services. It needs to be stressed here that offences listed in Articles 269, 271 and 278 SCC may only be committed exclusively in the territory of the Confederation, whereas the provisions of Art. 4 (1) SCC apply to offences committed abroad. This catalogue is exhaustive. This principle does not refer to other offences included in the Swiss Criminal Code and other non-Code offences.³¹

Although Art. 4 (1) concerns felonies and misdemeanours against the state and national security i.e. Articles 265-278 SCC, the Federal Tribunal adjudicated that it also applies to an offence which infringes private interest, such as political espionage (Art. 272) where an offender acts to the detriment of Switzerland or its citizens, residents or organisations. Thus, Art. 4 (1) will also apply in the case of infringement of private interest.³²

This regulation is grounded in the sovereignty of the state which should be protected against overseas threat. Moreover, it is believed that the state, in the territory of which an offence was committed, is not equipped with the provisions which would make the offender liable or is otherwise not interested in prosecuting acts which do not directly infringe upon its interests.³³ In the case of jurisdiction under Art. 4 SCC, the *ne bis in idem* principle is not applied. Art. 4 (2) SCC only includes the obligation to take the sentence served into account when determining the sentence to be imposed (if the sentence was served in full or in part in another country). This provision complies with the provisions of Art. 54 of the Schengen Agreement.³⁴

31 M. Harari, M. Liniger Gros, *op. cit.*, p. 50.

32 J. Hurtado Pozo, *Droit pénal général*, Zurich 2008, p. 77.

33 *Ibidem*, p. 78.

34 L. Moreillon (ed.), *op. cit.*, p. 165.

This provision does not include the condition to conform with the *dual criminality* principle. The term “commits abroad” means any place outside the territory of the Swiss Confederation, thus a place which does not fall under any jurisdiction such as the high seas, the high seas airspace and outer space.

3. Universal jurisdiction principle

Art. 5 SCC³⁵ concerns the jurisdiction of offences against minors committed abroad³⁶ and was introduced into the general part of the Swiss Criminal Code as an embodiment of the fight against the increasing phenomenon of offences against sexual freedoms, whose victims are minors, and also to combat so-called sex tourism.³⁷ The article expresses the principle of universal jurisdiction.³⁸ Under this article, Switzerland is vested with the competences to prosecute offenders for acts performed to the detriment of minors regardless of their nationality, even if this concerns an offence committed to the detriment of a foreign minor abroad by a foreign national. The only premise which would allow the Swiss Confederation to so act is the fact that the offender is staying in the territory of Switzerland and the decision has been taken not to hand them over. Under this article, extradition takes precedence

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- 35 Offences against minors abroad 1. This Code also applies to any person who is in Switzerland, is not being extradited and has committed any of the following offences abroad: a) trafficking in human beings (Art. 182), indecent assault (Art. 189), rape (Art. 190), sexual acts with a person incapable of proper judgment or resistance (Art. 191) or encouraging prostitution (Art. 195) if the victim was less than 18 years of age; b) sexual acts with children (Art. 187) if the victim was less than 14 years of age; c) aggravated pornography (Art. 197 (3)) if the articles or representations depict sexual acts with children. 2. Unless the offence involves a gross violation of the principles of the Federal Constitution and the ECHR, the person concerned is not liable to further prosecution in Switzerland for the offence if: a) he has been acquitted of the offence abroad in a legally binding judgment; b) the sentence that was imposed abroad has been served, waived, or has prescribed. 3. If the person concerned has been convicted of the offence abroad and if the sentence imposed abroad has been partly served, the court shall take the part served into account in the sentence to be imposed. The court decides whether a measure ordered abroad but only partly executed there must be continued or taken into account in the sentence imposed in Switzerland.
- 36 Expression amended by Annex No 14 of the Federal Act of 19 December 2008 (Adult Protection, Law of Persons and Law of Children), in force since 1 Jan. 2013 (AS 2011 725; BBl 2006 7001).
- 37 J. Hurtado Pozo, *Droit pénal général*, Zurich 2008, p. 80.
- 38 U. Cassani, *Titre 1. Champ d'application*, (in:) R. Roth, L. Moreillon (ed.), *Commentaire Romand. Code pénal I. Art. 1-110 CP*, Bâle 2009, p. 50.

over Swiss jurisdiction provided that the state in question submits an appropriate application.³⁹

Art. 5 SCC does not include the premise of dual criminality as the legislator wanted to emphasise that such degenerative acts require punishment regardless of the place where they were committed.⁴⁰ On the one hand this greatly facilitates criminal proceedings as the Swiss judge is not obliged to determine whether a particular act constitutes an offence in the place it was committed, while on the other, it might prove difficult to obtain evidence from the foreign authorities concerned if this particular behaviour does not constitute a prohibited act in their country. According to U. Cassani, this solution is inappropriate. Although such acts might be considered degenerative throughout the world, it would mean that people staying outside the territory of Switzerland would be obliged to obey Swiss law in relation to the acts listed in Art. 5 SCC.⁴¹

Art. 5 (3) and (4) SCC also contain provisions which relate to the *ne bis in idem* principle and which take into account a sentence served abroad. These regulations are identical to those discussed in relation to Art. 3 (3) and (4). The catalogue of offences included in Art. 5 (1) is exhaustive.⁴² Under Art. 5 (1) a person is liable for the offence stipulated in Art. 187 SCC if the victim was under 14 years of age at the time of the offence (as opposed to the previous provision of 16 years under Art. 187). This lowering of the victim's age to 14 years was introduced in order to adjust the regulation to the regulations of neighbouring countries,⁴³ whereas according to the Convention on the Rights of the Child, a person is liable for the offence stipulated in Articles 182, 189, 190, 191 and 195, if the victim was under the age of 18 years.⁴⁴

39 J. Hurtado Pozo, *Droit pénal général*, Zurich 2008, p. 81.

40 Message concernant la modification du code pénal suisse (dispositions générales, entrée en vigueur et application du code pénal) et du code pénal militaire ainsi qu'une loi fédérale régissant la condition pénale des mineurs, from 21.09.1998, FG 1999, OC 98.038, p. 1802.

41 U. Cassani, *Titre 1. op. cit.*, p. 58, U. Cassani, R. Roth. *Le juge suisse...*, *op. cit.*, pp. 449-475.

42 U. Cassani, R. Roth. *Le juge suisse ...*, *op. cit.*, p. 459.

43 Message..., *op. cit.*, p. 1802.

44 Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

Universal jurisdiction is also expressed in Art. 6 SCC.⁴⁵ This particular article regulates the situation where a person who commits a felony or misdemeanour abroad, which Switzerland is obliged to prosecute under the terms of an international convention, is liable to prosecution under the Swiss Criminal Code provided the same act is also liable to prosecution in the place where it was committed or no criminal law jurisdiction applies in this place on the condition that the person concerned remains in Switzerland and is not extradited abroad. This demonstrates both the principle of universal jurisdiction and the principle of *aut dedere aut iudicare*.

The principle of liability expressed in Art. 6 refers exclusively to offences committed abroad. Thus, it complements the principle of territorial jurisdiction included in Art. 3. The article neither stipulates the nationality of the offender nor that of the victim hence it concerns everybody regardless of their state affiliation or lack of.

Art. 6 is a blanket provision which refers to the provisions of international law. Thus, the legislator is not obliged to amend the provisions of criminal law being in force to adjust them to new international regulations.⁴⁶

The provisions of Art. 6 refer mainly to international conventions which contain the *aut dedere aut prosequi* or *primo dedere secundo prosequi* principles adopted by the European forum and by the

45 Offences committed abroad are prosecuted in terms of an international obligation: 1. Any person who commits a felony or misdemeanour abroad that Switzerland is obliged to prosecute in terms of an international convention is subject to this Code provided: a) the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission; and b) the person concerned remains in Switzerland and is not extradited to the foreign country. 2. The court determines the sentence so that overall the person concerned is not treated more severely than would have been the case under the law at the place where the offence was committed. 3. Unless the offence involves a gross violation of the principles of the Federal Constitution and of the ECHR, the person concerned is not liable to further prosecution in Switzerland if: a) he has been acquitted of the offence abroad in a legally binding judgment; b) the sentence that was imposed abroad has been executed, waived, or has prescribed. 4. If the person concerned has been convicted of the offence abroad and if the sentence imposed abroad has been partly served, the court shall take the part served into account in the sentence to be imposed. The court decides whether a measure ordered abroad but only partly executed there must be continued or taken into account in the sentence imposed in Switzerland.

46 M. Henzlin, Titre 1. Champ d'application, (in:) R. Roth, L. Moreillon (ed.), Commentaire Romand. Code pénal I. Art. 1-110 CP, Bâle 2009, p. 67.

United Nations to combat terrorism. The ratification of the European Convention on the Suppression of Terrorism⁴⁷ by Switzerland resulted in the introduction of Art. 6^{bis} into the then general section of the Swiss Criminal Code. This article contains the principle of universal jurisdiction based on the model of *primo dedere secundo prosequi*.⁴⁸

Art. 6 also refers exclusively to those conventions which concern the obligation to prosecute, i.e. the obligation to undertake criminal proceedings under national laws.⁴⁹ The states whose systems are based on the principle of opportunism may not refer to this principle. Switzerland is bound by over twenty conventions which contain this obligation.

The principle of universal jurisdiction was based on the premise of the dual criminality of an act. Essentially the act committed must also be considered an offence in the place of commitment. It is crucial that the law binding on the territory where the act was committed contained the provisions which make this particular act an offence as well as constituting an offence under the Swiss Criminal Code. In accordance with the Federal Tribunal's adjudication, dual criminality refers exclusively to statutory elements of an offence, not to the principles of liability.⁵⁰ The only exception to the principle of dual criminality is the commitment of a conventional offence in a place which does not fall under any jurisdiction, such as an offence committed on the high seas as some commentators suggest is the case.⁵¹

Another condition as to whether Swiss jurisdiction applies under Art. 6 SCC, is the fact that an offender stays in the territory of Switzerland and no decision has been taken to hand them over. It is not important whether the offender remains in the territory of the Confederation voluntarily or against their will.⁵² The relation between extradition and prosecution (whether extradition takes precedence over handover or vice versa) is stipulated in the convention which obliges to

47 European Convention on the Suppression of Terrorism from 27.01.1977, ETS 090.

48 M. Henzlin, *op. cit.*, p. 67.

49 M. Dupuis, et. al., *op. cit.*, p. 43.

50 ATF 132 II 81 c. 2, ATF 129 II 462, p. 4.

51 M. Henzlin, *op. cit.*, p. 72, M. Dupuis, et. al., *op. cit.*, p. 43.

52 ATF 137 IV 23 c., ATF 116 IV 244 c.5.

prosecute for a particular offence. If there are no applicable provisions under the convention, preliminary works should be referred to.⁵³ Under Swiss law the premises which exclude extradition are included in Art. 2 and Art. 37 of the Act on International Mutual Assistance in Criminal Matters and Art. 25 of the Constitution.⁵⁴ The lack of application for extradition does not exclude the competence to prosecute an offender.

Art. 6 (2) SCC introduces the obligation to apply the *lex mitior* principle while imposing a sentence, which means that the judge is obliged to determine the sentence which is not more severe than the sentence prescribed for this same offence at the place where it was committed. Hence, it is indispensable to compare maximum limits of sentence and types of penalties stipulated for a particular offence under the law in force at the place where the offence was committed. This does not pose a problem in the case of legal systems similar to the Swiss system, which contains penalties such as imprisonment, fines and medical treatment. In accordance with the recommendation of the Federal Council, the Swiss court needs to assess and compare all implications of the penalty it is planning to adjudicate.⁵⁵ However, if a foreign law stipulates the types of punishment which are *lex mitior* and additionally are not provided for in the Swiss law, such as community service or house arrest, problems may arise.

Art. 6 (3) and 6 (4) SCC encompass legal solutions which refer to the *ne bis in idem* principle and take into account a sentence served abroad. The regulations are identical to those discussed in relation to Art. 3 (3) and 3 (4).

4. Active and passive personality and residual jurisdiction

Art. 7 SCC is a complicated provision due to its merits.⁵⁶ It regulates several competence principles which allow to take advantage

53 M. Henzlin, *op. cit.*, p. 74.

54 Federal Constitution of the Swiss Confederation of 18 April 1999, OC 101.

55 Message..., *op. cit.*, p. 1804.

56 Other offences committed abroad: 1. Any person who commits a felony or misdemeanour abroad where the requirements of Articles 4, 5 or 6 are not fulfilled is subject to this

of subsidiary principles while determining the extraterritorial application of Swiss law. Art. 7 is applied exclusively in cases where Articles 4-6 SCC cannot be applied. Art.7 (1) introduces the principle of both active and passive personality whereas Art. 7 (2) includes the so-called residual jurisdiction principle which is based on substitute or universal jurisdiction *sensu largo*.⁵⁷

Art.7 (1) introduces the active and passive personality principle on the grounds of nationality of the offender or of the victim. It means that an offender or a victim must be a Swiss national but the offence is committed abroad. Articles 4, 5 and 6 SCC are not applicable here. The offender or victim must possess Swiss nationality at the time the offence is committed. If the person is of dual nationality, s/he is treated as a Swiss national if one of the two nationalities is Swiss. If this person loses Swiss nationality before the judgment is passed, s/he is still treated as a Swiss national.⁵⁸ One problem that can arise is if the offender acquires Swiss nationality after the offence was committed. In this regard, the Federal Tribunal has stated that on the grounds of the general part of the Swiss Criminal Code in force, this person should be treated as a Swiss national.⁵⁹

Code if: a) the offence is also liable to prosecution at the place of commission or the place of commission is not subject to criminal law jurisdiction; b) the person concerned is in Switzerland or is extradited to Switzerland due to the offence; and c) under Swiss law extradition is permitted for the offence, but the person concerned is not being extradited.

2. If the person concerned is not Swiss and if the felony or misdemeanour was not committed against a Swiss person, paragraph 1 is applicable only if: a) the request for extradition was refused for a reason unrelated to the nature of the offence; or b) the offender has committed a particularly serious felony that is proscribed by the international community.

3. The court shall determine the sentence so that overall the person concerned is not treated more severely than would have been the case under the law at the place of commission.

4. Unless the offence involves a gross violation of the principles of the Federal Constitution and the ECHR, the person concerned is not liable to further prosecution in Switzerland for the offence if: a) he has been acquitted of the offence abroad in a legally binding judgment; b) the sentence that was imposed abroad has been served, waived, or has proscribed.

5. If the person concerned has been convicted of the offence abroad and if the sentence imposed abroad has been partly served, the court shall take the part served into account in the sentence to be imposed. The court decides whether a measure ordered abroad but only partly executed there must be continued or taken into account in the sentence imposed in Switzerland.

57 M. Henzlin, *op. cit.*, p. 79, M. Dupuis, et. al., *op. cit.*, p. 46.

58 M. Dupuis, et. al., *op. cit.*, p. 46.

59 ATF 117 IV 369, JdT 1993 IV 127.

Three premises need to be fulfilled jointly to apply Swiss jurisdiction. First, the offence is liable to prosecution at the place it was committed or no criminal law jurisdiction applies at this place. Second, the person concerned is in Switzerland or is extradited to Switzerland due to the offence. Third, under Swiss law, extradition is permitted for the offence, but the person concerned is not being extradited.

The first condition is to fulfill the premise of dual criminality, which is interpreted according to Art. 6 (1). The Federal Tribunal has emphasised that the aforesaid premise is satisfied if the act is considered an offence under the law of the place in which it was committed and prosecuted under the Swiss law *ex officio*.⁶⁰ However, if the statute of limitations in relation to the offence has expired at the place it was committed, this constitutes a negative premise to instigate proceedings in Switzerland.⁶¹

Another premise is the fact that the person concerned remains in Switzerland. The premise is the same as that indicated in Art. 6 (1) SCC, however, here it is assumed that the offender might have been extradited to the foreign country concerned. It is not important whether the offender remains in the territory of Switzerland voluntarily or has been extradited. Some scholars believe that it is not admissible to make an offender liable if s/he remains in the territory of Switzerland against their will as a result of illegal action (e.g. kidnapping)⁶². However, it would be more legally acceptable if the offender is surrendered on grounds other than extradition, e.g. deportation or surrender as an applicant for refugee status on the basis of the refoulement principle.

Art.7 (1) is only applicable to felonies and misdemeanours which constitute grounds for extradition under Swiss law. Hence, misdemeanours of lesser degree, i.e. for which the punishment that can be levied is no more than one year of imprisonment under Swiss law and that of the requesting state are (by virtue of Art. 35 (1) of Act on International Mutual Assistance in Criminal Matters) excluded. In addition, the catalogue of offences under Art. 7 (1) should be expanded

60 ATF 99 IV 257.

61 M. Dupuis, et. al., *op. cit.*, p. 47.

62 M. Henzlin, *op. cit.*, p. 80.

to include felonies as well as political, martial and tax misdemeanours, which according to Art. 3 of the Act on International Mutual Assistance in Criminal Matters, are excluded from Swiss jurisdiction. Art. 7 (1), unlike Art. 7 (2), does not impose an obligation to submit an extradition application or to surrender an offender.⁶³

Art. 7 (2) SCC includes the premises of residual jurisdiction which takes place when neither offender nor victim are a Swiss national and an application for extradition from Switzerland is rejected due to circumstances other than the type of offence, or when the offender has committed a particularly serious felony that is proscribed by the international community. In such case other premises listed in Art. 7 (1), i.e. committing an offence outside the territory of Switzerland, subsidiary in relation to Articles 4-6 SCC and three cumulative premises presented in Art. 7 (1) (a) (b) and (c), require to be satisfied.

According to the Federal Council, the Swiss jurisdiction introduced in Art. 7 (2) (a) SCC, is grounded on the principle of delegated competence,⁶⁴ which results from the principle of residual jurisdiction. This principle is applied when Switzerland refuses to extradite an offender for reasons other than type of offence, i.e. on the grounds of Art. 2 of the Act on International Mutual Assistance in Criminal Matters.⁶⁵

Another premise to determine jurisdiction on the grounds of residual jurisdiction is committing “a particularly serious felony that is proscribed by the international community” by an offender (a foreign national). In this way the legislator refers to universal jurisdiction but the term is difficult to define. Some scholars remark that the wording of this provision was affected by the provision included in Art. 7 (2)⁶⁶ of the European Convention on Human Rights.⁶⁷ M. Henzelin, believes that according to systemic interpretation of Articles 4-7 SCC include

63 Message..., *op. cit.*, p. 1804.

64 *Ibidem*, p. 1805.

65 M. Dupuis, et. al., *op. cit.*, p. 48.

66 This Article does not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

67 M. Dupuis, et. al., *op. cit.*, p. 48.

such acts which do not fall under the jurisdiction on grounds of Art. 6 SCC. He additionally points out that offences under international customs or *ius cogens* crimes such as crimes of aggression, genocide, war crimes, torture etc., may also be considered “particularly serious felonies”.⁶⁸ Some of these crimes are penalised on the grounds of the Swiss Criminal Code, e.g. genocide – Art. 264 SCC, crimes against humanity – Art. 264a SCC or war crimes – Art. 264b-264h SCC. Hence, Art. 7 (2) (b) despite its apparent subjective scope, will exclusively supplement international statutes of criminal tribunals and norms of specific parts of the Swiss Criminal Code which constitute the grounds of universal jurisdiction, except for international conventions which introduce the possibility, not the obligation, to prosecute (the obligation to prosecute which results from international conventions is the premise of the jurisdiction under Art. 6 SCC).⁶⁹

Likewise, Articles 6 (2) and Art.7 (3) SCC impose the obligation to apply *the lex mitior principle* when sentencing.

Art. 7 (4) and (5) SCC, include provisions which refer to observing the *ne bis in idem* principle and taking into account the sentence served abroad in the sentence to be imposed. The regulations are identical to those which were discussed in relation to Art.3 (3) and (4).

68 M. Henzlin, *op. cit.*, p. 80, U. Cassani, R. Roth. *op. cit.*, p. 466 ff.

69 M. Henzlin, *op. cit.*, p. 88, M. Dupuis, et. al., *op. cit.*, p. 49.

PHENOMENON OF CRIMINALITY BY FOREIGNERS IN SWITZERLAND

Criminality like all other social phenomena requires statistical analysis as the information on the extent, structure and tendencies facilitates its explanation, control and prevention.¹ Such analysis needs to include examination of the number of suspects, convicts and those deprived of liberty. In addition, to answer the question as to what extent the criminality of foreigners poses a threat to the security of the Swiss state and its population, it is also essential to take into consideration the scale of criminality among Swiss nationals.

The extent and dynamics of the criminality revealed is reflected in the statistical data concerning both suspects and convicts. Hence, to obtain a more precise and reliable picture of the phenomenon and its tendencies we need to examine the phenomenon of criminality in both groups.² Moreover, analysis of the data referring to those who are deprived of liberty is also crucial as it allows to present the punitiveness of Swiss justice toward foreigners.

All statistical data presented in the study reflects detailed data made publicly available by the Swiss Federal Statistical Office.³

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- 1 J. Błachut, Problemy związane ze statystycznym opisem przestępczości w oparciu o dane statystyk policyjnych, *Archiwum Kryminologii*, Vol. XXV, 1999-2000, p. 123, J. Swół, *Kulawa statystyka przestępczości, Przegląd Policyjny* 1998, No. 1, p. 26.
 - 2 T. Szymanowski, *Orzecznictwo sądów karnych w Polsce na tle obrazu przestępczości w latach 1997 i 2005*, (in:) A. Szwarc (ed.), *Represyjność polskiego prawa karnego*, Poznań 2008, pp. 27-28.
 - 3 All the data were made available to the public on <http://www.bfs.admin.ch>.

1. Suspect foreigners – statistical overview

Criminal statistics are the source of revealed criminality. The statistics on suspects provided by the law enforcement authorities is considered the most complete data as it includes the widest scope of the criminals (which gradually reduces in subsequent stages of the proceedings) and therefore it is frequently used to assess the extent of criminality involved. However, this is not an easy task as the interpretation of criminal statistics may be troublesome,⁴ largely because we cannot be completely sure whether registered changes result from changes in the phenomenon itself or from the way the phenomenon is controlled.⁵

The Swiss police statistics provide information on criminality in the form of volume figures which indicate the number of offences, suspects and victims.⁶

As regards the initial stage of criminal proceedings, the data obtained, and the only figures which are available, concern the number of suspects for the years 2009-2015. As Fig. 4 shows the number of suspects was relatively stable (145,000 – 150,000) with the only increase noted being in 2013, when the number of suspects in Switzerland tended to grow. It needs to be highlighted that in the examined period the number of foreign suspects always outweighed the number of Swiss suspects.⁷ The increase in the total number of suspects noted in 2012 and 2013 resulted from an increase in the number of offences committed by foreigners, particularly in relation to prohibited acts stipulated under the Federal Act on Foreign Nationals and Integration (FNAI).

The year 2012 showed no considerable growth in the number of foreign suspects who were legally staying in Switzerland. The

4 See: A. Adamski, Interpretacja statystyk przestępczości w kryminologii, Przegląd Policyjny 1992, No 2-3, pp. 158-171.

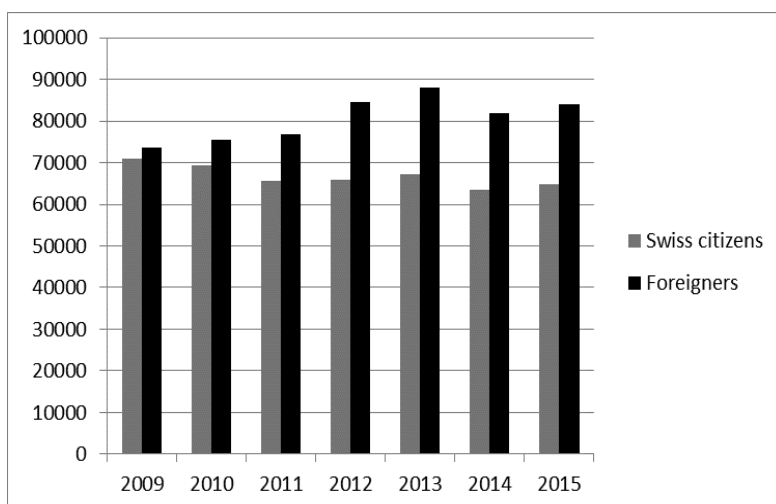
5 J. Błachut, Przestępczość w Polsce w latach 1986-1995 w świetle danych statystyk Policyjnych, Państwo i Prawo 1997, No. 3, p. 43.

6 S. Birrer, O. Ribaux, La statistique policière de la criminalité en Suisse peut-elle s'envisager dans le cadre du renseignement criminel?, Revue suisse de criminologie 2008, No. 2, p. 5.

7 See also: M. Eisner, M. Killias, Switzerland, European Journal of Criminology 2004, No. 1(2), p. 274.

increase which affected the total number of foreign suspects noted was among asylees, i.e. individuals who had either been granted refugee status or who were awaiting decision on an application for asylum (in 2011 and 2012 the number increased by 831 and 1638 respectively). Such growth mainly concerned offences against property, particularly shoplifting. As far as offences stipulated by the Federal Act on Foreign Nationals are concerned the number of recorded offences increased by 11% in 2011 and by 15% in 2012. Such offences primarily related to illegal border crossing, illegal stay or illegal employment.⁸ This pattern continued into 2013 with a further 14% increase being observed. In 2013 more illegal crossings were noted as well as moving place of residence (from one canton to another) without the required permit.⁹

Figure 4. Suspects in Switzerland 2009-2015



Source: Swiss Federal Statistical Office, police crime statistics.

8 Office fédéral de la statistique, Statistique policière de la criminalité (SPC), Rapport annuel 2012, Neuchâtel 2013, pp. 8-9.

9 Office fédéral de la statistique, Statistique policière de la criminalité (SPC), Rapport annuel 2013, Neuchâtel 2014, p. 9.

In the Swiss criminal statistics the structure of recorded offences is presented by legislative categories which define prohibited acts. The data on offences are shown with reference to the Swiss Criminal Code (SCC) as well as the Narcotics Act (NA)¹⁰ and the FNAI.

Table 5. Suspects in Switzerland by legislative category

Year	Nationality	Swiss Criminal Code	Narcotics Act	Act on Foreign Nationals and Integration	Other acts	Total
2009	Total	80481	38310	17722	8221	144734
	Swiss	42050	22570	1221	5152	70993
	Foreigners	38431	15740	16501	3069	73741
2010	Total	79357	38697	18376	8506	144936
	Swiss	40643	22367	1147	5168	69325
	Foreigners	38714	16330	17229	3338	75611
2011	Total	77836	37916	18711	8164	142627
	Swiss	38397	21464	912	4960	65733
	Foreigners	39439	16452	17799	3204	76894
2012	Total	81862	39914	21072	7627	150475
	Swiss	38341	22047	969	4642	65999
	Foreigners	43521	17867	20103	2985	84476
2013	Total	81400	41680	22670	9339	155089
	Swiss	37642	23019	1047	5399	67107
	Foreigners	43758	18661	21623	3940	87982
2014	Total	79237	33885	22267	9794	145183
	Swiss	37654	18766	1237	5716	63373
	Foreigners	41583	15119	21030	4078	81810
2015	Total	77248	35608	24753	11105	148714
	Swiss	36932	20453	1308	6115	64808
	Foreigners	40316	15155	23445	4990	83906

Source: Swiss Federal Statistical Office, police crime statistics.

10 Federal Act on Narcotics and Psychotropic Substances (Narcotics Act) of 3 October 1951, OC 812.121, hereinafter referred to as NA.

Table 5, depicts the number of suspects in Switzerland with reference to the legal acts aforementioned. Most suspects (54%), both Swiss nationals and foreign nationals, committed offences prescribed under the SCC. Before 2010 the majority of suspects were Swiss nationals, whereas after 2011 suspects of foreign nationality rose to the forefront in this group. Offenders who committed offences under the NA accounted for the second highest number of suspects (26%).¹¹ Within the scope of the NA, Swiss nationals dominated in the category and in the years 2009-2015 they represented 55-60% of suspects. However, the structure is of different complexion when we look at the FNAI. Crimes committed under this Act accounted for 13% of the total with 90% of suspects being represented by foreigners which, given the nature of the Act, is a natural consequence. Prohibited acts in this group include illegal border crossing, illegal stay and illegal employment, acts that can be committed only by foreigners. Swiss nationals, may also become suspects by committing acts which facilitate the illegal border crossing, illegal stay or illegal employment of foreigners, however its dimension is smaller.

The group of foreign suspects is divided by the Swiss Federal Statistical Office into three categories: foreigners legally residing in Switzerland (residents),¹² foreigners applying for refugee status¹³ and other foreigners¹⁴. Table 6 shows the number of foreign national suspects with reference to these categories and the legal act. As before mentioned over 50% of foreign suspects were those suspected of having committed acts stipulated by the SCC. This applies both to foreigners who legally reside in the country and to those applying for refugee status. 25% of foreign suspects committed acts under the FNAI, 20% under the Narcotics Act, and the remaining 5% committed acts which fall within the scope of other legal acts.

11 Similar findings presents: A. Kozlova, *Ausländerkriminalität in der Schweiz, Zusammenhang zwischen Migration und Kriminalitätsentwicklung*, Hamburg 2015, p. 109.

12 Residents include foreigners who possess: Residence permits (B), Settlement permits (C), residence permit with gainful employment (Ci).

13 Asylum-seekers – this group encompasses provisionally admitted foreigners (permit F), asylum-seekers (permit N), people in need of protection (permit S).

14 Others – this is the broadest group which includes: cross-border commuters (permit G), short-term residents (permit L), tourists, asylum-seekers, whose applications have been rejected, foreigners who are subject to deportation, foreigners staying illegally, foreigners in procedure for short-term work in Switzerland, foreigners whose status is not defined. *Statistique policière de la criminalité (SPC), Rapport annuel 2015, Neuchâtel 2016, p. 26.*

Table 6. Foreign suspects in Switzerland by category of foreigners or legislative category

	Foreigner's status	Swiss Criminal Code	Narcotics Act	Act on Foreign Nationals and Integration	Other acts	Total
2009	Residents	23446	7976	2072	1803	35297
	Asylum-seekers	3562	1834	1911	257	7564
	Others	11423	5930	12518	1009	30880
2010	Residents	23500	8454	2244	1874	36072
	Asylum-seekers	3406	1985	1657	252	7300
	Others	11808	5891	13328	1212	32239
2011	Residents	22396	7948	1928	1838	34110
	Asylum-seekers	4237	2322	2020	189	8768
	Others	12806	6182	13851	1177	34016
2012	Residents	23064	8112	1967	1636	34779
	Asylum-seekers	5875	2804	2716	115	11510
	Others	14582	6951	15420	1234	38187
2013	Residents	23384	8549	2390	2094	36417
	Asylum-seekers	4524	2354	2630	387	9895
	Others	15850	7758	16603	1459	41670
2014	Residents	23604	7213	2668	2281	35766
	Asylum-seekers	3127	1257	1848	170	6402
	Others	14852	6649	16514	1627	39642
2015	Residents	23657	7578	2734	2694	36663
	Asylum-seekers	2539	1004	1342	234	5119
	Others	14120	6573	19369	2062	42124

Source: Swiss Federal Statistical Office, police crime statistics.

The structure of offences among foreigners that fall within the category 'others', was quite different. These foreigners most frequently

committed offences which are stipulated under the FNAI, not under the SCC, which comes second. This group contains foreigners who stay in Switzerland for a short period of time, illegal migrants or those whose application for the granting of refugee status has been rejected. Hence, this overrepresentation in number of prohibited acts under the FNAI is clearly grounded in the status of these foreigners. Illegal migrants, by very definition of the term, commit the act of illegal border crossing, stay illegally or take up illegal employment. Those who have not been granted refugee status but who nevertheless wish to improve their material status thus resort to illegal employment or attempt to stay illegally in the territory of Switzerland. It needs to be highlighted that the number of suspects who committed offences under the SCC in the period 2009-2015 in this group was relatively stable. Conversely, the number of suspects who committed offences under the FNAI progressively increased. Those granted refugee status or those granted other forms of protection in Switzerland contain the lowest number of suspects, which might result from the fact that it represents the smallest group of foreigners staying in Swiss territory.

It can be concluded from the analysis of the criminality of foreigners in Switzerland that the years 2009-2015 mark the highest number of foreign suspects who in the statistics belong to the ‘others’ category, whereas foreigners who were granted refugee status or some other form of protection by the Swiss authorities committed the least number of offences. Among all suspects, residents accounted for only 44% of the total number. It confirms, that this particular group of foreigners represents the smallest threat to security.¹⁵

Table 7 depicts the number of foreigners suspected of having committed offences stipulated under the SCC in the years 2009-2015. Within the scope of the Code, foreign nationals most frequently commit offences against property, freedom, life and limb, forgery as well as offences against official powers.

15 Compare: K.L. Kunz, *Criminalité des étrangers en Suisse. Problematique et tentative d'explication* (in:) *Procédure pénale et exécution des peines: la questions des étrangers*, Caritas Suisse, *Compte-rendus* 1989, No. 1, pp. 5-6.

Table 7. Foreign suspects under the Swiss Criminal Code in the years 2009-2015 classified by category of offence

Type of offence	2009	2010	2011	2012	2013	2014	2015
Offences against life and limb	10336	9971	9705	9840	9833	9503	9268
Offences against property	20212	20513	21258	24246	24103	22204	20351
Offences against personal honour in area of secrecy or privacy	2900	3032	3534	4132	4159	4288	4628
Offences against liberty	9635	9579	9792	11641	11538	10850	10241
Offences against sexual integrity	1751	1747	1736	1951	2127	1949	2025
Offences against the family	443	393	425	469	498	528	524
Offences constituting a public danger	449	476	398	422	436	437	373
Offences against public health	19	14	14	20	14	18	17
Offences against public transport	82	110	118	144	149	138	116
Counterfeiting of money, official stamps, official marks, weights and measures	325	292	250	271	260	188	196
Forgery	2223	2337	2289	2568	3004	2919	3266
Offences against public order, genocide, war crimes	274	245	140	201	189	247	175
Offences against the state and national defence	X	5	6	3	4	X	3
Offences against the will of the people	0	1	X	4	2	X	1
Offences against official powers	2685	2884	2830	3528	3362	3233	3283
Offences detrimental of foreign relations	6	0	X	X	5	X	0
Offences against the administration of justice	1070	910	761	837	837	884	889
Offences against official or professional duty	25	23	36	19	35	28	34
Bribery	45	9	8	4	6	62	24
Contraventions of Federal Law	1532	1944	2301	2594	2556	2510	2785
Total	38431	38714	39439	43521	43758	41583	40316

Source: Swiss Federal Statistical Office, police crime statistics.

As illustrated above a significant growth in the number of suspects was observed in 2012 and 2013. Those years marked a remarkable increase within various types of crime, which encompassed offences against property, freedom, personal honour in the area of secrecy or privacy, forgery and offences against official powers (Table 7).

Analysis of the statistical data shows that offences against property mostly involved: shoplifting, theft, burglary and acts of vandalism. If we examine the status of foreigners in this context those which belong to the ‘others’ category committed the offences of shoplifting and burglary, whereas residents mainly stole. The high number of foreigners suspected of shoplifting results from the fact that this is an act which is reasonably easy to commit and is frequently conditioned by the low economic status of this group of foreigners.

As far as offences against freedom are concerned, offenders most often threatened people or unlawfully enter houses and stole at the same time. Those who used threats were mainly residents, whereas foreigners from the ‘others’ category unlawfully entered houses and stole. Offences against life and limb included assault and the causing of actual or grievous bodily harm and were mainly committed by residents.

Table 8, indicates the nationalities of resident suspects who most often committed offences under the SCC. In the years 2009-2015, the majority of foreign suspects were citizens of the following countries: Italy, Portugal, Serbia, Montenegro and Kosovo,¹⁶ Germany, Turkey, Macedonia, France, Spain, and Bosnia and Hercegovina.¹⁷ It can be stated that this structure reflects the structure of the foreigners staying in Switzerland. Most foreign suspects who possess a Swiss residence permit are of nationalities that prevail among the population of foreigners. (See: Table 1 Chapter II) In the years 2009-2015 the number of German suspects (despite an increase in the number of Germans present in Switzerland) remained relatively static. However, in the same period the number of Portuguese, French and Italian suspects grew, the latter against an apparent reduction in Switzerland’s Italian population. It is also worth noting, that the number of Turkish suspects was gradually decreasing which might be linked to shrinkage of the Turkish population in Switzerland.

16 Until 2010, the statistics showed the overall number of suspects from Kosovo, Serbia and Montenegro. Since 2011 the statistics for the nationals of Kosovo have been presented separately.

17 Similar findings presents: A. Kozlova, *op. cit.*, p. 111 ff.

Table 8. Resident suspects under the provisions of the Swiss Criminal Code in the years 2009-2015 by nationality

Country of origin	2009	2010	2011	2012	2013	2014	2015
Algeria	199	193	174	169	180	178	149
Germany	1474	1649	1737	1975	2054	2154	2149
Austria	297	275	287	298	287	309	321
Bosnia and Herzegovina	635	654	569	567	558	519	500
Brazil	485	474	454	473	494	500	505
Cameroon	212	234	225	176	215	214	209
Congo	139	152	256	182	158	158	129
Croatia	590	562	539	495	465	436	396
Eritrea		100	131	213	245	261	298
Spain	662	659	652	734	767	803	775
France	709	780	846	867	881	914	1007
Iraq	174	189	164	165	178	172	165
Italy	3045	2930	2823	2781	2905	2958	2932
Kosovo			1496	1574	1690	1805	1849
Macedonia	1076	1132	940	1013	977	939	975
Morocco	318	291	265	264	300	273	258
Nigeria	139	172	134	120	115	107	
Netherlands	104	118		113	107	103	135
Portugal	2604	2548	2583	2900	2917	3144	3220
Dominican Republic	288	318	266	258	279	282	255
Great Britain		134	128	124	138	118	157
Kosovo/Serbia/Montenegro	4255	4106	2179	2025	1863	1626	1491
Sri Lanka	428	396	379	353	328	346	370
Thailand	140	124	135	125	128	125	107
Tunisia	287	313	270	294	274	285	308
Turkey	1950	1982	1789	1709	1734	1659	1554
Other nationalities	3237	3022	2976	3098	3146	3216	3444
Total	23447	23507	22397	23065	23383	23604	23658

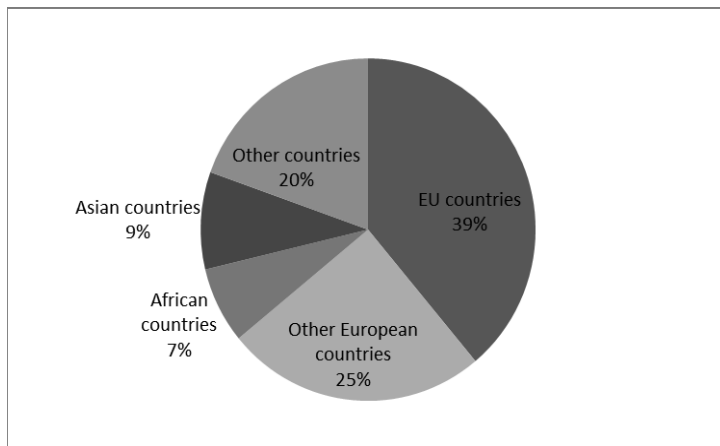
Source: Swiss Federal Statistical Office, police crime statistics.

* Since 2011 the data concerning Kosovo citizens are presented separately.

If we take the geographical origins of foreign residents suspected of committing offences under the SCC into consideration (Fig. 5) it can be stated that the vast majority of suspects come from European countries,

in total 64%. The representation of Asian and African nationals in this category is comparable at 9% and 7% respectively.

Figure 5. Geographical origins of foreign resident suspects in Switzerland 2009-2015



Source: Swiss Federal Statistical Office, police crime statistics.

The structure of foreign suspects, presented in Table 9, that fall in the category of asylum seekers, according to the criterion of their nationality, differed from the structure of the nationality of residents. Suspected residents were mainly nationals of European countries, particularly from Switzerland's neighbouring countries. As a rule, the number of suspected asylum seekers tended to decrease, with the peak in 2012 being due to an increase in criminal activity of Tunisian nationals, mainly committing offences against property (particularly shoplifting).¹⁸ Suspect asylum-seekers were mostly nationals of non-European countries, primarily from non-European Union states, who applied for refugee status after fleeing from armed conflicts occurring in their native countries. Suspect asylum seekers were typically nationals

18 Office fédéral de la statistique, Statistique policière de la criminalité (SPC), Rapport annuel 2012, Neuchâtel 2013, p. 8.

of Tunisia, Georgia, Algeria, Serbia, Kosovo, Montenegro, Morocco or Somalia and, to a lesser extent, nationals of Eritrea, Iraq, Somalia and Nigeria.

Table 9. Suspect asylum-seekers under the provisions of the Swiss Criminal Code in the years 2009-2015 – by nationality

Country of origin	2009	2010	2011	2012	2013	2014	2015
Algeria	209	236	389	1267	490	265	159
Eritrea	135	103		380	139	158	340
Georgia	546	444	258	357	357	232	156
Iraq	281	225	185	322	146	119	101
Morocco			231	188	509	263	139
Nigeria	169	247	229	179	204		
Serbia/Montenegro/Kosovo	422	354	219	124	197	127	
Somalia	229	198	157	124	163	186	186
Sri Lanka	111	124	117	121			
Syria				105	122	164	155
Tunisia		160	952	1577	639	293	109
Other nationalities	1463	1319	1503	1131	1561	1320	1196
Total	3565	3410	4240	5875	4527	3127	2541

Source: Swiss Federal Statistical Office, police crime statistics.

Asylum seekers suspected of offences mainly originated from states within the Maghreb region of Northwest Africa. The growth in criminality among these foreigners, noted since 2011, resulted from their mass influx into Europe, including into Switzerland, during the so-called Arab Spring. Asylum seekers who were granted protection in Switzerland usually arrived via Spain and France where, largely due to homelessness, they frequently committed offences in order to survive. Thus, the group includes individuals with a criminal record, many of

whom despite being given non-custodial sentences in Switzerland, subsequently progress to become persistent offenders.¹⁹

The analysis of the data presented above in Table 8 shows which foreign residents prevailed in committing offences under the SCC. The group encompasses nationals of Italy, Portugal, Serbia, Montenegro and Kosovo,²⁰ Germany, Turkey, Macedonia, France, Spain and Bosnia and Hercegovina. Table 10, on the other hand, indicates the types of offences committed by these nationals under the SCC.²¹ Table 10, includes aggregate statistical data for the years 2009-2015. Overall, it can be concluded that regardless of the national origin of suspects the structure of criminality under the SCC is fairly even.

Nationals of the countries referenced as well as other countries included in Table 10, mostly committed offences against property (c. 30%), offences against life and limb (c. 20%), offences against freedom (c. 17%), offences against personal honour in the area of secrecy or privacy (c. 8%) as well as offences against official powers (c. 5%), forgery (c. 3%) and offences against sexual integrity (c. 3%). As previously mentioned, Table 10, indicates that foreigners mainly committed offences against property. However, it is worth noting that the number of foreigners suspected of committing offences against property or offences against life and limb among the nationals of Portugal, Macedonia and Turkey, was reasonably similar. The disproportion was higher in the case of suspects who fall in the 'others' category (2:1 and 1.5:1 respectively). In addition, Turkish nationals committed relatively more offences against freedom than other nationalities.

19 R. Fibbi, B. Kaya, J. Moussa, M. Pecoraro, Y. Rossy, I. Steiner, *Les Marocains, les Tunisiens et les Algériens en Suisse*, Office fédéral des migrations, Bern-Wabern 2014, p. 86.

20 Until 2010, the statistics showed the overall number of suspects from Kosovo, Serbia and Montenegro. Since 2011 the statistics for nationals of Kosovo have been presented separately.

21 The available statistical data lack detailed information concerning the nationality of the suspects and legal classification of the offence.

Table 10. Suspected residents by category of offence in the years 2009-2015²²

	Offences against life and limb	Offences against property	Offences against personal honour in area of secrecy or privacy	Offences against liberty	Offences against sexual integrity	Offences against the family	Offences constituting a public danger	Offences against public transport	Counterfeiting of money, official stamps, official marks, weights and measures	Forgery	Offences against public order, genocide, war crimes	Offences against official powers	Offences against the administration of justice	Offences against official or professional duty	Other offences	Contraventions of Federal Law	Total
Total foreigners	53088	69093	21227	42144	7432	2770	2206	597	727	7659	815	12411	3959	113	22	15097	163061
Algeria	405	684	221	407	48	38	8	0	9	38	5	101	25	0	0	18	1242
Germany	3037	5394	1217	2485	600	166	244	61	29	592	67	1333	341	15	0	2311	13192
Angola	268	290	141	179	26	26	8	3	5	72	7	58	9	0	0	31	715
Austria	6757	8422	2481	4819	997	449	211	76	99	1131	123	1604	475	4	3	1044	19655
Bosnia and Herzegovina	1247	1871	405	1063	124	58	52	15	16	190	30	288	88	2	0	442	4002
Brazil	1311	1339	451	829	290	66	40	8	17	124	6	254	65	1	0	208	3385
Cameroon	503	652	204	317	100	38	25	4	15	127	5	115	40	0	0	40	1485
Colombia	173	180	56	103	25	19	7	1	4	12	0	30	13	0	0	12	426
Congo	438	532	215	316	45	39	18	3	6	95	11	97	26	0	0	21	1174
Croatia	1016	1563	306	888	87	45	51	22	19	155	35	293	93	2	0	476	3483
Eritrea	535	455	82	338	78	11	7	4	12	132	2	116	19	0	1	52	1248
Spain	1555	2236	762	1230	254	97	88	21	15	165	27	360	115	0	0	373	5052

22 Table 10 includes the aggregate statistical data for the years 2009-2015.

France	1851	2871	1342	1496	248	186	78	17	19	281	28	307	156	1	2	82	6004
Iraq	437	459	152	336	59	15	13	4	7	151	14	91	26	0	0	61	1207
Italy	5652	9120	3123	5380	928	290	352	68	107	971	117	1357	530	10	6	1789	20374
Kosovo	2927	3491	932	2322	341	96	89	34	32	466	43	610	215	1	0	1024	8414
Macedonia	2263	2849	547	1783	302	51	74	35	30	334	32	627	176	0	1	1044	7052
Morocco	778	876	460	624	79	62	16	2	6	38	5	100	39	1	0	42	1969
Nigeria	277	212	62	200	35	18	3	0	12	90	3	131	62	0	0	34	787
Netherlands	192	304	85	152	27	8	8	0	1	34	3	52	16	1	0	62	680
Poland	160	234	70	127	20	4	12	1	1	25	2	48	12	0	0	61	562
Portugal	7342	8022	3748	5548	935	466	393	68	57	543	76	1054	361	2	2	1282	19916
Dominican Republic	821	727	209	480	109	37	14	0	19	94	4	154	72	0	2	188	1946
Romania	54	134	39	61	28	2	3	0	0	16	0	11	3	0	1	16	256
Great Britain	241	331	104	159	37	32	12	6	2	54	4	48	16	1	0	37	799
Serbia/Montenegro/ Kosovo	5834	7830	1471	4717	592	166	176	45	81	807	78	1305	453	2	1	2044	17545
Sri Lanka	1051	1014	248	734	168	33	33	13	10	118	13	153	61	0	0	147	2600
Thailand	272	352	52	171	84	14	15	2	15	43	1	50	27	0	0	102	884
Tunisia	781	920	365	671	95	63	10	4	9	53	8	196	37	0	0	74	2031
Turkey	4299	4539	1441	3656	553	151	105	72	60	562	51	1190	315	68	1	1619	12377
Other nationalities	611	1190	236	553	118	24	41	8	13	146	15	278	73	2	2	361	2599

* Other offences are: Offences against public health, against the state and national defence and against the will of the people.
Source: Swiss Federal Statistical Office, police crime statistics.

The main motivation of offenders is to profit from their criminal undertakings, understood as gaining financial advantage. Consequently, most of the offences committed by foreigners are offences against property, which typically is grounded in the offenders' poor financial situation (see Chapter II). Nevertheless, it is also worth underscoring that offences against property are also most often committed by suspects of Swiss nationality.

Overall, 70% of all offences committed in Switzerland are offences against property, half of which involve theft, including car theft. The second largest category of offences includes damage to property.²³

Offences against life and limb and violent crimes constituted the second largest group of offences committed both by Swiss nationals and foreigners. Extreme violent criminal offences such as murder, grievous bodily harm, rape and robbery constituted less than 5% of all violent crimes recorded by the law enforcement authorities. Other violent offences include domestic violence such as offences against physical integrity and sexual offences with most being connected with violent behaviour between couples.²⁴ The structure of such criminality among resident foreign nationals does not differ from that among Swiss nationals, which seems to confirm that the phenomena of criminality in this regard represents nothing unusual in Swiss society as a whole.

The data included in Table 11 indicates the nationality of asylum-seekers who most frequently committed offences under the SCC. These were mainly nationals of Tunisia, Georgia, Algeria, Serbia, Kosovo and Montenegro, Morocco and Somalia. The data provided in Table 11, represents the criminality of nationals of specific countries.²⁵

23 Office fédéral de la statistique, *Statistique policière de la criminalité (SPC), Rapport annuel 2012*, Neuchâtel 2013, pp. 8-9.

24 Office fédéral de la statistique, *Statistique policière de la criminalité (SPC), Rapport annuel 2015*, Neuchâtel 2016, p. 8, S. Steiner, *Häusliche Gewalt, Migrationshintergrund und Strafverfolgung*, (in:) D. Fink, A. Kuhn, C. Schwarzenegger (eds.), *Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité*, Berne, 2013, p. 171. See also: M. Killias, M. Simonin, J. De Puy, *Violence experienced by women in Switzerland over their lifespan*, Berne 2005, pp. 158. Similar findings concerning late 80. presented K.L. Kunz, *Criminalité ...*, *op. cit.*, p. 22.

25 The available statistical data lack detailed information concerning the nationality of the suspects and legal classification of the offence.

Table 11. Suspect asylum-seekers by category of offence in the years 2009-2015²⁶

Country of origin	Offences against life and limb	Offences against property	Offences against personal honour in area of secrecy or privacy	Offences against liberty	Offences against sexual integrity	Offences against the family	Offences constituting a public danger	Offences against public health	Offences against public transport	Counterfeiting of money, official stamps, official marks, weights and measures	Forgery	Offences against public order	Offences against official powers	Offences against the administration of justice	Offences against official or professional duty	Contraventions of Federal Law	Total
Afghanistan	148	150	39	113	39	4	6	0	5	4	48	0	35	4	0	9	422
Algeria	237	2065	63	687	28	2	9	0	1	18	31	2	229	12	0	23	3015
Angola	63	108	25	46	8	1	6	0	0	0	18	2	14	3	0	1	208
Belarus	7	227	0	73	0	0	0	0	0	1	4	0	12	1	0	2	593
Eritrea	334	490	42	223	71	1	8	0	0	6	67	1	79	8	0	19	1255
Georgia	82	2259	5	801	12	0	2	1	1	4	47	1	48	8	0	2	2350
Iraq	412	542	119	344	72	5	11	0	1	7	149	4	93	10	1	26	1379
Morocco	188	1528	35	528	17	2	4	1	2	11	14	3	156	8	0	10	1330
Nigeria	119	431	15	125	26	0	3	0	2	61	54	1	512	54	0	16	1028
Russia	25	195	0	69	0	0	1	0	0	0	3	0	7	2	0	3	244
Serbia/ Montenegro	332	1156	102	504	56	5	13	0	3	10	60	6	53	17	0	35	1443
Somalia	479	604	84	394	84	9	20	0	11	6	94	10	140	16	0	50	1243
Sri Lanka	178	206	30	129	37	3	2	0	2	1	47	2	27	2	0	18	473
Syria	138	316	38	159	32	1	2	0	1	6	70	1	38	6	0	6	546
Tunisia	382	3152	71	1111	61	1	13	0	9	12	11	6	357	14	0	26	3730
Other nationalities	1842	5537	528	2235	323	34	65	0	28	91	570	29	1133	150	1	132	8026
Total	4966	18966	1196	7541	866	68	165	2	67	238	1287	68	2933	315	2	388	27285

Source: Swiss Federal Statistical Office, police crime statistics.

It can be stated that regardless of the national origin of the suspects involved the structure of criminality under the SCC is quite similar. The vast majority of suspects are alleged to have committed offences against property (c. 50%), offences against liberty (c. 20%), offences

26 Table 11 includes the aggregate statistical data for the years 2009-2015.

against life and limb (c. 12%) offences against official powers (c. 7%), forgery (c. 3%) and offences against sexual integrity (c. 3%). This structure differs from the structure of resident suspects since asylum-seekers were mainly suspected of having committed offences against property. The second largest group of suspects were those considered to have committed offences against freedom, unlike in the case of suspected residents where offences against life and limb ranked second. Threatening behaviour and unlawful entry (often accompanied by theft) prevailed as far as offences against freedom are concerned. Said structure of offences refers to nationals of Tunisia, Georgia, Algeria, the former Yugoslavia and Morocco. Nationals of Somalia, Nigeria, Iraq and Eritrea, in common with the 'others' group of suspects, are mostly alleged to have committed offences against life and limb, with offences against property ranking second. This also applies to the number of Afghanistan nationals alleged to have committed offences against property or offences against life and limb which, in the period examined, was almost identical.

Foreigners are also involved in drug-related crimes. Residents of foreign origin suspected of having committed offences falling under the Narcotic Act in the period analysed (Table 12) included nationals of Italy, Portugal, Serbia, Montenegro and Turkey, thus citizens of European states. In the territory of Switzerland, Italian organised criminal groups mainly commit drug-related crimes hence most foreign residents are suspected to have committed offences which fall within the scope of the Narcotic Act.²⁷ The diaspora of citizens from the former Yugoslavia constitutes an ideal breeding ground for organised crime groups, particularly in the area of drug dealing, prostitution, human trafficking and offences against property.²⁸ As the police report, the most common offences are possession of narcotic drugs for sale on the street and possession for personal use.²⁹

27 M. Perkowska, Activities of foreign organized criminal groups in Switzerland, (in:) E.W. Plywaczewski (ed.), Current problems of the penal law and criminology, Warszawa 2012, pp. 504-505, M. Perkowska, Przystępczość zorganizowana w Szwajcarii – fenomen zjawiska, (in:) K. Laskowska (ed.) Współczesne oblicza przestępczości zorganizowanej, Białystok 2014, p. 220.

28 M. Perkowska, Przystępczość zorganizowana..., *op. cit.*, p. 230.

29 Office fédéral de la statistique, Statistique policière de la criminalité (SPC), Rapport annuel 2015, Neuchâtel 2016, pp. 31-32.

Table 12. Resident suspects under the Narcotic Act in the years 2009-2015
by nationality

Country of origin	2009	2010	2011	2012	2013	2014	2015
Germany	515	646	609	707	777	655	832
Bosnia and Herzegovina	169	193	162	158	161	150	127
Brazil	145	153	145	165	172	132	159
Croatia	200	198	188	174	187	150	145
Spain	332	379	334	382	418	328	347
France	403	439	397	397	443	375	432
Italy	1488	1481	1382	1357	1412	1219	1306
Kosovo			359	383	411	357	365
Macedonia	273	277	252	292	251	202	215
Portugal	936	1087	1027	1089	1238	1112	1092
Serbia/ Montenegro	912	946	591	512	493	353	327
Turkey	626	619	579	633	582	480	413
Other nationalities	1976	2036	1923	1863	2004	1700	1818
Total	7975	8454	7948	8112	8549	7213	7578

Source: Swiss Federal Statistical Office, *police crime statistics*.

As far as asylum-seekers are concerned (Table 13), those suspected of having committed drug-related offences in the years 2009-2015 were mainly nationals of African states. The majority of offenders constituted nationals of Nigeria (over 30%), Tunisia, Gambia and Guinea. The nationals of African states, mainly from western Africa, are typically members of organised crime groups dealing in drugs.³⁰

30 M. Perkowska, *Activities ...*, *op. cit.*, pp. 504-510, M. Perkowska, *Przestępczość zorganizowana...*, *op. cit.*, pp. 225-227.

Table 13. Suspect asylum-seekers under the Narcotic Act in the years 2009-2015 by nationality

Country of origin	2009	2010	2011	2012	2013	2014	2015
Algeria			118	152	149		
Gambia	122	120	156	204	191		
Guinea	152	142	159	154	113		
Nigeria	431	541	440	549	358	133	165
Somalia		114		123	133		
Tunisia			321	400	222		
Other nationalities	1122	1067	1128	1221	1189	871	1092
Total	1830	1984	2322	2803	2355	1004	1257

Source: Swiss Federal Statistical Office, police crime statistics.

The number of foreigners suspected of having committed offences falling within the scope of the FNAI (Table 14³¹) tended to grow in the analysed period, except for 2011 when the number went down. As far as asylum-seekers are concerned, the situation was more dynamic. The number of suspects decreased both in 2011 and 2012 as well as since 2014, whereas in the other years a growth tendency can be seen. The number of suspects falling into the ‘others’ category appeared to grow throughout the whole of the analysed period. In said period, foreigners belonging to the ‘others’ category constituted the majority of suspects (78%), followed by residents and asylum-seekers (12% and 10% respectively). The analysed structure of criminality indicates that almost 75% of prohibited behaviour related to unlawful entry, exit or period of stay, whereas unlawful employment (20%) ranked second.

The perpetrators of offences which fall into the category of unlawful entry, exit or period of stay under the FNAI, most frequently stayed illegally in Switzerland or entered its territory unlawfully. Foreigners also commit the offence of unlawful stay by exceeding the period of legal stay.. Similarly, where a foreigner is apprehended by

31 Table 14 see page 133 ff.

an incidental control within Swiss territory rather than at a recognised point of entry, unless he is able to prove that he entered the country legally he will be liable for illegal stay as well as unlawful entry. The number of people suspected of illegal stay increased steadily from 2009 to 2015, with its peak in the years 2013-2015. Similar tendencies were displayed in the number of people suspected of unlawful entry. The growing number of people who attempted to enter Switzerland or stay in its territory illegally resulted from the massive wave of illegal migration to Europe that has been witnessed over the past few years. Switzerland was and still is an attractive destination for both legal and illegal migrants. Due to the specificity of offences, most can be seen to have been committed by foreigners falling into the category of ‘others’ rather than by residents or by *bona fide* asylum seekers.

The increase in the number of those suspected of unlawful entry or overstaying was accompanied by an increase in the number of foreigners suspected of facilitating the unlawful entry or departure or the unlawful period of stay in Switzerland. Residents prevailed in this category if we take both the legal classification and aggravated types of offences into consideration, i.e. in the aim of an individual’s personal gain or for gain within an association or group. Some foreigners who stay in the receiving state legally form well-functioning organisations which facilitate unlawful entry, stay or employment, frequently generating high profits from this type of activity. Some organised crime groups operating in the territory of Switzerland mainly deal with arranging illegal migration in a broad sense. Slavic (e.g. Serbian³²), African and Chinese groups are worth mentioning here.³³

The second largest group of offences which are penalised under the FNAI and frequently committed by foreigners is working without authorisation. As in the case of unlawful entry and unlawful stay a steady increase was observed during the six-year period analysed amounting to an overall rise in unlawful employment of 40%. Again this offence is mainly committed by foreigners that fall within the ‘others’

32 Office fédéral de la police, Lutte de la confédération contre la criminalité. Situation, mesures et moyens, Rapport annuel 2014, Berne 2015, p. 14.

33 Office fédéral de la police, Le trafic organisé de migrants et la Suisse Rapport 2014, Berne 2015, p. 74.

category and thus, it may reasonably be assumed that such suspects are also staying in Switzerland illegally. Illegal stay leads to illegal employment. Along with the increase in the number of foreigners who were suspected of working without authorisation, an increase in the number of people suspected of wilfully employing foreign nationals without work permits was noted. However, one important remark needs to be made here – Table 14, only includes the data which concern the number of suspected foreigners, hence it excludes Swiss nationals who may employ foreigners illegally.

Fraudulent conduct towards the authorities by providing false information or withholding essential information is another behaviour penalised under the Federal Act on Foreign Nationals. The number of foreigners who committed the offence steadily grew in the years 2009-2015. Such acts occur in the case of illegal migration, willingness to legalise stay or entering employment by people who unlawfully stay in the country or do not possess required permits and the like. The growing trend of such behaviour also encouraged other forms of fraudulent conduct against the authorities. Most offences of such kind were also committed by foreigners falling into the ‘others’ category, i.e. those who had obtained permission for short-term stay and most probably wished to prolong it illegally or those who had arrived in Switzerland illegally and subsequently attempted to legalise their presence. A considerable number of residents were also reported as having engaged in fraudulent conduct towards the authorities by providing false information or withholding essential information.

Fraudulent conduct towards the authorities by entering into a “marriage of convenience” with the intention of circumventing the regulations on admission or stay or by arranging, encouraging or facilitating such a marriage - all offences penalised under the FNAI - did not rank that high against the background of other offences committed by foreigners in Switzerland, and its occurrence tended to decrease in the period analysed. Residents prevailed in the group of foreigners who committed this type of offence. Thus, it might be concluded that entering into a marriage of convenience by foreigners is not a common method of legalising their stay. In this context, one may pose another question. What is the dark figure of such acts?

The number of foreigners who failed to comply with restriction or exclusion orders and who violated the requirements to register and give notice of departure, tended to grow until 2012. Again, the vast majority of offenders in this context belong in the 'others' category, which appears to be a logical consequence as this group comprises foreigners who unlawfully stay in Switzerland and unsuccessful asylum-seekers who have been ordered to leave the country. In the latter case, this happens after their application to be granted refugee status or other protection has been rejected.

The criminality of resident foreign nationals on grounds of the FNAI in the years 2009-2015 tended to increase, the only fall in number being recorded in 2011. As regards the structure of criminality, 33% of resident foreigners were suspected of illegal facilitation, with 23% facilitating unlawful entry, exit and stay, whereas those suspected of unlawful entry, exit or stay represented a mere 13% of the number.

The data included in Table 15, indicate that in the years 2009-2015 within the group of resident foreign nationals, offences falling within the scope of the FNAI were mostly committed by citizens of the former Yugoslavia (i.e. Montenegro, Kosovo and Serbia) and of Italy, Germany and Turkey. Hence including representatives of states that prevail in significant number in Switzerland anyway, namely nationals of Italy and Germany. It may be concluded from the statistical data that foreigners who legalised their stay for a longer period attempt to help others migrate or legalise their stay by means of methods which are not always in compliance with the law. The statistics reveal that residents mainly facilitate unlawful entry, departure and unlawful period of stay (24%) and other forms of assistance in illegal migration and employment (34%). In the period examined the number of residents suspected of facilitating unlawful entry, departure and period of stay, did not show any particular trend beyond such offences increasing and decreasing from time to time. However, the number of unlawful facilitation cases under the FNAI displays a growing tendency in this regard. Although behaviours such as illegal entry, exit or stay constituted only the third largest group, the number of cases steadily grew. Since 2011 data concerning nationals of Kosovo, Serbia and Montenegro have been presented separately.

Table 15. Suspect residents under the Federal Act on Foreign Nationals by nationality and by category of prohibited act in the years 2009-2015³⁴

Year	Country of origin	Illegal entry/exit/stay	Facilitating the unlawful entry or departure or the unlawful period of stay	Illegal facilitating	Fraudulent conduct towards the authorities	Other offences
2009	Brazil	30	62	35	5	8
	Portugal	23	54	33	5	15
	Germany	24	28	50	6	75
	Turkey	26	62	74	18	31
	Italy	13	78	69	4	70
	Serbia/Montenegro/Kosovo	74	208	176	23	39
	Other nationalities	172	304	289	70	170
Total	362	796	726	131	408	
2010	Germany	9	21	51	13	122
	Brazil	22	48	34	5	22
	Italy	17	56	82	4	117
	Macedonia	15	39	54	12	17
	Portugal	10	59	44	3	29
	Serbia/Montenegro/Kosovo	63	170	215	22	45
	Turkey	22	45	81	11	40
	Other nationalities	176	211	265	77	195
Total	334	649	826	147	587	
2011	Germany	5	15	34	16	113
	Italy	3	38	69	4	58
	Kosovo	26	64	119	19	11
	Macedonia	20	28	68	6	13
	Serbia/Montenegro	16	59	97	10	31
	Turkey	22	45	99	15	29
	Other nationalities	163	246	280	79	228
	Total	255	495	766	149	483

34 Categories of the prohibited acts were presented according to the classification provided by the Swiss Federal Statistical Office.

2012	Germany	6	15	29	6	107
	Italy	13	39	80	3	65
	Kosovo	26	63	127	8	19
	Macedonia	19	27	69	8	19
	Portugal	18	29	42	1	39
	Serbia/Montenegro	25	50	117	5	30
	Turkey	12	37	92	13	39
	Other nationalities	184	208	232	62	235
	Total	303	468	788	106	553
2013	Germany	13	16	34	9	158
	Italy	17	48	91	10	129
	Kosovo	27	98	177	6	45
	Macedonia	13	36	74	2	28
	Portugal	21	34	38	5	67
	Serbia/Montenegro	28	60	120	8	26
	Turkey	15	36	75	5	24
	Other nationalities	202	272	322	62	229
	Total	356	625	946	109	718
2014	Germany	16	19	41	11	187
	Italy	22	37	117	10	135
	Kosovo	35	82	185	13	41
	Macedonia	12	30	72	3	32
	Portugal	24	46	38	1	67
	Serbia/Montenegro	19	53	116	14	38
	Turkey	12	46	130	15	43
	Other nationalities	265	267	327	79	305
	Total	405	580	1026	146	848
2015	Germany	18	30	48	12	156
	Italy	21	45	82	28	118
	Kosovo	31	144	190	12	54
	Macedonia	20	36	83	7	21
	Portugal	28	35	30	6	45
	Serbia/Montenegro	15	65	119	12	32
	Turkey	14	39	108	5	43
	Other nationalities	260	337	395	70	307
	Total	407	731	1055	152	776

Source: Swiss Federal Statistical Office, police crime statistics.

In the period examined within the group of suspect residents committing crimes under the FNAI, most offenders were males and predominantly in the 30-39 and 40-49 year-old age groups. This appears to confirm the fact that such offenders have been established in Switzerland for a lengthy period of time and use their residency status as a cover for undertaking unlawful activities such as facilitating different forms of illegal migration.

Criminality among asylum-seekers under the Federal Act on Foreign Nationals and Integration in the years 2009–2015 fluctuated. The number of suspects increased until 2012 but since 2013 a gradual decrease is recorded (Table 16).

Table 16. Suspect asylum-seekers under the Federal Act on Foreign Nationals by nationality and category of offence in the years 2009-2015³⁵

Year	Country of origin	illegal entry/exit/stay	Facilitating the unlawful entry or departure or the unlawful period of stay	Illegal facilitating	Fraudulent conduct towards the authorities	Other offences
2009	Eritrea	190	1	8	0	9
	Georgia	90	2	0	2	27
	Iraq	92	5	20	4	18
	Nigeria	219	3	8	2	60
	Serbia / Montenegro / Kosovo	73	9	43	2	7
	Sri Lanka	87	3	11	0	2
	Other nationalities	799	37	86	16	145
	Total	1550	60	176	26	268
2010	Nigeria	299	1	4	2	102
	Other nationalities	995	36	180	19	264
	Total	1294	37	184	21	366

35 Categories of the prohibited acts were presented according to the classification provided by the Swiss Federal Statistical Office.

2011	Algeria	115	1	5	1	43
	Nigeria	321	1	5	0	66
	Eritrea	92	5	4	1	3
	Tunisia	242	1	2	0	71
	Other nationalities	913	20	155	14	198
	Total	1683	28	171	16	381
2012	Algeria	159	0	2	0	70
	Eritrea	127	2	4	2	11
	Morocco	146	0	1	1	46
	Nigeria	355	0	8	2	94
	Tunisia	424	0	3	3	107
	Other nationalities	1046	19	170	16	252
	Total	2257	21	188	24	580
2013	Algeria	178	2	3	0	77
	Eritrea	126	1	5	0	8
	Gambia	78	0	0	1	33
	Morocco	148	0	2	0	68
	Nigeria	294	0	5	2	65
	Tunisia	223	0	0	0	68
	Other nationalities	1137	22	122	19	263
	Total	2184	25	137	22	582
2014	Algeria	98	0	6	0	44
	Eritrea	345	14	5	1	7
	Morocco	103	0	1	1	37
	Nigeria	111	0	5	2	17
	Tunisia	100	0	6	1	42
	Other nationalities	720	33	146	12	201
	Total	1477	47	169	17	348
2015	Eritrea	215	3	8	1	11
	Other nationalities	814	46	151	19	214
	Total	1029	49	159	20	225

Source: Swiss Federal Statistical Office, police crime statistics.

The structure of criminality among asylum-seekers under the FNAI during the period examined looks different to that among residents. The most common offences committed by asylum-seekers were unlawful entry, exit and period of stay (72%), which of course is closely connected with the specificity of this particular group in that they do not possess the right to enter or stay in the territory of Switzerland.

The data included in Table 16, indicate that in the years 2009-2015, offences under the FNAI within this group were mostly committed by citizens of African states, e.g. Eritrea, Nigeria, Tunisia, Algeria and Morocco. Nationals of Eritrea and Nigeria stand among the most prominent groups who migrate illegally into Europe, although not the largest.³⁶ The number of Nigerian nationals within the group of asylum-seekers tended to grow until 2012 but since 2013 has declined, whereas a decrease in the number of Eritrean nationals was recorded in the years 2011 and 2015.

Asylum-seekers suspected of having committed an offence under the FNAI in the years 2009-2015, were mostly males in the 20-29 year-old age group, the majority of whom had not attained the age of 25 at the time of their arrival. Thus it can be concluded from the structure of offences committed under the FNAI by foreigners falling into this category, that invariably they are young migrants attempting to reach Europe from Africa illegally.

2. Foreign organized criminal groups in Switzerland³⁷

The broad analysis of organised crime in Switzerland by M.L. Cesoni, demonstrated that there are practically no “home-grown” organised criminal groups in the country. There are Swiss criminal gangs, but none that meet the criteria to be considered as an organised criminal group in the true sense of this expression. Nevertheless,

36 See: Frontex, Risk Analysis 2016, Warsaw 2016, p. 17.

37 This is the revised, extended and brought up to date version of chapters: M. Perkowska, Activities..., *op. cit.*, pp. 499-513, M. Perkowska, Przystępczość zorganizowana..., *op. cit.*, pp. 219-240.

this does not mean that Switzerland is free of organised crime. To the contrary, organised criminal syndicates from other countries and regions are very much active in the country.³⁸

Based on analysis of the Swiss annual reports for the years, elaborated by the Federal Office of Police, it is possible to conclude that organised criminal groups with origins in Europe, Asia, and West Africa are particularly active in Switzerland. In the last decade, federal and cantonal police agencies have observed a high level of activity of Italian, Russian-speaking, Chinese, West African, and southeastern European groups. In the same period, criminal activities among Libyan and Georgian organisations and the so-called “Outlaw Motorcycle Gangs”, were also observed.

A. Italian groups

The four largest mafia-style criminal organisations with Italian origins are the Cosa Nostra from Sicily, the Sacra Corona Unita from Apulia, the Camorra from Naples, and the 'Ndrangheta from Calabria. These organisations share many common characteristics. First, they have strong ties with their region of origin, often striving for greater supremacy over its rule. Second, they are involved in politics, the economy and in government administration, and are represented in over forty countries throughout the world. Third, an indispensable attribute of their activities is violence, often latent, but universally used in conflicts with other groups as well as being directed against the public and the state. Fourth, their criminal activities involve drugs, trade in weapons, money laundering, corruption, extortion and fraudulent tenders for public construction projects,³⁹ all typically concealed behind a network of legitimate front-companies.

Of all the Italian mafia organisations, the 'Ndrangheta has the strongest presence in Switzerland. The group is mainly involved in

38 M.L. Cesoni (ed.), *Criminalité organisée: des représentations sociales aux définitions juridiques*, Paris, Genève, Bruxelles 2004, pp. 102-103.

39 Office fédéral de la police, *Rapport sur la sécurité intérieure de la Suisse*, Berne 2004, p. 50.

cocaine, money laundering, serious bank and insurance fraud, weapons trade, counterfeiting of money, and robbery.⁴⁰

Those members of the 'Ndrangheta who have permanent residence in Switzerland often provide a safe house and financial assistance to other members of the group seeking refuge in the country. Typically, the 'Ndrangheta uses cultural organisations and immigrant organisations as a front for its criminal activities. Since 2005, members of the group have invested in real estate in Switzerland, particularly in cantons close to the Italian border, namely Tessin and Valais. In 2008, the group made investments in the construction, property, and restaurant sectors.⁴¹ In 2015, two Italians resident in the canton of Thurgau were arrested, tried and convicted. This was the first conviction to positively confirm the presence of the 'Ndrangheta in Switzerland, a cell of the organisation which had been active since 1970 and which was predominantly involved in drug trafficking.⁴²

Members of the Cosa Nostra are active in drugs and the laundering of money derived from proceeds of the drug trade between Latin America and Europe.

The Camorra in Switzerland is involved mostly in fraud, money laundering, trade in textiles and counterfeit products.⁴³

The Sacra Corona Unita, as well as some sub-groups of the Camorra, are involved in smuggling cigarettes and in the trading of drugs and weapons. For this purpose, they hide behind businesses registered in Switzerland.⁴⁴

The Italian groups present in Switzerland function independently of their parent organisations in Italy and adapt their operational methods to suit local conditions. Only rarely do they resort to the use of violence. Their structure also deviates from the traditional structure of Italian groups in that family links are not always predominant.

40 *Ibidem*, p. 51.

41 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse, Berne 2008, p. 28.

42 Federal police office, Annual Report Fedpol, Bern 2016, p. 28.

43 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse, Berne 2006, p. 50.

44 *Ibidem*.

To Italian organized criminal groups, Switzerland is not only a convenient venue for money laundering, but also a place where their members can take refuge from law enforcement. However, Switzerland is only a safe haven in relative terms in this regard, as every year Swiss police manage to apprehend some of their number who are hiding in the country.⁴⁵

B. Russian-speaking groups

One of the most important geopolitical events at the turn of the 1990's was the fall of the USSR, which resulted in some new and unforeseen problems arising in the newly established sovereign states. One of the key problems to emerge in this regard was crime.⁴⁶

Organised criminal actors from republics of the former Soviet Union have now become a permanent element of international crime – the most dynamic one. In fact, they have reached such high status in the international criminal world that they now sit alongside the Italian, Japanese, Chinese, and Colombian mafia, at the core of a new global criminal order.⁴⁷

Without doubt these Russian-speaking criminal groups pose a serious threat in Europe, a threat to which Switzerland itself is not immune. One of their less malignant pursuits is to use the facilities available in various European states for the purpose of laundering the proceeds of criminal activity, typically by way of investment. As an example of the scale of this exercise, up to 2002, 40 billion Euros had been invested in France alone.⁴⁸

The stable economic situation of Switzerland and the high quality of services provided by its financial sector in particular, are highly attractive to legitimate investors; to organised criminal groups, these

45 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse, Berne 2009, pp. 14-15. Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse, Berne 2001, p. 58.

46 K. Laskowska, Rosyjskojęzyczna przestępczość zorganizowana. Studium kryminologiczne, Białystok 2006, p. 12.

47 E.W. Pływaczewski, The Russian and Polish Mafia in Central Europe, (in:) D. Siegel, H. Bunt, D. Zaitch (eds.), Global Organizes Crime, Dordrecht-Boston-London 2003, pp. 65-66.

48 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse, Berne 2002, p. 60.

same attributes act as a magnet. Indeed, in recent years, representatives of these groups have made large investments in real estate in Switzerland and taken steps to establish businesses. As a result, many so-called businessmen from the former Soviet republics are now prominent clients of Swiss banks.⁴⁹ Likewise, individuals of those states who have amassed their fortunes mostly through corruption, view Switzerland as a place to deposit their money which they are now endeavouring to do.⁵⁰

The Federal Police emphasise that the structure of Russian-speaking criminal groups is not typical in that it lacks hierarchy. The groups do not always act covertly and most of their members are criminal-businessmen who are well connected with leading government figures in their country of origin. Such persons use legal companies, front companies, and financial market institutions for criminal purposes. They often support various local charities and cultural organisations as a means of winning public favour.⁵¹

That Switzerland is mainly being used by these criminal groups as a vehicle for money laundering, is confirmed by the growing number of businesses and branches of businesses owned by citizens of Russia and the former Soviet republics. Summarily, international experts question the transparency and legality of such entities. In Russia the ties between business, politics, and the criminal world still remain strong.⁵² Fortunately, Switzerland is devoid of such ties and for the most part is free of exposure to the sharp-end of criminal activities of these groups, unlike some other European countries.

While money laundering is the main activity of Russian-speaking criminal groups in Switzerland, the Swiss police have also been

49 In 2002 Pavel Borodin was sanctioned with a fine of 300,000 Swiss francs for money laundering.

50 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2006, Berne 2007, p. 20.

51 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2008, Berne 2009, pp. 10-11.

52 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2006, Berne 2007, p. 20.

focusing on the rapid increase in cybercrime, which is highly organised and in many instances has proven links to Russian hacking groups.⁵³

In 2009, an increase in the activity of gangs of thieves from Georgia was observed. According to the Swiss police, these groups will move on to other fields. The characteristic feature of such groups is their high degree of hierarchisation.⁵⁴ The most common crimes they commit relate to burglary and shoplifting. Ten members of the group were sentenced in 2010 for 200 burglaries, trading in drugs and money laundering.⁵⁵ The scale of the arrests and convictions in 2010 forced these groups to reorganise.⁵⁶ In 2016 the Federal Criminal Court in Bellinzona convicted two men from Georgia of supporting the criminal organisation known as “thieves-in-law”, which originated in the Soviet Union and is mainly rooted in Georgia.⁵⁷

As money laundering has become the largest single area of activity among Russian-speaking criminal groups in Switzerland (the magnet effect), new groups have appeared on the scene for this purpose and from as far afield as Uzbekistan.⁵⁸ The Swiss police are paying special attention to the activities of these groups, particularly in relation to the aforementioned issue of cybercrime.⁵⁹

Lithuanian gangs have also been operating in Switzerland since the beginning of 2000. The precise nature of their organisational structure is uncertain. They are responsible for serious aggravated robbery attacks targeted at jewellery stores. Police investigations point to the attacks being planned and co-ordinated at international level.⁶⁰

53 *Ibidem.*

54 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2008, Berne 2009, p. 11.

55 Office fédéral de la police, Lutte de la Confédération contre la criminalité, Situation, Mesures et Moyens, Rapport Annuel 2010, Berne 2011, p. 12.

56 Office fédéral de la police, Lutte de la Confédération contre la criminalité, Situation, Mesures et Moyens, Rapport Annuel 2012, Berne 2013, p. 14.

57 Federal Police Office, Annual Report Fedpol, Bern 2017, p. 16.

58 Office fédéral de la police, Lutte de la Confédération contre la criminalité, Situation, Mesures et Moyens, Rapport Annuel 2012, Berne 2013, p. 13.

59 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2007, Berne 2008, p. 20.

60 Federal Police Office Annual Report Fedpol, Bern 2016, p. 29.

C. Chinese criminal groups

Since the early 1990's, the Swiss police have closely monitored migrations from China to Europe and via Europe. Compared to France, Italy and Germany, Switzerland is not a popular destination among Chinese immigrants. In 2008, the number of Chinese resident in Switzerland amounted to c.1,000, mostly young persons - students and women. The so-called "Chinatowns" which exist in many countries – a closed district inhabited by a Chinese diaspora from within which the triads (Chinese organised crime groups) traditionally operate – have not developed.⁶¹ This, however, does not mean that Switzerland has escaped the attention of Chinese organised crime.

Of the many different forms of crime characteristic of the triads, only two have surfaced in Switzerland - illegal immigration and credit card fraud.

Switzerland, in particular Geneva International Airport, is an important European hub for Chinese based airlines and for immigrants entering the Schengen zone - either legally or illegally. Switzerland is not their final destination and only serves as a stopover where they can take on short-term work, usually off-the-books, and typically in restaurants.

Compared to other ethnic groups, the Chinese commit very few crimes in Switzerland. Indeed, in the years 2002-2008, only one Chinese citizen was sentenced and that for robbery. Nevertheless, some do commit credit card fraud in Switzerland, with the perpetrators of such crime acting in the same way as anywhere else in the world.⁶²

D. West-African criminal groups

Even though organised crime is a relatively new phenomenon in Africa, it has grown incredibly fast and has demonstrated a remarkable capacity to adapt to prevailing socio-economic and political conditions. The origins of most African criminal groups sit in the western part of Africa, predominantly Nigeria. Such groups are characterised by a strict

61 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse, Berne 2008, p. 29.

62 *Ibidem*, p. 30.

hierarchy, a fixed division of labour, and a high degree of secrecy. They are present on all continents. The point members of these groups, those who directly engage in the front-end of criminal acts - the couriers or “mules” as they are otherwise known (who smuggle drugs from one country to another) and the street traders (who sell product to the end user), are without knowledge of who they actually work for. Moreover, the continuous turnover of low-rank figures at this level, prevents them from ever learning how the group is structured and who its leaders are.

It is estimated that 25-40% of cocaine smuggled into Europe comes via West Africa from Latin America. The countries of that region, among others Togo, Guinea, and Guinea Bissau, are transfer countries for drugs smuggled into many European countries.⁶³

The scope of criminal activities of the African groups is very broad. In Switzerland, those from West- and Central-Africa focus on drug dealing, mainly cocaine. However, this is not their only field of activity, they are also involved in the trade in people, smuggling of immigrants, counterfeiting of documents and fraud.

The groups easily adapt to change, particularly in relation to new interdiction measures introduced by the police, which serves to keep their activities secure. As far as the physical act of smuggling is concerned, they avoid the use of traditional routes and methods. Instead they use other less-familiar routes, or develop new ones, and focus on smuggling small quantities of drugs at a time to minimise the loss if a courier is intercepted. The most popular destinations for drugs are the Netherlands and Spain. Cocaine is smuggled into Europe, including via Switzerland, by the couriers who transport the substance in “wraps” (non-dissolvable capsules) which they ingest prior to embarking on their journey. While the main method of entry into Europe is by air, the introduction of highly sophisticated detection methods (including body x-ray equipment) at airports, has rendered overland smuggling a more attractive proposition and this practice is now growing in size.⁶⁴ Since 2009, road and rail networks have been used as smuggling routes; those

63 *Ibidem*, p. 27.

64 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2001, Berne 2002, p. 63.

which effect Switzerland run through its northern and western borders (the latter connecting with France).⁶⁵ Drugs smuggled in from West Africa are subsequently “cut” (by introducing another substance to reduce its purity), divided into street-sale sized portions weighing 0.2g to 0.5g, with each portion individually packaged in small sealed plastic sachets. Typically, a street dealer carries only a small number of these sachets on their person at any one time.⁶⁶

The street trading of drugs in Switzerland has been dominated by West Africans for some time. Compared to drug dealers from other countries, the African dealers more often use aggressive sales techniques and are not afraid to use violence against police officers when confronted. The majority of them have applied for refugee status and many are underage, which complicates the penal procedure. Invariably, the leaders of these groups possess long-term stay permits in Switzerland, which most often they have acquired by marrying a Swiss citizen. In the Romansch-speaking regions of Switzerland, African groups also control the trade in marihuana and, as an exception, they also trade in heroine. The fact that at any given time street dealers only have a small quantity of drugs on their person, hinders the work of the police, as it can be easily disposed of if the dealer is pursued. The drug trade controlled by Nigerian groups operates on the back of a broad network of international contacts located in the drug producing regions of Latin America, the transit states in Africa and the host states in Europe.⁶⁷

Notwithstanding the foregoing, 2009 witnessed a radical change in the activities of African criminal groups in Switzerland, the Netherlands, and Spain. The introduction of new technologies at airports and combined cross-border operations by police authorities, resulted in the wide-scale arrest of both couriers and street dealers. As a consequence, the groups were faced with the problem of recruiting replacements in Africa which was all but insurmountable. However, by

65 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2008, Berne 2009, p. 12.

66 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2001, Berne 2002, p. 63.

67 *Ibidem*.

cooperating with their European counterparts, they managed to recruit couriers and dealers from Eastern European and Balkan states. The profile of activities of African groups in Switzerland is also changing. In addition to drug crimes, they have also become involved in people trading, the smuggling of immigrants and economic crimes.⁶⁸

Migrant smugglers also organise journeys to and through Switzerland. Until September 2015, the central Mediterranean passage was the main smuggling route to Switzerland's southern canton of Ticino. It was primarily used by people from Eritrea, Syria and Somalia, where the smuggling mafia turned people's misery into big business. Two Tunisian nationals and underage "pedestrian smugglers" were working for an Eritrean based in Milan who masterminded the operation.⁶⁹

Despite successes in suppressing the activities of organised criminal groups from West Africa, it will not be possible to eliminate them until such time as the political and economic situations in their respective countries of origin have been significantly improved and made stable.

E. Southeastern European organised criminal groups

Groups from Southeast Europe are groups from those states established after the fall of Yugoslavia, in particular those from Albania, Serbia, Montenegro, and Macedonia.⁷⁰ The first reports of activities by Albanian groups dates back to 1999.⁷¹ The activities of groups from the other states were reported later.

The growth of organized crime is particularly rapid in weak states which lack the mechanisms to suppress it effectively. The war in the former Yugoslavia and the continued formation of new states

68 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2008, Berne 2009, p. 13.

69 Federal Police Office, Annual Report Fedpol, Bern 2016, p. 42.

70 It is estimated that currently in Switzerland there are over 320,000 citizens of former Yugoslav republics and Albania. Immigration from these states was the largest in the history of Switzerland.

71 See: Département fédéral de justice et police Rapport sur la protection de l'État 1999, Berne 2000, pp. 94-95.

is conducive to the growth of organized criminal groups. Such groups became strong during the Balkan wars when they established their activities and penetrated into politics and the economy. Young states, such as Serbia, Montenegro, Kosovo, Albania, Macedonia and Bosnia, are still incapable of effectively suppressing organised crime. Despite the successes achieved by United Nations forces (the United Nations Interim Administration Mission in Kosovo) in suppressing organised criminal activity, the level of corruption, trade in people, and trans-border crimes continues unabated.⁷²

Albanian groups became active at the time refugees from the former Yugoslavia first appeared. Throughout Europe, they controlled the refugee transfer routes in cooperation with their Montenegrin, Croatian, Turkish, and Greek counterparts. Initially, their activities consisted of smuggling people into Switzerland and other European states, while at the same time smuggling in drugs and weapons.⁷³ Most members of these groups originate from the southeast region of the Balkans. They take the characteristics of clans, which for the most part they are, and most were established by connecting criminal groups with extremist groups and by establishing and maintaining strong ties with the world of politics and business. The operational work of police authorities has identified that the key areas of their criminal activities are the drug trade (heroin and cocaine), smuggling of immigrants, and trade in people. The groups are also active in money laundering through travel offices owned by Albanians.

In 2002, the Swiss police identified three distinct types of criminal group dominated by Albanians. The first uses existing contact networks where small criminal groups, consisting mostly of members of one family, operate under the cover of a legal front company. Their criminal activity focuses on one type of crime involving moderate levels of violence.

The second consists of medium size criminal networks with a hierarchical structure resembling that of family clans. Their leaders are members of one family who manage the group's operations from

72 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse, Berne 2004, p. 52.

73 See: Département fédéral de justice et police, Rapport sur la protection..., *op. cit.*, p. 95.

abroad. They behave in a professional manner and focus on one type of crime, with a precise division of roles among individual group members.

The last comprises criminal groups with a hierarchical structure which maintain contacts with numerous other groups both in their country of origin and abroad. The groups are not *strictly* ethnic and their members are of different nationalities. These groups have complex personal and organizational structures. There is a horizontal division of roles, determined by level within the hierarchy. Groups of this type occasionally use violence.

All of the above share common characteristics. They have broad networks of contacts both within their country of origin and beyond its borders. Illegal activity is closely tied to legal transactions and the secret nature of the groups' undertaking hinders their detection. The extensive organisational structure and network of connections with legal entities are brought together for the purpose of money laundering. The proceeds derived from criminal activities, are introduced into the economy in the groups' country of origin, but sometimes also into Switzerland.⁷⁴

Since 2003, the ethnic composition of the groups has changed dramatically and multi-ethnic groups have appeared. The groups are losing their clan-like character, but still the network of groups comprises several persons from the same family, which guarantees a high level of trust among its members. The structure of the groups has also changed, from a pyramidal hierarchy to one with fewer levels.⁷⁵

The ongoing evolution of organised criminal structures resulted in the appearance in Switzerland of new ethnic groups. These were Serbian with strong international ties. Serbian groups generally focus on drug dealing (mostly cocaine) but are also heavily involved in other criminal activities such as money laundering, trade in people, smuggling of immigrants, crimes against property (particularly theft of

74 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2000, Berne 2001, p. 35.

75 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2002, Berne 2003, p. 56.

jewelry), extortion, and more. Unlike the Albanian groups, few Serbian groups are based on family ties, but their members often come from the same localities. Switzerland is a target country for drug dealing and a transit country for Serbian organised illegal immigration.⁷⁶

In the following years, these groups were increasingly active in the crime of so-called “prostitution exploitation”. Then, from 2009 on, their criminal activity changed direction and became more mobile.⁷⁷ It focussed mainly on large cities and border regions and mostly entailed acts of burglary targeted at houses and apartments, warehouses and commercial centres.⁷⁸ The diaspora of former Yugoslavian citizens present in Switzerland, serves to provide these particular groups with very good cover for this and for other forms of criminal activity in which they become involved.

The activities of organised criminal groups from the former Yugoslavia will continue as long as similar groups continue to operate in the newly established states. Most of these states are still undergoing political and economic transformations, are not economically or politically stable, and constitute ideal conditions for organised crime to flourish.

F. Other criminal groups

Switzerland also became a destination country for mobile organised criminal groups that specialise in offences against property such as fraud, burglary, pickpocketing, mugging and wanton theft. These groups are mainly composed of nationals coming from Central and Southeast Europe but they also included nationals or residents of neighbouring countries who travel solely for criminal purposes (so-called “criminal tourism”). Here, Romanian groups, whose members neither live in Switzerland or maintained contacts with fellow citizens who do, serve as an appropriate example. The members of such groups

76 Office fédéral de la police, Rapport sur la sécurité intérieure de la Suisse 2003, Berne 2004, p. 43.

77 Office fédéral de la police, Lutte de la Confédération contre la criminalité, Situation, Mesures et Moyens, Rapport Annuel 2010, Berne 2011, p. 13.

78 Office fédéral de la police, Lutte de la Confédération contre la criminalité, Situation, Mesures et Moyens, Rapport Annuel 2012, Berne 2013, p. 15.

are young people, also minors or those pretending to be underage. The groups specialise in burglary and other crimes of opportunity which they execute with ruthless efficiency. Elderly people are most often the victims of such crimes.

In the recent years, groups of professional confidence tricksters have appeared. Typically they target the elderly using a variety of scams to defraud them after first winning their confidence, not least by claiming to be a distant relative. Their activities are controlled from Poland, Germany and Italy, and the groups are usually made up of Polish nationals. Polish groups as well as groups from Bulgaria and Bosnia, also specialise in pickpocketing.

Incidences relating to the theft of valuable jewellery were also reported in 2014. These were specifically targeted thefts attributed to members of the Pink Panther criminal group composed of nationals from Serbia and Montenegro. Not all of the suspects were indicted for involvement in organised crime but some were found guilty of this offence.

G. Organised criminality in Switzerland – statistical overview

Table 17. Suspects involved in organised crime in the years 2009-2014

Year	Swiss	Foreigner status			
		Total	Residents	Asylum seekers	Others
2014	10	30	8	0	22
2013	6	13	2	0	11
2012	4	19	0	0	19
2011	2	7	5	0	2
2010	2	17	7	1	9
2009	16	81	6	0	75

Source: Federal Statistical Office, police crime statistic.

Although a decade or so has elapsed since M.L. Cesoni conducted his research, it can still be stated with confidence that organised crime

in Switzerland is largely the realm of foreign actors. This is confirmed by the data concerning the number of foreign and Swiss nationals suspected of being involved in organised criminal activities under Article 260^{ter} of the Swiss Criminal Code.

The statistical data presented in Table 17 appear to contradict the picture of organised criminality in Switzerland. Several dozen offenders a year suspected of being involved in organised crime is not much to go on and might suggest a threat that is insignificant. This is due to the fact that it takes time to monitor the activities of a particular group; to prove its hierarchical structure, existing bonds and criminal activities, before any of its members can be arrested and brought to trial. Sometimes it is impossible to prove that such a group actually exists and thus it is easier to just expose the offences committed.

Organised crime is an international phenomenon. As previously mentioned, to groups such as the Italian mafia and those stemming from the former USSR, Switzerland mainly serves the purpose of being a vehicle for money laundering not as a location for other mainstream criminal activity. Switzerland “hosts” organised criminal groups from Italy, the former USSR, Africa and both Southeast and Eastern European countries. Members of these groups, particularly key members, are more frequently prosecuted by foreign law enforcement agencies and where this occurs, if the suspect or suspects concerned are detained on Swiss territory, they are usually surrendered to the country where the crimes were committed or had an effect and where these groups typically operate on a far greater scale. This within the framework of cooperation with Interpol and Europol as well as bilateral agreements in force. The factors presented above may serve to explain why the number of foreigners suspected of involvement in organised crime in Switzerland is low.

Table 14. Suspects under the Federal Act on Foreign Nationals and Integration in the years 2009-2015 by category of offence and category of foreigners

Year	2009			2010			2011			2012			2013			2014			2015										
	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other								
Violation of provisions governing entry into Switzerland	6267	89	1102	5076	6090	78	843	5169	6637	52	1158	5427	7522	66	1608	5848	7589	91	1484	6004	7089	126	1056	5917	9341	129	654	8558	
Unlawful stay	8812	315	521	7976	9423	290	588	8545	10154	234	808	9112	11484	259	1035	10190	12736	279	970	11487	12295	309	574	11412	12629	314	490	11925	
Failure to enter or leave the country through an authorised border crossing point	68	0	18	50	47	0	8	39	47	2	9	36	32	0	4	28	41	0	19	22	59	0	6	53	37	1	13	23	
Violation of provisions governing entry into the sovereign territory of another state	44	1	7	36	31	1	4	26	44	0	9	35	66	2	11	53	117	2	14	101	114	2	10	102	408	8	37	363	
Total illegal entry/exit/stay	12669	353	1495	10821	13064	331	1290	11443	13811	255	1692	11874	15545	303	2257	12985	16753	336	2184	14233	15947	405	1477	14085	18175	406	1028	16741	
Working without authorisation	2596	162	164	2270	3009	135	173	2701	2933	91	164	2678	3231	125	180	2926	3189	145	132	2912	3510	159	161	3190	3658	157	150	3351	
Finding foreign nationals employment in Switzerland without the required permit	201	100	3	98	213	155	2	56	182	152	3	27	243	158	3	82	260	199	1	60	187	152	2	33	218	183	0	35	
Employment of foreign nationals without a permit	567	470	5	92	674	558	13	103	620	528	10	82	613	529	4	80	704	627	8	69	853	747	11	95	857	744	9	104	
Serious offence: Employment of foreign nationals without a permit			0					0				0													0	4	4	0	0
Repeat offence concerning employment of foreign nationals without a permit	58	39	0	19	51	42	0	9	41	35	0	6	45	36	3	6	30	25	0	5	44	33	0	11	45	40	2	3	
Change of jobs without the required permit or change from salaried to self-employment	31	8	2	21	10	0	2	8	20	1	1	18	14	3	2	9	8	1	1	6	14	5	2	7	14	5	1	8	
Total illegal employment	3235	703	170	2362	3823	826	184	2813	3707	765	171	2771	4005	787	188	3030	4061	931	137	2993	4475	1026	169	3290	4665	1057	159	3449	

Year	2009			2010			2011			2012			2013			2014			2015									
	Total	Residents	Asylum I	Other	Total	Residents	Asylum I	Other	Total	Residents	Asylum I	Other	Total	Residents	Asylum I	Other	Total	Residents	Asylum I	Other								
Fraudulent conduct towards the authorities by providing false information or withholding essential information.	209	62	20	127	282	107	20	155	220	108	16	96	200	70	24	106	297	89	22	186	383	110	17	256	443	122	19	302
Fraudulent conduct towards the authorities by marrying a foreign national or arranging, encouraging or facilitating such a marriage.	87	62	5	20	58	43	1	14	51	46	0	5	33	30	0	3	19	15	0	4	38	32	0	6	37	24	1	12
Fraudulent conduct towards the authorities in the aim of gain, within association or group.	17	15	1	1	6	5	0	1	4	2	0	2	9	9	0	0	10	7	0	3	12	9	0	3	9	9	0	0
Total Fraudulent conduct towards the authorities.	300	131	26	143	335	147	21	167	265	149	16	100	239	106	24	109	321	107	22	192	426	146	17	263	486	152	20	314
Facilitating the unlawful entry or departure or the unlawful period of stay in Switzerland.	770	586	38	136	723	556	26	141	552	446	24	82	546	420	18	108	685	545	22	118	738	541	43	154	919	657	46	216
Facilitating entry of a foreign national into the sovereign territory or another state in violation of the entry provisions.	31	24	3	4	39	27	3	9	19	10	1	8	11	3	1	7	8	4	1	3	28	10	3	15	25	12	0	13
Facilitating the unlawful entry or departure or the unlawful period of stay in Schengen State.				0				0	0	0	0	0	7	6	0	1	39	31	1	7	49	35	3	11	76	50	1	25
Facilitating the unlawful entry or departure or the unlawful period of stay in the aim of gain, within association or group.	231	125	14	92	108	83	8	17	50	42	3	5	62	51	2	9	82	54	2	26	72	34	1	37	104	74	3	27
Total Facilitating the unlawful entry or departure of the unlawful period of stay.	1017	733	54	230	850	649	37	164	618	495	28	95	619	473	21	125	803	630	26	147	870	609	50	211	1105	776	50	279

Year	2009			2010			2011			2012			2013			2014			2015		
	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other	Total	Residents	Asylum I Other
Failure to comply with restriction or exclusion orders	499	3	230 266	826	6	265 555	908	11	275 622	1148	4	442 702	1449	8	473 968	1197	9	272 916	879	5	175 689
Violation of the requirements to register and give notice of departure	505	217	3 285	877	266	4 607	848	242	4 602	896	273	3 620	788	278	1 509	798	281	5 512	566	234	4 348
Movement of place of residence to another canton without the required permit	34	22	4 8	158	13	67 78	106	22	48 36	165	33	21 111	127	12	20 95	92	18	6 68	40	11	2 27
Failure of comply with the conditions of the permit	160	142	1 17	278	250	7 21	108	88	7 13	96	66	4 26	145	111	10 24	176	129	10 37	173	117	9 47
Failure to comply with the obligation to cooperate in obtaining identity documents	230	27	27 176	296	34	31 231	381	34	64 283	614	32	128 454	571	64	93 414	469	71	66 332	380	34	41 305
Other offences (Art. 120)			0	0		0				681	162	3 516	815	235	4 576	856	336	3 517	1006	346	4 656
Total other offences from Foreign Nationals Act	1388	405	262 731	2379	559	361 1459	2289	387	379 1503	3438	547	580 2311	3738	676	581 2481	3423	812	345 2286	2913	723	224 1966
Total global	16501	2072	1911 12518	17229	2244	1657 13328	17799	1928	2020 13951	20103	1966	2716 15421	21623	2390	2630 16603	21030	2688	1948 16514	23445	2734	1343 19368

Source: Swiss Federal Statistical Office, police crime statistics.

SWISS CRIMINAL POLICY TOWARDS FOREIGNERS

1. Criminal convictions of foreign nationals

The summary of statistical data concerning both suspects and convicts is required to analyse the extent and the dynamics of the criminality revealed, as it allows to investigate the phenomenon and its tendencies more accurately.¹

The court statistics usually include two types of information on criminality, i.e. the data concerning both actual court judgments in criminal cases and the convicts. These statistics enable to assess the extent of “adjudicated criminality” defined as the data set of people preliminarily presumed to have committed an offence by the law enforcement authorities and finally convicted in that respect by the court. Owing to various statistical units the statistics on convicts present a picture of criminality that differs from that presented by the statistics on suspects. Also, conviction is more often than not obtained after lengthy and arduous court proceedings. The lengthiness of proceedings is not an uncommon occurrence and therefore, a clear majority of judgments are reached much, much later than the completion of preparatory proceedings. It takes considerable time from the moment proceedings are initiated until judgment is reached and not all proceedings lead to a conviction.²

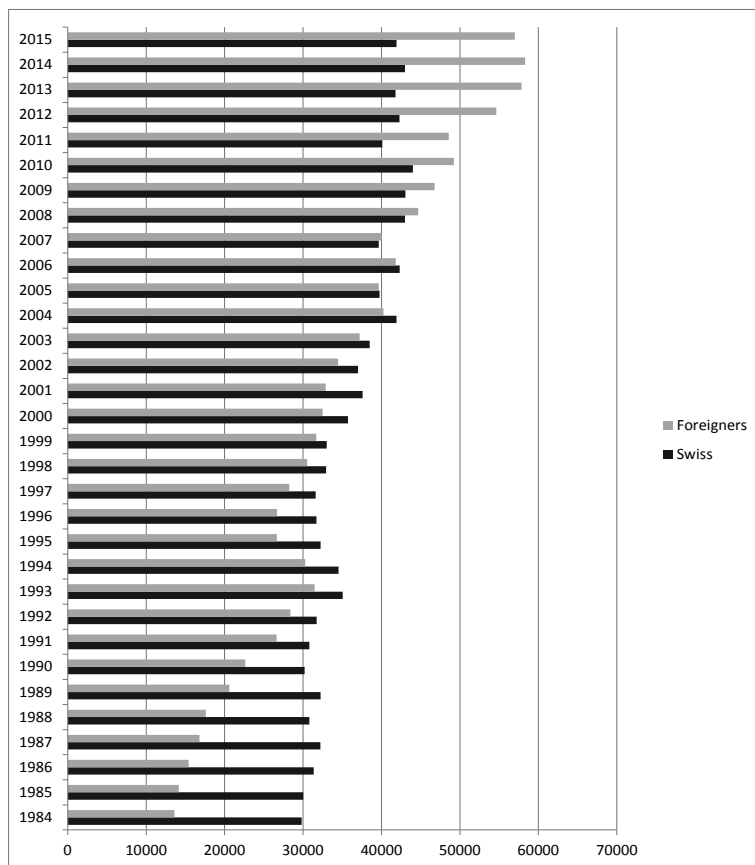
From a criminological point of view, the data concerning court judgments in criminal cases are of particular interest when

1 T. Szymanowski, *Orzecznictwo sądów karnych w Polsce na tle obrazu przestępczości w latach 1997 i 2005*, (in:) A. Szwarc (ed.), *Represyjność polskiego prawa karnego*, Poznań 2008, pp. 27-28.

2 *Ibidem*, pp. 30-31.

estimating the extent of criminality as they allow to assess the rate of “adjudicated criminality” and hence to assess the number of substantive determinations - whether or not a person who has been presumed a criminal by law enforcement authorities committed a crime. These data also allow to specify the structure of criminality.³

Figure 6. Swiss and foreign convicts during the years 1984-2015



Source: Federal Statistical Office, Criminal convictions statistics.

3 J. Błachut, Problemy związane z pomiarem przestępczości, Warszawa 2007, p. 235.

Prior to 1980, migrants were not highly represented in the statistics of police-recorded crime or in number of convictions. However, growth in the conviction rate of foreigners progressively occurred, and by 1988, the rate reached approximately twice the level of Swiss nationals. Over the years, the proportion of foreign perpetrators of crime continued to increase but levelled off after 1999.⁴ The number of convicts in Switzerland rose steadily from 1984 to 2015. Only from 2007 did the number of convicted foreigners outweigh the number of Swiss convicts. The number of convicted foreigners has tended to grow since 2014, whereas the number of convicted Swiss nationals has remained relatively stable. The share of foreigners in the total number of convicts appears to grow in the period examined. Respectively their number constituted, 31% in 1984, 47% in 1994, 49% in 2004 and 58% in 2015. This resulted solely from the increase in criminal activity of these offenders. The percentage share of convicts was larger than the percentage share of suspects in the total number of suspects. In 2009 foreigners constituted 51% of suspects compared to 56% in 2015. This higher rate resulted from the growing foreign population in Switzerland. The number of foreigners in the country has increased extensively since the 1990s, which also affected the rate of criminality. In addition, it is worth highlighting that the foreigners convicted under the FNAI, represented a considerable number of convicts. Since most of the acts for which they were penalised cannot be committed by Swiss nationals, foreigners naturally prevail in this group. Also, it is worth noting that the data provided by the Federal Statistical Office fails to indicate the sex and age of convicts. Likewise, such statistics include the conviction of foreigners who are not domiciled in Switzerland, therefore their true number is unknown and could have fluctuated quite significantly over the years.⁵

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- 4 A.T. Vazsonyi, J. Mikuska, Immigration Nation? Swiss *Fremdenkinder* Yesterday and Today, (in:) A. Kuhn, C. Schwarzenegger, P. Margot, A. Donatsch, M.F. Aebi, D. Jositsch (eds.), *Criminology, Criminal Policy and Criminal Law in an International Perspective: Essays in honour of Martin Killias on the occasion of his 65th birthday*, Bern 2013, p. 479, K.L. Kunz, *Ausländerkriminalität in der Schweiz – Umfang, Struktur und Erklärungsversuch*, *Schweizerische Zeitschrift für Strafrecht* 1989, No. 106, p. 378 ff.
 - 5 C. Schwarzenegger, D. Studer, *Kriminalität nach Nationalität und Aufenthaltsstatus. Eine Analyse der Strafurteilsstatistik 1984-2011*, (in:) D. Fink, A. Kuhn, C. Schwarzenegger (eds.), *Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité*, Berne, 2013, p. 119.

The analysis presented earlier in this chapter, which concerned foreigners suspected of having committed crimes penalised under the SCC, indicates that foreign nationals mostly commit offences against property. As a rule, fines are imposed for such offences but they are only recorded in the criminal database if their value exceeds 5,000 Swiss francs unless the nature of the offence committed demands that it be recorded therein. For example, foreigners who fall into the ‘others’ category frequently stay in the territory unlawfully. This does not pose any risk to society but due to the specificity of the offence the conviction requires to be recorded in the criminal database.⁶

Table 18. Foreigners convicted for a misdemeanour or felony in Switzerland in 2009-2015

Year	Total foreigners	Residents [*]	Other foreigners ^{**}	Foreigners of unknown status
2009	46 778	21 390	21 335	4 053
2010	49 228	22 429	22 869	3 930
2011	48 567	20 606	24 069	3 892
2012	54 631	22 575	27 540	4 516
2013	57 857	23 334	29 374	5 149
2014	58 302	24 521	28 927	4 854
2015	56 995	24 044	28 291	4 660

Source: Federal Statistical Office, *Criminal convictions statistics*.

* Residents include foreigners who possess: Residence permits (B), Settlement permits (C), residence permit with gainful employment (Ci).

** This category encompasses: provisionally admitted foreigners (permit F), asylum-seekers (permit N), people in need of protection (permit S), cross-border commuter (permit G), short-term residents (permit L), tourists, Asylum-seekers, whose applications have been rejected, foreigners who are subject to deportation, foreigners staying illegally, foreigners in procedure for short-term work in Switzerland. *Statistique policière de la criminalité (SPC), Rapport annuel 2015, Neuchâtel 2016, p. 26.*

6 *Ibidem*, p. 133.

Similarly, if a suspect is detained for having committed, for example, an offence against property and it subsequently emerges that the offender is staying in Switzerland illegally, said offender is held liable for both prohibited acts on separate counts. This is one of the factors which contributes to the high representation of foreigners in the total number of convicts.

The structure of convicts by residence status (Table 18) clearly indicates that foreigners who fall into the ‘others’ category prevail in the period examined by as much as 49%, whereas residents constituted 43%. The rate of foreigners within the ‘residents’ group gradually grew, with an exceptional fall in 2011. The number of convicts in the ‘others’ group increased until 2013 but a drop in the number was recorded in the last two years. This confirms that foreigners with resident status are more familiar with legal order and as such do not present a significant threat to security.

As far as the status of foreigners is concerned, the ‘others’ category is the most varied. This group encompasses not only short-term residents or those who have applied for international protection but also foreigners who stay in the territory unlawfully. Therefore, this group is subject to risk of committing offences, not only due to their irregular residence status but also their inadequate knowledge of the laws in force in Switzerland. Their economic situation is also a risk factor when compared to foreigners belonging to the ‘residents’ group, not to mention that of Swiss nationals. Also, it is worth highlighting that there are people within the group who have come to Switzerland with the intention of committing offences.⁷

The statistical data included in Table 19, concerns foreigners convicted under Art. 115 FNAI.⁸ During the period 2009-2015, the number of foreigners convicted under the provisions of this Article, grew until 2013, but decreased slightly in the two consecutive years

7 C. Schwarzenegger, D. Studer, *Kriminalität nach Nationalität...*, *op. cit.*, p. 130, Statistisches Jahrbuch der Schweiz, Bern 2001, p. 824.

8 The Federal Statistical Office provided the data which concern both convicted foreigners and Swiss convicts in total. Therefore, it is impossible to present the data which relate exclusively to foreigners. The acts prohibited on the grounds of Article 115 FNAI may only be committed by foreigners hence the study includes the data which refer only to this category of offences.

that followed, contrary to the rate of suspects which grew steadily throughout the whole of the 2009-2015 period examined.

Table 19. Foreigners convicted on the grounds of Article 115 of the Federal Act on Foreign Nationals and Integration over the years 2009-2015

Offence	2009	2010	2011	2012	2013	2014	2015
Violation of provisions governing entry into Switzerland	5 207	4 966	5 723	7 058	7 212	7 034	7 858
Unlawful stay in Switzerland	6 829	7 894	8 566	10 204	12 374	11 579	10 670
Working without authorisation	2 448	2 646	2 812	2 854	3 244	3 150	3 307
Failure to enter or leave Switzerland through an authorised border crossing point	45	40	20	23	22	25	10
Violation of provisions governing entry into the sovereign territory of another state	34	21	46	47	53	54	33
Committing an offence through negligence under art. 115	0	0	0	0	0	0	0
Total: Unlawful entry, exit, and period of stay and work without permit	10 202	11 005	12 056	14 267	16 303	15 480	15 246

Source: Federal Statistical Office, Criminal convictions statistics.

* A judgement may mention several offences, the sum of the various provisions is greater than the total.

Regarding the structure of offences, it is noteworthy that over 50% of offenders were convicted for unlawful stay in Switzerland, 31% for violation of the provisions governing entry into Switzerland, and 15% for working without authorisation. Therefore, the dynamics of the rate of foreigners suspected of unlawful period of stay in Switzerland, determined the dynamics of the rate of those convicted on the grounds of Art. 115 FNAI over the period analysed. The rate of those convicted for violation of the provisions governing entry steadily increased until 2012 and then remained unchanged. The number of foreigners convicted for working without authorisation also grew over the period. The number of those convicted for failure to enter or leave Switzerland through an authorised border crossing point or for violating the

provisions governing entry into the sovereign territory of another state was insignificant.

The majority of non-residents and asylum-seekers convicted were people who had committed acts prohibited under the FNAI. Resident foreign nationals, who mostly facilitated illegal stay or illegal employment, represented only a small proportion of convicts.⁹

The structure and dynamics of criminality among foreigners in Switzerland presented above, provokes the following question. Why do foreign nationals constitute more than 50% of suspects in a society where aliens form only 25% of the overall population?

M. Killias remarks that Switzerland's situation differs in two crucial aspects from other European countries. Firstly, the rate of foreign residents is considerably higher than in any other country, except in some smaller countries. Secondly, large-scale immigration started nearly fifty years earlier than in most other European countries. Unlike countries that are facing only first and second generations of immigrants, Switzerland has had substantial second and even third generations for some time. In spite of this long tradition, immigration in Switzerland still provokes troubles and tensions. To-date, Switzerland, like other European countries, has been unable to develop a consistent immigration policy.¹⁰

A. Kuhn, on the other hand, highlights socio-demographic and socio-economic factors. The first category includes sex and age. The share of both women and men in the population of Switzerland is reasonably balanced, whereas as far as the population of convicts is concerned, 85% are male and 15% are female. Regards age, 30% of the Swiss population is less than 30 years of age - offenders in this age group constitute 50% of all convicts. From this it can then be concluded that the scale of criminality in the state is subject to the demographic structure of the country - the higher the rates of people who are of criminal age and gender in society are, the higher the criminality in

9 R. Storz, S. Rónez, S. Baumgartner, *De la nationalité des condamnés. Résultats de la statistique de la criminalité*, Bern 1996, p. 22.

10 M. Killias, *Immigrants, Crime, and Criminal Justice in Switzerland*, Crime and Justice, Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives 1997, Vol. 21, p. 376.

the country is. According to surveys, 37% of residents live modestly or even below the social minimum - as much as 60% of convicts belong to this social group. Education is another crucial factor – approximately 60% of those convicted of offenses have only a very basic level of education.¹¹

It can be concluded therefore, that a typical offender is a young male of low educational standard from a marginalised background, hence the variable of nationality does not affect the rate of criminality. But one question can be posed here. Why do foreigners account for the majority of convicts?

The reason for this might be the fact that younger people migrate more than older people and males migrate more than females. If the most crime-inducing social group comprises of young men, hence the population of migrants is more crime-inducing and the place of birth here is irrelevant.¹²

If we compare the criminality of Swiss nationals and foreigners in specific age groups, taking into consideration the criterion of gender, the number of perpetrators of crime will not differ significantly,¹³ particularly in the group of foreign residents.¹⁴

The problem of so-called “second-generation” criminality is worth examining. In general, researchers found much higher rates for second generation crime particularly for violent offences. Such hypothesis was confirmed in a similar study conducted in Switzerland.¹⁵ Analysis of the

11 A. Kuhn, Comment s'expliquela surreprésentation des étrangers dans la criminalité? Vivre ensemble, Service d'Information et de Documentation sur le Droit d'Asile 2013, pp. 3-4, also: N. Queloz, Etrangers et criminalité, entre craintes, préjugés et réalités, (in:) S. Bauhofer, N. Queloz (eds.), *Etrangers, criminalité et système pénal*, Zürich 1993, p. 30.

12 A. Kuhn, *op. cit.*, p. 4.

13 See: M. Killias, Immigrants, Crime..., *op. cit.*, p. 381, similar conclusions has B. Jann, Herkunft und Kriminalität-Ergebnisse der polizeilichen Kriminalstatistik, (in:) D. Fink, A. Kuhn, C. Schwarzenegger (eds.), *Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité*, Berne, 2013, p. 112, K.L. Kunz, Criminalité des étrangers en Suisse. Problématique et tentative d'explication, (in:) *Procédure pénale et exécution des peines: la questions des étrangers*, Caritas Suisse, *Compte-rendus 1989*, No 1, p. 16.

14 Office Fédéral de la Statistique, *De la nationalité des détenus. Une analyse de la situation en Suisse*, Bern 1994, p. 15.

15 M. Killias, Kriminelle Fremdarbeiter-Kinder? Strukturelle Determinanten der Delinquenz bei Fremdarbeitern unter besonderer Berücksichtigung der zweiten Generation.“ *Revue Suisse de Sociologie* 1977, No. 3(2), pp. 3-33, N. Queloz, La reaction institutionnelle à la délinquance juvenile, aspects théoriques de la deviance et du contrôle social et recherche compa-

demographic structure of foreign suspects indicates that the criminality rate among the second generation is much higher, particularly in the case of offences penalised under the Narcotics Act (NA).¹⁶

Second generation criminality is explained by the theory proposed by T. Sellin, under the heading “the conflict of conduct norms”. The theory distinguishes primary culture conflict, as that derived directly from different cultural origins, typical of the foreign born, from secondary culture conflicts, derived from the process of social differentiation and typical of second generations. Sellin, also underscores that “the anomie deriving from economic deprivation and the malaise of a second generation finding the ways of their parents despised in the larger community given that the insertion of immigrants in the social structure of the destination country usually happens from the bottom”.¹⁷ However the “culture conflict” is not a rule and can only be used as an explanation for the higher rate of criminality among migrants in exceptional cases.¹⁸

On the basis of strain models it is plausible however that second-generation youths in Switzerland may no longer regard Southern European living conditions as their point of reference, but aspire instead to a way of life comparable to the Swiss middle-class despite being disadvantaged in education and professional achievement in competing with Swiss juveniles.¹⁹ The question might be posed here. What influences criminality more: the conflict of cultures or the socio-economic conditions of migrants in the receiving state? M. Aebi, claims it to be the latter.²⁰

native ayant trait à la réaction du système pénal à la délinquance apparente des enfants et adolescents suisses et étrangers, Neuchâtel 1986, p. 177 ff. M. Killias, La délinquance juvénile des migrants de la deuxième génération. Essai de bilan des recherches européennes, (in:) J. Schuh (ed.) Jugend und Delinquenz – Jeunesse et Délinquance, Grösch 1988, p. 223-284. A.T. Vazsonyi, M. Killias, Immigration and crime among youth in Switzerland, (in:) J.D. Freilich, G.R. Newman (eds) Crime and immigration, Ashgate 2007, pp. 213-246.

16 B. Jann, *op. cit.*, p.112.

17 D. Merlosi, Crime, punishment and migration, Sage 2015, p. 21. See also: L.M. Solivetti, Immigration, social integration and crime. A cross-national approach, Routledge 2010, pp. 26-27.

18 M. Killias, M.F. Aebi, A. Kuhn, Précis de criminologie, Berne 2012, p. 188.

19 M. Killias, Immigrants, Crime..., *op. cit.*, p. 400, A.T. Vazsonyi, J. Mikuska, Immigration Nation? ..., *op. cit.*, pp. 473-474.

20 M. F. Aebi, Immigration et délinquance: Le mythe du conflit des cultures, (in:) N. Queloz (ed.) Délinquance des jeunes et justice des mineurs: Les défis des migrations et de la pluralité eth-

A. Kuhn, however, believes that the nationality factor may determine criminality at times. For example, if a migrant comes from a country that is in a state of war, at best a brutalising factor in society, that person might introduce a bad role model into the receiving state.²¹ Traumatizing experiences can also correlate with criminality. Persons traumatised by violence in their childhood may repeat it in the adult life.²²

There are also a number of offences covered under the FNAI which can only be committed by foreigners such as unlawful entry, unauthorised stay and unauthorised employment. These offences increase the ratio of foreign suspects or convicts as Swiss nationals *per se* cannot commit such offences.²³

M. Killias, highlights that the low rate of criminality among foreign nationals in the 1960s, resulted from the fact that migrants were seldom without work; they were highly motivated to work and improve their economic status and mostly came from neighbouring countries which were not culturally diverse.²⁴ Thus over the course of time and with the influx of higher numbers of migrants (particularly from remote regions such as Africa, the Caribbean, the Far East, South America and the Balkans)²⁵ economic conditions progressively deteriorated, resulting in high rates of unemployment which ultimately led to the introduction of crime-inducing factors. As previously indicated in Chapter II, the social and economic conditions of foreign nationals are these days substantially worse than those of the Swiss. Thus unemployment, poverty and low level of education constitute factors that can lead to the generation of criminality. Young migrants “without appropriate education and often arriving illegally, have a particularly

nique / Youth Crime and Juvenile Justice: The challenge of migration and ethnic diversity, Bern 2005, pp. 97-123

21 A. Kuhn, Comment s'explique la surreprésentation des étrangers dans la criminalité? Vivre ensemble, Service d'Information et de Documentation sur le Droit d'Asile 2013, p. 5.

22 M. Killias, M.F. Aebi, A. Kuhn, Précis ..., *op. cit.*, p. 184.

23 R. Storz, S. Rônez, S. Baumgartner, *op. cit.*, p. 34, see more: C. Schwarzenegger, D. Studer, Krimilität nach Nationalität..., *op. cit.*, p. 138, M. Gafner, Personnes de nationalité étrangère, délinquance et renvoi: Double peine?, Revue de droit administratif et de droit fiscal 2007, No. 1, p. 4, N. Queloz, Etrangers et criminalité, entre craintes..., *op. cit.*, p. 29.

24 M. Killias, Immigrants, Crime..., *op. cit.*, p. 383.

25 B. Jann, *op. cit.*, p. 112, 34. Office fédéral de la statistique, De la nationalité des détenus. Une analyse de la situation en Suisse, p. 9.

low chances of integration into the Western labour market. In addition to this, an increasing proportion of offences are in fact trans-national, in the sense that offenders from Eastern Europe take advantage of new opportunities for easy transportation to organised criminal activities in Western Europe".²⁶

Another important consideration in this respect is that migrants, particularly those who have entered the territory of Switzerland illegally, are often under substantial pressure to service the debt owing to those who arranged their unlawful migration. Such debts invariably involve large sums of money which a migrant may find difficult if not impossible to obtain and which by itself can influence a drift toward criminal acts.²⁷

The people who apply for international protection or stay illegally and who, as mentioned before, constitute the majority of convicts,²⁸ suffer from the very worst economic conditions as well as lack family bonds.²⁹ It confirms the statement that economic and social factors affect the criminality rate, particularly taking into consideration the fact that those concerned mostly commit offences against property. Moreover being in an irregular situation pushes them to offences that guarantee a quick and easy gain. Such temptation is especially stronger in the perspective of sooner or later expulsion.³⁰

The criminological literature which concerns the over-representation of foreigners in the description of criminality in Switzerland also points to the issue of so-called criminal tourism where foreigners travel to Switzerland specifically to commit narcotics offences³¹ or offences against property,³² also offences committed

26 M. Killias, M.F. Aebi, Crime trends in Europe from 1990 to 1996: How Europe illustrates the limits of the American experience, *Jouropcean Journal of Criminal Policy and Research* 2000, No. 8, p. 52, also A. Kozlova, *op. cit.*, p. 142 ff.

27 See: R. Villé, La réalité sociale des immigrants en Suisse, (in) D. Fink, A. Kuhn, C. Schwarzenegger (eds.), *Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité*, Berne, 2013, p. 33.

28 See: C. Schwarzenegger, D. Studer, *Kriminalität nach Nationalität...*, *op. cit.*, p. 130.

29 *Statistisches Jahrbuch der Schweiz*, Bern 2001, p. 824.

30 M. Killias, M.F. Aebi, A. Kuhn, *Précis ...*, *op. cit.*, pp. 173-174.

31 L. Peila, *Criminalité de passage - criminalité de résidents, réflexions pratiques sur une impossible égalité*, *Revue pénal suisse* 2000, No. 118, p. 339.

32 IMES, ODR, fedpol, Corps des gardes-frontière, *Rapport sur la migration illégale*, Bern 2004, p. 32.

within organised criminal groups.³³ The offenders are encouraged by the low level of sanctions and penalties, particularly those of a non-custodial character. This is confirmed by the fact that since 1984, the number of convicted foreign and Swiss nationals has steadily increased. However, the population of foreign convicts has grown incomparably faster since 2007, which cannot be justified just by the structure of the Swiss population as only 25% of its whole is made up of foreign nationals.³⁴ The offenders in this group mainly commit offences against property – they are individuals who are neither economically or socially forced to commit criminal offences, are in Switzerland on a temporary basis, are unwilling to integrate and who personally benefit from the offences they commit. Their choice of Switzerland as a destination is not coincidental. Its citizens generally enjoy a good standard of living and hence own a variety of possessions attractive to thieves. Moreover, there exists in Switzerland the possibility of laundering the proceeds derived from their criminal activities.³⁵

2. Penitentiary policy towards foreigners

Swiss penitentiary statistics are relatively modest.³⁶ They do not provide information on the nationality of prisoners, merely the division between Swiss nationals and foreign nationals.

The incarceration ratio in Switzerland remained low in the years 2009-2015 with 78-87 per 100,000 inhabitants imprisoned,³⁷ however, the number of foreign prisoners is quite surprising. While the number of foreign suspects or convicts only slightly outnumbered suspected Swiss nationals in the period examined, the number of foreign nationals

33 K.L. Kunz, *Criminalité des étrangers en Suisse...*, *op. cit.*, p. 5.

34 C. Schwarzenegger, D. Studer, *Kriminalität nach Nationalität...*, *op. cit.*, p. 140. The same point of view presents M. Killias Interview, In der Schweiz kommen Kriminelle zu selten ins Gefängnis, <https://www.tagesanzeiger.ch/schweiz/standard/In-der-Schweiz-kommen-Kriminelle-zu-selten-ins-Gefaengnis/story/29019632> access 20.02.2019.

35 J.-L. Bacher, *Typologie de la criminalité des immigrants et „étrangers“*, (in:) D. Fink, A. Kuhn, C. Schwarzenegger (eds.), *Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité*, Berne, 2013, p. 82

36 L. Peila, *op. cit.*, p. 337.

37 M.F. Aebi, M.M. Tiago, C. Burkhardt, *SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Survey 2015, Strasbourg 2016*, p. 50.

imprisoned was quite substantial. Over the years 2009-2015 foreign nationals constituted 70-74% of the total prison population, one of the highest ratios in Europe,³⁸ which might be explained by the system of penalties prescribed under the SCC and the rules governing their execution and modification. As of 2010 (but in effect since 2007) the SCC essentially gives priority to non-custodial sentences. Imprisonment is imposed on the principle of *ultima ratio*, i.e. as a last resort when no other punishment can reasonably be imposed. In this respect a short-term prison sentence (below one year) can be converted to a fine.³⁹

Table 20. Prison population in Switzerland in 2009-2015

	2009	2010	2011	2012	2013	2014	2015
Total prison population	6 084	6 181	6 065	6 599	7 072	6 923	6 884
Complement of foreign nationals	4 274	4 428	4 333	4 874	5 258	5 055	4 885
%	70,2	71,6	71,4	73,9	74,3	73,0	71,0

Source: Federal Statistical Office, statistics on the execution of criminal sanctions.

According to Art. 34 SCC, the fine is imposed using the day-rate system having an upper limit of 3,000 Swiss francs per day. However, no minimum rate is stipulated and the actual rate levied is based on the “the personal and economic situation of the convict at the time of the verdict”. This allows to impose fines on people who receive little or no income, i.e. the unemployed, students, housewives and the like, or other low or non-income generating offenders.⁴⁰ This penalty can also be imposed on all foreign nationals regardless of whether or not they are residents, those who have applied for refugee status or some other

38 See: N. Delgrande, M.F. Aebi, Les détenus étrangers en Europe: quelques considérations critiques sur les données disponibles de 1989 à 2006, *Déviance et Société* 2009, No. 4 (Vol. 33), pp. 480-481, L. M. Solivetti..., *op. cit.*, p. 128.

39 M. Killias, Précis de droit pénal général, Bern 2008, p. 216, M. Dupuis (ed.) Code pénal, Bâle 2012, p. 237, M. Tonry, Why aren't penal policies harsher and penal experiences of non-citizens less severe in Switzerland, (in:) A. Kuhn, C. Schwarzenegger, P. Margot, A. Donatsch, M. F. Aebi, D. Jositsch (eds.), *Criminology, Criminal Policy and Criminal Law in an International Perspective: Essays in honour of Martin Killias on the occasion of his 65th birthday*, Bern 2013, p. 665 ff.

40 M. Dupuis (ed.) Code pénal, Bâle 2012, pp. 241-242.

form of international protection, as well as those who stay illegally in the territory.

However, a problem arises when the fine is not paid by the offender. In such cases Swiss law enables the priority to be reversed. According to Art. 36 (1) SCC, if the offender fails to pay the monetary penalty and it remains irrecoverable through debt collection procedures, the offender must serve a custodial sentence as an alternative to the monetary penalty.

Bearing in mind the fact that most of those convicted of offences are individuals who do not reside in Switzerland permanently and have an unsound economic status, it may rightly be stated that the imposition of a fine may at best be questionable and at worst ineffective.⁴¹ In consequence, under such circumstance the fine reverts to a sentence of imprisonment.

Community service is another non-custodial sentence that can be imposed as an alternative to imprisonment. According to Art. 37 SCC, the court may, with consent of the offender, order community service up to a maximum of 720 hours as an alternative to a custodial sentence of less than six months or a monetary penalty not exceeding 180 daily penalty units. There are no limitations concerning foreigners in that respect. However, the Federal Tribunal ruled that the penalty of community service may only be imposed on Swiss nationals or foreigners who possess residence status. In other words, a foreigner given such penalty must be in possession of a valid legal permit to stay in Switzerland,⁴² as the penalty imposed cannot constitute grounds for obtaining a residence permit in order to service the penalty. Thus, this penalty cannot be imposed on tourists, people who stay in the territory illegally or those who have applied for international protection. Hence, some limitations on imposing this non-custodial sentence were introduced towards some foreigners.

As mentioned above, some limitations on imposing non-custodial sentences have been introduced and thus, under such circumstances,

41 R. Storz, S. Rônez, S. Baumgartner, *op. cit.*, p. 39.

42 TF 16.10.2006, 1P.526/2006.

the judge appears to be left with a sentence of imprisonment as the only option. However, alternative measures might be implemented towards convicted foreigners such as a suspended sentence or placing the offender on probation. In the case of foreign nationals, particularly those who have not been staying in Switzerland for any length of time, it is difficult to justify the prerequisite of positive criminological forecast, i.e. the assumption that an offender will not commit further felonies or misdemeanours. As for those foreigners who stay in the territory of Switzerland illegally or whose stay is not otherwise regulated by law, it is impossible to fulfil the requirement to possess a permanent place of residence,⁴³ employment or positive community interview.⁴⁴ In this context the problem of discrimination of foreigners arises as far as access to probationary measures are concerned. In addition, it is difficult to monitor the probation period served by a foreigner. Studies confirm that it is this factor which contributes to the number of foreign nationals outweighing Swiss nationals in terms of overall prison population.⁴⁵

Clearly, the criminal record of an offender constitutes an obstacle to impose a suspended sentence, while committing another offence as recidivism excludes stating a positive criminological forecast. Also worth noting in this regard, is that the previous criminal record of an offender acts as an obstacle to imposing a suspended sentence and committing another offence as a recidivist, undermines the possibility of forming a positive criminological forecast.⁴⁶

Moreover, the sentence of imprisonment in the form of electronic house arrest is less frequently applied to foreigners than to Swiss

43 C. Spindler, Motiver et intégrer Etrangers en prison. Informations sur l'exécution des peines et mesures, Office fédéral de la justice, Bulletin info 2008, No. 1, p. 14.

44 A.H. Zermatten, T. Freytag, Libération conditionnelle: Code pénal versus pratique(s), Prison-info, La revue de l'exécution des peines et mesures 2017, No. 1, p. 36, D. Fink, La prison en Suisse. Un état des lieux, Lausanne 2017, p. 101.

45 A.H. Zermatten, T. Freytag, *op. cit.*, p. 36. However when times served are compared, both resident and non-resident foreign prisoners seem to be released earlier than the Swiss. The reason may be that foreigners convicted of serious crimes often lose their residence permits and are liable to deportation on release. For non-resident foreign offenders, deportation is almost inevitable. M. Killias, Immigrants, Crime..., *op. cit.*, p. 383.

46 R. Storz, S. Rônez, S. Baumgartner, *op. cit.*, p. 39.

nationals,⁴⁷ largely because the former are unable to meet the conditions that allow this type of penalty to be applied.

The sentence of imprisonment imposed on foreign nationals who do not possess a permanent residence permit serves as the primary instrument for detention. Therefore, it appears that the factor which determines the type of punishment to be applied is not so much the nature of the offence committed but rather the status of the foreigner concerned.⁴⁸

Scholars remark that foreigners are given stricter penalties and the sentence of imprisonment is more often imposed on them than on Swiss nationals,⁴⁹ which confirms the theory of labelling, i.e. the phenomenon of the criminality of non-nationals as something strictly dependant on the discriminatory attitude of agencies of social control.⁵⁰

The higher proportion of foreigners among the prison population also illustrates that on average they receive longer sentences.⁵¹ This tendency appears to have increased over the last decade, since the proportion of foreigners among prisoners increased more than the proportion among committals. The question then is whether foreign nationals receive longer sentences for similar crimes or whether they commit more serious offenses.⁵²

47 For example, in 2015 electronic house arrest was applied to 108 foreigners and 151 Swiss nationals; in 2014: 108 foreigners and 125 Swiss nationals; in 2013: 98 foreigners and 153 Swiss nationals. The Federal Statistical Office <https://www.bfs.admin.ch/bfs/en/home/statistics/catalogues-databases/tables.assetdetail.3524404.html> access 2.11.2017.

48 D. Fink, *Du boulet au bracelet. La peine privative de liberté et son avenir en Suisse*. Edition 2017. Tendances 1900-2006 et actualisation des données et des graphiques 2007-2017, p. 11, <http://www.chstat.ch/docs/publications/2017/Actualisation%20des%20graphiques%20Du%20boulet%20au%20bracelet%202017.pdf> access 20.02.2019 See more: D. Fink, *La prison en Suisse...*, *op. cit.*, pp. 136, D. Efanayi, D. Fink, *Politique migratoire et son évaluation* (in:) D. Fink, S. Keller, M. Manetsch, C. Schwarzenegger, (eds.), *Évaluation, Kriminologie und Strafrechtsreform. Evaluation, politique criminelle et réforme du droit pénal*, Bern 2017, pp. 166 ff.

49 C. Koller, D. Fink, *Cantons, population étrangère et criminalité disparités ou discrimination?* (in:) D. Fink, A. Kuhn, C. Schwarzenegger (eds.), *Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité*, Berne, 2013, p. 223.

50 L.M. Solivetti, *op. cit.*, p. 3, 146, M. Killias, M. F. Aebi, A. Kuhn, *op. cit.*, p. 168.

51 Office Fédéral de la Statistique, *De la nationalité des détenus. Une analyse de la situation en Suisse*, Bern 1994, p. 10.

52 M. Killias, *Immigrants, Crime...*, *op. cit.*, p. 396.

The type of penalties imposed depends on the gravity of the offence committed. Nationals of Switzerland most frequently commit offences prescribed by the Federal Act on Road Traffic,⁵³ which for the most part attract lenient non-custodial penalties. The second largest group of offences committed by foreign nationals relate to narcotics offences, for which relatively long sentences of imprisonment are imposed. Such offences are mainly committed by non-residents, which determines the type of sentence handed down.⁵⁴

According to the research conducted by M. Killias, when the average lengths of imposed sentences were compared, foreign residents and Swiss offenders tend to be treated in much the same manner, whereas non-resident foreigners tend to receive fairly longer sentences for homicide, robbery, and drug trafficking. To some degree, this could be due to dissimilarities in the seriousness of the average offence. For example, sentences for drug trafficking heavily reflect the quantities involved. In this regard, foreign (and particularly non-resident foreign) offenders are more often than not involved in large-scale narcotics operations (organised crime groups), whereas Swiss defendants are more frequently drug addicts who deal in drugs to support their own dependency. Consequently, while it may appear that some discrepancy occurs in sentencing it may well be that they do in fact all fall in line with informal judicial sentencing guidelines.⁵⁵

The over-representation of foreigners in Swiss prisons is also grounded in the fact that despite numerous agreements concluded on extraditing convicts to serve their sentence in their home country, few extraditions actually take place. This is mainly due to resistance by the convicts who would prefer to serve their sentence in a Swiss prison and who, in order to avoid extradition prolong the procedural process, often resorting to appealing the judgement before the Federal Tribunal.⁵⁶

53 Federal Act on Road Traffic from 19 December 1959, OC 741.01.

54 M. Killias, *Immigrants, Crime...*, *op. cit.*, p. 369, M. Eisner, M. Killias, *op. cit.*, p. 275, M. Killias, M.F. Aebi, A. Kuhn, *op. cit.*, p. 168.

55 *Ibidem.*

56 J.L. Bacher, *op. cit.*, p. 73.

CRIMINAL LAW ASPECTS IN PREVENTING AND COMBATING THE CRIMINALITY OF FOREIGNERS IN SWITZERLAND

It is not possible to present a uniform system for the prevention and combatting of crime among foreign nationals. To prevent crimes efficiently requires familiarity with the features of the phenomenon, that is, to examine and determine the etiological factors of crimes that foreigners commit and to analyse the risk of their commitment. Etiology and risk analysis must always be performed with reference to a particular type of crime committed at a specific time. Combatting (monitoring) the criminality of foreigners may be conducted based on the etiology of various types of crimes committed and the respective policy of criminal courts. Due to the multi-layered nature of this criminality, it is not possible to present elements of the system for preventing crime among foreigners with any degree of accuracy or meaningfulness.¹ Foreigners commit common offences (such as those against life and limb or property) as well as economic crimes, and more often of course they commit prohibited acts related to illegal immigration.

The criminalisation of prohibited acts, including those committed by foreigners, is the key element in crime prevention. The legislator aims not only at making a person liable for the commission of a prohibited act but also at deterring a prospective offender from committing such act by threat of punishment (so-called general prevention). Therefore, this chapter focuses on criminal law provisions which are mainly targeted at the prevention and combat of offences committed by foreign

1 I. Rzeplińska, Zapobieganie przestępczości cudzoziemców w Polsce, *Archiwum Kryminologii* 2016, Vol. XXXVIII, p. 13.

nationals. The author does not discuss the issue of illegal immigration prevention *sensu largo* due to the complexity of the phenomenon and large number of acts available in the area of administrative law in this regard.

Specific prevention, in other words the impact that penal law has on the offender to deter re-offending, is of vital importance. This preventive effect may be achieved by imposing penal sanctions or by education (in the form of rehabilitation).² Individual prevention is one of the basic objectives of penalties and penal measures under Swiss law,³ therefore expulsion, which targets at individual prevention⁴ and which is imposed exclusively on foreigners, is worth discussing here. The aim of this penal measure is to prevent a convicted offender from re-offending in the territory of Switzerland, principally by depriving them of their right to stay in the country.⁵

1. Combating and preventing criminality of foreigners through substantive law

Substantive law, which aims at preventing foreigners in Switzerland from committing

offences, mainly includes prohibited acts that are exclusive to foreigners. However, it also includes acts facilitating the commission of offences by foreigners. Collectively, these are:

- unlawful entry, exit, and period of stay and work without a permit – Art. 115 FNAI,
- encouraging unlawful entry, exit or an unlawful period of stay – Art. 116 FNAI,
- employment of foreign nationals without a permit – Art. 117 FNAI,
- fraudulent conduct towards the authorities – Art. 118 FNAI,

2 L. Gardocki, *Prawo karne*, Warszawa 2017, p. 198.

3 M. Killias, *Précis de droit pénal général*, Bern 2008, p. 190.

4 *Ibidem*, p. 241.

5 Message concernant une modification du code pénal et du code pénal militaire (Mise en oeuvre de l'art. 121, al. 3 à 6, Cst. relatif au renvoi des étrangers criminels), CO. 13.056, p. 5398.

- failure to comply with restriction or exclusion orders – Art. 119 FNAI,
- further offences – Art. 120 FNAI,
- unlawful claim for social insurance or social assistance benefits⁶ – Art. 148a SCC.

Article 115 (1) FNAI penalises a multi-act offence which may include: unlawful entry, exit, and period of stay and work without a permit and prescribes the penalty to be applied on conviction. In Art. 115 (2) another prohibited act is specified wherein the same penalty shall apply if the foreign national after leaving Switzerland or the international transit zone of the airports enters or makes preparations to enter the sovereign territory of another state in violation of the entry provisions applicable there.

The rules of lawful entry of foreign nationals into the territory of Switzerland are stipulated under Article 5 FNAI which states that they:

- a) must have a recognised identity document for crossing the border and a visa, if required;
- b) must have the required financial means for the period of stay;
- c) must not pose a threat to public security and order or to Switzerland's international relations; and
- d) must not be subject to a measure banning them from entry or an order for expulsion from Switzerland;
- e) provide a guarantee that they will leave Switzerland if only a temporary period of stay is planned.

Violation of any of these rules while entering the territory of Switzerland fulfils the constitutive elements of unlawful entry prescribed under Article 115 (1) (a) FNAI. Unlawful entry also occurs when a person fails to enter the country through an authorised border crossing point.

⁶ Inserted by No. 11 of the Federal Act of 20 March 2015 (Implementation of Art. 121 para. 3-6 Federal Constitution on the expulsion of foreign nationals convicted of certain criminal offences), in force since 1 Oct. 2016.

It is highlighted in the academic literature that unlawful entry takes place when a person crosses the border without the required documents, without a required visa, by producing counterfeit documents or in defiance of an imposed entry ban. The act of unlawful entry is deemed to have been committed at the moment the person crosses the border whether through a controlled border crossing point or otherwise.⁷ If a person does not have the required financial means for the period of stay or is unable to provide a guarantee that they will leave Switzerland on completion of their stay (where only a temporary period of stay is planned), they can be refused an entry visa but neither case constitutes grounds to instigate criminal proceedings under Article 115 (1) (a) FNAI.⁸

The one exception to the obligation to be in possession of documents which allow to lawfully enter the country, relates to a person who crosses the border with the sole intent to request refugee status. Here, Article 31 of the Geneva Convention Relating to the Status of Refugees⁹ applies. It stipulates that no penalties shall be imposed on refugees, on account of their illegal entry or presence, who are coming directly from a territory where their life or freedom was threatened, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.¹⁰

Constitutive elements of the prohibited acts stipulated under Article 115 (1) (a) FNAI will also be fulfilled if a foreign national crosses the border on a tourist visa but with the intention to take up employment or, if they take up employment without the requisite work permit and the intent to commit this act preceded crossing the border. Moreover, if a foreigner national makes a false statement or statements for the purpose of procuring a visa or residence permit, they will be held liable under Article 118 FNAI for fraudulent conduct toward the authorities.¹¹

7 M.S. Nguyen, *Droit public des étrangers*, Berne 2003, p. 667.

8 G. Sauthier, (in:) M.S. Nguyen, C. Amarelle (eds.), *Code annoté de droit de migration*, Berne 2017, p. 1301.

9 Convention relating to the Status of Refugees, Geneva, 28 July 1951. Article 31 (A) (1).

10 M. Perkowska, *Problem nielegalnego przekroczenia granicy przez osoby ubiegające się o nadanie statusu uchodźcy* (in:) W. Pływaczewski, M. Ilnicki (eds.) *Uchodźcy - nowe wyzwania dla bezpieczeństwa europejskiego na tle standardów praw człowieka*, Olsztyn 2015, pp. 52-62.

11 G. Sauthier, *op. cit.*, p. 1302.

Article 115 (1) (a) FNAI also penalises an illegal stay of foreigners in Switzerland, particularly after the period of stay for which a permit was granted has expired or which does not require a permit. The case law stipulates that an illegal stay should last at least 24 hours. A lesser period and in particular a several hour illegal stay or illegal transit, does not constitute grounds to initiate proceedings under Art. 115 (1) (a).¹² If a foreign national is detained at the border by the border guards, their stay is considered illegal in the meaning of Directive 2008/115/EC¹³ and is subject to a removal order in accordance with Art. 64 FNAI.

The stay is not deemed illegal if a foreign national cannot leave Switzerland for reasons beyond their reasonable control, for example, if their country of origin refuses to accept their return or refuses to issue necessary identity documents. The fundamental prerequisite for criminal liability is guilt, which does not apply here.

If a foreign national, against whom notice of a decision to leave Switzerland has been served, does not conform with that notice within the time prescribed they will be liable for illegal stay in accordance with Art. 115 (1) (a). If a foreign national concludes a marriage of convenience their stay is legal up to the time the marriage is annulled or notice of refusal to extend the period of stay has been served. In such case, pursuant to Art. 118 FNAI, the offender may also be held liable for fraudulent conduct towards the authorities.¹⁴

Detaining a foreign national for the purpose of expelling them appears to create some problems here. For example, the French Art. L. 621-1 Code of Entry and Residence of Foreigners and of the Right to Asylum¹⁵ was repealed as it mainly served the purpose of provisional arrest of foreign nationals in contradiction with Article 8 (4) of Directive 2008/115/EC which, in its scope, penalises foreigners for their illegal stay rather than facilitating their expulsion. Consequently, it could

12 ATF 112 IV 115, similarly M.S. Nguyen, *op. cit.*, p. 671.

13 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98.

14 G. Sauthier, *op. cit.*, p. 1303.

15 Ordonnance No. 2004-1248 from 24 November 2004 Code of Entry and Residence of Foreigners and of the Right to Asylum, No. 0274.

jeopardise the achievement of the objectives set out by the Directive, namely the implementation of an effective removal and repatriation policy towards third-country nationals.¹⁶

As G. Sauthier remarks, the Federal Tribunal recommends applying Article 115 FNAI in conformity with the case-law of the Court of Justice of the European Union now in force.¹⁷ It can be concluded therefrom that deprivation of liberty for illegal stay may only be imposed on the foreign national who remains in the territory of Switzerland after notice of the final decision on their expulsion was served and the deadline expired. Similarly, any person who has returned to the territory of Switzerland and remains therein without legal title can be held liable.¹⁸

Article 115 (1) (c) FNAI penalises work without authorisation which means that anybody who takes up gainful employment shall be held liable. According to Art. 11 (2) FNAI, gainful employment is any salaried or self-employed activity that is normally carried out for payment, irrespective of whether payment is made. Lack of appropriate permission is a sufficient prerequisite to be held liable. If the employed person is not salaried or receives remuneration which is below the statutory minimum level it is the employer that is held liable on grounds of unlawful employment.¹⁹

Thus, a foreign national who takes up employment without authorisation to work or who takes up employment contrary to the conditions specified in an issued work permit, shall be held liable. The conditions of employment are stipulated in Art. 38 FNAI.

16 Case C-61/11 PPU - El Dridi, Reports of Cases 2011 I-03015, points 59-60.

17 According to Article 16(2) of the agreement on free movement of persons between EU and Switzerland, the rulings of the ECJ (rendered prior to the date of signature of the agreement) must be taken into account while interpreting and applying the agreement as far as the latter refers to Community law notions. Furthermore, according to the Schengen association agreement between EU and Switzerland a qualified deviation from caselaw may lead to the cancellation of the agreement. In other agreements, however, there is no reference to the caselaw of the ECJ, even though they also frequently make use of Community law terms. But also in these cases, one has to generally refer to the caselaw of the ECJ considering the aim and the subject of the agreements. A. Epiney, How does the European Union Law Influence Swiss Law and Policies? (in:) S. Nahrath, F. Varone (eds.), *Rediscovering Public Law and Public Administration in Comparative Policy Analysis: a Tribute to Peter Knoepfel*, Bern 2009, p. 192.

18 G. Sauthier, *op. cit.*, p. 1300.

19 Federal Act on Illegal Employment, OC 2007 359.

Pursuant to Article 115 (1) (d), unlawful entry also occurs when a person fails to enter or leave the country through an authorised border crossing point, in other words, crosses the border at a location not designated for this purpose (a so-called “green border”). And this raises a very interesting issue. Under the Bilaterals II Agreement,²⁰ Switzerland’s state borders constitute internal borders of the Schengen zone. Thus, according to Article 22 of the Schengen Border Code,²¹ internal borders may be crossed at any point without conducting a border check on persons irrespective of their nationality. Consequently, for all intents and purposes Art. 115 (1) (d) is a “dead letter” as it could only be applied in the event of a temporary reintroduction of controls at internal borders.

As previously mentioned, the offence also takes place if, after leaving Switzerland or the international transit zone of airports, the foreign national enters or makes preparations to enter the sovereign territory of another state in violation of the entry provisions applicable there.

The acts stipulated under Article 115 FNAI are classified as misdemeanours since they are punishable with a custodial sentence not exceeding one year or a monetary penalty. However, if committing the prohibited act results from an act of negligence it is treated as a contravention (Article 103²² of the Swiss Criminal Code (SCC)) and

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- 20 The bilateral Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis (OJ L 53 from 27.2.2008, p. 52–79) was signed on 26 October 2004 in Luxembourg within the framework of the Bilateral Agreements II. The Agreement was approved by the Federal Assembly on 17 December 2004 and approved by the people in the referendum of 5 June 2005 (54.6% of Swiss citizens voted in favour). The Agreement finally entered into force on 1 March 2008. However, it operationally entered into force on 12 December 2008, and a few months later at Swiss airports (29 March 2009). According to this Agreement, the Swiss Confederation is associated on an equal footing with Iceland and Norway in the implementation, application and development of the Schengen acquis. I. Krašnicka, M. Perkowska, I Wrońska, Free Movement of Persons between Switzerland and European Union and State Security, *Przegląd Politologiczny* 2014, No. 3, p. 64.
- 21 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016.
- 22 Art. 103 SCC states: Contraventions are acts that are punishable by a fine.

punished with a fine. According to Art. 106 SCC, the maximum fine that can be levied is 10,000 Swiss francs.

According to Article 115 (4) FNAI, prosecution, committal to a court or the imposition of penalties may be dispensed with for foreign nationals who have unlawfully entered or left the country, provided they are immediately deported. Administrative measures which serve the purpose of deporting the offender are hence of a subsidiary nature as they are *lex specialis* to criminal law provisions.²³

Another act prohibited under the Act on Foreign Nationals is encouraging unlawful entry, exit, and period of stay (Article 116 FNAI) which aims at preventing migrant trafficking. Apart from the FNAI provisions in this regard, the provisions of the SCC along with the Schengen²⁴ and Dublin²⁵ Contracts of Association, serve the same purpose.

Migrant trafficking can be defined as acts undertaken by third parties, typically organised criminal networks, to facilitate migrants in crossing state borders unlawfully. Such acts include assisting migrants to cross borders at locations not designated for this purpose, transporting migrants across borders while concealed in vehicles, providing counterfeit documents and temporary accommodation, as well as other acts intended to deceive law enforcement agencies.²⁶ The need to combat migrant trafficking,²⁷ particularly in light of the removal of controls on Switzerland's borders under the Schengen agreement, was underscored by the Federal Council in its explanatory memorandum to the Act on Foreign Nationals.

23 G. Sauthier, *op. cit.*, p. 1300.

24 2008/146/EC Council Decision of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis.

25 Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, COM/2006/0754 final.

26 Office fédéral de la police, *Le trafic organisé de migrants et la Suisse. Rapport 2014*, Berne 2015, p. 29 ff.

27 Message concernant la loi sur les étrangers du 8 mars 2002, FG 2002, p. 3587.

Under Article 116 FNAI, an offence is committed when: any person who in Switzerland or abroad, facilitates the unlawful entry or departure or the unlawful period of stay in Switzerland of a foreign national or assists a foreign national to prepare for the same (Art. 116 (1) (a)), or who (since 2011) from within Switzerland facilitates the unlawful entry or departure or the unlawful period of stay in a Schengen State of a foreign national or assists a foreign national to prepare for the same (Art. 116 (1) (a^{bis})). In both cases, on conviction offenders are subject to the penalty prescribed in Art. 116 (3).

While the acts involved in facilitating unlawful entry and exit are clear-cut, it is not quite so easy to define what acts constitute the facilitation of illegal stay.²⁸ Caselaw states, these are acts targeted at the unenforceability or obstruction of issuing administrative decisions concerning the foreign national who illegally stays in Switzerland or which relate to their detention.²⁹ For example, such acts could include accommodating them in a hotel, renting them a room or providing them with financial assistance.

Nevertheless, acts which fall into the area of protection guaranteed by the Swiss Federal Constitution such as providing a foreign national who stays illegally in the country with help, food, legal aid or access of their child to education, do not fulfil the conditions prescribed under Article 116.³⁰ If they did this would lead to the violation of guaranteed fundamental rights, such as the right to assistance when in need provided for in Article 12 of the Constitution, particularly if it is not aimed at obstructing administrative or criminal proceeding concerning the foreign national involved.³¹

Under Article 116 (1) (a) FNAI, the legislator provided for the situation that the offender may act both in Switzerland or abroad. Thus,

28 M.S. Nguyen, *op. cit.*, p. 672.

29 G. Sauthier, *op. cit.*, p. 1314.

30 G. D'Addario di Paoli (in:) M. Caroni, T. Gächter, D. Thurnherr (eds.), *Ausländergesetz*, Bern 2010, p. 1187, M.S. Nguyen, *op. cit.*, p. 677.

31 G. Sauthier, *op. cit.*, p. 1315.

the principle of territoriality³² was applied wherein the outcome of the offence will occur in the territory of Switzerland.³³

Article 116 (1) (b) FNAI penalises a person who finds work for a foreign national in Switzerland who is not in possession of the requisite work permit.³⁴ This provision raises some interpretation problems given that Article 117 forbids the employment of foreign nationals who are not entitled to work in Switzerland.

It may be concluded from the caselaw that the act stipulated under Article 116 (1) (b), should meet the criteria characteristic for complicity (Article 25 SCC), in other words the offender “assists” in finding employment.³⁵

Under the provisions of Article 116 (1) (c) FNAI, a person also commits an offence if they facilitate the entry of a foreign national who has left Switzerland or the international transit zone of the airports into the sovereign territory of another state in violation of the entry provisions applicable there or assist that foreign national in preparing for such entry.

Criminal liability for the offences prescribed for under Article 116 (1) FNAI may in minor cases be mitigated and a fine imposed. To establish whether or not the case is minor it is necessary to assess the seriousness of the damage or danger to the legal interest concerned, the reprehensibility of the conduct, the offender’s motives and aims, and the extent to which the offender, in view of the personal and external circumstances, could have avoided causing the danger or damage (Article 47 (2) SCC).

While the law provides the possibility to mitigate the degree of criminal liability stipulated in Article 116 (3) FNAI, it also provides the possibility to increase it, for example in cases where the offender acts intentionally for their own or another’s unlawful financial gain (Art. 116 (3) (a)) or acts for an association or group that was formed

32 See more on territorial principle, Chapter III.

33 M.S. Nguyen, *op. cit.*, p. 674.

34 In the French version of FNAI the verb *procurer* was used.

35 G. Sauthier, *op. cit.*, p. 1317.

for the purpose of the continued perpetration of this offence (Art. 116 (3) (b)). This provision was introduced mainly to prevent organised forms of migrant trafficking, typically arranged by organised criminal groups who reap considerable financial rewards from facilitating illegal migration.³⁶ Hence the legislator pointed at two elements affecting the possible increase of criminal liability. The first is where the offender acts intentionally for their own or another's unlawful financial gain. The second is acting for an association or group. Participation in an organised criminal group is penalised by virtue of Article 260^{ter} (1) SCC³⁷ with (as in the case of Art. 116 (3) FNAI) the penalty of a custodial sentence not exceeding five years or a monetary penalty and the custodial sentence must be combined with a fine. Hence, this offence in aggravated form is treated as a crime, whereas in its basic form it is treated as a misdemeanour.

As beforementioned, the Swiss legislator penalised taking up employment without a work permit, finding work for a foreign national who does not possess a work permit as well as employing a foreign national who does not possess a work permit (Article 117 FNAI).

The employment of a foreign national who is not entitled to work in Switzerland, penalised by virtue of Article 117 (1) FNAI, has a wide scope due to the broad definition of the term “employer”. In fact it refers to employment as such, not to the notion of employer prescribed under the Code of Obligations.³⁸ Thus, an employer will also be a person who employs a foreign national, for example, to have their house cleaned in ignorance of the law in force. The competences to give instructions in the scope of the work performed must however exist to create an

36 Office fédéral de la police, *Le trafic organisé de migrants et la Suisse. Rapport 2014*, Berne 2015 p. 10, IMES, ODR, fedpol, Corps des gardes-frontière, *Rapport sur la migration illégale*, Bern 2004, pp. 24, 33.

37 More on statutory elements of offence of participation in organised criminal group in M. Perkowska, *Activities of foreign organized criminal groups in Switzerland*, (in:) E.W. Pływaczewski (ed.), *Current problems of the penal law and criminology*, Warszawa 2012, pp. 499-513, *Participation à une organisation criminelle. Distinction face à une bande familiale*, JDT 2007, No. IV, p. 135 ff., J. de Vries Reilingh, *La répression des infractions collectives et les problèmes liés à l'application de l'art. 260ter CP relatif à l'organisation criminelle*, notamment du point de vue de la présomption d'innocence, *Revue de la Société des juristes bernois* 2002, No. 138.

38 Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911, OC 220.

employer-employee relationship.³⁹ For example, under Article 91 FNAI, the employer is *inter alia* obliged to inspect a foreign national's identity card or check with the competent authorities to ascertain that they are entitled to work in Switzerland.⁴⁰ Failure to comply with the provisions in this regard carries penal consequences.

Article 117 (1) FNAI, introduces a penalty for any person who obtains a cross-border service in Switzerland for which the service provider has no permit. Cross-border services are temporary services provided in the territory of Switzerland under cover of an agreement by a person or company that is non-resident (Article 3 of the Decree on Admittance⁴¹). Providing a cross-border service requires obtaining a permit to do so.

Both offences stipulated under Art. 117 (1) FNAI, are misdemeanours punishable with the penalty of a custodial sentence not exceeding three years or a monetary penalty.

The liability can be increased for recidivists who re-employ foreign nationals. Pursuant to Art. 117 (2) FNAI, any person who has a legally binding conviction under Art. 117 (1) FNAI and again commits the same offences within five years is liable on conviction to a custodial sentence not exceeding three years or a monetary penalty. The custodial sentence must be combined with the monetary penalty. Under the provisions of Article 34 SCC, a monetary penalty amounts to a minimum of three and a maximum of 180 daily penalty units (Art. 34 (1)). A daily penalty unit normally amounts to a minimum of 30 and maximum of 3,000 Swiss francs (Art. 34 (2)). Hence, the range of monetary penalty is from 90 to 540,000 Swiss francs. However, Art. 34 (2), includes a discretionary provision to reduce the minimum daily penalty to 10 Swiss francs where the offender's personal and financial circumstances warrant such consideration.

One remark needs to be made here. Article 117 (1) FNAI penalises a person who wilfully employs foreign nationals. Up to 31 January

39 G. Sauthier, *op. cit.*, p. 1323.

40 G. Malinverni, Le projet de loi fédérale sur les étrangers, La Semaine judiciaire 2000, No. 12, p. 426.

41 Decree on Admittance, Residence and Employment of 24 October 2007, OC 142.201.

2014, only intentional offences were sanctioned. Since that date, persons who commit this offence as a result of negligence⁴² (Art. 12 (3) SCC) have also been penalised. In such case the penalty of fine does not exceed 20,000 Swiss francs.

Another act which violates criminal law is fraudulent conduct towards the authorities which is penalised under Article 118 FNAI. The Swiss legislator introduced criminal liability for wilfully deceiving the authorities. It is a solution aimed at eliminating so-called quasi-legal migration targeted at legalising an existing or potential illegal stay.

Article 118 (1) FNAI, penalises any person who deceives the authorities responsible for the implementation of the FNAI by providing false information or withholding essential information and thereby fraudulently secures the grant of a permit for themselves or another or prevents the withdrawal of a permit.

Thus, under the provisions of Art. 118 (1) FNAI, any foreign national or third party who participates in proceedings stipulated by the FNAI, is obliged to provide true and correct information and failure to do so constitutes a misdemeanour subject to penalty.⁴³ Fraudulent conduct in this regard may include: providing false information (both orally and in writing) or concealing information which may be crucial to the issue of a decision granting or extending permission to stay. The caselaw includes some examples of such prohibited acts: false information on the purpose of the visit to Switzerland, false information on family relationship or marital status, claiming that another person's child is their own to qualify under the family reunification procedure.⁴⁴ The act is deemed to have been committed the moment the notice of permission is issued. If discovery of the offence occurs before that time it is treated as an attempt to defraud the authorities.

42 Negligence is defined in Article 12 (3) of the Swiss Criminal Code as: "A person who commits a felony or misdemeanour through negligence if he fails to consider or disregards the consequences of his conduct due to a culpable lack of care." Para 3 of art. 117 FNAI Inserted by Annex No. 1 of the Federal Act of 14 December 2012, in force since 1 February 2014 (AS 2013 4375 5357; BBl 2010 4455, 2011 7325).

43 The obligation to cooperate with the authorities is grounded in Article 90 of FNAI: "Foreign nationals and third parties involved in proceedings under FNAI are obliged to cooperate in determining the relevant circumstances necessary to apply this Act."

44 G. Sauthier, *op. cit.*, p. 1328.

One specific means of legalising stay is by way of the so-called “marriage of convenience”. In some legal orders such marriages are not directly prohibited - it being possible to hold an offender liable on grounds of making false statements or facilitating the foreign national’s stay in the territory. The Swiss legislator, on the other hand, chose to introduce direct prohibition stipulating that any person who marries a foreign national or arranges, encourages or facilitates such a marriage with the intention of circumventing the regulations on the admission and stay of foreign nationals is, on conviction, subject to penalty.

An offence in this regard is committed when any person, who with the intention of circumventing the regulations on the admission and stay of foreign nationals, marries a foreign national or arranges, encourages or facilitates such a marriage (Art. 118 (2) FNAI), and where, on conclusion of the marriage, neither spouse wishes to form and maintain nuptial bonds.⁴⁵ As emphasised in the caselaw,⁴⁶ it is this lack of intention to create a conjugal relationship that is crucial here. Other factors which may point in this direction also need to be examined, for example, the status of the foreign spouse (whether their stay would have been possible without concluding the marriage), an overly large age difference between the spouses,⁴⁷ the circumstances of their first meeting and bonds (such as how long they have known each other, how well they know each other and whether one of the spouses originates from a marginalised community⁴⁸).

Any person who commits an offence under the provisions of Art. 118 (2) FNAI, is subject on conviction to a custodial sentence not exceeding three years or to a monetary penalty.

Furthermore, the legislator also introduced the possibility to increase the liability in cases where the offender acts intentionally for their own or another’s unlawful financial gain or acts for an association or group that was formed for the purpose of the continued perpetration

45 Rapport explicative au projet de loi fédérale sur les étrangers, Bern 2000, p. 20.

46 G. Sauthier, *op. cit.*, p. 1328 and TF 2C_177/2013 from 6 June 2013.

47 See: M. Nyffenegger, Le mariage pour obtenir un droit de séjour en Suisse: un avis des autorités compétentes en matière de droit des étrangers, *Revue de l'état civil* 2002, No. 6, p. 271.

48 R. Eugester, Le mariage pour obtenir un droit de séjour en Suisse: un avis des autorités compétentes en matière de droit des étrangers, *Revue de l'état civil* 2002, No. 6, p. 197.

of this offence. As in the case of Art. 118 (3) FNAI, the provisions were introduced to prevent organised forms of migrant trafficking. This offence carries the penalty of a custodial sentence not exceeding five years and the custodial sentence must be combined with a monetary penalty.

Article 119 FNAI, penalises the failure of a person to comply with a restriction or expulsion order. Under the provisions of Article 74 (1) FNAI, the competent cantonal authority may require a person not to leave the area they were allocated to or not to enter a specific area if: they do not hold a short stay, residence or permanent residence permit and they disrupt or represent a threat to public security and order (Art. 74 (1) (a)); or they are subject to a legally binding expulsion or removal order and specific indications lead to the belief that the person concerned will not leave before the departure deadline or has failed to observe the departure deadline (Art. 74 (1) (b)); or deportation has been postponed (Art.74 (1) (c)). Failure to comply with the ban is punishable by a custodial sentence not exceeding three years or a monetary penalty (Art. 119 (1)). However, it is possible to dispense with prosecution, the committal to court or penalties, if the person concerned can be deported immediately or the person is being held in detention in preparation for departure or pending deportation (Art. 119 (2) (a) and (2) (b) respectively). In such case a judge may, but is not obligated to, discontinue the proceedings.

It is worth highlighting, however, that according to the Return Directive and the case law of the European Court of Justice, it is forbidden to detain foreign nationals on the grounds of acts which relate to the rules of residence if it is possible to issue an expulsion order. Hence, the penalty imposed on the grounds referred to in Art. 119 FNAI, may only be applied where the foreign national was also convicted of a second offence unrelated to their residency status.⁴⁹

The penalty of a custodial sentence not exceeding three years or a monetary penalty for failing to comply with a restriction or expulsion order, seems surprisingly stiff. It compares with the penalty

49 G. Sauthier, *op. cit.*, p. 1339.

for fraudulent conduct towards the authorities and is a much stricter approach than in the case of unlawful entry, exit, period of stay and working without a permit. Unfortunately, the explanatory memorandum to the Bill contains no explanation as to why such a serious penalty was introduced. It only states, somewhat laconically, that the provision is to protect citizens from offenders and the administrative detention merely serves to execute the expulsion order.⁵⁰

It is also worth highlighting that the penal provisions of the FNAI appear to be more repressive than the provisions of the Act on the Residence and Permanent Settlement of Foreign Nationals which it replaced.⁵¹ The Federal Council, in its explanatory memorandum to the FNAI underscored that both illegal border crossings and human trafficking need to be combated systematically. Moreover, to effectively combat the illegal employment of foreigners it was also necessary to make employers liable.⁵²

In addition, the Swiss legislator stipulated some prohibited acts which are considered contraventions and which might be committed either wilfully or through negligence. Under Article 120 FNAI these are punishable by a fine⁵³ and they include the following:

- a) violation of the requirements to register and give notice of departure (Articles 10-16 FNAI);
- b) changing job without the required permit or changing from salaried to self-employment (Art. 38 FNAI);
- c) moving place of residence to another canton without the required permit (Art. 37 FNAI);
- d) failure to comply with the conditions of a permit (Articles 32, 33 and 35 FNAI);
- e) failure to comply with the obligation to cooperate in obtaining identity documents (Art. 90 (c) FNAI).

50 Message concernant la loi sur les étrangers..., *op. cit.*, p. 3589.

51 Federal Act of 26 March 1931 on the Residence and Permanent Settlement of Foreign Nationals.

52 Message concernant la loi sur les étrangers..., *op. cit.*, p. 3519. M. S. Nguyen, *op. cit.*, p. 661.

53 According to Article 106 (1) SCC the maximum amount of a fine for contravention is 10,000 Swiss francs, unless the law provides otherwise.

Unlike the Foreign Nationals and Integration Act, the Swiss Criminal Code does not stipulate prohibited acts that may only be committed by foreigners. The Swiss Criminal Code, in common with the criminal codes of other states, includes a wide array of offences which may be committed by Swiss nationals, foreign nationals and stateless persons. The statutory elements of an offence prescribed under Article 148a SCC, unlawful claim for social insurance or social assistance benefits, are worth discussing here. These provisions were included in the SCC in compliance with Article 121 (3-6) of the Federal Constitution on the exclusion of foreign nationals convicted for certain criminal offences.

In accordance with Article 121 (3) (b) of the Federal Constitution as amended, a foreign national who has improperly claimed social insurance or social assistance benefits shall be expelled. As the expulsion rules were stipulated in the SCC, to comply with the legality principle, the new prohibited act needed to be introduced into federal legislation, as well as to even out disparities in relation to cantonal legislation in this regard.⁵⁴

The popular initiative, which resulted in the revision of the Constitution and amendment of Article 121 thereof, aimed at reinforcing the provisions on preventing and combating frauds and misuses while claiming social insurance or social assistance benefits,⁵⁵ resorting even to the strictest penal measure of all - expulsion from the territory of Switzerland.

This offence is committed when any person who misleads another by providing false or incomplete information, failing to disclose information or in any other way or who compounds an existing error so that they or an associate obtains social insurance or social assistance benefits to which they or their associate is not entitled (Art. 148a¹⁶⁵ (1) SCC).

54 Message concernant une modification du code pénal..., *op. cit.*, p. 5400, 5435.

55 Message concernant l'initiative populaire "Pour le renvoi des étrangers criminels (initiative sur le renvoi)" et la modification de la loi fédérale sur les étrangers du 24 juin 2009, OC 09.060, p. 4579.

This provision shows that misleading another person by providing false or incomplete information may take various forms. The statutory elements of the offence are fulfilled not only if a person produces false or incomplete information but also when they fail to disclose information. Hence, the offence may also be committed if the person simply fails to act. Also, there is no distinction between unlawful claims being addressed to state administrative bodies (federal, cantonal or communal authorities) or to private agencies entrusted with administrative tasks, for example in the area of healthcare.⁵⁶

An unlawful claim for social insurance or social assistance benefits is a causal offence and as such, the prohibited act is committed at the moment the benefits are transferred to the person when, under the provisions of Art. 148a¹⁶⁵ (1) SCC, the offence becomes subject to a custodial sentence not exceeding one year or monetary penalty. If discovery of the offence occurs before the benefits are transferred, the act is treated as an attempt.

This is an exclusively wilful act, although contrary to fraud (Article 146 SCC), the perpetrator may not necessarily aim at securing an unlawful personal gain or gain for another.

Article 148a SCC is *lex generalis* for Art. 146 which penalises fraud. One of the constitutive elements of fraud is deception, which occurs when its perpetrator demonstrates cunningness or crafty artfulness.⁵⁷ In the case of Art. 148a SCC, the prohibited act is committed when a person provides false or incomplete information, fails to disclose information or compounds an existing error, without the need to deceive anybody.⁵⁸ Nevertheless, if that person deceives to obtain social insurance or social assistance benefits they will be held liable under Art. 146 SCC, which

56 Message concernant une modification du code pénal et du code pénal militaire (Mise en oeuvre de l'art. 121, al. 3 à 6, Cst. relatif au renvoi des étrangers criminels), OC 13.056, p. 5433.

57 M. Dupuis, B. Geller, G. Monnier, L. Moreillon, C. Piquet, C. Bettex, D. Stoll, *Code pénal*, Bâle 2012, p. 833.

58 M. Dupuis, L. Moreillon, C. Piquet, S. Berger, M. Mazou, V. Rodigari, *Code pénal*, Bâle 2017, p. 987.

is *lex specialis* for Art. 148a^{165,59} and the penalty will be far more severe – deprivation of liberty for up to five years or a monetary penalty.⁶⁰

Article 148a (2) SCC provides for the penalty of a fine in minor cases. As far as offences against property are concerned, the SCC states that the offender is liable on complaint to a fine where the offence relates only to a minor asset value or where only a minor loss is incurred (Art. 172^{ter}(1)). It has been assumed on the grounds of the Federal Tribunal case law that the minor asset value referred to is a sum that does not exceed 300 Swiss francs.⁶¹ Nevertheless, to determine whether or not a case is minor, all principles normally applied in the determination of sentences need to be taken into consideration, *inter alia* the offender's previous conduct and personal circumstances as well as the effect the sentence will have, which may serve to reduce the degree of culpability (Art. 47). In that context, the case law grounded in the application and interpretation of Art. 148a (2) will be of key importance.⁶²

The objective scope of the offences which, according to the intentions of the Swiss legislator aims at combating and preventing criminality among foreigners, appears to be sufficient. The Foreign Nationals and Integration Act penalises offences of illegal migration, in other words illegal border crossing, illegal stay or illegal employment, as well as providing criminal liability for persons who encourage, facilitate and organise this conduct, and those who employ foreigners unlawfully. In addition, the Act introduces the provisions of fraudulent conduct towards the authorities. Such conduct is not expressly penalised in many European legal orders, which foreigners often take advantage of, and which may occur for example, while legalising stay or taking up employment although this does not always fulfil the constitutive elements of offences such as presenting false documents and making false statements.

59 Message concernant une modification du code pénal..., *op. cit.*, p. 5431.

60 Article 148a (1) of SCC refers to an offence with custodial sentence not exceeding one year or to monetary penalty.

61 M. Dupuis, L. Moreillon, C. Piquet, S. Berger, M. Mazou, V. Rodigari, *op. cit.*, p. 1119-1120.

62 Message concernant une modification du code pénal..., *op. cit.*, p. 5434.

Another interesting step in this direction was the introduction of legislation that penalises marriages of convenience, a practice often adopted by foreign nationals to legitimise their stay in Switzerland when no other grounds exist to remain in the country legally. Not all European legislations include such provisions which significantly facilitates the process of making offenders accountable for their actions. The application of other penal measures in this regard are nowhere near as effective.

As a result of popular initiative, the provisions on unlawful claim for social insurance or social assistance benefits were introduced into the Swiss law. It can rightfully be said that here, Swiss society made a very brave move against dishonest beneficiaries of social benefits, penalising unlawful claims, not just the receipt of social benefits. Unlawful claims are made both by nationals of a particular country and foreigners. Unfortunately, the latter frequently migrate for economic purposes, not necessarily to take up employment but rather to live on the social assistance benefits that are available. Therefore, adoption of the aforementioned provisions seems to be both well-grounded and appropriate.

2. Combating and preventing criminality of foreigners through penal measures

Penalties and penal measures aim at general or specific (individual) prevention. The purpose of penalties is to deter potential offenders from committing an offence or from re-offending if they have already been convicted of an offence. Expulsion as a penal measure, also serves two purposes. First, it serves as an instrument for preserving public order. Expulsion as a penal measure serves two purposes. First, as an instrument for preserving public order. Second, as an additional measure to custodial or monetary penalties.⁶³

63 M. Gafner, *Personnes de nationalité étrangère, délinquance et renvoi: Une double peine?* Revue de droit Administratif et de droit Fiscal 2007, No. 1, p. 8, *L'expulsion judiciaire des étrangers en Suisse: La récidive et auteurs lié à ce phénomène*, Criminoscope 2009, No. 41, p. 2.

The Swiss, again through the mechanism of popular initiative, introduced changes to the Constitution in the area of policy towards foreign convicts. In consequence, its Article 121 was amended by the addition of four new paragraphs which relate to the expulsion of foreign nationals. For example, Art. 121 (3) stipulates that foreign nationals will lose their right of residence and all other legal rights to remain in Switzerland if they: a) are convicted with legal binding effect of an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or b) have improperly claimed social insurance or social assistance benefits.

According to Article 121 (4), the legislature will define the offences covered by Art. 121 (3) in more detail and is vested with the competence to extend the catalogue of offences included therein. As a result of the amendments a new penal measure, expulsion, was introduced into the Swiss Criminal Code,⁶⁴ which may only be imposed on foreign nationals (Articles 66a-66d SCC).

Article 66a SCC stipulates the prerequisites of mandatory expulsion. A foreigner is mandatorily expelled for a period of 5 to 15 years if convicted for one of the offences listed therein regardless of the sentence imposed. The catalogue of prohibited acts covered by mandatory expulsion is exhaustive⁶⁵ and specifies the vague entries

64 Expulsion as a penal measure was binding as long as the General Part of the Criminal Code was in force by 31 December 2006. Those provisions were repealed since this penal measure duplicated administrative expulsion under the Federal Act of 26 March 1931 on the Residence and Permanent Settlement of Foreign Nationals. Message concernant la modification du code pénal suisse (dispositions générales, entrée en vigueur et application du code pénal) et du code pénal militaire ainsi qu'une loi fédérale régissant la condition pénale des mineurs du 21 septembre 1998, FG 1999, p. 1910.

65 Article 66a of SCC enumerates: a) intentional homicide (Art. 111), murder (Art. 112), manslaughter (Art. 113), inciting and assisting suicide (Art. 115), illegal abortion (Art. 118 para. 1 and 2); b) serious assault (Art. 122), female genital mutilation (Art. 124 para. 1), abandonment (Art. 127), endangering life (Art. 129), attack (Art. 134); c) aggravated misappropriation (Art. 138 para. 2), aggravated theft (Art. 139 para. 2 and 3), robbery (Art. 140), fraud for commercial gain (Art. 146 para. 2), computer fraud for commercial gain (Art. 147 para. 2), misuse of a cheque card or credit card for commercial gain (Art. 148 para. 2), aggravated extortion (Art. 156 para. 2-4), profiteering for commercial gain (Art. 157 para. 2), handling stolen goods for commercial gain (Art. 160 para. 2); d) theft (Art. 139) in conjunction with unlawful entry (Art. 186); e) fraud (Art. 146 para. 1) related to social insurance or social assistance, unlawful claims for social insurance or social assistance benefits (Art. 148a para. 1); f) fraud (Art. 146 para. 1), fraud in relation to administrative services and charges (Art. 14 para. 1, 2 and 4 of the Federal Act of 22 March 1974 on Administrative Criminal Law) or tax fraud, misap-

included in Article 121 (3) of the Constitution such as violent offences, serious sexual offences, and offences in relation to the trafficking of drugs.⁶⁶ According to the principle of legal certainty in penal law, the criteria to implement such a serious measure must be precise. Although the initiators of the popular initiative intended to expel those who committed serious offences,⁶⁷ Art. 66a SCC includes offences of different gravity, both felonies and misdemeanours, such as offences against life and limb, offences against property or sexual freedoms, offences constituting a public danger, against public health, war crimes, as well as offences related to drugs and those prohibited by the Act on Foreign Nationals. The list does not enumerate contraventions.

The offender's conviction constitutes the fundamental prerequisite to impose mandatory expulsion. The offender needs to be found guilty and the penalty needs to be imposed. The offender cannot be expelled if a penalty is not imposed, for example, where the offender is exempted from punishment (Articles 52-54 SCC).⁶⁸ No minimum penalty has been stipulated to order mandatory expulsion. The entry "irrespective

appropriation of taxes deducted at source or any other offence related to public charges that carries a maximum penalty of a one-year custodial sentence or more; g) forced marriage, forced registered partnership (Art. 181a), trafficking in human beings (Art. 182), false imprisonment and abduction (Art. 183), aggravated false imprisonment and abduction (Art. 184), hostage taking (Art. 185); h) sexual acts with children (Art. 187 para. 1), indecent assault (Art. 189), rape (Art. 190), sexual acts with persons incapable of judgement or resistance (Art. 191), encouraging prostitution (Art. 195), pornography (Art. 197 para. 4 second sentence); i) arson (Art. 221 para. 1 and 2), wilfully causing an explosion (Art. 223 para. 1 no. 1), misuse of explosives and toxic gases with criminal intent (Art. 224 para. 1), wilfully causing danger without criminal intent (Art. 225 para. 1), manufacture, concealment and transport of explosives and toxic gases (Art. 226), causing danger by means of nuclear energy, radioactivity and ionising radiation (Art. 226^{bis}), preparatory offences (Art. 226^{ter}), wilfully causing a flood or collapse (Art. 227 para. 1 no. 1), criminal damage to electrical installations, and hydraulic or protective structures (Art. 228 para. 1 no. 1); j) wilfully causing danger by means of genetically modified or pathogenic organisms (Art. 230^{bis} para. 1), wilful transmission of human diseases (Art. 231 para. 1), wilful contamination of drinking water (Art. 234 para. 1); k) aggravated disruption of public traffic (Art. 237 para. 1 no. 2), wilful disruption of rail traffic (Art. 238 para. 1); l) acts preparatory to the commission of an offence (Art. 260^{bis} para. 1 and 3), participation in or support for a criminal organisation (Art. 260^{ter}), endangering public safety with weapons (Art. 260^{quater}), financing terrorism (Art. 260^{quinqies}); m) genocide (Art. 264), felonies against humanity (Art. 264a), serious violations of the Geneva Conventions of 12 August 1949 (Art. 264c), other war crimes (Art. 264d-264h); n) wilful violations of Article 116 paragraph 3 or Art. 118 para. 3 of the Foreign Nationals and Integration Act of 16 December 2005; o) violation of Art. 19 paragraph 2 or 20 para. 2 of the Narcotics Act of 3 October 1951.

66 Message concernant une modification du code pénal..., *op. cit.*, p. 5416.

67 Union démocratique du centre, Oui à l'initiative populaire pour le renvoi des étrangers criminels (initiative sur le renvoi). Argumentaire pour la votation du 28 novembre 2010, p. 12.

68 Message concernant une modification du code pénal..., *op. cit.*, p. 5396.

of the sentence imposed” included in Art. 66a SCC, theoretically means that a foreign offender can be expelled even if only a minimal penalty is imposed, such as a three-day custodial sentence or a monetary penalty of three daily penalty units. The term “sentence imposed” also means that a foreign offender can be expelled even if placed on probation.⁶⁹

Mandatory expulsion is not only imposed on a person who commits an offence, it is also imposed on accomplices and those who instigate, aid, abet or attempt to commit an offence.⁷⁰

As previously mentioned, this measure may only be imposed on foreigners, i.e. nationals of other countries, and is applied regardless of their legal status (whether or not they were granted refugee status or whether or not they possess a type B or C residence permit, etc.). One problem that can arise here relates to foreign nationals holding dual citizenship. However, it is noted that the law does provide the possibility to revoke Swiss citizenship in cases where the person granted this status engages in conduct seriously detrimental to the interests or the reputation of Switzerland,⁷¹ which *prima facie* seems to present a way round this obstacle should the need arise to issue an expulsion order.

In accordance with Art. 66a (1) SCC, expulsion is ordered mandatorily but with two exceptions. First, Art. 66a (2) states that the court may refrain from ordering expulsion if it would cause serious personal hardship to the foreign national concerned and the public interest in expulsion does not outweigh the private interest of the foreign national in remaining in Switzerland. In such cases, account must be taken of the special position of foreign nationals who were born or have grown up in Switzerland. Thus, according to these provisions, serious personal hardship to the foreign convict justifies refraining from ordering mandatory expulsion. Second, Art. 66a also obliges the judge to examine the convict’s personal situation, particularly if the foreign convict was born in or grew up in Switzerland. here, the legislator

69 M. Dupuis, L. Moreillon, C. Piquet, S. Berger, M. Mazou, V. Rodigari, *op. cit.*, pp. 493-494.

70 Message concernant une modification du code pénal, *op. cit.*, p. 5416.

71 Art. 42 of Federal Act on Swiss Citizenship from 20 June 2014. OC 141.0.

assumes that such people might be assimilated with Swiss society, which gives grounds to refrain from ordering mandatory expulsion.⁷²

Furthermore, committing an offence in justifiable self-defence (Art. 16 (1) SCC) or in a justifiable situation of necessity (Art. 18 (1)) also constitute grounds for optional refrainment from ordering expulsion (Article 66a (3) SCC).

Article 66a^{bis} SCC, includes provisions on non-mandatory expulsion, in other words, the court may expel a foreign national from Switzerland for 3-15 years if convicted and sentenced or made subject to a measure under Articles 59-61 or 64 SCC for a felony or misdemeanour that is not listed in Art. 66a SCC. Again, contraventions are excluded where ordering expulsion is concerned. Nevertheless, in the case of non-mandatory expulsion there is no need to first convict the offender, hence it is possible to impose this measure even if the punishment has been waived or if only a light penal measure has been imposed. As a result, despite the fact that expulsion here is optional, it is in fact more severe.⁷³

The Swiss legislator, apart from stipulating refrainment on the use of expulsion under certain circumstances, also introduced some provisions which make this penal measure more stringent, such as in the case of re-offending. Under Article 66b SCC, expulsion may be ordered for a period of 20 years or even indefinitely. These provisions state that: any person who has been made subject to an expulsion order who commits a further offence that meets the requirements for expulsion under Article 66a shall be expelled again for 20 years (Art. 66b (1) SCC). Here, the SCC paraphrases the provisions of Art. 121 (5) of the Constitution. The expulsion must be re-ordered if the conditions stipulated under Art. 66a SCC are fulfilled and it is irrelevant whether the perpetrator re-offended while completing the sentence or after the penalty was served. When a second expulsion order is issued, this time for the period of 20 years, it absorbs the previous order issued for the period from 5 to 15 years.⁷⁴

72 Message concernant une modification du code pénal, *op. cit.*, pp. 5424-5425.

73 M. Dupuis, L. Moreillon, C. Piquet, S. Berger, M. Mazou, V. Rodigari, *op. cit.*, p. 503.

74 Message concernant une modification du code pénal, *op. cit.*, p. 5426.

The legislator went even further than the Swiss constitution as the possibility of indefinite expulsion was provided for in case of recidivism if the conditions stipulated under Article 66a SCC are met during the period of the first expulsion. According to the doctrine, recidivism only refers to the mandatory expulsion stipulated under Art. 66a, not to non-mandatory expulsion covered by Art. 66b SCC.⁷⁵ Indefinite expulsion is an option that can merely be ordered. It is not mandatory.

In accordance with Article 66c (1) SCC, the expulsion order applies from the date on which the judgment becomes legally enforceable. However, before enforcing the expulsion order, any unsuspended sentences or parts thereof and any custodial measures must be executed (Art. 66c (2)). The expulsion order is enforced as soon as the offender is conditionally or finally freed from serving the custodial sentence or other measures imposed or the custodial sentence is revoked, on condition that any outstanding portion of the sentence need not be served and no other such measure has been ordered. Expulsion may also be executed even if the release period has commenced.⁷⁶

An expulsion order also applies where a convicted person is transferred to their home country to serve the criminal penalties or measures handed down to them by a Swiss court (Art. 66c (4) SCC). Here, the prescribed expulsion period commences on the day the offender leaves Switzerland (Art. 66c (5) SCC).

Article 66a SCC, provides the possibility to defer enforcement of a mandatory expulsion order in cases where the person concerned is recognised by Switzerland as a refugee and, if expelled, their life or freedom would be endangered due their race, religion, nationality, affiliation to a specific social group or their political views. However, this does not apply to a refugee who fails to meet the criteria for invoking the ban on refoulement under Article 5 (2) of the Asylum Act of 26 June 1998.⁷⁷ Deferral of the enforcement of a mandatory expulsion order is also possible if the expulsion would violate other provisions of international law, for example, where the receiving state

75 M. Dupuis, L. Moreillon, C. Piquet, S. Berger, M. Mazou, V. Rodigari, *op. cit.*, p. 504.

76 Message concernant une modification du code pénal, *op. cit.*, p. 5428.

77 Asylum Act of 26 June 1998, OC 142.31.

refuses to accept the person or refuses to issue travel documents.⁷⁸ There is also the question of forcibly returning a person to a place where there is an ongoing territorial or civil war or some equally hazardous situation, which would effectively serve to violate Article 3 of the European Convention on Human Rights⁷⁹ prohibiting inhuman or degrading treatment or punishment.⁸⁰ In fact, it needs to be highlighted that expulsion is deemed unacceptable in any situation which might serve to infringe an individual's rights and freedoms guaranteed by the Convention,⁸¹ regardless of whether that individual happens to be a convicted offender or otherwise.

It is difficult to assess the effectiveness of expulsion as a penal measure in combating and preventing criminality among foreigners in Switzerland, mainly due to the fact that the legislation in question has only been in force for a short time.⁸² There are no updated data available to indicate the number of expulsions that have been served since its introduction in late 2016 or their frequency. Moreover the executing regulation entered into force on the 1st March 2017. From this moment the execution is finally possible. The first available public data shows that in 2017 the mandatory expulsion have been pronounced in 915 convictions and the non-mandatory expulsion in 124 convictions.⁸³ However, exactly how much this would help to assess its effectiveness at this early stage is questionable, although it would be interesting to learn how many, if any, attempts have been made by expelled foreigners to re-enter Swiss territory illegally. This by itself might serve as a useful pointer.

In summary, expulsion deprives any foreign national convicted of an offence listed under Article 66a SCC, of the right to stay in the

78 The subsaharian African states may serve as an example of states here. Their nationals were not practically expelled when the former general part of the Criminal Code was in force. L'expulsion judiciaire des étrangers en Suisse: La récidive et auteurs lié à ce phénomène, *Criminoscope* 2009, No. 41, p. 4.

79 Convention for the Protection of Human Rights and Fundamental Freedoms from 4 of November 1950.

80 M. Dupuis, L. Moreillon, C. Piquet, S. Berger, M. Mazou, V. Rodigari, *op. cit.*, p. 507.

81 M. Gafner, *op. cit.*, p. 23.

82 Regulations in force since 1 October 2016.

83 <https://www.bfs.admin.ch/bfs/fr/home/statistiques/catalogues-banques-donnees/tableaux.as-setdetail.5366309.html> access 31.01.2019.

territory of Switzerland, and its most striking feature under Swiss law is that it is imposed mandatorily. The catalogue of offences it covers is broad and encompasses both felonies and misdemeanours. The period of an offender's stay, its legality or lack thereof, are of no significance in relation to the court's decision. In addition, the judge may order non-mandatory expulsion if the foreigner was convicted for a felony or misdemeanour not enumerated under Art. 66a SCC. The prerequisites to apply this measure and which have been thoroughly described, serve to demonstrate its severity.

On the other hand, the Swiss Criminal Code does offer the possibility to refrain from ordering expulsion, especially for humanitarian reasons or respect for human rights. Over time, practice will show particular cases in which courts will refrain from ordering expulsion whether mandatory or non-mandatory. Some issues will need to be addressed in this context such as the protection of family bonds or the welfare of minors in instances where one of their parents' faces expulsion. The principle of individual liability of an offender states that other people, especially children, should not themselves suffer consequences from the offender's conviction.

CONCLUSIONS

The study presents the phenomenon of criminality of foreigners in Switzerland in the years 2009-2015. The analyses in the scope of migration policy, demographic situation of the population, social and economic conditions of foreigners, the structure and the dynamics of foreign crime as well as penal measures relating to its combat and prevention, fully or in part confirmed the hypotheses proposed.

The analysis of the research literature on migration policy of Switzerland since the middle of the 20th century until the 21st century, mainly showed its evolution. This policy was determined by the demand for workers on the one hand and by social fears of foreign overpopulation on the other. Switzerland has always been a country open to foreigners in need of protection and those who genuinely suffer persecution, might take comfort from its humanitarian tradition as so many people have in the past.

The demographic evolution of Switzerland presented in Chapter II, was strongly affected by immigration. Population growth in the country was determined by economic conditions. For example, the highest levels of population growth were recorded at the end of a period of economic growth - at the beginning of the 1980s and 1990s and again in the years 2001-2002 and 2007-2008. Conversely, in periods of economic recession, for example in 1982 and the second half of the 1990s, net immigration decreased significantly as too did the population growth indicator.

Population growth resulted in a fear of foreign “overpopulation” which is a constant of Swiss immigration policy and constitutes probably its most specific feature. Direct democracy gives it a concrete impact as populist parties have at all times the opportunity to try to block government action by putting the issue, whatever that may be, to public vote. Seven such attempts to inhibit immigration were made during the period referenced and all failed; an eighth attempt,

however, proved successful. Therefore, as E. Piquet remarks, it is clear that grassroots movements and xenophobia had a major influence on the formulation of Swiss political discourse in general and that immigration would have been stronger if the government had not constantly monitored the level of xenophobia and simply followed the open-door policy suggested by the economy.¹ It is very important to remember that this voting revealed a difficult dilemma – how to find a balance between the opinion of society (expressed in popular voting) and international obligations (included in bilateral agreements). This question is still open in this multinational society where 25% of the current population is of foreign origin and 35% of the population are people with a migration background. Such a significant change is the product of a migration policy that led to an influx of foreign nationals. It had, and still does have, an undeniable influence upon the structure and dynamics of criminal activity in Switzerland, especially the structure and dynamics of criminal activity among foreign nationals.

The population of foreigners in Switzerland mainly consists of EU nationals, the majority of whom are citizens of neighbouring states. Collectively, they form the largest contingent within the “residents” group. The second largest group is composed of nationals of the former Yugoslavia who obtained residence permits within the framework of international protection arising from the Balkan wars which erupted in the 1990s. More recently the majority of people who sought protection in Switzerland consists of Eritreans, Syrians, Somalis and Afghans. This corresponds to the general trend in Europe and growth in the number of asylum seekers.

Explanatory studies were undertaken to answer the research question. The social and economic conditions of foreigners in Switzerland were presented on the basis of the analysis of scientific literature and statistical data, as it has been assumed that standards of living may be a factor that induces criminality. In this regard, the research proved that the economic and social status of immigrants is

1 E. Piquet, Economy versus the people? Swiss immigration policy between economic demand, xenophobia and international constraint, (in:) M. Giugni, F. Passy (eds.) *Dialogues on Migration Policy*, Oxford 2006 pp. 85-86.

much worse than that of Swiss citizens. The unemployment rate among professionally active foreigners was twice as high as that among the Swiss. Unfortunately it was much higher in the case of young people. This factor was of particular importance from the point of view of research on criminality statistics. The unemployment rate among foreigners is largely related to their education. Foreigners possessing a university degree face considerably fewer problems in finding work.

Foreigners who speak one of the three official Swiss languages reasonably well also have fewer problems in finding employment. Those who do not speak any one of the languages, do not have university degree or who even lack compulsory education, are prone to negative behaviour. Moreover, this group is professionally active in sectors that are particularly sensitive to economic change, deskilling and lack of job security, which results in problems with social integration. The duration of being unemployed is also a vital factor. It was found that a large proportion of unemployed foreigners were without work for more than twelve months at a time. The aforementioned factors affect the poverty rate, that is again higher for foreign nationals than for the Swiss. In addition, foreigners are an overrepresented group among the “working poor”, especially those from EU third countries, and are more often dependent on social assistance. The analysis of social and economic indicators of foreigners’ living conditions in Switzerland shows that they are an “at-risk” group. In each of the areas analysed - unemployment, poverty and education, the situation of this social group is worse than that of the Swiss, which results from numerous and diversified factors. By far the main contributing factor here can be laid at the door of Swiss migration policy, which was determined by searching for a cheap workforce therefore resulting in the influx of migrants of low social status. It was not until the introduction of free movement between Switzerland and the European Union that migrants of higher social standing arrived, which reflected in an immediate and observable increase in education level among the resident foreign national population. As previously commented, the worse the socio-economic situation of foreigners the more it places them at risk of social exclusion; likewise, it also increases the risk of their turning to crime.

The following conclusions may be drawn from the criminological analysis of the criminality of foreigners based on the statistics reviewed.

It can be stated from police statistical data that foreign nationals constituted the majority of suspects in Switzerland in the period analysed but not by an overwhelming majority. Foreigners constituted 51%-54% of the total number of suspects. The dynamic of foreign suspects demonstrated an upward trend throughout the period considered. This was particularly influenced by the growing number of foreign suspects held under the Foreign Nationals and Integration Act. It has been stated, taking into consideration the residency status of foreigners, that most fall into the “others” category, c. 46%.² At first glance foreigners who belong to the “residents” group would appear to constitute the largest group of foreigners in Switzerland but they only represent 44% of foreign suspects as a whole. The hypothesis was only partially confirmed by the research as in the period considered the total number of foreigners falling into the “others” group constituted the majority of suspects, however, the prevalence was not significant (44%-46%). In addition, in the years 2009, 2010 and 2011, residents made up of the majority of suspects. Foreign nationals who belong to the “others” group, stay in the country for the shortest period of time. They are the least familiar with legal norms and their social and economic status is worse. Moreover, this group also comprises foreigners who stay in Switzerland illegally and hence commit the offence of illegal stay, as well as those who are subject to deportation due to the infringement of administrative and penal law provisions concerning the rules of residence and who are mandatorily required to leave Swiss territory. This is also confirmed by the fact that the majority of suspects were recorded under the Foreign Nationals and Integration Act. Nevertheless, residents constitute the largest group within the population of foreigners in Switzerland hence their prevalence in the structure of suspects overall. Residents mainly commit offences under

2 Others – this is the broadest group which includes: cross-border commuters (permit G), short-term residents (permit L), tourists, asylum-seekers, whose applications have been rejected, foreigners who are subject to deportation, foreigners staying illegally, foreigners in procedure for short-term work in Switzerland, foreigners whose status is not defined. Statistique policière de la criminalité (SPC), Rapport annuel 2015, Neuchâtel 2016, p. 26.

the Swiss Criminal Code and the Narcotic Act. Rarely do they commit offences under the Foreign Nationals and Integration Act.

Analysis of the geographic origin of foreigners suspected to have committed offences in Switzerland proved that the majority originated from European countries. The numbers relating to suspects coming from Asian and African countries were fairly alike.

The descriptive research concerning the nationality of suspects in the group of residents revealed that most suspects were nationals of European countries such as Italy, Portugal, the former Yugoslavia, Germany, France and Turkey. These nationals formed the largest foreign population in Switzerland and consequently their record of criminality was the largest as well. Nationals of neighbouring countries constituted the largest group of foreign suspects, however, offences penalised under the Foreign Nationals and Integration Act were mainly committed by nationals from the former Yugoslavia.

Where asylum seekers are concerned, the structure of foreign suspects is quite different. Here, nationals of African states such as Tunisia, Algeria, Morocco, Eritrea, Somalia and Nigeria, along with those from the former Yugoslavia, mainly prevail. In this group of suspects it was not possible to confirm the hypothesis as the nationals of neighbouring countries do not satisfy the conditions to be granted international protection.

To summarise, from the analysis of data relating to all categories of foreign nationals, it can be stated that those suspected of having committed offences in the years 2009-2015 mainly came from countries which neighbour Switzerland, namely Italy, Germany, France and Austria, and they entered Switzerland for economic reasons. Nationals from the former Yugoslavia constituted the second largest group and nationals of Portugal the third. The nationals of former Yugoslavia were forced to immigrate in the 1990s due to the collapse of Yugoslavia and subsequent Balkan wars, whereas Portuguese nationals constitute a large population of economic emigrants who have been coming regularly to Switzerland since the 1980s.

The criminality of foreigners in Switzerland has also been analysed by its material scope. It has been shown that if we take the type of prohibited act into account, most of the offences committed in the years 2009-2015 are acts punishable under the Swiss Criminal Code, followed by acts prohibited under the Foreign Nationals Act and acts penalised under the Narcotics Act. Offences committed under other acts constitute merely a few percent of the total. The Swiss Criminal Code contains the widest range of prohibited acts and accordingly, the majority of the suspects (over 50%) committed offences catalogued therein. Up to 25% of foreign suspects committed offences under the Foreign Nationals Act and 20% under the Narcotics Act. The structure of suspects by type of offence was mainly in line with the general structure of suspects in Switzerland. The only differences to occur of any significance relate to offences under the Foreign Nationals and Integration Act, as in the majority of cases they can only be committed by foreigners (illegal entry, illegal stay and the like).

Analysis of the structure of foreign suspects by category confirmed that the structure corresponds with offenders who fall into the “residents” and “asylum-seeker” categories. Foreign nationals who belong in the “others” category mostly committed prohibited acts under the Foreign Nationals Act, not those prohibited under the Swiss Criminal Code, which came second. The overrepresentation of offences penalised by the Foreign Nationals and Integration Act is confirmed by the status of these foreigners.

The descriptive studies confirmed that in the scope of offences prescribed under the Swiss Criminal Code, foreign nationals were mostly suspected of having committed offences against property (mainly theft and property damage); offences against freedom (primarily threats and unlawful entry accompanied by theft); offences against life and limb (chiefly assault and causing actual bodily harm); offences against official powers and forgery.

The majority of foreign nationals suspected of having committed offences under the Swiss Criminal Code and who possessed a residence permit originated from Italy, Portugal, the former Yugoslavia, Germany, Turkey, Macedonia, France and Spain. The number reflects

the largest national groups living for years in Switzerland. The structure of criminality on the basis of the Swiss Criminal Code was fairly alike (with some exceptions). One third of the foreigners who fall into the “residents” group committed offences against property, whereas 20% committed offences against life and limb. Moreover, these suspects committed offences against freedom, against personal honour in the area of secrecy or privacy, offences against sexual integrity, offences against official powers and forgery.

Most foreign suspects in the “asylum seekers” category are nationals of Morocco, Algiers, Tunisia, Somalia, the former Yugoslavia and Georgia, which represents the structure of peoples in this group finding their way to Switzerland. The considerable number of Maghrebis represented is a consequence of their intensified influx into Switzerland during the period analysed. Half of those convicted committed offences against property, whereas 20% committed offences against freedom. In addition, offenders committed offences against life and limb, offences against official powers, offences against sexual integrity and forgery. However, in terms of detail the structure was different to that of resident suspects.

Where drug-related crime is concerned, those most active in the “residents” group were found to be nationals of Italy, Portugal, the former Yugoslavia, Germany and Turkey, whereas in the group of asylum seekers, nationals of African countries, mainly Nigeria as well as Tunisia, Gambia and Guinea prevailed. Commonly, the offence committed was that of drug possession. However, it was also confirmed that foreign organised criminal groups operate in the territory of Switzerland and that those of Italian, West-African and former Yugoslavian origin are mainly involved in the smuggling and street trading of drugs.

The research showed that intensified foreign crime was observed in the scope of acts prohibited under the Foreign Nationals and Integration Act, which results from the need to reach the territory of Switzerland and settle therein even if illegally so. The structure of the acts committed by foreigners in that respect depends on their status of residence. Foreign nationals belonging to the “residents” category,

were mainly suspected of facilitating unlawful entry or departure, unlawful period of stay and illegal employment. These were mainly nationals of the former Yugoslavia, Italy, Germany and Turkey. Hence, it may be concluded that those who managed to legalise their stay in the territory of Switzerland sometimes engage in unlawful activities to help other foreigners enter and stay in the country. Foreign nationals from the “asylum seekers” group most often committed offences of unlawful entry, exit or period of stay in the years studied. This category mainly included foreigners who lacked the right to stay or enter the territory of Switzerland and these were typically nationals of Nigeria, Eritrea, Tunisia, Algiers and Morocco.

It can be stated that the hypothesis concerning the structure of criminality of foreigners in Switzerland by the offence committed can be confirmed. The research revealed that foreigners mostly commit common offences which are penalised under the Swiss Criminal Code. They include offences against property, freedom and sexual liberty as well as offences against life and limb and this structure is relevant to foreigners who possess a residence permit. In the case of those foreigners who lack this permit or who stay in the territory of Switzerland illegally, the structure is much different. The offences they are most likely to commit relate to prohibited acts that fall under the Foreign Nationals and Integration Act.

The research on penal policy towards foreigners showed that since 2007 convicted foreigners have outnumbered convicted Swiss offenders. The number of foreign suspects showed an upward trend during the same period while the number of Swiss suspects remained constant, a consequence of the increased growth of the foreign population in Switzerland since the 1990s. The studies revealed that a considerable share of the foreign convicts were offenders who committed offences under the Foreign Nationals and Integration Act. Significantly, the majority of those convicted were foreigners who lacked a residence permit.

Analysis of the data on prison population in Switzerland showed a considerable overrepresentation of foreigners. The incarceration rate among foreign nationals is one of the highest in Europe due to the

system of penalties prescribed in the Swiss Criminal Code which, as proven in the study, excludes the possibility of imposing non-custodial sentences. This mainly results from the legal status of foreigners staying in Switzerland and the fact that they do not receive a regular income which is a prerequisite in terms of imposing a fine. Likewise, a foreign national whose legal status is unlawful or in question, cannot be given community service, have their sentence suspended or be placed on probation and, as invariably they are without a fixed address, electronic house arrest cannot be applied either. In addition of course, committing serious offences leads to more serious penalties being imposed.

The descriptive and explanatory research enabled the factors which shaped the structure and dynamics of foreign criminality in Switzerland to be presented. Primarily, this comes down to demographics, in particular relating to the significant number of immigrants that make up the Swiss population as a whole coupled with their relative socio-economic status. Foreign nationals, including those who belong to the “residents” group, have a much lower social and economic standing. They are generally not as well educated as their Swiss counterparts and therefore they have greater difficulty in finding work; hence the unemployment rate among their number is higher. As a result, some immigrants live below the social minimum. These are risk factors which induce crime. The demographic structure is also crucial. The most crime inducing group consists of young males and thus, as immigrants are mainly young males as their number increases so too does the degree of crime inducement.

Switzerland has been an immigration state since the second half of the 20th century and it now supports second- and third-generation immigrants. So-called second-generation criminality is effectively explained away on the basis of culture conflict theory. However, the blight of living with low economic resources in what is essentially a consumption society, cannot be ignored as an inducement to become involved in crime.

In addition, so-called criminal tourism is present in Switzerland, which is induced by a multitude of high-value goods which prompt

offences sweetened by the prospect of light penalties, mainly of a non-custodial character, in the case of offences against property.

The criminality of foreigners also covers organised crime. It can be stated, having analysed the scientific literature and statistical data available, that this form of criminal activity has been, and still is, dominated by foreigners. In the period covered by the research, a high level of activity among Italian, Russian-speaking, Chinese, West African, and southeastern European groups was observed. The territory of Switzerland mainly serves as a base for money laundering, not for pursuing main criminal activities although there were some exceptions in this regard. Thanks to the reconnaissance resources of the Swiss police, it was possible to present the main characteristics of the groups concerned and their criminal activity. The Italian groups were involved mainly in the trade in cocaine, money laundering, serious bank and insurance fraud, trade in weapons, counterfeiting money, and robbery. Russian-speaking groups mostly invested money originating from illicit operations. Chinese groups focused on illegal migration and credit card fraud. The criminal activities of African groups were seen to be very broad, as they committed a wide range of drug offences and were involved in human trafficking, smuggling of migrants, counterfeiting documents, and fraud. Illegal migration and human smuggling were also the main activities of the southeastern European groups along with the simultaneous smuggling of drugs and weapons, and so-called prostitution exploiting crimes.

The research conducted also examined the system for combatting and preventing crime, which, due to the complexity of the problem, was limited to the penal aspects only. The study on substantial penal law was based on the analysis of the regulations which penalise offences which can also be committed by foreigners or the regulations which were introduced to combat those offences. Therefore, statutory elements of the offences mainly relating to illegal migration were discussed. The extent of penalisation was found proper and sufficient. It may even be considered relatively broad in comparison to other European countries as not all legal orders punish illegal stay, concluding a marriage of convenience and unlawful claim for social insurance or social assistance benefits. Not to mention another very restrictive

measure - the expulsion of convicted foreign nationals, which was recently introduced into the Swiss Criminal Code within the framework of the popular initiative. Due to the relatively short period that has elapsed since this measure came into force, it is difficult to assess both its appropriateness and effectiveness as an instrument for crime prevention. Moreover, taking into account all of the instruments which are supposed to combat and prevent criminality among foreigners in Switzerland, after closely analysing the dynamics of the phenomenon it can be concluded that they are not particularly effective. The number of suspects in the period researched indicated a continuing upward trend. However, detailed analyses of the offences committed revealed that the increase in number of suspects correlates with the growth in inflow of illegal migrants. Of the penal measures now in force, it has to be said that they appear to lack deterrent force, not least among illegal migrants who seem to ignore them. Growth in the number of foreign suspects was a natural consequence of population growth in Switzerland. Therefore, the hypothesis stating that the system of penal measures valid in Switzerland now guarantees the effectiveness of combatting and preventing criminality among foreigners may only be confirmed to a limited extent. It is worth highlighting here that the penal system itself is inadequate and requires the support of the administrative system regulating the rules on the entry, stay and exit of foreigners. This, however, may not be satisfactory either when one takes into consideration the factors which occur in other countries resulting in the inflow of immigrants that often bypass legal channels. As the research reveals, it is the offences such as illegal migration or acts which directly relate to it that determined the increase in the number of foreign suspects.

Another important measure for combatting foreign crime, which was introduced into the Swiss Criminal Code in 2016, is mandatory expulsion when a foreign national is convicted for having committed any one of a catalogue of serious offences. This measure is intended to be restrictive in the extreme although the legislator provided the possibility for it not to be imposed at all. It will be some years yet before its effectiveness can be properly evaluated.

It is not an easy task to forecast criminality but one may make a statement drawing on the research conducted that the criminality of foreigners will continue to show an upward trend for as long as Switzerland remains an immigration country which continuously accepts migrants. The possibility of future humanitarian crises which may serve to generate an increased flow of immigrants into Europe cannot be ignored either. Therefore, foreign population growth will almost certainly result in the continuing increase in crimes committed by foreign nationals. The factor which may hinder such increase is the new immigration policy which aims at restricting immigration, for example by introducing an EU immigrant quota. This restrictive measure has been provided for in the Federal Constitution but to-date no limitations have been introduced in practice.

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