

FURNACE OF COSTA RICA

LAW SCHOOL

Thesis for the degree of Bachelor of Laws.

"PRACTICAL APPLICATION OF THE LAW ON
MIGRATION AND FOREIGNERS IN THE FIELD OF
HUMAN SMUGGLING, ANALYSIS OF ITS POSSIBLE
REFORMS".

Ana Gabriela Chaves Peralta

San Jose, January 2010



UNIVERSITY OF COSTA RICA
LAW SCHOOL AREA OF
RESEARCH



February 3, 2010 FD-
AI-T-146-10

Doctor
Daniel Gadea Nieto
Oecano, School of Law Dear Dean:

I hereby inform you that the Final Graduation Project of the student(s) **ANA GABRIELA CHAVES PERALTA**, came **A21483**, entitled "APPLICATION PRJECTS OF THE MIGRATION AND FOREIGNER LAW IN THE AREA OF TRAFFIC IUCITO OE PERSONS, AN ANALYSIS OF ITS POSSIBLE REFORMS" was approved by the Advisory Committee, so that it may be submitted for final discussion.

Likewise, Theundersigned has reviewed the requirements at form y I also inform you of the composition of the Examining Board. Likewise, I inform you of the composition of the Examining Board.

Examining Board	
President (a)	Prof. Alvaro Burgos Mata
Secretary	Prof. Rafael Sanabria Rojas
Informant	Prof. Ronald Salazar Murillo
Member (a)	Prof. Rafael Gullock Vargas
Member (a)	Prof. Miguel Zamora Acevedo

The date and time for the PUBLIC PRESENTATION of this Thesis is set for February 18, 2010 at 7:00 p.m. in the Replication Room, located on the fifth floor of the Faculty.

Sincerely yours,



Dr. Olivier Rémy Gassiot
DIRECTOR

Marta
e:,-

San Jose, January 26, 2010

Seftor:
Dr. Olivier Remy Gassiot
Director of the Research Area Faculty
of Law
University of Costa Rica

S.... D

Dear Professor Remy:

I am pleased to inform you that, as Director, I have reviewed the research work of the graduate Ana Gabriela Chaves Peralta, entitled "Practical Application of the Immigration and Foreigners Law on Illegal Trafficking of Persons. Analysis of its possible reforms", which meets the substantial and formal requirements to be presented as a thesis to opt for the degree of Ucenciada en Derecho.

The research contains four major chapters, the first of which develops in a doctrinal manner the content of the criminal figures of Trafficking and Trafficking in Persons, which are often confused by professionals. The second chapter develops the treatment given by the Public Prosecutor's Office to the investigation and eventual prosecution of these cases, highlighting the difficulties it presents, since it is an organized crime, which has various nuances that distinguish it from conventional crime. The third chapter analyzes the new Law of

Migration and Foreigners, and compares it with the recent draft of the Migration Law that was approved by the Congress of the Republic in the last few months. months of the 2009 fiscal year, and effective March 1, 2010. And

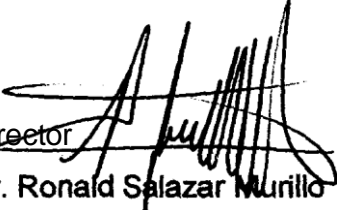
Finally, in the fourth chapter, an analysis is made of Spanish comparative law and the treatment given by national jurisprudence to the issue of trafficking in persons.

As can be seen, the subject has not only been little explored in the national doctrine and the work is novel, since it is the first one that approaches the subject from the perspective of its application, it is also very current, since there has not been a succession of laws that regulate the figure of illegal trafficking in persons, so the applicant has had to integrate in her work all the reforms produced, including the one that being a law has not yet entered into force.

The work of the graduate Chaves Peralta has special relevance in the national legal life, as it is a totally updated investigation of the criminal figure of trafficking in persons, and above all, because it refers to a modern form of criminality that is being combated, especially due to the constant migratory movements of foreigners into the national territory. The author does not limit herself to describing the various reforms that have been carried out, but rather expresses her opinion on the advantages or disadvantages of the reforms and the differences that are prima facie observed.

After examining the research work, I have approved it, and I consider that it constitutes a novel, profound and updated contribution to an important criminal figure.

Yours respectfully:


Director
Dr. Ronald Salazar Murillo

San Jose, January 27, 2010

Sir:

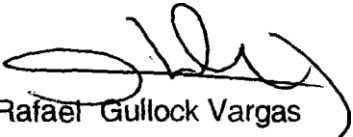
**Lie. Olivier Remy Gassiot
Director of the Research Area**

**School of Law University
of Costa Rica**

Dear Sir:

I am pleased to greet you by means of this letter and to inform you that, as reader of the research carried out by the graduate: Ana Gabriela Chaves Peralta, entitled: "Practical Application of the Immigration and Foreigners Law in the Matter of Trafficking in Persons, Analysis of its Possible Reforms", I have examined it and give my approval since it satisfies the requirements of form and substance demanded by the area.

Sincerely yours:


Dr. Rafael Gullock Vargas

San Jose, January 27, 2010

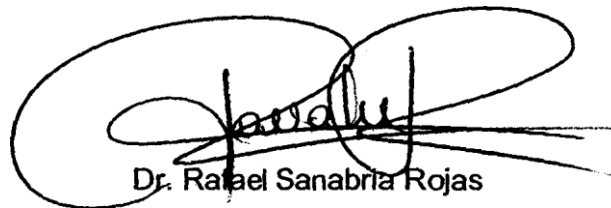
Sir:

Lie. Olivier Remy Gassiot
Director of the Research Area,
Law School
University of Costa Rica

Dear Sir:

I am pleased to greet you by means of this letter and to inform you that, as reader of the research carried out by the graduate: Ana Gabriela Chaves Peralta, entitled: "Practical Application of the Immigration and Foreigners Law in the Matter of Illegal Trafficking of Persons, Analysis of its Possible Reforms", I have examined it and give my approval since it satisfies the requirements of form and substance demanded by the area.

Sincerely yours:



Dr. Rafael Sanabria Rojas

DEDICATION

To God, my heavenly father for giving me the opportunity to study *and* supply all my needs, for being my greatest support *and* giving me the strength to achieve my dreams.

To my parents, for their love, support, good advice *and* encouragement.
and teach me to value the importance of a good education.

To Carlos Jimenez R, my boyfriend, who is a great blessing in my life, *and* an unconditional support, thank you for all your help.

ACKNOWLEDGMENTS

To Mr. Ronald Salazar Murillo, my thesis director, whom I thank for all his help, availability of time *and* advice, he is definitely a person I admire, he is a great professional, from whom I learned a lot *and* I hope to apply the knowledge acquired in my professional life.

To Rafael Gullock Vargas *and* Rafael Sanabria, for helping me as readers, even though they are very busy people, they took the time to read the thesis and give me very valuable observations.

To all the people who helped me in one way or another to carry out this research.

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ABBREVIATIONS

CPPC6Criminal Procedure Code

Art Article

Dept. Department

SNLSNo Law Number

BIBLIOGRAPHIC CARD

CHAVES PERALTA, Ana Gabriela, "Practical Analysis of the Migration and Foreigners Law in matters of Human Trafficking". Thesis for the Law Degree, Law School, University of Costa Rica, San Jose, 2010.

DIRECTOR: Dr. Ronald Salazar Murillo

LIST OF KEY WORDS: Trafficking in Persons, Trafficking in Persons, Organized Crime, Bill, Legislative Assembly, Criminal Prosecution, Public Prosecutor's Office, Functional Direction, Arrival Trafficking, Clandestine Immigration, Objective Type, Subjective Type, Active Subject, Passive Subject, Migration and Foreigners Law, Protocol, Conventions, Legislative Background, Legal Asset, Letter Rogatory, fraud, coyotaje, coyote, trafficker, trafficker, trafficked person, trafficked person, victim, violence, recruitment, crime, aggravating factors, transportation, transfer, shelter, threat, fraud, deception, violence, coercion, abuse of authority, Judicial Police, evidence.

SUMMARY

International migration is a complex social process historically linked to the development of nations. The current debate on them must necessarily be framed within the analysis of the growing process of international migration.

globalization that the world economy is undergoing. This process has led to a deepening of global imbalances, with differences between countries becoming more and more abysmal, resulting in some countries having a higher standard of living than others.

All of the above has led to an increase in the transfer of people, in many cases illegally from one country to another, through the figure that we will analyze, which is the illegal trafficking of persons, a crime also known as coyotaje, pollerismo or contraband, which in most cases is the product of organized crime.

When analyzing the figure of trafficking in persons it is necessary to define it, to avoid confusion with a criminal type that is trafficking in persons, although they are similar in certain aspects, both crimes are not the same in all their elements and it is important to be clear about which criminal type we are facing, The type of investigation to be carried out by the Public Prosecutor's Office depends on this distinction, and at the internal level of this institution, it will be defined to which Specialized Prosecutor's Office the case will be handled, in order to gather solid evidence that will allow the prosecutor to request the opening of the trial.

Although this crime is regulated in Article 245 of the current Migration and Foreigners Law, No. 8487, it is omitted with respect to some conducts that could be sanctioned, which is the reason why

a series of bills were proposed, by virtue of the need to reform the current penal type in order to give it a broader scope and to specify it in the best way; One of the bills was accepted, studied and after the corresponding legislative procedure became Law No. 8764, which came into force on March 1, 2010, including a new and updated regulation on Trafficking in Persons, which includes new aggravating circumstances and responds adequately to the migratory phenomenon, in order to control a problem that is growing day by day and that seriously violates human rights, affecting people and their dignity.

It is always important to mention the regulations of other countries, especially when the crime to be studied occurs on a large scale in these countries, so this work also includes an analysis of Spanish comparative law, in which we study their regulations on the subject and certain differences that they have in relation to us, taking into account that Spain is considered a large recipient of victims of this crime.

Finally, it is worth mentioning that in our country few cases have been tried for this crime, however, there have been both acquittals and convictions that allow us to analyze the elements that led the judges to make their decision and to see the normative interpretation of the type.

INTRODUCTION

The crime of human trafficking has increased considerably in recent years, due to the difficult living conditions in less developed countries where people have few options to develop adequately, also the increase is associated with the tightening of migration policies in industrialized countries, in both cases governments have not sought adequate solutions to minimize the problem.

It can be said that the phenomenon of migration constitutes a complex social process linked to the development of nations, which has increased due to the growing process of globalization that the world economy is undergoing. This process has led to a deepening of world imbalances, with increasingly abysmal differences between countries, which means that some have a better standard of living than others.

This polarization of wealth brings with it a series of conflicts and contradictions that have a direct impact on the phenomenon of migration. On the one hand, a large part of the world population of the least favored countries looks to the rich countries as their last hope to achieve an increase in their quality of life, a situation that will not always be achieved, since the migratory phenomenon is extremely complex and affects positively or negatively the economies of the countries, depending on the possibilities that these have to absorb and incorporate into society the people who move from one place to another, providing them with the conditions necessary for their economic development.

basic and minimum social services for a true development, such as education, food and medical care.

Migration generally originates in regions where the population suffers the greatest pressure, whether economic, social, demographic or political, and tends to go to countries where it is presumed that there are better opportunities for individual or family development, whether legally or illegally.

The different situations in the countries give rise to an increase in the movement of people who in many cases do not meet the minimum requirements or conditions requested for legal entry into the receiving country, a situation that is exploited by people who turn this into a lucrative business in which the person who is forced to migrate becomes an object of commerce, since they pay very large amounts of money to look for better opportunities.

Behind the different social realities experienced by each of these people who are forced to move, there are sophisticated networks of criminal groups that turn the situation into a business that produces a lot of money and provokes the mobilization of people, even in violation of human rights.

The crime of human smuggling, also known as coyotaje, pollerismo or contraband, is the product of the actions of sophisticated and complex transnational organized crime networks, which is an activity that has been on the rise, generally committed in a planned manner, with the aim to reduce the risk of smuggling.

In order to make a profit, the activity is continuous, entrepreneurial and there is a hierarchically structured division of labor, sometimes involving the use of violence, intimidation and the exercise of influence over various people at border posts or strategic locations.

The crime to be studied in this work is regulated in our country through a special law called Law of Migration and Foreigners, law number 8487, which typifies the conducts that characterize it in its article number 245. This article describes the actions that make up the crime, the aggravating circumstances of the type, and also indicates the sanctions to be imposed in the event of such conduct.

In spite of having this regulation at the national level and a few treaties at the international level, it has not been possible to put an end to this situation, since every day transnational crime networks are more sophisticated and see human trafficking as an extremely lucrative business that generates many dividends. Therefore, the following hypothesis was put forward in this paper: "the current regulation of human smuggling is insufficient to adequately prosecute the criminal phenomenon and requires reform.

The main objective of this research is to make an analysis of the crime of trafficking in persons that is regulated in the Migration and Foreigners Law and the reforms that are required to make to this criminal type to expand and specify it; along with a study of the type compared to the crime of trafficking in persons, which is different and should not be confused, to establish the basic guidelines when investigating a crime by the authorities

and finally a jurisprudential analysis and a review of the Spanish legislation on the subject.

Having said the above, it is important to indicate what is intended to be covered or studied in each specific objective that this research work will contain such as: Oescribir en que consiste el delito de Trafico de Personas y las características que lo identifican, esto con el fin de delimitar bien la figura jurídica de la cual estamos hablando y poder identificarla adecuadamente.

To make a comparative analysis between the crime of Trafficking in Persons and the crime of Trafficking in Persons, this analysis is extremely important, since the two crimes are generally confused as if they were one and the same, which is not the case, since the conducts that characterize these crimes are regulated in different legal instruments; Trafficking is regulated in law number 8720 which is the Law for the Protection of Victims, Witnesses and other Subjects involved in the Criminal Process and Trafficking in Persons is regulated in article 245 of law number 8487.

Subsequently, the basic guidelines that are taken into account by the Public Prosecutor's Office when investigating the crime under study will be established, since this is the accusing body in our country and the one in charge of carrying out a good instruction, so that these cases can eventually be brought to trial, having useful and sufficient evidence to achieve a conviction against the persons who commit the crime.

This will be followed by a study of the reforms that are intended to be made to article 245 of the law, so that it is not omitted when describing the conducts that constitute the crime, and with the last objective of examining the jurisprudence of our Courts with respect to the crime.

For the realization of this work, a documentary research with field work elements will be carried out, since the primary sources of information are constituted by documents, but at the same time it has field elements since it is necessary to collect information that has not been previously gathered in any document, in this case the interview will be used as a field research technique to collect such information.

In view of the above, the bibliographic review is extremely important for the collection of information, as well as the analysis of the jurisprudence of the few cases that have gone to trial and even to cassation; visits to institutions that in some way provide an approach to the matter and interviews with professionals in the field.

In the first section of the first chapter, a general analysis of human trafficking will be made, as well as a description of the characteristics that identify it. In the second section of this same chapter, a comparative analysis will be made between the crime of trafficking in persons and the crime of trafficking in persons based on a summary of the crime of trafficking and the elements that compose it.

In the second chapter, the first section will study the criminal policy and the criminal prosecution policy with respect to the subject and the second section will develop the basic elements of the criminal investigation carried out by the Public Prosecutor's Office when faced with a case of trafficking in persons.

In the third chapter, section one we will study the legislative background of the current Immigration and Foreigners Law, law number 8487, in the second section we will analyze the opinions of the Legislative Assembly for the approval of bill number 15694, which reforms the aforementioned Immigration and Foreigners Law; Finally, in the third section of this chapter, an analysis will be made of the Migration and Foreigners Law, number 8764, which amends the above mentioned Migration and Foreigners Law, in relation to the illicit traffic of persons.

Finally, in the fourth chapter, a mention will be made of the Spanish legislation on the crime of trafficking in persons, specifically that contemplated in article 318 bis of the Spanish Penal Code; to conclude with a brief study of the jurisprudence of the Third Chamber of the Court with respect to the crime in question.

chapter one: definition of the crime of illicit trafficking in narcotic drugs and psychotropic substances

TRAFFICKING IN PERSONS AND HUMAN TRAFFICKING. DIFFERENCES BETWEEN BOTH CRIMES.

Section I:

Illegal trafficking in persons. Concept. Characteristics. Conduct that integrate the type.

The crime of trafficking in persons has been increasing in Costa Rica, which generated that as of the year two thousand six, it was regulated as a crime in the Migration and Foreigners Law, No. 8487, in article 245, previously only the crime of trafficking in minors for adoption was regulated in the Penal Code, article 376¹.

It is important to point out that it is only now with this new regulation that it is possible to prosecute the real perpetrator of the crime, the person who devised and organized everything.

false document, among other crimes; it is possible to speak of a "goodness of the law".

¹ A prison term of two to four years shall be imposed on whoever sells, promotes or facilitates the sale of a minor person and receives for it any type of payment, gratification, economic reward or of any other nature. The same penalty shall be imposed on whoever pays, gratifies or rewards with the purpose of receiving the minor person.

Imprisonment shall be from four to six years when the perpetrator is an ascendant or relative up to the third degree of consanguinity or affinity, the person in charge of the guardianship, custody or any person who exercises the representation of the minor. The same penalty shall be imposed on the professional or public official who sells, promotes, facilitates or legitimizes by means of any act the sale of the minor. The professional or public official shall also be disqualified for two to six years from the exercise of the profession or office in which the act occurred.

The term coyote is used to identify the person who receives payment to evade immigration controls, the term comes from the Mexican culture, in which it is known as coyote to the person who, like the animal called coyote, is very cunning because he manages to survive in the deserts, especially during the crossing to evade immigration checkpoints.²

Normally, the victims of these crimes believe that the coyotes are people who are helping them and do not see that what they are doing is endangering their lives, and that their activity is organized in such a way that the purpose is to obtain an economic benefit.

The illicit traffic of people is a crime that carries a whole social drama behind it, since the people who pay to leave or enter a country leave their family, their environment, in order to find better living conditions, but then these people lose their roots and often stay in the country to which they migrated because they make their lives with someone else and leave their family in their country of origin, Many times in precarious conditions, such in the case of Costa Rica in the area of Perez Zeledon, a place which is called "place of the single women", since the men migrate and leave their families, a problem that brings this situation is that there is delinquency due to the lack of resources, they seek as an easy way out to commit crime, to this is associated that the families are disintegrated and most of the young people lack family support.

² Radio Program "Los Fiscales y Usted", June 30, 2008. "Trafficking in Persons", Guest: Mr. Edgar Ramirez Villalobos, Deputy Prosecutor of Perez Zeledon.

In Costa Rica we are still in a stage of "denial", in which it is believed that "nothing happens here", and we do not take into account the reality that is lived in Perez Zeled6n and other areas such as Los Santos, where international networks have already been detected, groups in charge of the smuggling of people, who are responsible for helping them to evade the border crossing from Mexico to the United States.³

These networks are made up of lawyers, civilians, notaries, who are in charge of the documentation and the procedures to be carried out; they are cases of organized crime, which is structured on different scales, in which various subjects act.

This crime is a serious crime, which is why its regulation was necessary, since it is structured in such a way that 99.9% of the cases are organized crime, and it is also considered a serious crime because what is to be protected by regulating the conduct is the integrity of the States, the security of how those States function, as well as protecting the integrity of individuals.

The standard is analyzed:

1- Concept.

Trafficking in persons is defined and sanctioned by the Migration and Foreigners Law number 8487, in its article 245, as follows:

³ Radio Program "Prosecutors and You", June 30, 2008. "Trafficking in Persons-", Guest: Mr. Edgar Ramirez ViHalobos, Deputy Prosecutor of Perez.

"A penalty of imprisonment of two to six years shall be imposed on any person:

- a) With the purpose of illicit traffic, drives or transports persons to enter or leave the country through places not authorized by the General Directorate, evading the established migratory controls or using false information or documents.
- b) Whoever, for the purpose of illicit trafficking in persons, harbors, conceals or covers up foreign persons who enter the country or remain illegally in the country.

The penalty established in this article shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes.

With respect to "Trafficking in Persons", the United Nations Protocol to Prevent, Punish *and* Suppress Trafficking in Persons has defined this practice as follows:"the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of fraud, of deception, abuse of power or abuse of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of transferring a person from one place to another for the purpose of subsequent subjection to some form of exploitation". ⁴

⁴ Article 3 (a), Law N° 8315 "Protocol to prevent, suppress *and* punish trafficking in persons, especially women *and* children - November 15, 2000.

The Protocol against the Smuggling of Migrants by Land, Sea and Air defines Smuggling of Persons as follows in Article 3(a): "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.⁵

2-Analysis of the type, characteristics, behaviors that integrate it:

Human smuggling is currently one of the most important problems at the international level, along with arms trafficking, drug trafficking and human trafficking. Generally these crimes are the product of "transnational organized crime", which is the result of an organized criminal group as defined by the United Nations Convention against Transnational Organized Crime in its article two as follows: "A structured group of three or more persons, existing for a period of time and acting in concert for the purpose of committing one or more serious crimes or offences established in accordance with this Convention in order to obtain, directly or indirectly, a financial or other material benefit".

⁵ Protocol against the Smuggling of Migrants by Land, Sea *and* Air, supplementing the United Nations Convention against Organized Crime, ratified by the Republic of Costa Rica through Executive Decree No. 31298 of July 14, 2003, published in the Gazette No. 163 of August 26, 2003, law No. 8314

Organized crime is a type of criminality that is characterized by the movement of enormous sums of money that are destined to cover the expenses necessary to commit the crimes both in national territory and abroad, in addition to the fact that the activities that make up this type of criminality have diversified and are becoming increasingly sophisticated.

The smuggling of persons involves a human tragedy, as people are forced to migrate in many cases because of the economic situation, in other cases also as a result of violence and armed conflicts in their country of origin.

Type analysis:

Article 245 of the Migration and Alien Law, which contemplates the criminal offense of trafficking in persons, states the following:

A penalty of imprisonment of two to six years shall be imposed on any person:

- a) For the purpose of illicit traffic, to drive or transport persons to enter or leave the country through places not authorized by the General Directorate, evading the established immigration controls or using false information or documents.
- b) Whoever, for the purpose of illicit trafficking in persons, harbors, hides or conceals foreign persons who enter the country or remain illegally in the country.

The penalty established in this article shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes.

The Objective type:

This is made up of subjective, normative and descriptive elements, in the case of the crime of trafficking in persons, it requires that the active subject (which in this case would be the trafficker) for the purpose of illicit trafficking, leads or transports persons to enter or leave the country through unregulated places, evading immigration controls, or using false information or documents. Also commits the crime, who with the same purpose of trafficking, lodges, hides or covers up foreign persons who enter the country illegally or remain in the country, in the same conditions, this according to article 245 of the Migration and Foreigners Law.

Active Subject:

The crime as a human work always has a perpetrator, who is precisely the one who performs the prohibited action and can only be a physical person, it can also be said that the active subject is the person (s) who performs the typical, unlawful and guilty conduct, in the case of trafficking in persons, the active subject would be the trafficker, which can be any person. However, whenever the criminal type requires, explicitly or by its meaning, a personal condition, whether physical or legal, we are in the presence of a special crime, trafficking in persons is a proper special crime, since in this type of crime the special quality has the function only of

The crime may be committed by anyone who does not have that status, a situation that occurs in the aggravated forms of commission of the crime, since it is required that the active subject be a public official or that a minor be used to commit the crimes.

From the above it is concluded that the active subject is therefore not the person who illegally crosses the border, but the person or criminal organization that conducts, transports, lodges, hides or conceals persons, for the purpose of trafficking, in other words the active subject is the person or organization that facilitates the illegal border crossing, regardless of the motives that led the trafficked person to this type of crossing.

Passive Subject:

It is the addressee of the protection of the legal property, different from the passive subject of the action, who is only the person on whom the criminal action falls, but not necessarily the addressee of the protection of the legal property.

Unlike the active subject, the passive subject may be a natural or legal person, and even the social conglomerate, such as crimes affecting public health.

The passive subject is the person on whom the conduct of the active subject (trafficker) falls, normally called "trafficked person" or "victim of trafficking", and would be the person who generally pays for the illicit entry, exit or stay in the country.

Conduct:

The conduct is given by the realization of the verbs indicated by the norm under study in its first clause which are: to drive, to transport, and the second clause: to lodge, to hide, to cover up; as we can see both clauses of article 245 of Law 8487 make mention to different types of conducts.

In the first place, the crime will be consummated when the person(s) drives or transports others for purposes of illicit trafficking, performs acts that facilitate their entry into or exit from the country, this is done by evading the established immigration controls or by using false information or documents when passing through these controls.

In addition, according to what is stated in said norm, the unlawful conduct is carried out when someone, with the purpose of unlawfully trafficking another person, harbors, hides, or conceals foreign persons who enter the country illegally or remain illegally in the country.

i What are the aggravated forms of the criminal offense?

The criminal offense is aggravated when a public official has participated in some way in the commission of the conduct, whether as perpetrator, co-perpetrator, accomplice, and the offense is aggravated when minors are used in the commission of the crime.

The mode of commission of the crime, understood as the way in which the trafficker carries out the criminal conduct, is as follows:

* Driving or transporting persons to enter or leave the country through places not authorized by the General Directorate of Immigration, evading the established immigration controls or using false information or documents.

* Harboring, hiding, concealing, harboring foreign persons entering the country or staying illegally in the country.

As we can see in the ways of committing the crime there is a breach of the requirements of the immigration authority, since in the first case there is an entry or exit through places not authorized by the Directorate of Migration and Foreigners, evading controls or resorting to the use of false information or documents, This lets us say that when this situation occurs, it is because the trafficked person cannot properly and adequately comply with the legally established requirements and that is where the trafficker enters to act, taking advantage of this situation to carry out the illicit conduct.

The legal right protected by the crime of trafficking in persons:

With respect to the protected legal right, Dr. Rafael Gullock Vargas⁶ says the following:

"The concept of legal property has acquired its maximum expression within the theory of crime: this concept has been used for the systematization of the special criminal part as the material substrate of the unjust content of human conduct in violation of the law.

⁶ Rafael Gullock Vargas (2008) El Delito de Trafico de Inmigrantes - 1- ed.- San Jose, CR: Editorial Juridica Continental. Pgs. 20-22

Legal goods are those presuppositions that the person needs for his/her self-realization and the development of his/her personality in his/her social life. Among these presuppositions are, first of all, life and health, which are respectively denied by death and suffering. To these are added other material presuppositions which serve to preserve life and to alleviate suffering: means of subsistence, food, clothing, housing, or else idea(s) presuppositions which allow the affirmation of the personality and its fibre development, honor, freedom, to cite a few examples.

These minimum existential and instrumental presuppositions are called "individual juridical goods" insofar as they directly affect the person. Next to them there are also the "community legal goods" that affect more the community as such, constitute the grouping of several individual persons and presuppose a certain social or state order.

The determination of the legal assets to be protected by means of penal protection is historically conditioned. They depend not only on concrete social needs, but also on the dominant moral conceptions of society.

It must be considered that the first clause that regulates the conducts of driving or transporting persons to enter or leave the country, and the second clause that contemplates the conducts of harboring, hiding, concealing or maintaining foreign persons entering the country, require a specific intent. The crime of illegal trafficking in persons requires, as an element subjective, the purpose of illegally trafficking human beings. The intention

The direct or indirect purpose of obtaining a financial or material benefit, as referred to in Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, was not included in Article 245 of this special law, so that it is sufficient that any of the above actions be carried out and the intent to smuggle persons illegally be determined for the crime to be committed, without the need for any economic retribution or any type of material benefit to be involved.

According to the above regulations, there is a double object of protection in this type of crime. In the first instance, the State's interest in controlling migratory movements and thus preventing them from being used by organized criminal groups. In this sense, the Judge has chosen to punish those conducts that favor the entry or permanence in our country of foreign citizens who do not comply with the established migratory requirements, without necessarily having any financial or other material benefit, and regardless of the relationship between the active and passive subjects.

But it also protects the respect of the human rights of foreign citizens, being the obligation of the State to comply with the treaties and other instruments of International Law, establishing in the internal regulation mechanisms for the protection and assurance of human rights, by means of substantive norms and rules of procedure, in order to effectively guarantee, in the first instance, the respect of fundamental rights, and at the same time, to provide the people with the facilities that, in the event of a violation of their human rights, they may be able to

to find state protection, which will allow them to claim, by means of internal legal regulations, these violations and to find justice, avoiding through this crime that they are treated as objects, to the detriment of their dignity and their status as subjects of law".

The subjective type:

It is composed of intent and guilt. The intent is the knowledge and will on the part of the active subject to carry out the objective elements of the criminal type. Thus, in the fraudulent type, what happened (the realization of the objective type) coincides with what is wanted (the realization of the subjective type). A person acts with malice who knows what he is doing and wants what he is doing. The perpetrator must know that he is performing a fact and what fact he is performing. This will implies an active doing, by which the perpetrator is satisfied with the realization of the legal type or at least accepts as probable its realization.

In the case under study, we can say that we are faced with an intentional crime that requires in the author the knowledge and the will that the conduct is directed to the purpose of driving or transporting persons for the purpose of trafficking, or harboring, concealing or covering up knowing the unlawfulness of the act being committed, as well as the nature of displacement of the persons affected.

In most cases, it is not a simple displacement of illegal immigrants, but rather, such displacement is carried out with the purpose of obtaining, directly or indirectly, some economic or other benefit from the illegal immigrant's presence in the country.

The material order as indicated in Article 3, paragraph a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air.

Section II:

Trafficking in Persons. Concept. Characteristics. Conducts that integrate the type.

1- Concept.

Trafficking in Persons is defined at the international level by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children in its article three⁷ as follows:

- a) Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
- b) Such exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

⁷ Law No. 8315 "Protocol to Prevent, Repnm1r and Punish Trafficking in Persons, Especially Women and Children" November 15, 2000

- c) The consent given by the victim of trafficking in persons or any form of exploitation with the intention described in paragraph a) of this article shall not be taken into account when any of the means set forth in said paragraph have been used.
- d) The recruitment, transportation, transfer, harboring or receipt of a child shall be considered "trafficking in persons" even if it does not involve any of the means set forth in subparagraph (a) of this article.
- e) Child shall mean any person under 18 years of age.

At the national level, the crime of human trafficking is regulated in Article 172 of the Criminal Code, which was amended by Law No. 8720, "Law for the Protection of Victims, Witnesses and Other Participants in Criminal Proceedings". The article reads as follows:

Article 172: Crime of human trafficking

"Whoever promotes, facilitates or favors the entry into or exit from the country, or the movement within the national territory, of persons of any sex to perform one or more acts of prostitution or to subject them to exploitation, sexual or labor servitude, slavery or practices similar to slavery, forced labor or services, servile marriage, mendicancy, illicit extraction of organs or organs of any sex, shall be punished with imprisonment of six to ten years, and shall be subject to a penalty of six to ten years.

irregular adoption".

The penalty of imprisonment shall be from eight to sixteen years, if any of the following circumstances apply:

- a) The victim is under eighteen years of age or is in a situation of vulnerability or disability .
- b) Deception, violence or any means of intimidation or coercion.
- c) The perpetrator is a spouse, cohabitant or relative of the victim up to the third degree of consanguinity or affinity.
- d) The perpetrator takes advantage of his or her relationship of authority or trust with the victim or his or her family, whether or not there is a family relationship.
- e) The perpetrator takes advantage of the exercise of his profession or the function he performs.
- f) The victim suffers serious damage to his health.
- g) The punishable act was committed by a criminal group composed of two or more members".

2.-Analysis of the type, characteristics and behaviors that integrate it:

Human trafficking has been called modern slavery. The victim of this crime is subjected to deplorable living conditions and exploitation that can be sexual, labor, among others. Unlike years ago in which people were sold, now perhaps there is no express sale, but the victim of trafficking is subjected to different forms of exploitation, in which his or her will or consent is not given. irrelevant, for this purpose the persons or criminal groups that commit the offense

use force, deception, or abuse of power, limiting the decision-making power of the person being treated.

Behind this crime, as in the case of human trafficking, there are large organizations or organized criminal groups that facilitate the crime by carrying out tasks such as recruiting people. For this purpose, they often use advertisements in newspapers in which they request nannies or maids to work in other countries. When the persons arrive at their destination, their passports are taken away, they are prevented from communicating with their families and from leaving their homes, and thus the exploitation begins.

In addition, the same criminal organization facilitates the obtaining of documents to leave the country or enter other countries so that the persons are not detected. In these cases the person becomes a commodity, which often generates an economic benefit for another (s) person (s) through the exploitation to which it is subjected, at the time in which the person does not fulfill the function for which it was recruited in a deceitful manner, is discarded, and it is given that the person is alone, without documents, without possibilities of help, in a country of which often does not even know the language, nor know the authorities to which eventually could resort.

Type analysis:

Article 172 of the Penal Code, which contemplates the criminal offense of trafficking in persons, states the following:

"The penalty shall be imprisonment for six to ten years, whoever promotes, facilitates or favors the entry into or exit from the country, or the movement within the national territory, of persons of any sex to perform one or more acts of prostitution or to subject them to exploitation, sexual or labor servitude, slavery or practices analogous to slavery, forced labor or services, servile marriage, begging, illicit extraction of organs or irregular adoption".

The penalty of imprisonment shall be from eight to sixteen years, if any of the following circumstances apply:

- a) The victim is under eighteen years of age or is in a situation of vulnerability or disability.
- b) Deception, violence or any means of intimidation or coercion.
- c) The perpetrator is a spouse, cohabitant or relative of the victim up to the third degree of consanguinity or affinity.
- d) The perpetrator takes advantage of his or her relationship of authority or trust with the victim or his or her family, whether or not there is a family relationship.
- e) The perpetrator takes advantage of the exercise of his profession or the function he performs.
- f) The victim suffers serious damage to his health.
- g) The punishable act was committed by a criminal group composed of two or more members".

The Objective type:

This is made up of subjective, normative and descriptive elements, and in the case of the crime of trafficking in persons requires that the active subject (which in this case would be the trafficker) promotes, facilitates or favors the entry into or exit from the country or the movement within the national territory of persons of any sex, to perform one or more acts of prostitution or to subject them to exploitation, sexual or labor servitude, slavery or practices similar to slavery, forced labor or services, servile marriage, mendicancy, illicit extraction of organs or irregular adoption.

Active Subject: Treatment Provider

The term trafficker refers to those who engage in the recruitment and transportation of persons, those who exercise control over victims of trafficking, those who transfer or keep them in exploitative situations either within or outside the country or who facilitate their movement within the national territory, as well as those who participate in related crimes and those who derive direct or indirect profit from trafficking, its constituent acts and related crimes.

In the case of trafficking in persons, we can say that the active subject required by the criminal type in the first part of the article, which would be the trafficker, can be any person, since no specific qualities are required of the trafficker.

speaking of a special offense of its own, the offense can be committed by anyone.

The second part of the article that regulates the aggravating circumstances, refers to specific active subjects such as: spouse, cohabitant or relative of the victim up to the third degree of consanguinity or affinity, or when the crime is committed by a person who takes advantage of his or her relationship of authority or trust with the victim or his or her family, whether or not there is a kinship relationship, which could be the case of a guardian, The article also speaks of a person who takes advantage of the exercise of his profession or the function he performs, we could speak in this case of a public official, finally the article speaks of a specific active subject when it says "If the punishable act is committed by a criminal group composed of two or more members", which would be the case of an organized criminal gang.

According to the analysis of the norm we can see that from a simple active subject in the first part of the article, in the second part in paragraphs c, d, e and g it is specifically demanded qualities or characteristics of the active subject such as a kinship relationship with the victim, among others requested by the type, Therefore, in this case we would be in the presence of an improper special crime as long as we are talking about the second part of the criminal type, and in the specific cases mentioned in the above mentioned paragraphs, since the special quality has the sole function of aggravating the penalty of the perpetrator.

Passive Subject:

The passive subject is represented by the person on whom the conduct of the active subject falls, which can be any person, whether female, male or child.

When we speak of the passive subject, we speak of the "trafficked person", who is the person who is the victim of trafficking. It should be noted that any person can be a victim of this type of crime. However, there is a group of people who are more vulnerable due to different situations, including poverty, such as women and children, especially when it comes to sexual exploitation, servitude and in some sectors of economic exploitation, such as in cases of domestic and agricultural work, among others.

Conduct:

In the case of Trafficking in Persons, we speak of an alternative behavior, which will be consummated by the realization of any of the three guiding verbs contained in Article 172 of the Penal Code. The verbs described in the article are: "promote", "facilitate" and "favor".

The crime of trafficking in persons is a mere activity, since it is consummated by promoting, facilitating or favoring the entry, exit or movement within the national territory of persons of any sex to perform one or more acts of prostitution or to subject them to exploitation, sexual or labor servitude, slavery or practices analogous to slavery, forced labor or services, servile marriage or begging,

illicit removal of organs or irregular adoption. All actions are part of the criminal conduct. The normative provision is complied with, with the participation of the active subject in some of the diverse actions, which the type regulates and carrying them out.

An analysis of Article 172 of the Penal Code shows that the purpose of the crime, as is clear from the law, is to subject a person to "prostitution, to subject him/her to some type of exploitation, in short, to limit the person's scope of decision, since the trafficker will exercise all his/her "power" over the victim and his/her conduct".

Conduct that is carried out to execute the trafficking:

Capture:

The Diccionario Juridico Elemental defines solicitation as: "The purposeful inducement of one person to another, in a fraudulent manner, so that the latter performs acts of generosity in favor of the recruiter or third parties".⁸

According to the aforementioned definition, in the capture there is a total or partial dominion over the will of a person, such dominion is exercised by one or several persons, with the purpose of performing acts for their benefit.

It should be noted that in most cases, these acts are performed by the victim of trafficking against her will and with few possibilities to stop doing them, due to the type of exploitation she is suffering.

⁸ Cabanellas de Torres, Guillermo. "Diccionario Juridico Elemental" Editorial Heliasta S.R.L.

We can say that recruitment will be a type of "selection" and this is where the participation of one of the members of the criminal organizations behind this type of crime begins and that is the recruiter who will be in charge of looking for the people who are going to be subjected to trafficking or smuggling. In the case of trafficking, victims are initially recruited through deception, then in order for such deception to occur, victims will be presented with offers of work or personal improvement, in order to gain their trust, this taking into account poverty, unemployment, lack of educational opportunities and limited access to social and health services, or domestic violence that in many cases these people are suffering.

Transportation or Transfer:

The above-mentioned article of the Penal Code states: "Whoever promotes, facilitates or favors the entry into or exit from the country, or the movement within the national territory of persons of any sex".

In order for such departure from or entry into the country to occur, there must be a transfer or transport of the victims. Such transfer or transportation may be defined as follows: "transfer or conveyance of persons or things from one place to another or between two places."⁹

It is the material fact of taking the victims of trafficking from one place to another, within the country or between the borders of different countries.

⁹ Cabanellas de Torres, Guillermo. "Diccionario Jurfdico Elemental" Editorial Heliasta S.R.L Buenos Aires, Argentina. IX Edici6n.1993. Page 389.

It is worth mentioning that the penal type of human trafficking that is regulated in our Penal Code did not previously regulate internal trafficking, which basically refers to the process of recruiting people and moving them within the national territory, in most cases they are people who come mainly from rural areas in order to exploit them in some way either in big cities or in border areas of high commercial traffic; However, with the reform that was made to the penal type by means of law number 8720 that was published in La Gaceta number 77 of April 22, 2009, the type was modified and the internal trafficking was included with the purpose of giving more scope to the norm and that certain conducts were not left out of regulation.

Continuing with the analysis of the norm, this exit or entry of the people who are victims of trafficking, will be done by land, in the case that the distances are very large, by air or sea; It must be remembered that among the functions of the criminal organizations that operate behind this type of crime, is to facilitate the way to leave or enter a country, and this is done in most cases by getting the victims the documents they need to avoid problems in the border areas.

In this process of transferring or transporting victims, we find people such as the sending agent, who is responsible for sending people using travel documents, which in most cases are false. This is done in order to facilitate the transfer.

find as part of this process the transporter, which is the one that will be in charge of the transfer of people.

Welcoming or reception:

It occurs once the transfer is completed. Reception is when the trafficked persons are taken to the place where they will remain, either indefinitely or for a short period of time. This function will be carried out by the receiving agent, who is the person in charge of receiving the victim when she/he arrives at the destination and is also responsible for providing her/him with a temporary stay. In order to minimize the risk of absconding, in most cases the victim's travel and identification documents are retained by the receiving agent; the transporter works directly with the receiving agent.

An important element to note is that the reception of people is very rarely punished, since those who perform these actions claim as a defense that they do not know the real destination of the people they are hosting, in case the place they are giving them is temporary, often indicating that they (micamente) gave them a place to stay while they found a place to settle these people, without asking questions and without knowing more than necessary.

Logically, in the vast majority of cases the recipients really do know or at least suspect what the issue is about, since it is *common for* the trafficker(s) to pay a lot of money to these people in order to buy their silence as well as basic conditions for the people.

who are going to be in the place offered by them, either for a short or long time.

It should be noted that the place where the victims are going to stay may also be known as "El Albergue", and may be the place of work or close to it. The person who is in this place is permanently under surveillance. In the event that the place of work is different from the place where the trafficked person lives, the transfer is carried out under the supervision of the members of the criminal organization.

To this we can add that in some cases the victims, depending on the type of exploitation they are going to suffer, are placed in brothels, in houses when they are exploited as domestic employees, nightclubs, massage parlors, escort services, bars, among others; therefore, the owners of the businesses also participate in the activities carried out by the criminal organization.

Conduct that makes up or modes of occurrence of trafficking in persons:

Threat:

This can be understood as "the saying or deed by which the more or less immediate purpose of causing harm is implied, an indication or announcement of impending harm".¹⁰

Threats are often aimed at intimidating the trafficked person into complying with the demands of the traffickers or of the traffickers themselves.

¹⁰Cabanelas de Torres, Guillermo. - Diccionario Juridico Elementar Editorial Heliasta S.R.L Buenos Aires, Argentina. IX Edici6n.1993.Pag .32.

The threat is intended to instill fear in the victim with the objective of instilling fear in the victim with the objective of instilling fear in the victim with the objective of instilling fear in the victim. This means that the threat will operate on the mood of the person, unlike the violence that will operate on the body of the victim; the threat is intended to instill fear in the victim in order to perform a behavior, and in case of failure to do so is exposed to a future evil and even death.

Violence:

Among the aggravated forms of the criminal type we find the case in which the crime is produced through the use of violence, which is exercised on the victim's body.

Dr. Rafael Gullock has this to say on the subject: "Violence is the use of aggression, beatings and confinement of the victim. Violence occurs during the early stages of subjugation of the victim, which is known as "the process of habituation", which is used to break the victim's resistance in order to facilitate his control." ¹¹

Fraud and Deception:

Fraud is a characteristic element of this type of crime, since in most cases there are false job offers, in which the active subject deceives the victim so that he/she will be interested.

¹¹Rafael Gullock Vargas (2008) El Delito de Trafico de Inmigrantes - 1- ed.- San Jose, CR: Editorial Juridica Continental. Page 26.

in the job advertisements and thus attract her to the eventual exploitation process.

In addition to "good jobs", economic stability is offered, which the victim lacks, and once the person is transferred either legally or illegally to the workplace, identification documents, including passports, are taken away and destroyed, and the victim is subjected to various types of exploitation, including labor or sexual exploitation, among others.

Victims of this crime are often subjected to debt bondage, as they are forced to provide their services to the trafficker in order to cover the cost of transportation to the country(ies) of destination, as well as living expenses. The problem is that the victim does not know the amount of her debt and when she perceives that the debt bondage is unfair, disproportionate, and that she is being exploited, it is almost impossible for her to find help due to language barriers, social issues and the isolation she is being subjected to.

Coerción:

It is the subjection of the trafficked person to serious injuries or physical limitations, in order to make him/her believe that the trafficker is the only person who can help him/her, in a way that makes him/her think that there may be a legal abuse by the trafficker.

Abuse of Authority:

This assumption is regulated within the aggravating circumstances of the criminal type of trafficking in persons. Abuse of authority occurs when the active subject is invested with some kind of power or authority over the passive subject, which comes from the legal system (for example a guardian, a curator), and the exercise of that power facilitates the submission of the person to trafficking, this is done by the active subject who is in a position of power, in order to receive in return some kind of benefit or gift.

Taking advantage of a situation of need or vulnerability of the victim:

Human trafficking takes place in a situation of need of the victim, since most of the people who suffer this type of crime live in situations of poverty, discrimination, gender inequality, lack of economic opportunities; therefore, they become vulnerable people, who see the promises and offers of traffickers as the only option to get out of the circumstances in which they find themselves.

i What are the aggravated forms of the criminal type?

The crime is aggravated when some of the circumstances referred to in the same article are present, such as:

- a) The victim is under eighteen years of age or is in a situation of vulnerability or disability.
- b) Deception, violence or any means of intimidation or coercion.

- c) The perpetrator is a spouse, cohabitant or relative of the victim up to the third degree of consanguinity or affinity.
- d) The perpetrator takes advantage of his or her relationship of authority or trust with the victim or his or her family, whether or not there is a family relationship.
- e) The perpetrator takes advantage of the exercise of his profession or the function he performs.
- f) The victim suffers serious damage to his health.
- g) The punishable act was committed by a criminal group composed of two or more members.

In any of the situations mentioned above, whoever commits this type of crime is punished with a prison sentence of six to ten years to a prison sentence of eight to sixteen years.

The mode of commission of the crime:

Understood as the way in which the criminal conduct is carried out by the trafficker is as follows:

- 1- Transferring the person from their place of residence to another part of the country, isolated from their normal environment, in order to dominate and exploit them more easily, in this case we would be talking about internal trafficking, since what is given is a displacement within the same national territory.
- 2- To transfer the person from his or her country of origin to another

country (or countries), thus involving a border crossing between several States.

In the two cases mentioned above, the victim is initially tricked and then forced to move from one place to another. Although these movements may be illegal, this is not necessarily the case, as both false and legitimate documents can be used. The person is always seen as a simple commodity and the verification of this type of crime is very difficult, since the victims are generally under close surveillance and are not in a position to denounce these acts.

Trafficked persons are recruited and sold mainly for purposes of sexual exploitation such as prostitution, pornography, pedophilia, sex tourism; labor exploitation also occurs, with greater emphasis on domestic work, the circumstances described above *being* carried out against the victim's will.

There is also the case in which the victims are recruited to be used in begging and the profits from this activity are exploited by the trafficker, to this must be added that behind some cases of trafficking there are sales of organs, forced pregnancies to then dispose of the child (a), servile marriages, all to the detriment of the victim of trafficking.

The legal good protected by the crime of trafficking in persons:

The legal right protected by the crime of trafficking in persons is the Dignity of Persons, which is the basis of human rights. It should also be noted that this crime is pluriofensivo, since they can be

This is because not only is the person's freedom of self-determination violated, turning him/her into a simple "object of production", but also personal aspects such as sexual freedom are violated. It is also important to add that the injury to the legal right **will** cease when the "trafficked" person ceases to be a victim of exploitation regardless of the type.

Section III: DIRECTIONS BETWEEN TRAFFICKING AND TRAFFICKING IN PERSONS.

Why is it important to make this distinction?

- Victims of trafficking have immediate psychological support needs that trafficked persons do not have.
- Both trafficking and smuggling are criminalized differently and require different judicial procedures to prosecute offenders.
- The trafficked person and those who assist them face increased risks to their safety (traffickers will do everything possible to avoid losing "their investment").
- It brings together different responsibilities of the states and other sectors.

Differences:

- Smuggling of migrants is also known as coyotaje, pollerismo, contrabando, it occurs without deception, people are seen as objects, it is voluntary; human trafficking is known as white slavery,

is given through deception, i.e. forced, the people are victims and require greater attention (full institutional support).

- Smuggling of migrants is defined as "The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident"¹². Trafficking in persons" is defined as "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force, abduction, deception, inducement, coercion, duress or abuse of power, or the giving or receiving of payments or benefits to achieve the consent of authority of one person over another for the purpose of exploitation, regardless of the person's consent. Exploitation would include at a minimum the exploitation of prostitution or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, removal of organs for illicit purposes, bonded labor".¹³
- Smuggling of migrants is an international crime, which requires the "illegal entry" of a person into a country of which he or she is not a national or resident. Trafficking in persons can occur both within the country and within the country.

¹² Article 3, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Organized Crime, ratified by the Republic of Costa Rica by Executive Decree **No.** 31298 of July 14, 2003, published in La Gaceta **No.** 163 of August 26, 2003, Law **No.** 8314.

¹³ United Nations Convention on Transnational Organized Crime, November 15, 2000.

The Penal Code in Article 172 of the Penal Code, which refers to displacement within the national territory, regulates internal trafficking as well as international trafficking.

- In human trafficking, the passive subject is the person(s) who is the victim of the traffickers, on whom their conduct falls, while in the crime of human trafficking, in addition to the foreign citizen, the State is the offended party when its immigration laws are violated by an illegal border crossing.
- In human trafficking, the crime is consummated when the person enters or leaves the territory in an irregular manner. The crime of trafficking in persons is consummated when the protected legal right is harmed and continues for as long as the injury lasts (exploitation), so we can speak of trafficking as a permanent crime, as opposed to trafficking in persons.
- In the crime of trafficking in persons, the contact with the trafficker (coyote) is made by the victims themselves, even though they are aware of the risks to which they are exposed without any exploitative relationship. Trafficking consists of using, for one's own advantage and in an abusive manner, the qualities of a person, through effective exploitation in which traffickers must resort to the recruitment, transportation, transfer, capture or reception of individuals. The means to carry out these actions are the threat, or the use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability.

Trafficking in persons has a different purpose than smuggling, since the purpose of trafficking is to exploit the person who is the victim, such exploitation can be sexual, in the case of forced prostitution, sex tourism, among others; Exploitation can also be labor, in most cases this exploitation occurs in domestic work, since the person works in a house where their work is excessive, in inhumane conditions, with minimal payment or in many cases without payment, the work done by the person is in exchange for a place to sleep and food, but always giving an abusive treatment by the active subject. Another type of labor exploitation, for example, is agricultural work, but most of the labor exploitation that occurs is domestic, to this we must add that exploitation can occur in various situations by the trafficker as for example in cases of begging, but the purpose behind the crime of trafficking in persons is only the illegal entry of migrants to a particular country.

Victims of human trafficking require protection and assistance services. Costa Rica has an Office for the Protection of Victims and Witnesses of Crime, and in April of this year enacted the Law for the Protection of Victims, Witnesses and Other Participants in Criminal Proceedings, which gives special attention to the case of human trafficking, protection and assistance that is not generally granted to migrants who have been smuggled into a State.

- With respect to consent, in the case of smuggling, immigrants have given their consent despite the dangerous *and* degrading conditions that the transfer may entail. In trafficking, on the other hand, there is generally a situation of exploitation *and the* victim's vulnerability is exploited through violence, intimidation, deception, or abuse, so it can be said that in this case the victim's consent will not be taken into account, since it is not given.
- Illicit trafficking concludes once the victim has arrived at his or her destination, since there is a transfer *and* the "commercial" relationship ends there, while in trafficking the victims are successively exploited, the person is transferred but the "commercial" relationship does not end, it continues.
- There is another important difference to rescue *and it* is that in the case of human trafficking, the trafficked person who is the one who pays to enter or leave a country illegally, does not suffer revictimization in case of attending a trial, although it is true that he/she may appear as an offended party in the case, the payment that was involved was made voluntarily, However, in the case of human trafficking, the offended person, who is the victim of the trafficker, in court has to remember *and* express in a loud voice all the suffering she went through while she was a victim of the exploitation of the traffickers, so it can be said that the victim of human trafficking is the victim of the trafficker.

in cases of human trafficking, there will always be re-victimization when the person is subjected to legal proceedings.

- In trafficking there is rarely an advance payment, unlike in human smuggling. The relationship between smuggler and migrant ends when the migrant crosses the border.

In synthesis, we can indicate that the objective of human trafficking is the illegal entry or exit of immigrants, while the purpose of trafficking is the exploitation of the person, of various types; However, there can be an intertwining between the two crimes, since in many cases people who pay to enter a country illegally, while in their country of destination are stripped of their documents, become victims of trafficking and are exploited by those who at one time favored their entry, This happens in some cases because the traffickers, after charging a specific amount for the entry and exit of the country, allege that the expense incurred for the transfer is higher, so that the person is forced to perform acts he/she does not want, including suffering some kind of exploitation, in order to pay off "their debt".

CHAPTER TWO: Basic guidelines to be taken into account at the time to investigate Human Trafficking cases

Section One: Criminal Policy and Prosecution Policies in relation to the crime of Trafficking in Persons.

The crime of trafficking in persons is currently regulated and defined in article 245 of the Migration and Foreigners Law, law number 8487, prior to the existence of a criminal type that is regulated either in the Penal Code or a special law such as the one we are analyzing, there is behind this a criminal policy of the State that has as basic decisions, the definition of what should be understood as a crime, the penalty that should be imposed for those who are proven to be responsible for them, as well as the way in which such penalty should be fulfilled; This policy will be defined by the legislator through laws, which will be applied by the Public Prosecutor's Office, which in turn will establish the respective criminal prosecution policies in order to give the appropriate approach or processing to the cases that are regulated by law.

Criminal prosecution policy is indispensable, given that it is materially impossible to prosecute all crimes committed in society, not only because of their number, but also because the intensity with which the protected legal interests are affected varies according to the particularities of each case. This requires a level of reflection in each case, which is only possible in a specific case.

feasible to the extent that it is carried out in those cases considered a priority.¹⁴

The criminal prosecution policy depends on the inputs it receives from the macro system to which it belongs, which is the State's criminal policy, since in order for the Public Prosecutor's Office to be able to define prosecution priorities, it is essential that the State's criminal policy defines what should be understood as a crime, since it cannot prosecute something that does not constitute a crime. The priorities must also be defined in terms of greater or lesser social reaction, this means that the penalties vary in their intensity according to whether the legal good protected by each crime is understood to be more or less important, hence not all crimes are punished in the same way; It is important to point out that the media play an important role in an indirect way when legislators define the criminal policy of the State, since they exert a certain degree of pressure so that penalties are increased or conducts that were not regulated before are regulated.

The operators involved in criminal prosecution policy are limited to the Public Prosecutor's Office, which is the manager of this policy, and the judges, who safeguard the legality and constitutionality of the decisions adopted by the representatives of the Public Prosecutor's Office. As we can see, we are dealing with a defining and executing body and a control body. In structural terms, the

¹⁴ Dr Roberto Bustamante A. Criminal Prosecution Policy of the Public Prosecutor's Office. A first approach to the subject. Cuadernos de estudio del Ministerio Publico de Costa Rica. Revista Especializada en Criminología y Derecho Penal, **N- 8**. Page 7.

Criminal prosecution policy is defined and executed by a single body: the Public Prosecutor's Office; control of this activity is a function of the judiciary.¹⁵

Criminal prosecution policy is structured in two ways: one that goes from the legislator to the enforcer, that is, from the generic to the concrete, and the other that goes from the persons directly or indirectly involved with a case or a group of cases to the enforcers, that is, from the concrete to the generic.¹⁶

The legislator is the one who will establish a set of priorities that must be attended to by the procedural operators such as the Public Prosecutor's Office, and which govern the prosecution policy. The legislator is in charge of defining the prelación of the legal assets, the ways of reacting to the commission of a crime, the intensity of that reaction and the mechanisms through which the procedural operators can give concrete form to that prosecution policy, in other words, the legislator will make an ex ante programming, oriented to the future, which will be applied when facing a case of those previously regulated.

The officials of the Public Prosecutor's Office must act on the specific case, once the reported facts are known, or a case becomes known by other means (anonymous information, previous investigation), the prosecutor in charge must distribute the resources available: human, material, time. In the Prosecutor's Office it is determined in

which cases can be investigated more or less intensively, which cases can be investigated more or less intensively, which cases can be investigated more or less intensively, and

¹⁵ Dr Roberto Bustamante A. Criminal Prosecution Policy of the Public Prosecutor's Office. A first approach to the subject. Cuadernos de estudio del Ministerio Público de Costa Rica. Specialized Journal in Criminology and Criminal Law, N8 8.

¹⁶ Ibidem, Page 9

may be resolved by means of an alternative instrument to the indictment, and in which cases it is preferable to negotiate with the defense or go to trial.

The alternatives are very varied when faced with a specific case. This requires the Public Prosecutor's Office to adequately plan the possible responses, as it is responsible for a very important part of the country's criminal policy, taking into consideration a series of social, economic, human, legal and circumstantial factors.

It is not possible to pretend that each prosecutor, in any part of the national territory, adopts the policy that according to his criteria is the most adequate for a certain type of criminality, but there is a general policy, defined by the Attorney General in agreement with the prosecutors and the rest of the operators of the criminal system, in relation to certain cases, which in no way will be definitive and immutable, but will tend to transform and adapt to social changes. That is to say, an adequate planning of the ways of operating, the positions to assume, the strategies, alliances and agreements that the prosecutor may adopt during the course of the investigation and during the development of the entire criminal process.¹⁷

The authorities of the Public Prosecutor's Office, which would be the Attorney General of the Republic, the deputy prosecutors and the supervising prosecutors, can only exercise a posteriori control over the execution of the prosecution policies constructed on the basis of the conceptual framework previously defined by the

¹⁷ Alvarez Gonzalez Daniel (2007) The Preparatory Procedure. Costa Rican Criminal Procedural Law volume II. San Jose, Editorial Asociaci6n de Ciencias Penales de Costa Rica. Pag. 313,

legislator. This basically involves two types of control: one of a legal-formal nature, i.e. that the procedural management instruments chosen are correctly used, and the other of a constitutional nature, that the correctness of the grounds used is assessed in the light of fundamental rights such as the right to equality, the right to defense and the right to effective judicial protection of the process.¹⁸

According to Article 13 of the Organic Law of the Public Prosecutor's Office, the Attorney General "shall give his subordinates general or special instructions on the interpretation and application of the laws, in order to create and maintain unity of action and interpretation of the laws in the Public Prosecutor's Office". The same article adds that "Instructions shall be given, regularly, in written form and transmitted by any means of communication, including by teletype."

It is based on this legislation that the Attorney General's Office has issued a series of circulars and guidelines aimed at unifying prosecution policies and hegemonizing the interpretation that should be given to the law. At the same time, a series of guidelines have been established to unify the cases in which the different procedural institutes should be applied, such as alternative measures, abbreviated proceedings and opportunity criteria, or to determine alternative solutions as provided for in the Code of Criminal Procedure. In this regard, the Public Prosecutor's Office has issued Circulars 1-PPP-2008 and 2-PPP-2008, in addition to a series of guidelines.

¹⁸ Dr Roberto Bustamante A. (2008) Política de Persecución criminal del Ministerio Público. A first approach to the subject. Cuadernos de estudio del Ministerio Público de Costa Rica. Revista Especializada en Criminología y Derecho Penal, N- 8. Page 10.

The prosecutors of each territorial circumscription define the criminal prosecution policies applicable to each case.

Regarding the issue of criminal prosecution policies, it is noteworthy that when interviewing prosecutors Cynthia Cubillo Piedra and Pablo Cedeno Selva, the first being the coordinating prosecutor of the Prosecutor's Office of Miscellaneous Crimes, the unit in charge of trafficking cases before the entry into force of the Law against Organized Crime; and the second an assistant prosecutor of the Deputy Prosecutor's Office against Organized Crime, the office that is currently in charge of investigating the criminal type under study. Both indicated that there has not been and there is no criminal prosecution policy given by the Attorney General, which indicates how to treat this type of cases, a situation that in my opinion is very serious, especially because in these cases we are dealing with organized crime.

Section Two: Basic elements of the criminal investigation carried out by the

The Public Prosecutor's Office when confronted with a when confronted with a traffic case

The company is a member of the

How is a human trafficking investigation initiated?

The crime of trafficking in persons is classified by our Code of Criminal Procedure as a crime of public action, which means that the bodies in charge of criminal prosecution may initiate the investigation ex officio, i.e. without the need for a special request from a person or authority, when they have direct notice of an apparently criminal act and from then on all procedural activity is initiated.

Article 16 of the Code of Criminal Procedure states that when the criminal action is public, it will be exercised by the Public Prosecutor's Office, without prejudice to the participation granted by the Code to the victim or citizens (in the event that a person files a complaint and this complaint is the one that initiates the investigation).

In most, if not all, cases of trafficking in persons, the criminal investigation is initiated ex officio, once a criminal act of this type is reported, often information presented by the media is the origin of an investigation that initiates the process. However, this does not exclude the possibility that the course of the procedure may be initiated by the complaint of any person as regulated in art. 278 of the CPP¹⁹. The complaint may be made verbally when the citizen presents himself before the respective authority and brings the fact to its attention; or it may be presented in writing (art. 279 of the same code).²⁰

Another element to highlight is that the Judicial Investigation Agency has set up the telephone line 800-8000-645 for people to report the crime. Many times people are afraid for their lives, so they do not report a crime.

¹⁹ Article 278.- Power to report. Those who have notice of a crime of public action may denounce it to the Public Prosecutor's Office, to a Court with criminal jurisdiction or to the Judicial Police, unless the action depends on a private instance. In the latter case, only those who have the power to initiate, in accordance with this Code, may denounce.

The court receiving a complaint shall immediately bring it to the attention of the Public Prosecutor's Office.

²⁰ Article 279 - Form, the denunciation may be presented in written or oral form, personally or by special representative. In the latter case it must be accompanied by a power of attorney. When it is verbal, a record shall be drawn up in accordance with the formalities established in this Code. In both cases, if the official verifies the identity of the complainant.

In practice, it is relatively common to receive anonymous or secret reports of illicit activities, especially when they are related to organized crime (drug trafficking, human trafficking or smuggling, kidnapping, gangs dedicated to car theft).

In cases of human smuggling, a direct report of an apparently criminal act is usually made and from that moment on, all the procedural activity begins.

Article 62 of the CPP²¹ provides that the Public Prosecutor's Office will exercise the criminal action as established in the law and will practice the necessary, pertinent and useful diligences to determine the existence of the criminal act, therefore the Public Prosecutor's Office is obliged to verify if the information presented by the media or anonymously is real and if it is indeed in the presence of a criminal act.

Similarly, Articles 289 and 290 of the Code of Criminal Procedure state that the purpose of criminal prosecution by the Public Prosecutor's Office, in cases of publicly actionable crimes, must be aimed at preventing further consequences, promoting an investigation that
the circumstances of the facts and the perpetrators or

²¹ Article 62 - Functions. The Public Prosecutor's Office shall exercise the criminal action in the manner established by law and shall practice the pertinent and useful diligences to determine the existence of the criminal act. It shall be in charge of the preparatory investigation, under jurisdictional control in the acts that require it.

The representatives of the Public Prosecutor's Office must formulate their requirements and conclusions in a reasoned and specific manner.

The court must take all the necessary steps and actions for this purpose.

After the initiation of the investigation by any of the aforementioned means (denunciation, information from the media), the Prosecutor's Office in charge seeks that the offended person (trafficked person) loses the fear generated by the payment he/she made knowing that he/she was performing an improper conduct, In addition, a first contact with the victim is sought, the victim is not reproached for his illegal status, the person is asked to provide information about the coyote, other trafficked persons are contacted to have a good body of evidence, to determine that the mode of operation is not isolated and finally it is tried to establish contact with the trafficker (coyote), The trafficker (coyote) is stopped when he/she is transferring other people, either at the airport or by any other means, he/she is not stopped alone, he/she is stopped with the group that is being transferred, This with the purpose of verifying that they are offended and not coyotes, we seek to make the group aware so that they collaborate, since many times behind this transfer hides a swindle of which these people are being victims, from there on an intensive investigation of the given situation is initiated.

1. What is the role played by the Judicial Police and the Functional Directorate in the investigation of human trafficking cases?

The investigation of crimes, a common area of work of prosecutors and police, is a function intimately linked to the duty of objectivity and truth beyond any other interest. Through investigation, the aim is to overcome a state of uncertainty by seeking all known sources that can provide the information necessary to solve the case. The state of certainty finally reached must always be the product of what the sources themselves report, without any manipulation whatsoever. This information and the certainty provisionally obtained from them will be expressed in the indictment and, finally, will be transformed into evidence and certainty judicially expressed in the sentence.

The duty of objectivity in the function is imposed on the prosecutor and the police by article 6 of the C.P.P.²² . which establishes the obligation of all authorities involved in the procedure to record both unfavorable and favorable circumstances to the accused, this duty is assigned, in particular, to the Public Prosecutor by article 63 of the Procedural Code.

²² Article 6 - Objectivity. Judges shall resolve with objectivity the matters submitted to them.

From the beginning of the proceeding and throughout its course, the administrative and judicial authorities must record in their actions and assess in their decisions not only the circumstances detrimental to the accused, but also those favorable to him.

It shall be the duty of judges to preserve the principle of procedural equality and to remove any obstacles that prevent or weaken its validity.

Penal²³ *and* that of ascertaining the real truth by article 189 of the same body of law²⁴.

The Judicial Police plays an extremely important role, it is the auxiliary of the Public Prosecutor's Office as indicated in article 67 of the CPP²⁵, *and* will be under the control *and* direction of the latter, and will also be in charge of investigating crimes of public action, such as cases of Human Trafficking, in order to identify the perpetrators *and* participants, gather evidence, among other things.

In case the suspect(s) are fully identified, the judicial police, according to the orders given by the prosecutor in charge of the case *and* in coordination with him/her, will direct its function to obtain evidence against the person(s) so that when the respective report is submitted, it will be as detailed as possible as to the guilt of the suspect(s). All evidence collected must follow the established procedure.

²³- Article 63.- Objectivity. In the exercise of its function, the Public Prosecutor's Office shall adapt its acts to objective criteria and shall ensure effective compliance with the guarantees recognized by the Constitution, International and Community Law in force in the country and the law. It shall investigate not only the circumstances that allow to prove the accusation, but also those that serve to exonerate the accused from responsibility; likewise, it shall formulate the requirements and requests in accordance with this criterion, even in favor of the accused.

²⁴ Article 180.- Objectivity. The Public Prosecutor's Office and the courts have the duty to seek for themselves to ascertain the truth by means of the permitted means of proof, strictly complying with the aims of the criminal prosecution and the objectives of the investigation.

²⁵ Article 67.- Function. As an auxiliary of the Public Prosecutor's Office and under its direction and control, the Judicial Police shall investigate the crimes of public action, prevent their consummation or exhaustion, individualize the perpetrators and participants, gather the evidence useful to support the accusation and exercise the other functions assigned by its Organic Law and this Code.

by the CPP, in order to ensure that such evidence is not obtained illegally and then cannot be taken into account to support an accusation.

Prosecutors must give legal guidance to police work as regulated in article 68 cpp²⁶ , since many police investigations were not successful in court due to the violation of procedural guarantees and fundamental rights at the time **of** their discovery, custody and incorporation into the process, which implied their nullity.

The prosecutor must exercise control over police activity to ensure respect for the fundamental rights of the parties and the success of the investigation. The purpose of the powers granted to the prosecutor over the police investigation is fundamentally to guarantee the viability of the case at trial, since the prosecutor is the one who knows what evidentiary needs must be met in order to establish, before the court, the circumstances of the act and the authorship and participation of the accused.

The functional direction given by the prosecutor to the Judicial Police is extremely important in cases of human trafficking, since in the absence of a specific investigation protocol on the subject, good communication between the investigators and the prosecutors in charge of the case is essential.

will be fundamental, since they are the ones who will say what they want and what they do not want.

²⁶ The Public Prosecutor's Office shall direct the police when it must assist in the work of investigation. The officers *and* agents of the Judicial Police shall always comply with the orders of the Public Prosecutor's Office *and* those that during the processing of the proceeding, the judges may direct.

In exceptional cases and with justification, the Prosecutor General may directly designate officers of the Judicial Police to assist him in a specific investigation. In this case, the judicial authorities may not be removed from the investigation without the express approval of that official.

the judicial police will be in charge of how; The functional direction is going to be the means by which the fundamental points of the investigation are established, given the inexistence of a protocol that establishes the basic guidelines for investigating cases of human trafficking and in view of the fact that each case is different, it is necessary in each one to determine the investigation strategy and the prosecutor is the one who is going to direct the investigation as he/she wishes, In contrast to this, in the Sexual Crimes Prosecutor's Office, which handles cases of trafficking when there is sexual exploitation, has a series of protocols to give the proper processing to the cases it handles, the Prosecutor's Office against Organized Crime, which is the prosecutor in charge of the processing of trafficking cases, only has a protocol in cases of kidnappings.

In the practical application of the functional direction to the case, when the accused is not determined, or when the fact or his participation cannot be determined due to lack of information, the prosecutor may apply three modalities of exercise, according to the nature or seriousness of the fact; the complexity, simplicity or difficulty of the investigation or its public repercussion²⁷. The prosecutor, once he has defined the useful procedures, in accordance with the Follow-up and Time Control System²⁸, must communicate to the police in writing

²⁷ Article 6 of the Public Ministry Circular 17-98

²⁸ Circular 15-05 of the Attorney General's Office states in this regard in paragraph - § 2.- **Initial assessment of the case:**

2.2.c) Useful procedures: documents to be requested, expert opinions to be ordered and witnesses to be interviewed, as well as any other activities or evidence necessary for the investigation and to ensure the follow-up of the case. Each measure should state the name of the official or unit responsible for carrying it out or adding it to the file, as well as the time period within which it is ordered and within which it should be carried out.

The first written communication is the first step in the process of identifying the type of functional management that will be applied, according to the plan that has been elaborated, which allows the researchers to know how they will interact with him/her. From this first written communication, you can arrange for the meetings deemed necessary for the smooth operation of the research.

When the police initiate the knowledge of the case, carrying out preliminary proceedings, the modality (A)²⁹ is applicable, which consists of a simple approval by the prosecutor of the objectives that, according to the evidentiary reality of the case and the criminal type, the police intend to carry out, without any special directive being necessary because they are matters in *which the police already know what they have to do and how to do it*. It is not an autonomous investigation of the police because it requires the express authorization of the prosecutor and his supervision, for which he must indicate dates, in which he must evaluate the details of the progress of the investigation.

The second modality (B) implies a more direct control of the case, since in it the prosecutor, taking into account the legal requirements of the criminal type, derived from its own assumptions, jurisprudence or doctrine, expressly indicates the evidentiary objectives to be achieved in the investigation, whether to prove the fact or to prove the authorship and participation of the accused. Once the prosecutor has formulated and communicated this indication, he leaves to the discretion of the police the choice of the investigative or prosecutorial acts to be carried out.

be complied with. When confidentiality of the proceedings to be carried out is required, a file will be drawn up and kept under the responsibility of the prosecutor in charge of the case.

²⁹ Attorney General's Circular N8 18-2002

In this modality, the police are free to determine their actions and are bound to comply with the objectives set by the prosecutor. The actions of the police are controlled on the spot or in a deferred manner, in periodic meetings to evaluate the case or through the presentation of reports on dates previously set by the prosecutor. The modality under discussion is applicable, for example, to those cases in which the investigation requires agility in decision-making by the police or highly specialized criteria from the technical point of view on the part of the investigators. For example, let us think of terrorism investigations, international drug trafficking, accounting investigations, money laundering and, in general, investigations related to organized crime.

The third modality (C) consists of an absolute control of the case, which takes the form of a precise indication by the prosecutor to the police of the objectives and activities to be carried out. A joint analysis of the case is always recommended. This may be due to the lack of experience or knowledge of the investigators with whom the prosecutor works, the seriousness of the case, its public repercussions or other criteria that make it advisable. In this case, the Case Tracking and Control System report should include the deployment of the Otile diligences ordered to the police and the date of fulfillment of each one.

Likewise, according to interviews with prosecutors who handle these cases, I was able to confirm that there is no specific protocol for the processing of these crimes.

In this type of case, the investigation cannot be limited to a series of steps to gather specific evidence, so the prosecutor in charge of the case will be in charge of directing the investigation and proposing the steps to gather the evidence that he deems most appropriate.

However, any investigation behind organized crime cases has many difficulties, among them the fact that criminals are becoming more creative every day, this is one of the reasons why there is no investigation protocol, This is one of the reasons why we do not have an investigation protocol, because like them we would have to be innovating and changing it and also a great difficulty is that it is very difficult to determine the "ringleader" or "big fish" behind the whole criminal organization, in spite of that the investigators assigned to the cases, as well as the prosecutors, make their best effort in order to determine the degree of responsibility of the persons that they manage to detain.

The functional direction is coordinated by the prosecutors with the investigators of the Miscellaneous Crimes Section of the Judicial Investigation Agency, Trafficking in Persons Sub-section, who are the ones who carry out the relevant investigations in this type of cases.

L What to do when faced with a case of organized crime and under what parameters is the case processed?

While it is true that there is no specialized Although the Judicial Investigation Agency does not have a specialized section to deal with crime cases, it does not have a specialized section to deal with crime cases.

organized, both the investigators and the prosecutor of the case, conduct the investigation in the best way possible in order to gather the necessary evidence.

In order to be able to deal with organized crime, which is increasing every day in Costa Rica, at the beginning of 2008, was created the Deputy Prosecutor against Organized Crime, which has among its specific functions to know all cases of organized crime, and move throughout the country to conduct trials in which criminal groups of this type are involved, with the creation of this new prosecutor's office there was a transfer of functions, With the creation of this new Prosecutor's Office, there was a transfer of functions, since the Prosecutor's Office of Miscellaneous Crimes ceased to hear cases of trafficking in persons and transferred the knowledge of these cases to this new specialized Prosecutor's Office, which only hears cases of trafficking in minors for adoption, Cases of trafficking in persons in which there is labor exploitation are handled by the Prosecutor's Office of Miscellaneous Crimes, and if there is sexual exploitation, the case is handled by the Deputy Prosecutor's Office of Sexual Crimes and Domestic Violence.

It is important to point out that certain cases will be brought to the attention of the Deputy Prosecutor's Office against Organized Crime, even if there is no criminal organization at work, since by disposition of the Attorney General, this Prosecutor's Office brings other types of cases to their attention, For example the case of the White House Casino in Escazu or the case of some Costa Rican women who were victims of trafficking, they were sexually exploited in Mexico, this case was the responsibility of the Deputy Prosecutor's

Office of Sexual Crimes and Domestic Violence, but due to the transcendence of the cases in the

In view of the nature of the media and the type of persons involved, the Prosecutor General decided that the specialized Prosecutor's Office should be the one to hear the case.

This new Prosecutor's Office responds to the need for a specialized Prosecutor's Office with a larger budget and better trained personnel in order to be able to better investigate and respond socially to the growing wave of organized crime.

In view of the fact that in most of the cases of illicit trafficking of persons there is a criminal organization behind, which is in charge of the whole process of transfer of persons; at the time of carrying out the respective investigation of the case and when the prosecutor determines that he is facing a case in which there is an organization of this type, he can make use of law number 8754, which is the Law Against Organized Crime, created as well as the Deputy Prosecutor's Office against Organized Crime, This law includes a procedure for the declaration of a special procedure which is regulated in article 2 first paragraph of said law³⁰ and said procedure excludes the complex procedure established by the CPP in its articles 376 to 379.

³⁰ Art.- Declaration of special procedure

When, during the course of criminal proceedings, the Public Prosecutor's Office establishes that, in accordance with international standards in force and the present Law, the facts investigated qualify as organized crime, it shall request the court in which it is acting to declare the application of a special procedure. The procedure authorized in this Law excludes the application of the complex procedure.

The court will make a reasoned decision accepting or rejecting the request of the Public Prosecutor's Office. The decision in favor of the request of the Public Prosecutor's Office will have a declaratory character. The court shall adjust the time limits; to this end, it may modify the resolutions it deems necessary.

Once it is declared that the investigated facts qualify as organized crime, all the ordinary terms established in the Criminal Procedural Code, Law No 7594, for the duration of the preparatory investigation, will be doubled.

This is a special law that seeks to provide a greater response by the criminal justice system to this new type of crime.

Article 1 of this law defines organized crime as follows:

"Organized crime means a structured group of two or more persons existing for a certain period of time and acting in concert for the purpose of committing one or more serious crimes".³¹

It also explains that it will be applied to investigations and proceedings in cases of national and transnational organized crime.

The Public Prosecutor's Office, according to the second article of this law and in case it determines that the investigated facts qualify as organized crime, must request from the Court a declaration of application of special procedure.

The greatest benefit of a declaration of special procedure in cases of illicit trafficking in persons is that all the ordinary deadlines set in the CPP, law 7594, for the preparatory investigation are doubled, giving more time to investigate, collect evidence and establish responsibilities.

³¹ Article 1 of the Law against Organized Crime reads as follows: .- Interpretation *and* application

Organized crime means a structured group of two or more persons existing for a certain period of time and acting in concert for the purpose of committing one or more serious crimes.

The criminal action to prosecute crimes committed by or on behalf of members of criminal organizations will be public according to article 3 of the law in comment, therefore it falls on the Public Prosecutor's Office *and* cannot be converted into a private action.

Another important element of this law is that it seeks to minimize impunity by establishing a statute of limitations period different from that established in the CPP. In cases of organized crime this period will be ten years from the date of the commission of the last crime *and* according to article four of this law this period may not be reduced for any reason.³²

This law also extends the term for the extension of pre-trial detention, from a maximum of three years according to article 258 CPP³³ to a term of five years, since the Criminal Cassation Court may extend the term of pre-trial detention for a further five years.

³² Art 4 Law against Organized Crime - Statute of Limitations for criminal action

The statute of limitations for criminal action, in cases of organized crime, shall be ten years from the commission of the last offense and may not be reduced for any reason whatsoever.

³³ Article 258.- Extension of the term of preventive detention. At the request of the Public Prosecutor's Office, the term provided for in the preceding article may be extended by the Court of Criminal Cassation for up to one more year, provided that it fixes the specific time of the extension. In this case, the court shall indicate the necessary measures to expedite the proceedings.

If a conviction is handed down that imposes a custodial sentence, the term of preventive detention may be extended by means of a well-founded resolution, for an additional six months. The latter extension shall be added to the terms of preventive detention indicated in the preceding article and the first paragraph of this regulation.

Once these time limits have expired, a new extension of the time of preventive detention may not be granted, except as provided for in the final paragraph of this Article, in order to ensure the conduct of the debate or of a particular act, to verify the suspicion of flight, or to prevent the obstruction of the investigation of the truth or recidivism. In such cases, the deprivation of liberty may not exceed the time absolutely necessary to fulfill the purpose of the provision. The Third Chamber or the Court of Cassation, exceptionally and *ex officio*, may authorize an extension of the preventive detention beyond the above terms and for up to six months more, when ordering

a new trial.

the original term of preventive detention (which according to Article 7 of this law³⁴ is up to 24 months) for up to twelve more months, which would make three years, if a conviction is handed down that imposes a prison sentence, The term may be extended for twelve more months by means of a well-founded resolution, which would make a total of four years, *and* exceptionally *and ex officio*, the Chamber or Court of Cassation may authorize an extension of the preventive detention for twelve more months, when it orders a new trial, which would make a total of five years.

The cases that will be processed in this new prosecutor's office will follow the parameters of this new law, which establishes different deadlines than those established by the CPP, however, as far as the law is omitted, the Criminal Procedural Code *and* the Criminal Code will be applied.

As an organized crime case usually involves people from several countries, it is necessary to resort to international assistance procedures in order to gather the necessary evidence to support an eventual indictment.

1. What procedures must be carried out, by what means and before what authority, with what authority, the purpose of collecting evidence abroad?

In cases where it is necessary to collect evidence from abroad or to take any other action in connection with a case that is being investigated by the court.

³⁴ Art 7 Law against Organized Crime - Term of Preventive Imprisonment

Without prejudice to the provisions of paragraphs a) and b) of Article 257 of the Code of Criminal Procedure, Law No 7594, the original term of preventive detention shall be up to twenty-four months.

If the prosecutor's office is investigating the case, it is necessary to resort to the Mutual Legal Assistance procedure, which is defined as follows:

"It is the mutual cooperation or assistance provided by States in order to be able to obtain outside the territory of the requesting State the necessary evidence for the development of a process or investigation".³⁵

This procedure will be based on the recognition and enforcement of decisions derived from a foreign jurisdictional power or from an Authority duly recognized by the requesting country by virtue of international conventions.

The participants in the Mutual Legal Assistance are the States through their competent authorities, in our case the Public Prosecutor's Office, when it is necessary to collect evidence or carry out various procedures abroad, as it is almost always necessary in cases of organized crime, the prosecutor of the case must resort to an element called Letter Rogatory, a means by which assistance will be requested from a foreign authority.

The Letter Rogatory is defined as "The request issued by a Costa Rican or foreign authority to its counterpart in another country or in ours, with the request to carry out an investigative or evidentiary act or to obtain information".

³⁶

³⁵ Public Prosecutor's Office of Costa Rica (2004), Protocolo de Actuaciones. San Jose: Dpto. de Publicaciones e impresos, Poder Judicial. Pag 264.

³⁶ Ibid.

The prosecutor in charge of the case will prepare the Letter Rogatory which should contain at least the following information:

Name of the authority in charge of the preparatory investigation

A description of the seriousness of the sanction, the facts and the applicable law.

A description of the purpose of the request and the nature of the assistance expected to be obtained.

In the event that the freezing or seizure of property reasonably believed to be in the territory of the requested State is required, details of the facts justifying the measure and particularly of any investigation initiated in relation thereto should be given, together with a copy of any judicial decision ordering it.

Describe any procedures that the requesting State would like the requested State to carry out in order to give effect to the act, especially when evidence is involved.

Express the wish to maintain confidentiality regarding the request and the reasons for requesting such action

Detail the period of time in which the requesting State would like the request to be executed according to procedural needs.

If applicable, provide details describing the property to be located, seized, confiscated or immobilized and the place where it is believed to be located in the requested State.

Provide any other information deemed **useful** for the success of the application.

The Rogatory Letter will be elaborated by the prosecutor of the Organized Crime Prosecutor's Office, which is in charge of the Human Smuggling cases, this letter must be revised in order to be properly filled out, once the letter is ready, the prosecutor will present it to the Office of Technical and Legal

Counsel.

In this office of the Public Prosecutor's Office, a specialized prosecutor will review that the letter complies with the requirements of form and is well founded, in case the prosecutor who reviews it considers that it lacks some requirement or important element, In case the reviewing prosecutor considers that the letter lacks any requirement or important element, he/she returns it to the prosecutor who prepared it so that he/she can fix it, or in case the letter complies with all the necessary requirements, this office will present the Letter Rogatory to the Secretariat of the Court, which is in charge of sending the document to the Ministry of Foreign Affairs and Worship with a note in which it is requested that the document be filled out, After this, the office of Legal Counsel of the Ministry of Foreign Affairs and Worship sends the Letter together with all the accompanying documents to the address indicated in the office of the Secretariat (our embassies or consulates abroad), when the consul receives it has two months to fill it out, once the process is completed, it sends it back to the Ministry of Foreign Affairs, so that they send the document to the Secretariat of the Court and from there it is sent to the original Judicial Office.

1. Which principles must be respected in order to be able to to be able to realize the

Legal assistance abroad?

In order to carry out procedures abroad and for them to be valid in our country, it is necessary to respect a series of principles, among them the principle of application of the procedure in force in the requested State,

according to this principle, it is based on an accepted international standard which states that the requested proceedings are governed by the law of the jurisdiction. However,

Exceptionally, it is admitted that in the investigation some actions may be executed following the procedure of the requesting State (which would be our country), as long as it does not violate the domestic law of the requested State (the country to which the letter rogatory is addressed). Thus, for example, in some countries the testimony of a witness requires the presence of a defense attorney, in our country it does not.

Another principle that proves to be very important for the purpose of gathering evidence or carrying out other types of proceedings abroad is the principle of dual criminality, according to which the offense that is the subject of the letter rogatory must be prosecutable in the requested State if the requested act was carried out in that State. Thus, for example, when it is a question of executing a seizure, a search and seizure, among others, it is required that the offense giving rise to the request be criminalized in the territory where it is to be executed.

A fundamental principle is the principle of non bis in idem, a principle that is also regulated by our Political Constitution in Article 42 and by the CPP in Article 11, according to which the execution of the requested act is not proceeding if the act has already been judged in the requested country.³⁷

In order to ensure that the information or evidence collected is not used in other proceedings, the principle of Speciality must be respected, which refers to

³⁷ Art 42 Constitution - The same judge may not be a judge in different instances for the decision of the same point. No one may be tried more than once for the same punishable act.

It is forbidden to reopen closed criminal cases and judgments that have been ruled with the

authority of res judicata, except in the case of an appeal for review.

Art 11 CPP.- Single prosecution. No one may be criminally prosecuted more than once for the same act.

fundamentally because the proceedings, the evidence collected, the information or documents transmitted can only be used in the process in which the mutual legal assistance was requested. For this reason, the request made from Costa Rica to another State must identify the process and describe the fact; for this reason the Letter Rogatory must be clear and precise as to what is being requested.

There is a principle that extends extradition to Mutual Legal Assistance, and it is the principle of Refusal in case of Political Crimes, which means that the request will be refused if the crime that originates it has a political, military, religious or racial character.

Finally, it is worth mentioning the principle of refusal in case of threat to public order, according to which a letter rogatory may be refused if its execution involves public disorder, a threat to the security or sovereignty of the State to which the letter is being sent.

**t. Which procedure for gathering evidence is not regulated in the Code?
Is it used in cases of Human Trafficking?**

In cases of illicit trafficking in persons, communications may be intercepted, which is a special procedure regulated by Law 7425, "Law on the Registration, Seizure and Examination of Private Documents and Intervention of Communications".

Pursuant to Article 24 of the Political Constitution³⁸ and Article 9 of Law 7425, "Law on Registration, Seizure and Examination of Private Documents and Interception of Communications", the courts of justice are responsible for authorizing the interception of oral, written or other types of communications, including fixed, mobile, wireless and digital telecommunications.

Logically, such authorization by the Courts involves a prior procedure, which will basically consist of the specific analysis of a case, in which the prosecutor of the case in association with the Deputy Prosecutor, in the exercise of the functional direction, will evaluate the appropriateness of the measure, and if according to such evaluation the measure is considered appropriate, the respective background of the case will be transferred to the evaluation of the Attorney General of the Republic.

The right to privacy, freedom and secrecy of communications is guaranteed. Private documents and written, oral or any other type of communications of the inhabitants of the Republic are inviolable. However, the law, whose approval and amendment shall require the votes of two thirds of the Deputies of the Legislative Assembly, shall establish in which cases the Courts of Justice may order the seizure, search or examination of private documents, when it is absolutely indispensable to clarify matters submitted to the courts. a its

Likewise, the law shall determine in which cases the Courts of Justice may order the interception of any type of communication and shall indicate the crimes in the investigation of which the use of this exceptional power may be authorized and for how long. Likewise, it will indicate the responsibilities and sanctions incurred by the officials who illegally apply this exception. Judicial decisions under this rule must be reasoned and may be enforced immediately. Its application and control shall be the non-delegable responsibility of the judicial authority. judicial authority.

The law shall establish the cases in which the competent officials of the Ministry of Finance and the Office of the Comptroller General of the Republic may review the accounting books and their annexes for tax purposes and to audit the proper use of public funds. A special law, approved by two thirds of the total number of Deputies, shall determine which other bodies of the Public Administration may review the documents that such law specifies in connection with the fulfillment of their regulatory and oversight powers to achieve public purposes. It shall also indicate in which cases such review is appropriate. No legal effects will be produced by the correspondence that was subtracted nor the information obtained as a result of the illegal interception of any communication. (Constitutional Reform 7607 of May 29, 1996).

The request for interception of communications can only be made by the Attorney General of the Republic, the Director of the Judicial Investigation Agency or the party when it has been constituted (art. 10 of Law 7425).

When assessing the measure, the prosecutor must take into *consideration the specialty of the criminal act*, since the interception of communications in our legal system is not appropriate for all criminal acts, but exclusively in cases of kidnapping for ransom, aggravated corruption, aggravated pimping, manufacture or production of pornography, trafficking in persons or trafficking in persons to commercialize their organs, aggravated homicide, genocide, terrorism, and the crimes provided for in the Law on narcotics, psychotropic substances, drugs of unauthorized use, legitimization of capital and related activities, No. 8204 of December 26, 2001, pursuant to Article 9 of Law 7425.

Another element to take into account is the *existence of a criminal investigation*, since in accordance with article 9 of the Law in commentary, the interception proceeds within the procedures of a police or jurisdictional investigation, that is to say, it is a typical measure of the repressive function of the State, for which reason there must be a criminal case under investigation that will require the interception of the communications.

Together with the above mentioned element, there will be the *prior existence of indications of the commission of a crime*, which means that the intervention can only be authorized if there are sufficient indications that a criminal activity is being carried out (Art.9 Law 7425).

The request for intervention must indicate which are the indications about the fact that the police provide in such a way that the reasons for considering that they can obtain by this means either the discovery or the verification of facts or circumstances important for the investigation are clear.

The existence of prior indications precludes interception based on mere suspicions without at least a minimum degree of verification or in general search for criminal offenses of the kind mentioned above and regulated in article 9 of the aforementioned law.

It is important to point out that by means of the interception of communications the judicial authority can have a casual knowledge of crimes not contemplated in article 9 of the law, the conversations of utility for the criminal cause under investigation are recorded, however it does not mean that there will not be what, in doctrine, have been called "casual discoveries", in doctrine, have been called "chance discoveries", which refer precisely to the finding - from the intervention - of various situations such as criminal acts of the accused different from the one that motivated the intervention, criminal acts of a third party not author or participant of the crime under investigation, but related to it; criminal acts of a third party unrelated to the investigated crime, knowledge coming from a third party but related to the investigated crime, knowledge coming from a third party that refers to a criminal act different from the investigated crime.³⁹

³⁹ Public Prosecutor's Office of Costa Rica (Ministerio Publico de Costa Rica) (2004), Protocolo de Actuaciones. San Jose: Dept. of Publications and Printed Material, Judicial Branch. Pag 254

It is important to point out that although the knowledge obtained from these casual discoveries could not be eliminated, it is also true that this does not imply that this knowledge could not be taken into account as "noticia criminis", in such a way that, from this fortuitous knowledge, an independent investigation could be initiated on this new fact in which the interventions from which this news was obtained could not be induced as evidence in any way, since the intervention is justified as indispensable evidence of the commission of any of the criminal conducts (Art 10 law 7425), this means that the intervention is going to be used as an element that proves the existence of the fact and the participation of the investigated fact, not in another⁴⁰. In the case of a casual discovery, this would serve as "noticia criminis", which is totally legitimate, but it would be necessary to look for evidentiary elements in other sources and use the information as evidence in another process.

In summary, after the analysis made on the procedures at the level of the Judicial Police and the Prosecutor's Office, we can say that the legislator is in charge of regulating what is a crime, however, the one in charge of prosecuting the persons who incur in the regulated conducts is the Public Prosecutor's Office, which is in charge in aid of the judicial police of carrying out an investigation, from said investigation will depend if a case can be charged or not, this according to the elements of proof that are available.

⁴⁰ - **Art. 28** of law 7425: The results of the interception of oral or written communications may not be used for any purpose other than that for which the measure was taken".

It is important to indicate that every investigation must be carried out respecting certain principles and rights of the persons being investigated, otherwise the evidence will not be useful. In cases of human trafficking, the Public Prosecutor's Office does not have a protocol of actions or a similar document which establishes the procedures to be carried out, However, according to the interviews conducted, I was able to confirm that the Deputy Prosecutor of the Deputy Prosecutor's Office against Organized Crime, the specialized prosecutor who handles the cases, and other coordinating prosecutors, are seeking to create a document containing the minimum procedures that must be followed when investigating this type of case.

This specialized prosecutor's office, due to its recent creation (2008), has charged several cases, however they are still in the intermediate stage, so it can be said that the trials attended by the prosecutors on the matter have been cases that the Miscellaneous Crimes Prosecutor's Office inherited, so to speak, but it is relevant to mention that the incidence in trial of these cases has been minimal, Despite the efforts made by the Public Prosecutor's Office, a conviction has not been achieved in all the cases that have been brought to trial. An important case, which has been reported in the media, was that of Carlos Hernan Robles, but this case was not tried under the Migration Law, but for the trafficking of minors for adoption, regulated in article 376 of the Penal Code.

The Prosecutor's Office joins efforts in order to give a greater approach to this type of cases, although the circulating includes other crimes that this specialized prosecutor's office sees, it can be said that they are not saturated

as in other cases.

In addition to this, prosecutors are being trained and given more knowledge and more weapons, such as a larger budget, in order to ensure that the investigation is carried out in the best possible way and to reduce impunity and avoid the mistakes that were previously made in order to achieve the maximum number of convictions.

To this end and in order to give greater support to the work of the Public Prosecutor's Office, special laws have been enacted, such as Law No. 8754, which is the Law Against Organized Crime and Law No. 8720, which is the Law for the Protection of Victims, Witnesses and other parties involved in the criminal process, To this we must add that there is a Criminal Procedural Code recently reformed by the last mentioned law as well as the Criminal Code, which regulate everything that is not contemplated in these laws, and in addition there is law number 7425, "Law of Registration, Seizure and Examination of Private Documents and Intervention of Communications" which is very important in these cases.

We can say with certainty that the Public Ministry does everything possible to prosecute in the best way and get a conviction of the people who are involved in cases of organized crime such as cases of human trafficking, despite this it is extremely difficult to get to the root of the problem which are the heads of the networks and in most cases direct the entire network from another country and Costa Rica only functions as a transit country for people who are transferred to other places, despite this is

make every effort to prosecute and hold accountable as appropriate.
the case.

**CHAPTER THIRD: Study of the reform of article 245 of the Law of
and its comparison with Article 249 of the Migration and Foreign Affairs Act
No. 8487 and Article 249 of the
the new Law No. 8764**

**Section One: Legislative Background of the current Migration Law
and Extranjerfa law number 8487:**

In order to regulate the figure of illicit trafficking in persons, which was not regulated before 2006, a series of bills were proposed before the Legislative Assembly, which included the new penal type or intended to modify the Penal Code:

- 1- *Draft bill entitled "Penalty/ Penalization of/ Legal Trafficking of Migrants"*, which was assigned Legislative file 15140, presented before the Legislative Assembly by Deputy Maria Lourdes Ocampo Fernandez on February 21, 2003. The text of the bill consisted of two articles, in Article 1, it was intended to amend Article 276 of the Penal Code, including a new second paragraph, in order to impose a penalty of one to six years of imprisonment in cases where the purpose of the association was trafficking for the entry of undocumented persons into the national territory and the penalty was aggravated in the event of the participation of a public official in connection with his duties. Article 2 was intended to reform Title Seven, Chapter One of the General Law on Migration and Foreigners, Law No. 7033, which was in force at that time, so that it would be amended to include the following provisions

Articles 88 bis, 88 ter *and* 88 quater were added to Article 88, so that not only would the deported foreigner who re-enters the country without authorization or the foreigner who enters the country evading immigration control through an unauthorized place would be punished, but also those who cause nationals or foreigners to enter the country through immigration posts with false public or private documents would be punished, The penalty was aggravated if the person committing the crime was a public official acting in the course of his or her duties. The heaviest penalty was to be imposed on the person who helped to evade immigration control another person who was a prisoner of national or international justice, a maintenance debtor or who was prevented or restricted from leaving the country by an order issued by a competent national authority. This bill included three transitional provisions. The aforementioned bill, following the corresponding procedure at the legislative level, was submitted to the Permanent Commission of Legal Affairs for its respective study and report, *and* said department generated a "Legal Report" in April 2004, indicating that on March 9, 2004, file N° 14.269, which consisted of a new General Law of Migration *and* Foreigners, which both the base text and the opinion, would include a penal sanction for those who engage in the illegal trafficking of persons.

the new crimes that were being committed, which attracted attention

They considered that Article 88 bis (basically, it would punish anyone who brought someone into the country with false documents, but that the opposite could very well be the case, i.e., who helped them to leave the country through the immigration posts, but with false documents; They indicated in relation to article 88 ter, that there was a certain similarity with article 274 of the Penal Code that was being reformed, they considered that both the article of the code that was to be modified and this new article were regulating the same thing, after the respective analysis and due to the lack of votes to approve the bill, it simply remained a bill and did not become law, so that the figure of trafficking in persons, lacked regulation until that moment.

2- *Bill called "Law to combat human trafficking"*, which was assigned the legislative file number 15592, presented before the Legislative Assembly by several deputies on May 10, February 2004. The text of the bill consisted of thirty-six articles, divided into six chapters, the first chapter included the most important definitions, the second chapter the criminal offenses and related provisions, the third chapter dealt with the assistance and protection of victims, the fourth chapter dealt with the misuse of commercial transportation, the fifth chapter dealt with the prevention of trafficking in persons and the last chapter dealt with security and control of documents. The draft law in question, following the corresponding legislative procedure, was submitted to the Standing Committee on Legal Affairs for its consideration.

The respective study and report and said department generated a "Legal Report" in the month of October two thousand and four, in which it indicated that: "some of the articles included mention aspects that have already been contained in national laws, as well as in international instruments ratified by our country", "some of the norms contemplated respond more to an instrument of a regulatory nature than to a law of the Republic", They also indicated that there was a lack of definition of the criminal type (trafficking in persons) in general insofar as the term of the penalty was not established, in general they considered that the law had a poor quality and that this was detrimental to its proper understanding and correct application by the legal operator. This bill did not become law.

- 3- *Draft law called "Law to eradicate the illicit traffic of persons or coyotaje"*, which was assigned the legislative file number 15786 presented before the Legislative Assembly by Congresswoman Gloria Valerin Rodriguez on January 20, 2005. The text of the project consisted of a single chapter containing ten articles, in its first article it typified the crime of illicit trafficking of persons and in the other articles it mentioned four other crimes, it also established a rule related to the confiscation or seizure of goods derived from the illicit trafficking of persons, as well as rules that regulate the treatment of foreigners that have legally entered the country as victims, injured parties or witnesses of these crimes; In addition, it regulates the liability of public officials who commit misdemeanors or crimes against persons.

Finally, the bill establishes the declaration of public interest the prosecution of conducts *and* crimes related to the illicit trafficking of persons or coyotaje. The mentioned bill, following the corresponding procedure at the legislative level, was brought to the attention of the Permanent Commission of Legal Affairs, for its respective study and report *and* said department generated a "legal report" in the month of March two thousand six, in which it indicated that: "The Bill under examination raises political-criminal issues *and* gives greater importance to the economic problem involved in the contractual relationship that is established between the "coyote" *and* his "client". This is clear from the "Explanatory Memorandum", where direct reference is made to journalistic reports that emphasize the business side of this criminal activity. At the same time, the Bill refers to a series of international documents, conventions *and* protocols related to the smuggling of migrants, from which it draws the need for legislative activity to control this phenomenon, pointing to the need to protect human dignity *and* the principles of the rule of law. The organization of the conducts ranges from the criminalization of "coyotaje" itself, a special form of criminal association when the objective of the group is the commission of this act, as well as certain forms of fraud with documents, especially when they are used to facilitate this activity. However, the draft also introduces, without seeming to be aware of it, the concept of trafficking in persons for the purpose of committing fraud.

trade in organs, tissues and body fluids and to be subjected to sexual practices, servitude or slavery or, in general, to promote human rights violations. This causes an important variation in the political-criminal principles of the bill and requires an adaptation so as not to cause problems of interpretation that could be serious when interpreting and applying this legal text, mainly with regard to the protected legal right which, in the latter case, is the life, bodily integrity and dignity of persons, or even the freedom and self-determination of the victim. This bill did not become law, since it did not comply with the respective requirements.

- 4- *Draft bill called "Immigration and Foreigners Law"*, which was assigned Legislative File 14269, presented before the Legislative Assembly by several deputies, the text of the bill consisted of fifteen titles, divided into several chapters and 268 articles. The aforementioned bill, following the corresponding procedure at the legislative level, was submitted to the Permanent Committee of Legal Affairs for its respective study and report, and said department generated a "legal report", unlike the aforementioned bills, Unlike the aforementioned projects, the project in commentary, did not intend neither to modify the Penal Code, nor to create a specific law that would regulate the trafficking of persons, however for the first time in a project of law in which it was intended to regulate everything related to migration and foreigners, a new penal type was included, which was going to be a new type of crime, which was going to be a new type of crime.

The law included everything about this type of crime; Specifically in Chapter **XIV**, which was named Crime of Illegal Trafficking of Persons, which consisted of a single chapter, which included the classification of the crime, consisted of three articles, the first included the classification, the second spoke about the destination of movable and immovable property that had been used in the commission of the crime, The last article dealt with foreigners who had entered Costa Rican soil without complying with the provisions regulating their entry and who were in the country irregularly without documentation or with irregular documentation, for having been a victim, injured party or witness of an act of illicit trafficking in human beings, illegal immigration or sexual exploitation, these persons could be exempted from responsibility, according to the article, if they cooperate with the competent police officers, The benefit of exempting them from responsibility was a faculty of the General Directorate of Migration, and if the case arose, the persons could be repatriated to their country of origin. This bill after the respective analysis and after undergoing some modifications, it will be

The law currently regulates the crime of trafficking in persons, in its Chapter XV, which consists of three articles, which remained exactly the same as those contained in the bill.

After the analysis of the bills that sought to create the criminal type of illicit trafficking of persons, it is worth mentioning that with law 8487, it was possible to regulate this conduct, but shortly after this law came into force, a new bill was presented, which seeks to amend the current Migration Law, This bill has already complied with all the legislative procedure and the respective ratification, and became law number 8764, which became effective as of March 2010.

Section Two: Analysis of the opinions of the Legislative Assembly for the approval of bill number 15694, which amends the law of Migration and Alien Affairs, law number 8487

In order to modify the Migration Law number 8487, a *bill called "Migration and Foreigners Law"* was proposed to the Legislative Assembly, which was assigned the Legislative file 15694, presented to the Legislative Assembly by the Executive Power on March 21, 2007, and was signed by the President of the Republic, Oscar Arias Sanchez, the Minister of Government, Police and Citizen Security at that time, Fernando Berrocal.

As with all bills, this one, prior to mentioning the respective titles, chapters and articles, a justification was made in order to justify what it was intended to achieve with the proposed bill and why it was necessary to repeal Migration Law 8487, a law that includes in its regulation the crime of illicit trafficking of persons, among the reasons mentioned we have the following:

- Adapt our institutional legal framework to the new migratory phenomenologies.
- Enable the law as a key instrument in the fight against corruption, implementing technical changes that facilitate controls, agility and procedural flexibility to encourage regularization and compliance with the duties and responsibilities of the migrant population that lives and intends to live in the country.

ExHcited adaptation of the legal text of the law to the commitments acquired by the country in international treaties and conventions, mainly in the area of human rights. Specifically, controls and sanctions regarding trafficking and smuggling of persons for commercial purposes and other forms of exploitation, safeguarding and protection of persons who are victims of forced mobilization and who require refuge in our country, homologating the procedure of the migratory authorities with the protection of the best interests of the child, equality and equity between genders, ages and ethnic and social backgrounds.

- Establishment of a new migration model that legalizes the integration process of the migrant population by means of social security contributions and their participation in social welfare projects at the community level, thus encouraging the transfer of knowledge and technology for the social development of the communities where the foreigners are located.

- Improve migration control by defining the crime of trafficking in persons as well as aggravating circumstances in cases of violation of the human rights of the victims; and special protection for them. This implies coordination and liaison with strategic instances that make it possible to detain organized crime groups that take advantage of migratory vulnerabilities to remain and operate in the country, which in the future implies a risk for the socio-cultural development that a country should naturally have. Likewise, the strengthening of the Migration Police, which would be renamed: Technical Migration Police; and, it would have a professional support unit that would qualitatively improve its actions in the fight against transnational organized crime that operates in migratory matters.
- Collegiate decision-making system through the legal constitution of the Visa Commission to facilitate transparency in immigration decisions and policies.
- Simplification of procedures through administrative functional autonomy. Enable the development and implementation of technologies that make corruption crimes impossible, streamlining and facilitating procedures, increasing controls and improving the quality of the services provided.
- Creation of a migratory labor statute to improve the qualifications of personnel and their adaptation to the migratory environment.

- Labor flexibility in favor of the guarantees and rights of the migrant population and the possibility of reorienting the migrant population working in the country towards the real needs recommended by the competent authorities for such purposes.
- The implementation of a new figure called migratory canon that would make it possible to capture resources to allocate them to the social services on which the migrant population has the greatest impact, which would imply reinforcing the solidarity contribution system that operates in the country and which is a distinctive feature of our institutional framework.

After the previous justification, the article of the project was entered, which consisted of sixteen titles, being that in the first of them the preliminary dispositions for the application of the law were included, in the second title everything related to the principles of the migratory policy was included, The third title dealt with the subject of the migratory authorities and their respective classifications; the fourth title dealt with the rights, limitations and obligations of foreigners; the fifth title referred to the entry, exit and stay of foreigners; and the fifth title referred to the entry, exit and stay of foreigners, The sixth title commented on the migratory categories, the seventh title referred to the migratory documents, the eighth title commented on the means of transportation, and the eighth title referred to the means of transportation, in title number nine, reference was made to employers and persons who lodge foreigners, continuing with the mention of the titles, in title number ten, the subject of sanctions for foreigners was mentioned, likewise in title eleven,

administrative procedures were mentioned, in title number twelve, comments were made on the following

The thirteenth title deals with the payment of fees and the establishment of the special fund, and the fourteenth title deals with the administrative board of the General Directorate of Migration and Foreigners.

The title number fifteen deserves special mention, which is relevant to this work, since in the bill, this title mentions the crime of illicit trafficking in persons, it is composed of a single chapter, which in turn is divided into five articles, in the first article the figure of illicit trafficking in persons is typified, The second article deals with the disposition of movable and immovable property used in the commission of the crime, the third article refers to the crime of trafficking in persons, the fourth article of this single chapter refers to the measures of protection and assistance that can be given to a person victim of the crime of trafficking, and finally the fifth article deals with influence peddling in migratory matters.

Finally, title sixteen refers to the complementary and final provisions.

Following the respective legislative process, the Department of Technical Services of the Legislative Assembly issued a legal report in August 2007, in which the following was pointed out regarding the new criminal offense of illicit trafficking in persons:

ARTICLE 246.⁴¹

This article begins the regulation that this law contemplates on the crime of illicit trafficking in persons. The comparative table is as follows:

LAW NO. 8487 IN FORCE	BILL
<p>ARTICLE 245.</p> <p>A penalty of imprisonment of two to six years shall be imposed on any person:</p> <p>a) With the purpose of illicit traffic, drives or transports persons to enter or leave the country through places not authorized by the General Directorate, evading the established migratory controls or using false information or documents.</p> <p>b) Whoever, for the purpose of illicit trafficking in persons, harbors, hides or conceals foreign persons who enter the country or remain illegally in the country.</p>	<p>ARTICLE 246.</p> <p>A prison sentence of two to six years shall be imposed on anyone who facilitates, in any way, the illegal entry or exit of a foreign person from the country, with the purpose of obtaining, directly or indirectly, an economic or other material benefit. The penalty established in this article shall be increased by one third when in the commission of the acts:</p> <p>a) Against a minor migrant person.</p> <p>b) The life, health or integrity of the employees has been endangered.</p>

⁴¹ Asamblea Legislativa de la Republica de Costa Rica. Legal Report prepared by the Technical Services Department, August 2007.

<p>The penalty established in this article shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes.</p>	<p>migrants affected.</p> <p>c) Inhumane or degrading treatment of these migrants.</p> <p>d) The perpetrator or accomplice is a public official.</p> <p>e) The person charged belongs to an organized criminal organization or group involved in or dedicated to such activities. For the purposes of this Law, "inhuman or degrading treatment" shall be understood as that which deliberately causes serious physical or mental suffering.</p>
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This article creates a criminal offense, which although not indicated, is the illicit trafficking of immigrants, in which to describe the conduct it incorporates the phrase "with the purpose of obtaining, directly or indirectly, an economic or other material benefit" and includes more grounds for aggravating the penalty.

With respect to the configuration of the criminal offense, they stated the following: "Thus, the criminal offense is well configured from the legal point of view and the verb used "facilitate" describes the action of facilitating by any

means the

entry into and exit from the country of a foreign person for the purpose of obtaining an

economic or material benefit. That is, this crime is limited to trafficking, hence the action is not framed to facilitate the permanence in the country, a situation that is typical of the crime of trafficking in persons.

The report also made mention of the conventions approved by Costa Rica on the subject, and in this regard stated the following: "Costa Rica has approved several international conventions that repress the smuggling of migrants and contain provisions for the State to introduce punitive norms to repress the smuggling of persons, such as the United Nations Convention against Transnational Organized Crime (Law No. 8302), the Protocol on the Smuggling of Migrants (Law No. 8314) and the Protocol on the Smuggling of Migrants (Law No. 8314), the Protocol on the Smuggling of Migrants (Law No. 8314) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Law **No.** 8315), which are in force and fully applicable in our country".

As part of the legislative process, an optional Constitutional consultation was made to the Constitutional Chamber regarding the crime, on the same manifesto:

"The vulnerability of the migrant population, the violations to their fundamental rights by virtue of such condition are elements that are integrated in the legal good and that justify the sanctioning of the subjects that engage in various mediation and promotion tasks that make up the cycle of the international transfer of human beings".
*Constitutional Chamber, Resolution **No.** 2005-09618".*

Following the respective legislative process, this bill was passed to the standing committee on government and administration for its study and report.

After the respective study, opinion number one was generated, in the meeting room of the Permanent Commission of Government and Administration, in San Jose, on the twenty-fifth day of the month of November of two thousand eight, and in accordance with the mandatory consultations (which were made to a series of institutions) and recommended and hearings, a series of changes were made in the wording of the text presented and published in La Gaceta N. 76 of April 20, 2007, which according to their criteria, brought the migratory development policies closer to the needs of the country and the conditions in which the migrants could enjoy their permanence. ^o76 of April 20, 2007, which according to their criteria, brought the migration development policies closer to the needs of the country and the conditions in which migrants could enjoy their stay under any of the proposed migration categories.

Within the same opinion a first substitute text is proposed, which is published in La Gaceta **No** 207 of October 27, 2007. This text compiles a large number of observations made by the different organizations and institutions in the consultation and hearing process, and regulates in its *article 251* the crime of illegal trafficking of persons, this first substitute text does not undergo any transformation with respect to the text of the project presented by the Executive Power at the first moment, in relation to the regulation that had been established on the matter.

When it was published, the first substitute text was again submitted for

consultation and, in view of all the comments made in the various consultations, a second substitute text was generated on November 11, 2008,

The text was published in La Gaceta 227 of November 24, 2008, which presents some changes, the fundamental ones were: a restructuring of the chapters related to the creation of economic funds and *also the elimination of the chapter that contemplates the crimes of trafficking and smuggling of persons*, said text is sent to the mandatory consultations, in order to conclude the preliminary process and submit the bill for discussion on the merits.

As a result of the various consultations that were made in relation to this second substitute text, the Supreme Court of Justice made the following observation:

That there were a series of inaccuracies in the chapter called "Crime of Illegal Trafficking in Persons"; observations that the Assembly said would not fit in the second substitute text, given that this chapter is no longer contemplated in the same⁴².

This means that in the second substitute text, presented by the Executive Branch, the regulation related to the trafficking of persons is eliminated, leaving unpunished a conduct that has become very frequent, such as the trafficking of persons, which is well known to be the product of organized crime in most cases.

Since this text was published in La Gaceta 227 of November 24, 2008, only a substitute text, the respective consultations were carried out, a second opinion was generated, after which the bill was again sent for legislative processing to the Permanent Commission of Government and Public Administration.

⁴² By means of official communication No. ° 573-08 dated October 21, 2008.

In the first instance, it comments on the report of the Department of Technical Services of the Legislative Assembly, which recommends the return of the figure of trafficking and smuggling to the bill.

Motion number 16594-Moc-137-2 was also filed on March 17, 2009, in order to include the chapter on illicit trafficking of persons in the text.

The chapter regulating the illicit trafficking of persons was included again, and the respective consultations were made to the Supreme Court of Justice. A response was received from the Supreme Court of Justice on June 23, 2009, by means of Official Letter No. SP-229-09, which specifically recommended three changes to the text of the bill:

1. Reduce the number of persons to two, in the aggravating circumstance contained in paragraph d) of the article criminalizing the crime of illicit trafficking in persons.
2. Eliminate or delimit the article that refers to the protectionist provisions that apply to the victims of human trafficking.
3. Discuss the relevance of maintaining the article that refers to the confiscation and forfeiture of assets derived from the crime of illicit trafficking in persons.

In short, the Supreme Court of Justice recommended making some adjustments to the text, firstly so that the text contemplated in the Immigration and Foreigners Law would not contradict the *"Law for the protection of victims, witnesses and other parties involved in criminal proceedings, reforms and additions to the Code of Criminal Procedure and the Criminal Code"*, and secondly so that this legislation would complement what is already regulated; Since while the draft of the Migration and Foreigners Law was being discussed in the Legislative Assembly, this new law was enacted, which came to modify the provisions of the Criminal Code in relation to the crime of trafficking in persons, so that the inclusion of the same crime in the draft of the new migration law, was counterproductive.

Finally, a last text is generated, by means of which the observations made by the Supreme Court of Justice are corrected and the regulation of illicit trafficking of persons is included, from the original text presented by the Executive Branch that contained a single chapter on the matter, which consisted of five articles, four were eliminated, so that this chapter only contains one article, which is the classification of the crime of illicit trafficking of persons.

Section Three: Analysis of article 249 of the Migration Law number

8764, which amends the Immigration and Foreign Affairs Law, law number 8487,

in connection with human smuggling.

Trafficking 1/icito of persons. Concept. Characteristics. Conducts that integrate the quy in the New Migration Lev.

The illicit traffic of persons in the Migration and Alien Law 8487 was regulated as follows:

Article 245:

A penalty of imprisonment of two to six years shall be imposed on any person:

- a)** For the purpose of illicit trafficking, driving or transporting persons to enter or leave the country through places not authorized by the General Directorate, evading the established immigration controls or using false information or documents.

- b)** Any person who, for the purpose of illicit trafficking in persons, harbors, conceals or harbors foreign persons entering or illegally remaining in the country.

The penalty established in this *article* shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes.

The J/icio de Personas traffic in the Migration and Alien Law 8764, will be regulated in the following manner:

ARTICLE 249:

A prison sentence of two to six years shall be imposed on anyone who drives or transports persons into or out of the country through places not authorized by the competent immigration authorities, evading the established immigration controls or using false information or documents or using false information or documents.

altered. The same penalty shall be imposed on anyone who, in any way,

promotes, promises or facilitates the obtaining of such false or altered documents and whoever, with the purpose of promoting the smuggling of migrants, harbors, hides or conceals foreign persons who illegally enter or remain in the country.

The penalty shall be three to eight years of imprisonment when:

- 1) The migrant is a minor.
- 2) The life or health of the migrant is endangered, due to the conditions in which the act is carried out, or serious physical or mental suffering is caused.
- 3) The author or participant is a public official.
- 4) The act is carried out by an organized group of two or more persons.

Analysis of the new type, characteristics, behaviors that integrate it:

The Objective type:

The crime of trafficking in persons requires that the active subject (which in this case would be the trafficker), for the purpose of illicit trafficking, drives or transports persons to enter or leave the country through places not regulated by the competent immigration authorities, or by using false or altered information or documents. The crime is also committed by anyone who, with the same purpose of trafficking, promotes, promises or facilitates the obtaining of such false or altered documents, as well as by anyone who harbors, hides or conceals foreign persons who illegally enter or remain in the country.

Active Subject:

The crime as a human work always has a perpetrator, who is precisely the one who performs the prohibited action and can only be a physical person, it can also be said that the active subject is the person (s) who performs the typical, unlawful and guilty conduct, we can say that in the case of trafficking in persons, the active subject would be the trafficker, which can be any person. However, whenever the criminal type requires, explicitly or by its meaning, a personal condition, whether physical or legal, we are in the presence of a special crime, it can be said that trafficking in persons is a proper special crime, since in this type of crime the special quality has the function of attenuating or aggravating the penalty of the perpetrator, However, there is a factual correspondence with a common crime, which may be committed by anyone who does not have that status, a situation that occurs in the aggravated forms of commission of the crime, since it is required that the active subject be a public official or that the person committing the crime be an organized group of two or more persons.

From the foregoing, it is concluded that the active subject is not the person who illegally crosses the border, but rather the person or criminal organization that, for purposes of illegal trafficking, conducts or transports persons to enter the country, or the person or organization that enters the country. is therefore not the person who illegally crosses the border, but the person or criminal organization that for purposes of illegal trafficking, leads or transports persons to enter or leave the country through places not regulated by the competent immigration authorities, with false or altered information or documents, or the person or criminal

organization that in any way promotes, promises or facilitates the obtaining of such false or altered documents; with the norm the legislator does not intend to punish the person who crosses the border illegally, but rather the person or criminal organization that in any way promotes, promises or facilitates the obtaining of such false or altered documents.

illegally crossed the border, or obtained documents in a non-legitimate manner, what is intended is to punish those who facilitate such conduct.

Passive Subject:

It is the addressee of the protection of the legal property, different from the passive subject of the action, who is only the person on whom the criminal action falls but not necessarily the addressee of the protection of the legal property.

Unlike the *active* subject, the passive subject may be a natural or legal person, or even the social conglomerate.

The passive subject is the person on whom the conduct of the active subject (trafficker) falls, normally called the "trafficked person" or "victim of trafficking", and would be the person who generally pays for the entry, exit, illegal stay in the country or for obtaining the documents.

It can also be said that the State is offended by virtue of the immigration laws that are violated.

Conduct:

The conduct is given by the realization of the verbs indicated in the norm under study, which are: to conduct, transport, promote, promise, facilitate, lodge, conceal, cover up; as we can see, Article 249 of Law 8764 mentions different types of conduct.

Since illicit trafficking is a crime of mere activity, it will be consummated when the person(s) drives or transports others for the purpose of illicit trafficking,

performing acts that facilitate their entry into or exit from the country, through places not authorized by the competent immigration authorities, evading the established immigration controls or using false or altered data or documents.

The crime is also committed by anyone who, with the same purpose of trafficking, promotes, promises or facilitates the obtaining of such false or altered documents.

In addition, according to the provisions of this rule, unlawful conduct is also committed when, with the purpose of promoting the unlawful trafficking of

(a) A person harboring, concealing or harboring foreign persons who have illegally entered or remain in the pars.

What are the aggravated forms of the criminal offense?

The criminal offense is aggravated when the migrant is a minor, when the life or health of the migrant is endangered by the conditions in which the act is carried out or when serious physical or mental suffering is caused; the criminal offense is also aggravated in cases in which a public official has participated in some way in the conduct, whether as perpetrator, co-perpetrator or accomplice, and the offense is aggravated when the act is carried out by an organized group of two or more persons.

The mode of commission of the crime:

Understood as the way in which the trafficker or coyote carries out the criminal conduct is as follows:

* Driving or transporting other persons for purposes of illicit traffic, performing acts that facilitate their entry into or exit from the country, through places not authorized by the competent immigration authorities, evading the established immigration controls or using false or altered data or documents.

* Promoting, promising or facilitating the obtaining of false or altered documents.

* To harbor, conceal or cover up foreign persons entering the country or staying illegally in the country, with the purpose of promoting the illegal trafficking of migrants.

As we can see, in the three ways of committing the crime there is a failure to comply with the requirements of the immigration authority, since the first case involves entry or exit through places not authorized by the immigration authorities, evading the controls established by them or resorting to the use of false or altered documents, This means that when this situation occurs, it is because the trafficked person cannot adequately comply with the legally established requirements and that is where the trafficker comes in, taking advantage of this situation to carry out the illegal conduct. In the second case, the person who commits the crime helps the smuggled person to obtain false or altered immigration documents, so that the person does not comply with the requirements of the immigration authority. In the third case, with the purpose of promoting the smuggling of migrants, the smuggler lodges, hides or covers up persons who entered or remain in the country of origin.

illegal manner, i.e. without complying with the requirements of the law.

The subjective type:

It is composed of intent and guilt. Malice is the consciousness and will to carry out the objective type of a crime. It is the will of the typical result. The knowledge that presupposes this will is that of the objective elements. In such a way that in the fraudulent type, what happened (the realization of the objective type) coincides with what was willed (the realization of the subjective type). A person acts with malice who knows what he is doing and wants what he is doing. The perpetrator must know that he is performing an act and what act he is performing. This will implies an active doing, by which the perpetrator is satisfied with the realization of the legal type or at least accepts as probable its realization.

In the case under study, we can say that we are facing a fraudulent offense that requires in the perpetrator the knowledge and the will that the conduct carried out by him, has the purpose of driving or transporting persons for purposes of illicit traffic through places not authorized by the General Directorate of Immigration, evading immigration controls or using false or altered documents; as well as promoting, promising or facilitating the obtaining of such false or altered documents. The person shall not be allowed to lodge, conceal or cover up for other persons knowing the unlawfulness of the act he/she is committing.

Legal asset:

The law seeks to protect two legal interests, firstly the interest of the State to exercise control over migratory movements, so that they are not used by organized crime groups, and secondly the interest of the State to protect the

rights of migrants.

In the second instance, it is intended to protect the respect of the human rights of foreign citizens.

Differences between the criminal offense of illicit trafficking in persons regulated by the

lev 8487 and the que to be regulated in article 249 of law 8764.

With the new Migration and Foreigners Law, Law No. 8764, some changes are introduced to the regulation on the illegal trafficking of persons, which is currently regulated by Law No. 8487 in its Article 245, among the main changes we have:

Regarding Conduct:

The current regulation of illicit trafficking in persons, article 245 of law 8487 includes in its criminal conduct only the governing verbs included in the first and second clause of the norm, which are: driving, transporting, harboring, concealing, concealing: The normative provision is complied with as long as the offender performs any of the described conducts, either driving or transporting persons for the purpose of trafficking, for their entry or exit from our country, likewise the crime is consummated in the case that a person lodges, hides or conceals foreign persons who entered or remain in the country illegally.

The new regulation, in addition to the described conducts, includes three new governing verbs, which are: Promote, promise or facilitate. This means that the crime will be consummated in the event that the trafficker promotes, promises or facilitates the obtaining of false or altered documents for the person to evade immigration controls.

This means that the criminal type covers more conducts than it was previously covering, this responds to the need to punish conducts that will always be behind such a crime, since this type of crime is generally the product of a series of conducts that move in a chain, and that are carried out by a criminal organization in which there is a division of tasks, such as the coyote or trafficker, who receives a payment to "help" people to enter or leave our country, However, there are other people that make up the criminal organization that are in charge of generating the documents that will be given to the person to be trafficked, documents that may be false or altered as indicated in the norm, this does not mean that the same coyote can not perform both behaviors or all those indicated in the norm, This does not mean that the same coyote cannot perform both or all of the conducts indicated in the law, that is, facilitate the transfer of the person and provide him/her with the documents, this may be the case, but since this crime is the product of organized crime, in most cases there is a division of functions between the different persons that are part of the organization.

Regarding the aggravated forms of the criminal type:

The current regulation of illicit trafficking in persons, article 245 of law 8487 includes only two aggravating circumstances, which are, in case the perpetrator or accomplice of the crime is a public official, or when minors are used to commit this crime. The new regulation will include as aggravating circumstances the fact that the migrant is a minor, when the life or health of the migrant is endangered due to the conditions in which the act is carried out or when it causes serious harm to the migrant's life or health.

physical or mental suffering; furthermore, the type is aggravated when the act is carried out by an organized group of two or more persons.

The fact that a minor is used to commit this crime is eliminated as an aggravating circumstance; the new regulation will only punish the fact that the migrant is a minor.

In the event that one of the causes of aggravation of the type occurs, the penalty increases from two to six years to a penalty of three to eight years.

The mode of commission of the crime:

With respect to the mode of commission of the crime, we can indicate that Article 245 of Law No. 8487 mentions three modes, which are as follows:

Driving or transporting persons to *enter* the country through places not authorized by the General Directorate of Migration, evading the established immigration controls or using false information or documents.

Driving or transporting persons for their *exit* from the country through places not authorized by the General Directorate of Migration, evading the established migratory controls or using false data or documents.

And harboring, concealing, harboring foreign persons entering or staying illegally in the country.

Advantages and disadvantages of the new regulation.

The disadvantages that I consider the new penal type to have are, in the first place, in relation to the elimination of one of the aggravating factors that was contained in criminal type of article 245 of the law N° 8487, and the one that refers to When minors are used to commit the crime, this means that this conduct is deregulated, which could occur, since coyotes or traffickers, in order to avoid going to jail or evade justice in some way, may use minors to commit the illegal conduct, and in case of using them, the penalty imposed would not be that of the aggravated criminal type.

Secondly, the penalties are still very low, despite the fact that human trafficking cases are organized crime.

As for the advantages of the new regulation, it should be noted that it responds to the need to regulate more precisely the crime of illicit trafficking in persons, a crime that was previously regulated but in a very brief manner, the previous type was not in accordance with the social reality, in which the crime was increasing and it was known that it was the product of organized crime, but the rule did not refer to this.

The new regulation comes to regulate a conduct that the law N° 8487 in its article 245 does not regulate and that in most of the cases of illicit traffic of people occurs, this conduct is the one carried out by the person who is in charge of promoting or facilitating the migratory documents, either by giving the trafficked person a false document or one that is altered; the new regulation is

a new regulation that is not regulated by the law N° 8487 in its article 245.

The person who carries out this conduct is part of a network in which the functions are divided, so the reform in this aspect is in line with reality, since not only will be punished those who drive or transport people to enter or leave the country, but also those who provide them with immigration documents or help them, so to speak, to obtain such documents.

Another very important element that comes to regulate Article 249 of the new Migration Law, in its second paragraph, is a case that can occur and is the endangering of the life or health of the migrant by virtue of the conditions in which the act is executed; I consider that this new aggravating circumstance is very important since in most cases of illicit trafficking of persons, the people who are trafficked are considered simple merchandise, so they are driven or transported in impoverished conditions, many times they suffer cold, go hungry, are exposed for hours to the sun, are treated as if they were animals, many times they are transported in overcrowded conditions inside trucks, with little air circulation, practically as if they were cattle; In Costa Rica trucks have been stopped in which Nicaraguans were found who could not in any way meet their basic needs and this does not matter to the trafficker, since what interests him is the payment that is in between, but perfectly a person can die during the transfer for entry or exit of our country, it is worth mentioning that this is a situation that occurs a lot in the cases of people who want to enter the United States and have to go through the desert that is on the border with Mexico, many of them have to cross the border with the United States.

people lose their lives during the crossing because in this place the weather conditions are very difficult, during the day very sunny and during the night very cold.

In relation to the above mentioned and continuing with the commentary of the second paragraph of the norm, this not only regulates the endangering of the life or health of the migrant, it also punishes the fact that serious physical or mental suffering is caused to the migrant, because it may well be that the life of the person is not endangered, but it may be the case that suffering associated with other conditions is caused, for example that they are addressed with bad language, that they are devalued as a person, that they are treated as merchandise, a situation that I have already mentioned.

Finally, in relation to the advantages of the new law, it is very important to mention that this law is intended to punish new forms of committing crimes, such as organized crime, which almost always occurs in cases of illicit trafficking of persons. The law establishes that the penalty will be aggravated in the case that the crime is committed by an organized group of two or more persons; although there is currently a law against organized crime, the criminal type is not described in that law but in the Migration Law, so it is very appropriate that it is included as an aggravating circumstance, since it responds to the reality that is lived every day, and in this way it broadens the scope of the law.

With respect to the reform:

I consider that the reform of Article 245 of Law No. 8487 is necessary, since after analyzing the advantages and disadvantages of the new penal type, it can be seen that it is more in accordance with reality, and adequately punishes and prosecutes all the conducts that the crime of illicit trafficking in persons may entail, It is also important to mention that the previous penal type of article 245, was very brief, but the new one is broader and more structured, new and accurate aggravating factors are included, since it seeks to adequately prosecute the crime.

CHAPTER FOUR: The Crime of Human Trafficking in the United States of America

spanish legislation and its treatment in costa rican jurisprudence

Section One: The offense of trafficking in persons in the Penal Code

English

Spain, which *was still experiencing* European return emigration at the beginning of the 1980s, has become a preferred destination for immigration coming mainly from Africa and Latin America and in recent years from Eastern European countries, both as a definitive destination and as a gateway and passageway to the rest of the Community. Despite its comparatively small volume, it has been *experienced in* a very accelerated way and with the added drama of deaths in the Strait of Gibraltar and elsewhere, which has made the phenomenon one of the biggest problems and challenges. Since then, the police measures that have been taken, the regularization processes, the different "immigration laws", have progressively become some of the most debated and polemic issues for the Spanish society.

In Spain, the phenomenon of irregular immigration is also relatively *new* and the State's response to this phenomenon has been accompanied in recent years by continuous legal reforms. The first "foreigners law" of 1985, which appeared as a text oriented primarily to the mere administrative regulation of the requirements for entry and stay in Spain, was repealed by the law of 2000 and subsequently reformed, as were the corresponding laws.

Regulations. These are administrative regulations governing the entry and stay of foreigners in Spain. Simultaneously, offenses related to irregular immigration are being introduced in the Penal Code; regulations that have also been modified in recent years.

The Spanish Penal Code and Trafficking in Persons

The first time that the Spanish Penal Code contemplated the conduct of illicit trafficking in persons was with the introduction of article 499 bis by Law number 44 of 1971, in a new chapter called "crimes against freedom and safety at work", which punished "anyone who traffics in any illegal way with labor or intervenes in fraudulent migrations"⁴³.

The 1995 Penal Code included the crime of illegal labor trafficking (article 312) and the crime of promoting or favoring clandestine immigration to Spain (article 313.1).

With Organic Law No. 4 of 2000, on the Rights and Freedoms of Foreigners in Spain and their Social Integration, a new title was introduced in the Penal Code, XV bis: "Crimes against the rights of foreign citizens", in which, through article 318 bis, illegal trafficking of persons was punished in general and the penalties were increased.

⁴³ Asociaci6n Algeciras Acoge (2010). :: <http://www.iin.oea.org/sim/cad/sim/pdf/mod2/trafico.pdf>.

[Consultation:7 January. 2010].

This article 318 bis, from its inception, raised a series of questions derived from its lack of systematic coordination with the administrative infractions contained in the law on foreigners.

Although it was strange the introduction of this title through such an anomalous procedure as an additional provision of a basically administrative law, it was necessary, since although the 1995 Penal Code, which had little to do with its approval, in its article 312 sanctioned the illegal trafficking of labor and in article 313 the promotion or favoring of clandestine immigration of workers to Spain, it did not regulate certain assumptions, such as cases in which people were illegally trafficked to Spain because of their age or other circumstances, certain cases were not regulated, such as, for example, cases in which persons were illegally trafficked who, due to their age or other circumstances, did not necessarily intend to work in Spain, or who could not prove that they were workers.

With the introduction of this title, the crime of illegal labor trafficking in Article 312 of the Penal Code was modified at the same time, increasing the penalty.

The aforementioned law was subsequently amended by Organic Law No. 8 of 2000, of December 22, 2000, because "during its validity, aspects were detected in which the reality of the migratory phenomenon exceeded the provisions of the law".⁴⁴

⁴⁴ Asociaci6n Algeciras Acoge (2010). s <http://www.iin.oea.org/sim/cad/sim/pdf/mod2/trafico.pdf>.
[Consultation:7 January. 2010).

The next reform of the criminal offense of illegal trafficking in persons in Spanish legislation was introduced by Organic Law No. 11 of 2003 on "Specific measures relating to citizen security, domestic violence and social integration of foreigners", which amends article 318 bis of the Penal Code; The justification for the amendment is the need to reform the criminal response to the new forms of crime that take advantage of the phenomenon of immigration to commit their crimes, so the amendment of articles 318 and 318 bis of the Criminal Code is intended to combat the illegal trafficking of persons, which prevents the integration of foreigners in the country, with this reform the penalties were significantly increased. This reform came into effect in the last months of 2003.

The new text contained a significant increase in the penalties in this regard, establishing that the illegal trafficking of persons, regardless of whether or not they are workers, is punishable by imprisonment of four to eight years. In order to effectively protect persons by preventing this type of conduct, the penalties are increased when the illegal trafficking, among other cases, endangers the life, health or integrity of persons, or when the victim is a minor or disabled.

Once again, the text of the provision was amended by Organic Law No. 13 of 2007, of November 19, 2007, for the extraterritorial prosecution of illegal trafficking or clandestine immigration of persons, as stated in its explanatory memorandum, so that the description of the criminal offense is not restricted to cases of trafficking in persons.

illegal or clandestine immigration is carried out from, in transit or with destination to Spain; they will also be criminal if they are carried out with destination to another country of the European Union.

Thus, there is already a relevant corpus iuris juridico-penal in Spain, in terms of foreigners in order to regulate a situation that was getting out of hand for the Spanish authorities, such as the illegal trafficking of persons, since previously only the trafficking of persons for labor purposes was regulated, which is why the assumption indicated by article 318 bis of the Penal Code, was evolving to respond to what was happening in the social reality, reasons that led the legislator to the constant modification of the mentioned article.

Analysis of Art. 318 bis of the Spanish Penal Code

Legal text:

Article 318 bis of the Penal Code:

- 1- Whoever, directly or indirectly, promotes, favors or facilitates the illegal traffic or clandestine immigration of persons from, in transit or with destination to Spain, or with destination to another country of the European Union, shall be punished with a prison sentence of four to eight years.
- 2- If the purpose of illegal trafficking or clandestine immigration is the sexual exploitation of persons, they shall be punished with five to ten years imprisonment.

- 3- Those who carry out the conducts described in any of the two previous paragraphs with profit motive or using violence, intimidation, deception or abusing a situation of superiority or special vulnerability of the victim, or being the victim of legal age or incapable or endangering the life, health or integrity of persons, shall be punished with the penalties in the upper half of their sentences.
- 4- In the same penalties of the previous section and in addition to the absolute disqualification of six to twelve years, shall be incurred by those who carry out the acts taking advantage of their position of authority, people of this or public official.
- 5- The penalties higher in degree than those provided for in paragraphs 1 to 4 of this article shall be imposed, in their respective cases, and special disqualification for profession, trade, industry or commerce for the time of the sentence, when the guilty party belongs to an organization or association, even of a transitory nature, dedicated to the performance of such activities.

In the case of the heads, administrators or managers of such organizations or associations, the upper half of the penalty shall be applied to them, which may be increased to the next higher degree.

In the cases provided for in this paragraph, the judicial authority may also decree one or more of the measures provided for in Article 129 of this Code.

6- The Courts, taking into account the seriousness of the act and its circumstances, the conditions of the guilty party and the purpose pursued by the latter, may impose a penalty one degree lower than the respectively indicated one.

The criminal conduct that is punished is that of promoting, favoring or facilitating, directly or indirectly, the illegal traffic or clandestine immigration of persons from, in transit or with destination to Spain or to another country of the European Union. The profit motive component is not required here. The basic type is the one indicated by the first clause of article 318 bis of the Penal Code.

For consummation it is not required that the victim has entered, exited or transited through Spanish territory: the conduct of promotion, favoring or facilitation is sufficient.

As for the taxpayer, only foreign citizens can be taxpayers.

Article 318 typifies a crime of mere activity. Although the type refers to persons in its plural meaning, it does not seem necessary for the activity to affect more than one person to be criminal. Thus, even if several persons are affected, we will be dealing with the existence of a single crime.

There is no unanimity in the doctrine regarding the legal right protected. Some authors maintain that the general protection of the fundamental rights and liberties of the foreigner is sought, to which it is objected that many of these rights (right to life, liberty, physical integrity, etc.) are already protected through the common types of crimes against persons in the Criminal Code, which are applied without discrimination.

on the basis of the nationality of the victim. Others are of the opinion that the State's migration policy is being protected, a State interest is being defended, such as the protection of migratory flows.

For its part, Spanish jurisprudence has stated that article 318 bis is especially aimed at the care and respect for the rights of foreigners and their dignity as human beings, preventing them from being treated as objects, clandestinely and for profit, with clear harm to their moral integrity. Thus, the interest of the State in the control of migratory flows already defended through administrative action only finds criminal protection if the rights of foreign citizens are seriously and negatively affected by the conduct, whether in a current and effective manner or at least in the face of a highly probable risk of concretion.

"The criminal conduct lists two types of conduct: illegal trafficking and clandestine immigration. The Spanish Attorney General's Office has considered that, following the nomenclature that inspires the United Nations instruments on the subject, the types of art. 318 bis cover two behaviors of very different gravity: the so-called smuggling of migrants, consisting of facilitating the illegal entry, transit or stay of persons in a country, and trafficking in persons or trafficking aimed at exploiting the migrant using means such as coercion, threat or abuse of a situation of need, or involving minors under 18 years of age, even without using the above-mentioned means."⁴⁵

⁴⁵ Virginia Mayordomo Rodrigo. El delito de Trafico Ilegal e inmigraci6n clandestina de personas, 1st Edition, 2008, Spain. Page 101

This regulation is the result of the confusion produced between two figures of such a different nature as human trafficking and illegal immigration. It is necessary to insist that while the former is designed to protect foreign citizens, the latter serves above all to reinforce the rules that limit their right to enter and reside in Spain or in any country of the European Union.⁴⁶

Clandestine immigration:

In view of the terms used in Article 318 bis, and given that they are not the same as those used in the various international texts analyzed, a distinction must first be made between illegal immigration and clandestine immigration. According to a grammatical or literal interpretation, clandestine is synonymous with "secret, hidden. It is generally applied to what is done or said secretly for fear of the law or to elude the law", it implies doing something "hiding from the authorities". And illegal is defined as that which is contrary to the law. (page 103)

Regarding the jurisprudence on what should be understood by illegal immigration, it has said the following:

Thus, in the Spanish Supreme Court Ruling number 2205/2002, dated January 30, 2003⁴⁷, it is considered as such that which is carried out outside of the administrative regulations governing the entry of foreigners into Spain.

⁴⁶ *ibidem*.

⁴⁷ Ruling 2205/2002 of the Spanish Supreme Court.

In Decision 739/2003 of the Spanish Supreme Court, dated May 14, 2003⁴⁸, it was stated that clandestine immigration will be: "facilitating the arrival of a person to Spanish territory in a secret, hidden, surreptitious or illegal manner", covering this punishable behavior to "the very fact of transportation, its organization or even the subsequent reception in Spain in connivance with those who participated or prepared the corresponding trip".

The non-jurisdictional plenary session of the Second Chamber of the Supreme Court, held on July 13, 2005, agreed to consider as constituting the crime of illegal immigration the fact of entering Spain as a tourist with the purpose of remaining there to work, in the case of persons who do not have a work and residence permit in Spain.

Virginia Mayordomo Rodrigo is inclined to consider as illegal immigration that which is carried out without subterfuge, in plain sight, without documents. And clandestine immigration, that which is carried out trying to circumvent the controls of the authorities, giving rise in those who favor it to a criminal offense.⁴⁹

Arrival traffic:

Before examining the various meanings of the term trafficking, what is less controversial is its status as illegal; it must take place outside the rules established for legitimate border crossings or in violation of those rules, which includes both clandestine border crossings and illegal border crossings.

⁴⁸ Ruling 739/2003 of the Spanish Supreme Court.

⁴⁹ Virginia Mayordomo Rodrigo. El delito de Trafico llegal e inmigraci6n clandestina de personas, 1a Edici6n, 2008, Espana Pag 107.

use of formulas authorizing transitory entry into the country (tourist visas, for example) for the purpose of permanence, circumventing or failing to comply with the administrative rules authorizing it the rules or failing to comply with administrative rules authorizing it under such conditions.⁵⁰

As for the term trafficking, most of the international texts to combat trafficking in persons or illegal population movements do not use it, being more common the reference to trafficking in persons or human beings as a concept opposed to illegal or clandestine immigration. Thus, its precision for the purposes of interpreting Article 318 bis is not simple due to the different meanings that the term trafficking can encompass in its legal use. Trafficking is considered to be "trade carried out irregularly" "to deal unduly in a certain thing"⁵¹ "to engage a person in trade or business, in particular, in an illegal or clandestine manner".⁵²

And trafficking comes from trabajar, comerciar, meaning "traffic or trade in human beings"⁵³. One of its meanings, white slavery means "trafficking in women who are engaged in prostitution".

⁵⁰ Virginia Mayordomo Rodrigo. El delito de Trafico Ilegal e inmigraci6n clandestina de personas, 1^a Edici6n, 2008, Spain p. 108.

⁵¹ Maria Moliner, Diccionario del uso del espanol, Madrid, 1998, p 1277. Cited by Virginia Mayordomo Rodrigo. El delito de Trafico Ilegal e inmigraci6n clandestina de personas, 1^a Edici6n, 2008, Spain, p 109.

⁵² Larousse, Gran Diccionario de la Lengua Espanola, Barcelona, 1196, p. 1736. Cited by Virginia Mayordomo Rodrigo. El delito de Trafico Ilegal e inmigraci6n clandestina de personas, 1st Edition, 2008, Spain, p. 109.

⁵³ Ibidem, page 109

As for what Spanish case law considers to be *illegal trafficking*, the Spanish Supreme Court's Decision No. 147, dated February 15, 2005, has been repeatedly cited. The lower court had qualified the act as constituting a crime against the rights of foreign citizens provided for in article 318 bis CP, applying the basic type, attenuated by paragraph 6. The case involved a municipal police officer who attempted to illegally introduce an undocumented foreign citizen into Spain, without any evidence of having received any amount of money in exchange.⁵⁴

Upon appeal, the Supreme Court considered that the meaning of the precept is aimed at punishing those who, in a more or less surreptitious manner or in an attempt to circumvent legal controls, introduce into Spain a person with whom they carry out an act of trafficking. Trafficking means to trade, to take advantage or to obtain a profit from this activity which can be simply transitory, occasional or permanent.

Since Article 318 bis also refers to conduct consisting of carrying out illegal trafficking, a distinction must be made between this behavior and trafficking. Trafficking is understood to mean trading illegally, taking advantage, obtaining profit illegally for oneself or for a third party. In the context of this precept, it refers to the act of transferring people from one place to another with the consequent non-compliance with the regulations on entry and stay of immigrants in Spanish territory; it has an implicit transnational component.

⁵⁴ Ruling 147/2005 of the Spanish Supreme Court.

Ueda Virginia Mayodormo Rodrigo considers that trafficking in persons constitutes a category of human trafficking in which human beings are degraded to the status of objects. They are traded in commercial chains, moved within or outside the country, and then at their destination, they are subjected to some type of exploitation that also entails an attack on their dignity. It is synonymous with slavery and the transnational component is not essential.

This act constitutes a crime of anticipated consummation insofar as the moment of completion of the offense is brought forward to the moment of initiation of the illegal trafficking. It is also a crime of mere activity that is consummated with the carrying out of recruitment, transportation, intermediation or any other activity that promotes or favors clandestine immigration or illegal trafficking, regardless of the result achieved.

As can be seen, the crime of illegal trafficking is distinguished from clandestine immigration, but despite this distinction, both conducts are punished according to the same criminal type.

Aggravation for the purpose of sexual exploitation

In Spanish legislation, the conduct of "trafficking in persons" is not regulated as a separate crime from "trafficking in persons", hence, in the regulation of the latter, conducts of one or the other are intermingled.

The law therefore equates the two concepts in this legislation.⁵⁵

As we can see in the norm in its subsection 2 which states. "If the purpose of illegal trafficking or clandestine immigration is the sexual exploitation of persons, they shall be punished with 5 to 10 years of imprisonment".

As for the specific reality of women trafficked for the purpose of sexual exploitation, these are women who have been recruited in their countries of origin by criminal organizations; intermediaries lure them by promising them substantial earnings for jobs that rarely have anything to do with prostitution. When they agree to their captors' proposals, the latter provide them with a plane ticket, sometimes a passport or visa and a certain amount of money to prove their status as tourists. Once they arrive at the airport, they are deprived of this money, their passports are withheld and they are forced to pay exorbitant sums of money to pay off the debt incurred, forcing them to engage in forced prostitution under a normally inhuman and degrading regime, i.e. locked up or controlled in all their movements, threatened in their persons and those of their families and beaten, as already mentioned in the first chapter, section two.

⁵⁵ El Delito de Trafico e Inmigrantes/ Rafael Gullock Vargas- 1³ ed.- San Jose, CR: Editorial Juridica Continental,2008. Page 39.

What is described affects various essential legal rights: sexual freedom due to the forced practice of prostitution to which the victims of these acts are subjected, freedom of will formation through the threats they receive, freedom of movement or kidnapping. The physical integrity due to the mistreatment to which they are subjected and even their patrimony if the abusive disbursement of money they must make to pay off the debt fixed by the organization is valued as a swindle.

In Spain, prior to the 1995 reform of the Penal Code, pimping, ruffianism and third party renting of rooms were criminalized in Spain. This reform contributed significantly to the development of the sex industry in Spain, mainly with the incorporation of immigrants. Organized criminal groups were able to take advantage of this reform, which decriminalized previously prosecutable conducts favoring prostitution, and a sex industry began to develop explosively.

Regarding the objective type contained in paragraph 2 of Article 318 bis of the Criminal Code, Ruling 651/2006 of the Spanish Supreme Court states that "it must be assumed that sexual exploitation must be understood to include, in addition to prostitution, other employment of immigrants for purposes of a sexual nature."⁵⁶

⁵⁶ Ruling 651/2006 of the Spanish Supreme Court.

The type is broadened, since it is no longer required that the exploitation be committed by means of violence, intimidation, or deception, or by abusing a situation of need or superiority or vulnerability of the victim.

The subjective type incorporates as an element the purpose of sexual exploitation by the active subject or a third party.

The subtypes of paragraphs 3, 4 and 5 of art. 318 bis are also applicable to trafficking for sexual purposes. However, the recording based on the profit motive must be excluded, as it is inherent to the purpose of this traffic, reflected in the reference to the term "exploit".⁵⁷

It should be noted that only foreigners, with the exclusion of citizens of the European Union and assimilated countries, can be subject to the crime typified in art. 318 bis. For the other cases, article 318 bis will be applicable.
188.1 CP.

Relationship between art 318 bis and art 313.1 Spanish CP

In the absence of protection for all foreigners regardless of their relationship with the labor market or prostitution, the criminal offense of Article 318 bis was created, since Article 188.2 of the Penal Code protects persons trafficked for the purpose of sexual exploitation, and Article 313.1 protects foreign workers. However, some of the conducts regulated in article 318 bis were punishable in another way, which has been generating problems.

⁵⁷ Attorney General's Office, Circular 2/2006.... p.34, quoted by Virginia Mayordomo Rodrigo. El delito de Trafico ilegal e inmigraci6n clandestina de personas, ¹⁸Edici6n, 2008, Spain, p. 143.

difficult to resolve⁵⁸, as has happened with some of the offenses contained in Title XV of the Penal Code, relating to crimes against workers' rights.

There have been overlaps between the criminal conduct provided for in Article 318 bis and the crime of promoting or favoring clandestine immigration of workers to Spain, contained in Article 313.1 of the Criminal Code.

In summary we can say that in Spain, the penal type of the crime of trafficking !legal and clandestine immigration of persons, has undergone over time a series of reforms, in order to respond to the social reality that in that country was taking place, however despite the various modifications that have been made, it is still not sufficiently clear and precise, since within the same type regulates trafficking in persons, This is defined by international protocols and conventions, which could eventually be taken as a basis for regulating trafficking as a separate criminal offense from illegal trafficking and clandestine immigration, so that it ceases to be only an aggravating circumstance of this type and the conduct is adequately prosecuted.

Section Two: Analysis of the Costa Rican jurisprudence in relation to the with Human Trafficking.

In this section, we will study the treatment granted by Costa Rican jurisprudence, particularly that of the Third Chamber, as to

⁵⁸ Rodrguez Montaiies, T., op.cit., pp. 17-37, cited by Virginia Mayordomo Rodrigo. El delito de Trafico llegal e inmigraci6n clandestina de personas, ¹³ Edici6n, 2008, Spain p. 200.

The crime of illicit trafficking in persons, the criminal offense of which is regulated in the Immigration and Foreigners Law.

With respect to jurisprudence, the Chamber has ruled on several appeals in cassation, in relation to the first offense under study.

In a resolution of April twenty-sixth, two thousand eight, of the Criminal Trial Court of the Second Judicial Circuit of Alajuela, the convicted R, F. and A. were acquitted. for the crime of infraction to the migration law in its modality of illicit traffic of persons committed to the detriment of the State, since the judges considered, in a majority position, that *the action is atypical* since it was demonstrated that the persons had entered Costa Rica hours before and it was later that the defendants picked them up for their transportation. This in the center of the town of Isla Chica, two kilometers from the border with Nicaragua. Therefore, the conduct is not the one described in the penal type, which indicates that the transportation is given for the entrance or exit of the country, since this was given hours after the entrance of the subjects to the national territory.

The representative of the Public Prosecutor's Office filed an appeal in cassation, since he considers that there was an erroneous interpretation and application of Article 245 of the Immigration and Foreigners Law, indicating that the Court considered the facts to be true but erroneously interpreted the applicable criminal offense and gave it dimensions beyond its own literal meaning and the restrictive interpretation required by our legal system. For the appellant, to interpret that the criminal offense is verified at the very moment

when the road is crossed is to be considered a crime.

The border line would lead us to the nonsense of establishing that the criminal law represses a conduct that territorially we would not be authorized to sanction, since a subject would be sanctioned for acts that occurred in Nicaragua. According to the Court, prior to entry, there must be an act of driving or transporting.

The Chamber partially accepted the appeal filed by the Public Prosecutor's Office and in this regard the Chamber stated the following:

"The sentencing Court, in a majority position, understood that the action is atypical since it has been demonstrated that the persons had entered Costa Rica hours before and it was later that the defendants picked them up for transportation. This was done in the center of the town of Isla Chica, two kilometers from the Nicaraguan border (folios 131 to 133). However, this is an erroneous reasoning, since the action of entering, according to the above, does not cease until all the police posts or checkpoints have been passed, inasmuch as, in any of these, continued access can be prohibited, as finally occurred in this case. What the complainant does not agree with is that the judges should have applied, then, paragraph 2) of Article 245 of the aforementioned article, since, although the act of transporting, for profit, immigrants who are outside the law, could mean their concealment, any interpretation is unnecessary since it is a conduct expressly prohibited.

by legal order. On this subject, this Chamber has had the

The Commission had the opportunity to pronounce, in resolution 2008-00115 of 9:45 a.m. on February 15, 2008, and, according to which, for the purpose of defining the concept of legal trafficking in persons, given the absence of domestic legislation, the Protocol against the Smuggling of Migrants by Land, Sea and Air, which complements the United Nations Convention against Transnational Organized Crime, approved by Law No. 8314 of

The Protocol was ratified by the Republic of Costa Rica through Executive Decree No. 31298 of July 14, 2003, published in La Gaceta No. 163 of August 26, 2003. Thus, Article 3 of the Protocol defines illicit trafficking in persons as "the facilitation of the entry of a person into a State Party of which said person is not a national or permanent resident for the purpose of obtaining, directly or indirectly, a financial or other material benefit". It is established that, in this type of assumptions, we find ourselves before a crime that is usually executed with the concurrence of several subjects, stationed in different territories, who seek the border crossing of persons, bypassing the migratory procedures of the country of destination, that is to say, it is a transnational/ organized crime. Therefore, it is not strange that there is a concurrence of wills, which although without prior notice, are presented successively to ensure the achievement of the unlawful result and, therefore, that the consummation of the crime may be achieved.

The amount of the product in question depends on the additional

administrative police checkpoints, located close to the border zone, which are precisely to monitor the passage of persons and detect those who fail to comply with the corresponding migratory procedures. In addition, with regard to the distinction between the offenses that concern us, it was understood that there is a difference in time and space with respect to the conducts that are sanctioned. The first paragraph of Article 245 of the aforementioned article penalizes those who, for the purpose of illegal trafficking in persons, drive or transport illegal persons to or from the country, that is to say, the agent's action is aimed at passing from one country to another, persons with the purpose of facilitating the entry or exit of illegal persons.

the exit of that Jugar, in an illegal manner. However, in the second
In the same article, there is a modification in the conduct and status of the immigrant person, since it punishes anyone who, for the purpose of illicit trafficking in persons, harbors, hides, conceals or maintains foreign persons who enter the country, that is to say, anyone who, for the purpose of trafficking in persons, harbors, conceals or maintains foreign persons who enter the country, that is to say,
does not bind the active subject to the action of entering the foreign country,
The active agent provides shelter, hides or conceals, for the purpose of their illegal entry or stay in the country, and the active agent provides shelter, hides or conceals, for the purpose of their illegal entry or stay in the country.
country. Another element that allows us to consider more clearly the

The difference between the two described conducts is that in the first clause, both the entry and exit actions are sanctioned, in the case of the second clause.

In both cases, the agent active from this territory facilitates the crossing of the border, either to enter or leave the country, or to enter the country illegally.

leaving the territory. But, in the second clause, only the harboring, concealment, concealment or permanence of foreigners who enter or remain illegally in the country is sanctioned, eliminating the sanction for the case of exit, since there would be no sanction in the case of exit, since there would be no sanction in the case of exit.

The foreigner is already in another country, since the foreigner is already located in another territory. This distinction makes a difference in time and space with respect to criminal prosecution.

On the other hand, the agent's purpose must be intrinsic to the conduct. This position remains fully valid in all its scope.

(underlining not from/ original)

Likewise, in sentence **No.** 127-07, issued at sixteen o'clock on August sixteenth, two thousand seven, the Criminal Trial Court of Guanacaste, Liberia Headquarters, indicated that the conduct of the accused was *atypical*, reason for which he was acquitted, even though it did fall under the assumptions established in Article 245 of the Immigration and Foreigners Law No. 8487.

In this case, it was discussed the fact that the accused lodged undocumented foreigners and charged them money for transporting them illegally in the province of Guanacaste, said illegal aliens entered the country with the help of another subject who was not the defendant in the case, with whom they had contact until they were in Costa Rican territory and he promised to transport them to Liberia; despite the facts, the court

⁵⁹ Third Chamber of the Supreme Court of Justice, Vote **No.** 471-2009 of sixteen o'clock in the afternoon, and

twenty-five minutes of March thirty-first, two thousand nine.

considered the conduct to be atypical, since the accused did not have the purpose of facilitating the entry of immigrants into the country.

In view of the court's decision and the fact that the defendant was acquitted, the representative of the Public Prosecutor's Office filed an appeal in cassation, alleging failure to apply Article 245(b) of the Immigration Law, considering that the judges made an erroneous assessment.

In this regard, the Chamber resolved as follows:

"In the case at hand, we are dealing with a crime that is usually executed with the concurrence of several subjects, stationed in different territories, who seek the border crossing of persons, bypassing the immigration procedures of the country of destination, i.e., it is a matter of transnational organized crime. In this order of ideas, it is not strange that there is a concurrence of wills, which although without prior notice, are presented in succession to ensure the achievement of/ the anti-judicial result. In this way, it must be considered that the consummation by the illegal immigrants of the irregular entry into the country depended on the fact that they also circumvented the checkpoints and controls of the police. administrative police, located close to the border zone, and The purpose of the project is precisely to monitor the passage of people and detect those who fail to comply with the corresponding immigration procedures".

"Recapitulating, according to the Court, the accused lodged in his house the foreigners who remained in the country illegally, and charged a sum of money to transfer them to Liberia, however, they consider that this fact is not a crime, since it does not have the purpose of facilitating the entry of immigrants to the country. However, taking again what is described in paragraphs a) and b) of numeral 245 of the Migration and Alien Law, it can be deduced that there is a difference with respect to the conducts that are sanctioned, in time and space. In the first paragraph, it punishes those who, with the purpose of trafficking in persons, or transporting or transporting them for the purpose of In other words, the agent's action is aimed at passing from one country to another, persons with the purpose of facilitating their entry or exit from that place, illegally. However, we note that in the second clause, there is a modification in the conduct and status of the immigrant, since it punishes whoever, for the purpose of illicit trafficking in persons, harbors, hides, conceals, harbors, harbors or conceals or maintain foreign persons entering the country, i.e., it does not link the active subject with the action of entering a foreign country, but rather refers to those foreign persons who The active agent provides lodging, conceals or covers up, for the purpose of their entry or stay in an unlawful manner/ at the pals. It is clear, as indicated by the trial court, that all of the The purpose of the conduct must be the illicit trafficking of persons.

Another element that makes it possible to consider more clearly the difference between the two types of conduct.

between the two described conducts, is that in the first clause, it is

The law punishes both the act of entry and exit of immigrants, in both cases the active agent from this territory facilitates the crossing of the border, either to enter or leave the territory. But, in the second clause, only the harboring, concealment, concealment or permanence of immigrants is sanctioned.

foreigners entering or staying illegally in the country,

The sanction for the case of deportation has been eliminated, since the foreigner is already in another territory and therefore has no jurisdiction to prosecute acts committed in another country. This distinction makes a difference in time and space with respect to criminal prosecution. On the other hand, as the a quo states, the purpose of the agent must be intrinsic to the conduct, and in this case it is demonstrated that the subject charged a sum of money, which included the lodging and transportation of the immigrants, who he knew, were in an irregular situation, and that they intended to evade the control posts. In this sense, the Protocol against the Smuggling of Migrants by Land, Sea and Air, in its article 3, paragraph a), considers within the conduct of facilitating the illegal entry of a person to a State, "with the purpose of obtaining, directly or indirectly, the following

indirectly, a financial or other benefit of an orderly nature material", a purpose that is accredited in the case file, on the part of the accused. In the present case, for the Court, the fact accused by the representative of the Public Prosecutor's Office, namely, "[...]"¹.

". In that fact the accused is accused that: "On September 24, 2006 the accused J. between three and four o'clock in the afternoon approximately contacted the undocumented Nicaraguans J. and C. in Penas Blancas on the border with Nicaragua. and knowing that they had entered the country illegally that day and had no permit to remain in Costa Rica, J. offered to take them to Liberia in exchange for forty-five thousand co/ones with the promise that he could circumvent the police checkpoints.[...]" (cfr. 105 vue/to and 106), does not constitute a crime, because he is not the one who introduced them to the country, ruling out the application of paragraph a) of numeral 245 cited; and because the accused did not have the purpose of facilitating the entry of immigrants to the country, since they were already within the national territory, eliminating, also, the possibility of framing this conduct in paragraph b) of said article. However, according to the analysis made of the two paragraphs of/ numeral 245 of repeated quotation, which was made a few lines back, the Court's derivation, to rule out the application of/ paragraph b), does not adjust to the descriptive and normative parameters of/ the criminal type in comment "60.

It is important to mention that many of the acquittals that occur are due to the erroneous interpretation and application of the law by the judges, who give the criminal type a limited scope.

⁶⁰ Third Chamber of the Supreme Court of Justice, Vote No. 2008-115 of nine o'clock forty-one minutes of February fifteenth, two thousand eight.

For example, in sentence 172-2007, of the Criminal Court of the First Judicial Circuit of Guanacaste of 4:30 p.m., October 12, 2007,

the case of some foreigners of Chinese nationality that were introduced to the country by unidentified persons, through a post not authorized by the General Direction of Migration and Foreigners, in March 2007, without specifying the exact date, later these foreigners were transported by the accused. The exact date was not specified, subsequently these foreigners were transported by the accused in a minibus to a place that could not be determined. March twenty-ninth, two thousand seven, at twenty-six hours at the entrance to Cuajiniquil, Guanacaste, the accused was detained by the police when he was traveling in the minibus from south to north, transporting the foreigners. In spite of the aforementioned facts, *the* court concluded that in order for the crime to be committed, it was necessary for the accused to have been arrested and detained by the police.

in article 245(b) of the Migration and Alien Affairs Law, was

The Public Prosecutor's Office believes that the accused must have covered up for the foreigners in order to facilitate their illegal entry into or exit from the country, a reasoning that violates the rules of sound criticism, for which reason it filed an appeal in cassation:

In this regard, the Chamber stated the following:

"The rec/amo is admissible for what will be said. In view of the challenged fa/lo, as well as the arguments presented by the prosecutor, it is concluded that the Court incurred in an erroneous assessment of article 245 of the Migration Law, which makes it

necessary to declare the nullity of the fa/lo. As can be seen from the fa/lo, the Court considered the following to be accredited: "1.

On March twenty-ninth, two thousand seven, the accused E, in the minibus license plate PB 1069 Toyota Hiace, transported C, L, L, L, G, L, L, L, L, C, C, C. and L, all immigrants, to a place that has not been determined. On March twenty-ninth, two thousand seven, at twenty-two o'clock at the entrance to Cuajiniqui/, Guanacaste, the accused E. was detained by the police, when he was traveling in the minibus license plate PB 1069, with direction from south to north, transporting C, L, L, L, L, G, L, L, L, C, C. and L." (ctr. folio 184). In this regard, the trial court states: "[. ...] And in this sense, the representative of the Public Prosecutor's Office himself has pointed out in his arguments that none of the accused facts (sic) were intended to be included in this clause of Article 245, so suffice it to say that, having reviewed the indictment, the accused is not actually accused of having transported or led these persons of Chinese nationality to enter our country or to leave it. The point under discussion in this particular matter is in relation to paragraph b) of Article 245 of the aforementioned Law. In that provision, the criminal act described in this norm is to harbor, conceal or cover up, and gives us two assumptions, namely: Whoever hides, harbors or conceals foreign persons who enter the country; and the second assumption given by the law is whoever hides, harbors or conceals persons who remain illegally in the country. Now, the rule is also clear that, any of the assumptions that we have mentioned so far must be for the purpose of illicit trafficking in persons. In other words, it is not enough to comply with

the

elements of the criminal type that a person hides, lodges or harbors a foreigner who enters the country or who illegally remains in our country, but those actions must be for the purpose of illicit trafficking in persons. Therefore, it is necessary to define what the norm refers to with this expression. If we look in the Migration and Foreigners Law, we see that there is no definition of illicit trafficking of persons, in fact, what according to our legislation is considered illicit trafficking of persons is precisely described in article 245 of the Migration Law [...] we see that by means of Law 8314 of September 16, 2002, the Legislative Assembly approved the Protocol against the Smuggling of Migrants by Land, Sea and Air, which complements the United Nations Convention against Transnational Organized Crime. Article 3(a) of the above-mentioned international instrument defines what is to be understood by smuggling of persons. (a) 'Smuggling of migrants' means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident. Therefore, on the understanding that smuggling of persons has been defined as the facilitation of the illegal entry of a person into a State of/which such person is not a national or permanent resident for the purpose of obtaining, directly or indirectly, a financial or other material benefit, we should

to conclude that, only the crime typified in paragraph b) of/ article 245 of the Migration and Foreigners Law exists when the active subject lodges, hides or conceals foreign persons who enter the country, or when he lodges, hides or conceals foreign persons who remain illegally in the country, but in both cases those actions must be directed to a certain end, which consists of facilitating the entry or exit of/ pals illegally (that is, without complying with the migratory requirements)[...] In accordance with the factual framework, as well as the acquittal conclusion reached by the Court, the following considerations must be made. First, Article 245 of the Immigration and Foreigners Law establishes: "Artículo 245.-

A prison sentence of two to six years shall be imposed on anyone who: a)- For the purpose of illicit trafficking, drives or transports persons to enter or leave the country through places not authorized by the General Directorate, evading the established migratory restrictions or using false information or documents. b)-. To whoever, for the purpose of illicit trafficking of persons, a/oje, hides or conceals foreign persons who enter the country or remain illegally in it. The penalty established in this article shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes". According to this numeral and to what is consigned in the fa/lo, the judges considered that the accused acts were atypical, because they did not involve minors in the commission of the crime.

specifically attribute to the accused having transported or led illegal Chinese immigrants to enter or leave our country (folios 191 and 192). They arrive at this conclusion, resorting to the definition of/ the concept of "for the purpose of trafficking in persons" which Jo does not contain in the Migration Law itself, but which is expressed in Article 3 (a) of/ the Protocol mentioned in the judgment, to say therefore, that the content of/ subsection b of/ numeral 245, must be understood as long as the verbs of/ the type are adjusted to the purpose of facilitating the entry or exit of/ pals in an irregular manner, seen as a concrete action that must also be executed by the active subject. However, such/ conclusion is incorrect, since the concept to which

The term "illicit trafficking of persons" is in fact already contained in paragraph a, confusing the postulates of both paragraphs. From a reading of the norm in question, it is evident that our

/The legislator established those cases in which, apart from punishing the concrete action of driving or transporting illegal persons to enter or leave the national territory, by evading the established immigration controls, or using false documents (paragraph a), it also penalizes those situations in which, while illegally inside the country, the perpetrator tries to lodge, hide or cover up illegal immigrants, who have already evaded the immigration controls.

the control, in order to ensure its illegal permanence (subparagraph b), without requiring, for this second assumption, that the

The purpose is to facilitate the illegal entry or exit of the offenders, an aspect that if it were required - as the Court does - would be a contradiction in terms, given that precisely such purpose is stipulated in the first clause. What is contained in subsection b is to punish any person who, knowing that there are persons who have already entered the country illegally, or who remain in the country under that status, even if he/she has not facilitated their entry or exit, they try to maintain said illegal permanence, through any of the actions indicated by the verbs contained in said subsection, as the prosecutor makes it clear, when stating that the verbs of subsection b, "are applied when the persons are already in the country" (ctr. folio 170). The norm in question must be seen in conjunction with what is established in numeral 1 of the Immigration Law: "The present law shall regulate the entry of Costa Rican and foreign persons to the territory of the Republic, and the exit from it, as well as the permanence of foreign persons in the country". (emphasis added). It is clear as indicated by the same Court in its ruling, that all the conducts must have as a precise purpose, the illicit trafficking of persons, but obviously the distinction that the same norm contains must be made, inasmuch as said purpose is fulfilled under the assumptions already explained. In addition, the criminal content of both paragraphs is duly differentiated, although they complement each other, since it is true that as to the content of paragraph b), what is being considered as a criminal offense is that it is a crime that has a specific purpose.

The only stipulation is to "harbor," "ocu/te," or "harbor" the persons

undocumented, who entered or were in the country illegally, without the requirement of the norm, which the a quo in its erroneous interpretation is based on, that is to say, that such action is carried out with the determined purpose of facilitating the entry of such persons from the country illegally. In the case in question, it has been proven that the Chinese nationals entered the country illegally, and that in that capacity they remained in our country, and that in the evening hours of March 29, 2007, they were transferred by the accused E, heading south to north, So that upon passing through the post of Cuajiniquil, Guanacaste and upon being required by the authorities of the Public Force stationed at the post of/ Comando Norte, the respective documentation, it is that they realize that these are persons who are illegally in terms of their migratory status, The accused is accused of transporting undocumented persons in order to cover up their illegal stay in our country, without it being required that he carry out such action with the determined purpose of facilitating the entry of these persons illegally or even their eventual departure, The Court's assessment is based, as the appellant indicates, on what is stated in the challenged norm, since it does not matter in the second case what the destination of these foreigners will be, since it is sufficient to demonstrate that they had already entered or remained illegally in our country, as has been proved in this case. Based on the a quo's erroneous interpretation of/ subsection b of/

The Court acquitted E , because it considered that the Public Prosecutor's Office did not refer that the accused had transported the undocumented immigrants with the purpose of taking them out of the country, nor that the "concealment" Jo made for that purpose, but that on the contrary, this last action was made by the accused so that the immigrants would remain illegally in the country (cf. folio 195), for which reason they considered that the accused act was atypical; However, this last conclusion is Jo precisely what the cited numeral sanctions, that is to say, that the action of concealment or concealment that according to the accusation, the accused intended to carry out, Jo was with the purpose of procuring the illegal permanence of the immigrants in our country, always in compliance with the purpose of maintaining the illicit traffic of persons, thus incurring in contradiction with the cited norm. The Court, contrary to what Jo expresses in his fa/lo, does incur in an error regarding the analysis of the type, wrongly attributing to the Public Prosecutor's Office omissions and deficiencies in its accusation, because it did not require important elements for the conduct attributed to the accused to fall within the criminal type, The prosecutor, with full knowledge of the content of numeral 245, attributed to the accused the concrete actions that, in his opinion, are in accordance with said norm." 61

⁶¹ Third Chamber of the Supreme Court of Justice, Vote No. 931-2009 of nine hours and forty minutes of July twenty-fourth, two thousand nine.

After studying the jurisprudence of the Third Chamber, it is important to indicate that very little has been resolved by this Chamber in this regard, since when the Migration and Foreigners Law number 8487 entered into force until mid-2006, few cases were resolved, since it takes a long time in the preparatory stage, because they are cases of organized crime, so most cases were resolved in two thousand eight and the appeals were resolved in the year two thousand nine.

It is worth mentioning that the vast majority of the appeals were filed by the representatives of the Public Prosecutor's Office, since the judges did not adequately apply the criminal offense, in several cases the conducts did fit the type, but the judges considered that the conduct was atypical, acquitting the defendants of the crime of illicit trafficking in persons, a conduct that is quite reproachful and goes against human rights.

CONCLUSIONS

Human trafficking, like other crimes such as drug and arms trafficking, moves millions of dollars per year, since it is a highly lucrative activity in which trafficked persons are seen as mere objects of commerce.

It is important to point out that the objective of human smuggling is the illegal entry or exit of immigrants, while the purpose of trafficking is the exploitation of the person, of various kinds; However, there can be an intertwining between the two crimes, since in many cases the person who pays to enter from one country to another illegally, while at his destination, is stripped of his documents, becomes a victim of trafficking and is exploited by those who at one time favored his entry, This happens in some cases because the traffickers, after charging a specific amount for the entry and exit of the country, allege that the cost incurred for the transfer is higher, so that the person is forced to perform acts she does not want, including suffering some kind of exploitation, in order to pay off "their debt".

The distinction between both crimes is fundamental, the type of investigation carried out by the Public Prosecutor's Office, which is in charge of prosecuting the crimes, will depend on this distinction, not only because of the investigation that is carried out, but also because human trafficking and human smuggling are not known by the same prosecutor's office, in the case of human smuggling, it will be known by the Deputy Prosecutor's Office against Crime.

Organized, specialized prosecutor's office in organized crime and trafficking goes to

Another reason why it is important to make a true distinction between the different crimes is that in cases of trafficking in persons, the victims of the crime require specialized attention, due to the exploitation to which they were subjected, and this attention will be provided by specialists such as a psychologist or social worker; Another important element of the distinction of crimes is to avoid re-victimization in court, which occurs mostly in cases of trafficking in persons, since in cases of trafficking, the person is not subjected to exploitation.

We can say with certainty that the Public Prosecutor's Office does everything possible to prosecute in the best way possible and to obtain a conviction of the persons involved in cases of organized crime such as cases of illicit trafficking in persons, the crime that concerns us in this investigation, Despite this, it is extremely difficult to get to the root of the problem, which are the ringleaders of the networks and in most cases they direct the entire network from another country, so our country only functions as a transit country for people who are transferred to other places, despite this, every effort is made to prosecute and establish responsibilities as the case may be; with the same purpose were created important !For the same purpose, important laws were created, such as Law No. 8754, which is the Law Against Organized Crime and the Law for the Protection of Victims, Witnesses and other participants in the criminal process, Law No. 8720, which responds to legal gaps in relation to organized crime and victim assistance.

It is worth mentioning that as part of the legislator's response to the different social situations and in view of what is happening on a daily basis, law number 8764 is currently being approved, which will regulate in its article 249, what is related to the illicit traffic of persons, thus modifying what is currently regulated in law number 8487, in its article 245, this reform to the current Migration Law, introduces important changes, for example, three new governing verbs are included in the norm, This amendment to the current Migration Law introduces important changes, for example, three new governing verbs are included in the law, which are: Promote, promise or facilitate. This means that the crime will be consummated in the event that the trafficker promotes, promises or facilitates the obtaining of false documents for the person to evade immigration controls, which is not currently regulated.

This responds to the need to punish conducts that will always be behind a crime of this type, since this type of crime is generally the product of a series of conducts that move in a chain, and that are carried out by a criminal organization in which there will be a division of tasks, it is common that there are people who are responsible for generating the documents that will be given to the person to be trafficked, documents that may be false or altered as indicated in the new rule; The introduction of these new governing verbs is necessary and appropriate in order not to let escape conducts that are committed in order to carry out the illicit act.

The new regulation also includes several aggravating circumstances: the fact that the migrant is a minor, when the life or health of the migrant is endangered due to the conditions in which the migrant is executed, or when

the migrant's life or health is endangered due to the conditions in which he/she is executed.

In order to give a wider scope to the law, which precisely regulates situations that almost always occur in cases of human trafficking, such as endangering the life or health of the migrant, among other things, these aggravating circumstances respond to the need for an adequate regulation of the criminal offense.

It also seeks, through one of its aggravating factors, to combat one of the main activities of organized crime, such as human trafficking.

The reform is aimed at modifying our legislation in order to bring it up to the level of very modern legislations that adequately regulate the matter, such is the case of the Spanish legislation, which has undergone a series of constant transformations in recent years, due to the migratory flow that it receives illegally every year, Despite the fact that the law of this country is quite correct in relation to the trafficking of persons, it includes within the same criminal type the figure of trafficking, without establishing a distinction, and also makes a distinction between illegal trafficking and clandestine immigration.

Throughout the work and after having made the respective analysis it can be said that the hypothesis: "the current regulation of the figure of illicit trafficking of people is insufficient to adequately prosecute the phenomenon.

The "criminal offense and requires reforms" that was proposed in the preliminary draft of the investigation was demonstrated by means of the arguments that were presented in relation to the reform that the criminal offense of human smuggling will undergo as of March; this was achieved through the study of the background, aggravating factors and the norm in general.

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ANNEXES 1

JURISPRUDENCE OF THE THIRD CHAMBER CONCERNING ILLICIT TRAFFICKING OF PERSONS

Res: 2009-000471

THIRD CHAMBER OF THE SUPREME COURT OF JUSTICE. San Jose, at sixteen hours and twenty-five minutes of March thirty-first, two thousand nine.

Appeal in cassation filed in the present case against R, license number 7-110-984, single, merchant, neighbor of San Juan de Lajas in front of the first entrance, F, license number 2-447-059, single, farmer, neighbor of Los Chiles 75 meters south of Aguila de Plata, and against A , license No 2-469-375, single, housewife, neighbor of San Juan de Lajas, at the same address of R, for the crime of violation of the Migration Law in its modality of Illegal Trafficking of Persons, committed to the detriment of the State. Magistrates Magda Pereira Villalobos, President a.i., presided over the appeal, Jesus Alberto Ramirez Quiros, Carlos Chinchilla Sandi, Jenny Quiros Camacho and Carlos Manuel Estrada Navas, the last two as Alternate Judges. Damian Alfaro Carvajal also intervened in this instance in his capacity as defense counsel for the defendants. The representative of the Public Prosecutor's Office appeared.

Resulting:

1. That by means of sentence No. 107-2008, issued at fourteen o'clock on April twenty-sixth, two thousand eight, the Criminal Trial Court of the Second Judicial Circuit of Alajuela. Therefore: "WHEREFORE: In accordance with the above, cited laws and article 39 of the Political Constitution; 1, 30, 31, 45, 71, of the Penal Code; 9, 360, 361, 363, 364, 365, 366 of the Penal Procedural Code, 245 of the Migration and Foreigners Law; this Tribunal by the votes cast and by majority acquits the accused R, AND F., of all penalties and responsibility for the crime of INFRACTION OF THE CRIME OF INFRINGEMENT of the Criminal Code of the Second Judicial Circuit of Alajuela. for the crime of INFRINGEMENT TO THE MIGRATION LAW IN ITS MODALITY OF ILLEGAL TRAFFICKING OF

The judge Rolando Salas Perez saves his vote and declares them responsible for the crime of violation of the Migration Law, in its modality of illegal trafficking of persons and imposes to each of them a prison sentence of two years, The benefit of conditional execution was granted to each of them for the term of three years, under the warning that in case of committing a new crime punishable with a penalty of six months or more, it will be revoked. The confiscation of the seized goods is rejected, and the return of the seized vehicles to those who prove to be their legitimate owners is ordered. The present case is resolved without special condemnation in costs. The costs of the proceeding shall be borne by the State. By means of reading, be notified"(sic). ROLANDO SALAS PEREZ. ANTONIO BARRANTES TORRES. HUMBERTO RODRIGUEZ MONTOYA.

2. That against the above pronouncement, Mr. Minor Chacon

Calderon in his capacity as representative of the Public Prosecutor's Office,

appeals on the grounds of form. It requests that the case be remanded for a new trial.

3. After the respective deliberation, the Chamber considered the issues raised in the appeal.

4. What at the procedures can be found at have observed the relevant legal requirements have been observed.

Magistrate Pereira Villalobos reports; and,

Whereas:

I. Since the appeal filed by Minor Chacon Calderon, representative of the Public Prosecutor's Office, against sentence 107-2008, issued by the Criminal Court of the Second Judicial Circuit of Alajuela, Ciudad Quesada, at 2:00 p.m., on April 22, 2008, which acquitted the convicted R, F. and A. for the crime of violation of the migration law in its modality of illicit trafficking of persons committed to the detriment of the State, is being heard. and A. for the crime of infraction to the migration law in its modality of illicit traffic of persons committed to the detriment of the State.

II. In the first ground of cassation, the appellant alleges erroneous interpretation and application of Article 245 of the Immigration and Foreigners Law. He argues that the Court considered the facts to be true but erroneously interpreted the applicable criminal offense and gave it dimensions beyond its own wording and the restrictive interpretation required by Article 245

of the Migration and Alien Law.

our legal system. It was understood that for the application of this paragraph

In this case, it was determined that the transportation provided to the illegal Nicaraguans took place hours after they had entered the national territory. For the plaintiff, to interpret that the criminal offense is verified at the very moment in which the border line is crossed would lead us to the nonsense of establishing that the criminal law represses a conduct that territorially we would not be authorized to sanction, since a subject would be sanctioned for events that took place in Nicaragua. According to the Court, prior to entry, there must be an act of driving or transporting. Similarly, in an inexplicable manner, the judges ruled out the application of the second paragraph of the same rule. It was understood that the verbs to harbor, conceal or cover up were not expressly included in the indictment, which also constitutes an erroneous application that generates impunity. The act of taking illegal persons through an area not authorized by the Directorate of Immigration and Foreigners implies hiding or concealing, without these verbs being necessary in the list of facts. The

complaint is declared partially admissible. For an adequate analysis of the point, we must necessarily start from the enunciation of the criminal type under study, namely, Article 245 of the Immigration and Foreigners Law, Law No. 8487 of 22

November 2005, published in La Gaceta No. 239 of December 12, 2005.

a. *For the purpose of illicit trafficking in persons, drives or transports persons to enter or leave the country through places not authorized by the General Directorate, evading established immigration controls or using false information or documents.* b. *Whoever, for the purpose of illicit trafficking in persons, harbors or transports persons to or from the country, through places not authorized by the*

General Directorate, evading established immigration controls or using false information or documents, shall be sentenced to two to six years' imprisonment,

conceals or covers up foreign persons who enter or illegally remain in the country. The penalty established in this article shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes". Even considering the literal wording alone, it is evident that the rule does not refer to facilitating the passage of illegal immigrants only through the border zone of the country, in the absence of express mention, as the Court of Appeals misunderstood it. On the other hand, the verb *"ingresar"* is synonymous with *"entrar"*, which corresponds, among other meanings, to: *"{...} to go or pass from the outside in, [. ...] to pass through one part to enter another [. ...]"* (Diccionario de la Lengua Espanola. Real Academia Espanola, Madrid, Vigesima Segunda Edici6n, 2001, p.631). This necessarily leads us to understand that we are dealing with transportation for illegal entry into the country, where, as we know, there are several migratory posts in the entire area surrounding the borders, precisely because people can pass through other points of the dividing line where there is no migratory control office, as is the case in Igico. Hence, the same rule provides, in the case of the transport of illegal persons, that their passage is facilitated through places not authorized by the immigration authority. The sentencing Court, in a majority position, understood that the action is atypical since it has been demonstrated that the persons had entered Costa Rica hours before and that the defendants picked them up for transportation. This in the center of the town of Isla Chica, two kilometers from the border with Nicaragua (folio 131 to 133). However, this is an erroneous reasoning since the action of entering, according to what has been stated, does not cease until all the police posts or checkpoints have been passed, inasmuch as, in

In the case of any of these, access may be prohibited to continue with the access, as finally occurred in this case. The complainant is not correct in that the Judges should have applied, then, paragraph 2) of Article 245 of the aforementioned article, since, although the action of transporting, for profit, immigrants who are outside the law, could mean their concealment, any interpretation is unnecessary since it is a conduct expressly prohibited by the legal system. On the subject, this Chamber has had the opportunity to pronounce, in resolution 2008- 00115, of 9:45 a.m. on February 15, 2008:45 hours of February 15, 2008, and, according to which, for the purpose of defining the concept of illegal trafficking of persons, given the absence of domestic legislation, the Protocol against the Smuggling of Migrants by Land, Sea and Air, which complements the United Nations Convention against Transnational Organized Crime, approved by Law No. 8314 of March 8, 2002, ratified *by the Republic of Costa Rica through Executive Decree No. 31298 of July 14, 2003, published in La Gaceta No. 163 of August 26, 2003.* Thus, Article 3 of the Protocol defines illicit trafficking in persons as *"the facilitation of the legal entry of a person into a State Party of which such person is not a national or permanent resident for the purpose of obtaining, directly or indirectly, a financial or other material benefit"*. It was established that, in this type of case, we are dealing with a crime that is usually committed with the concurrence of several individuals, stationed in different territories, who seek the border crossing of persons, bypassing the immigration procedures of the country of destination, that is to say, it is a matter of transnational organized crime. Hence, it is not surprising that there are

a concurrence of wills, which although without prior notice, are presented successively to ensure the achievement of the unlawful result and, therefore, that the consummation of the offense in question depends on the circumvention of the checkpoints and controls of the administrative police, located near the border zone, which are precisely to monitor the passage of persons and detect those who fail to comply with the corresponding immigration procedures. In addition, with respect to the distinction between the offenses in question, it was understood that there is a difference in time and space with respect to the conducts that are sanctioned. The first section of Article 245 of the aforementioned article punishes those who, for purposes of illegal trafficking in persons, drive or transport illegal persons into or out of the country, that is to say, the agent's action is aimed at passing from one country to another, persons with the purpose of facilitating their illegal entry into or exit from that place. However, in the second clause or section of the same article, there is a modification in the conduct and the status of the immigrant person, since it punishes whoever, for purposes of illegal trafficking of persons, lodges, hides, conceals or maintains foreign persons who enter the country, In other words, it does not link the active subject with the action of entering a foreigner, but rather refers to those foreigners who enter the country and the active agent provides lodging, hides or conceals for the purpose of their illegal entry or stay in the country. Another element that allows to consider with greater clarity the difference between the two described conducts is that in the first clause, both the illegal entry and exit of immigrants is punished, in both cases the active agent from this territory facilitates the passage through the border, either to enter or leave the territory.

But, in the second clause, only the lodging, concealment, concealment or permanence of foreigners who illegally enter or remain in the country is sanctioned, eliminating the sanction for the case of egress, since there would be no competence to know facts executed in another country, since the foreigner is already in another territory. This distinction makes a difference in time and space with respect to criminal prosecution. On the other hand, the purpose of the agent must be intrinsic to the conduct. This position remains fully valid in all its scope. Thus, it is ordered the nullity of the sentence and the debate that preceded it. The matter is remanded so that, by means of a new composition of the Court, a new trial may be held. As unnecessary, no pronouncement is made as to the second ground of cassation filed.

Therefore:

The cassation appeal of the representative of the Public Prosecutor's Office is declared admissible. The nullity of the sentence and the debate that preceded it is ordered, as well as the resubmission of the case so that, by means of a new composition of the Court, a new trial may be held. As unnecessary, no pronouncement is made as to the second ground of cassation filed. NOTIFIED.

Magda Pereira V.

President a. i. Jesus Ramirez Q.

Carlos Chinchilla S. Jenny Quiros C.

Carlos Manuel Estrada N. (Alternate Mag.

NOTE FROM MAGISTRATES QUIROS CAMACHO AND ESTRADA NAVAS

The undersigned magistrates join the vote expressed in the operative part of this resolution, but we clarify that the conduct attributed to the accused is not framed within paragraph a) of numeral 245 of the Migration and Foreigners Law, but in paragraph a) of numeral 245 of the Migration and Foreigners Law, but in paragraph a) of numeral 245 of the Migration and Foreigners Law.

b) of the same numeral.

In effect, it is accused that on December 11, 2006 at approximately nine o'clock at night, officers of the Public Force of Los Chiles intercepted in the sector of Coquital de los Chiles, specifically in front of the Bar El Gancho, the vehicle license plate 277903 which was driven by the defendant R. In this vehicle the defendant was transporting three undocumented Nicaraguans who had entered Costa Rica illegally hours before, which she was taking to Naranjo de Alajuela, helping them to evade the established migratory controls. The vehicle license plate 409469 was intercepted, which was being driven by the accused F. who was traveling accompanied by the accused A. In this vehicle the accused were transporting nine undocumented Nicaraguans, who had entered Costa Rica illegally hours before and were being taken to Naranjo de Alajuela. In this way, the defendants H and D. also intended to help

The foreigners to evade the established migratory controls, taking them through an area not authorized by the General Directorate of Migration and Foreigners.

For its part, section 245 of the aforementioned Law states:

"Article 245. shall be punished by imprisonment from two to six years.

years to whom:

a. With the purpose of illicit traffic, drives or transports persons to enter or leave the country through places not authorized by the General Directorate, evading the established migratory controls or using false information or documents.

b. Whoever, for the purpose of illicit trafficking in persons, harbors, hides or conceals foreign persons who enter the country or remain illegally in the country.

The penalty established in this article shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes. "

From the reading of the transcribed numeral, it is very clear that the charge in the case under study does not consist of driving or transporting persons into or out of the country, as required by paragraph a), since the Nicaraguans had already been in Costa Rica for a few hours when they were detained, as described in the indictment.

It is clear from the indictment that the conduct under debate falls within the budgets of paragraph b) because it does not attribute to the accused the entry of the Nicaraguans into the country, but rather that once inside the country, the accused proceeded to cover up for them, helping them to evade the established immigration controls and taking them through an area not authorized by the General Directorate of Immigration and Foreigners.

Jenny Quiros C. (Substitute Mag. Carlos Manuel Estrada N.
(Alternate Mag.

Res: 2009 -00931

**THIRD CHAMBER OF THE SUPREME COURT OF JUSTICE. San Jose, at
nine hours and forty minutes of July twenty-fourth, two thousand nine.**

Appeal brought in the present case against E
Magistrates Magda Pereira Villalobos, President a.i.; Jesus Alberto Ramirez Quiros, Alfonso Chaves Ramirez, Carlos Chinchilla Sandf and Lilliana Garcfa Vargas, the latter as Alternate Magistrate, intervened in the decision of the appeal. In addition, Mr. Roy Ching Leston, as private defense counsel for the accused. The representative of the Public Prosecutor's Office, Ricardo Quiros Vargas, was also present.

Resulting:

1.-By sentence No. 172-07 of sixteen hours and thirty minutes of twelve (sic), the Criminal Trial Court of Guanacaste, Liberia Headquarters, resolved: "WHEREFORE: In accordance with the above, Articles 39 and 41 of the Political Constitution, Articles 1, 30, 31, 45 and of the Penal Code, Articles 1, 6, 141, 142, 144, 184, 184, 360, 361, 363, 364, 365 and 366 of the Procedural Code. The majority of Judges SABORiO JENKINS and CARBALLO LOPEZ acquitted E , for the crime of ILLICIT TRAFFICKING OF PERSONS that had been attributed to him to the detriment of MIGRATION LAW. The return of the vehicle license plate PB 1069 to its rightful owner is ordered. Judge Salazar Navas, saves the vote and in its place declares Mr. E , responsible for the crime of ILLEGAL TRAFFICKING OF PERSONS and as such imposes a sentence of THREE YEARS IN PRISON. It does not grant the benefit of conditional execution of the sentence and orders the confiscation of the vehicle in favor of the State. The costs of the criminal proceeding are to be paid by the State. BY READING THIS NOTIFIED. (sic). Fs. JOSE ANGEL SALAZAR

NAVASRAFAELSABORIO

JENKINSANAC. CARBALLO LOPEZ."

Ricardo Quiros Vargas, representative of the Public Prosecutor's Office, filed a cassation appeal against the above pronouncement.

3.- Once the respective deliberation was completed, the Chamber began to hear the appeal.

4.- The pertinent legal requirements have been observed in the procedures.

Magistrate Chaves Ramirez reports; and,

Whereas:

1.- Appeal filed by Lie. Ricardo Quiros Vargas, Prosecutor, against sentence number 172-2007, of the Criminal Court of the First Judicial Circuit of Guanacaste, seat of Liberia, of 4:30 p.m., October 12, 2007. Reason for the form: As the only allegation, the appellant accuses erroneous application of article 245 paragraph b) of the Immigration and Foreigners Law, since the Court, in its criteria, concluded that in order to configure the crime typified in said paragraph, it is necessary that the accused has covered up the foreigners with the purpose of facilitating the entry or exit of the country, in an illegal manner, reasoning that in its opinion, violates the rules of sound criticism. He requests that the sentence be annulled and a retrial be ordered. The claim is well founded for what will be said. In view of the challenged judgment, as well as the arguments presented by the prosecutor, it is concluded that the Court incurred in an erroneous evaluation of article 245 of the Immigration Law, which makes it necessary to declare the nullity of the judgment. In the present case, the Public Prosecutor's Office accused the accused E. of the following facts: "1. Without determining the exact date, but in the month of March two thousand seven, the undocumented Chinese nationals C, L, L, L, G, L, L, L, L, C, C, C. and L, (all of whom, according to the investigations carried out, are from Colombia) who were staying in a house whose location could not be ascertained. 2. On March 29th of the year two thousand and two thousand seven, at approximately 8:00 p.m., the accused E , appeared at

The offenders were transported to that site, not yet geographically located, in the minibus license plate PB 1069, Toyota Hiace, with the intention of transporting the offenders C, L, L, L, G, L, L, L, C, C. and L. for the purpose of illicit trafficking in persons. Said transportation was carried out by covering up the illegal stay of the offended persons in our country, knowing that they were undocumented, taking advantage of the late hours of the night, and in this way, the accused E. managed that C, L, L, L, G, L, L, L, C, C. and L, remained illegally in our country. 3. That same day at 10:50 p.m. at the entrance of Cuajiniquil, Guanacaste, the accused E. was detained by the authorities of the Public Force of the Northern Command, when he was traveling in the minibus with license plates PB 1069, with direction from south to north.

transporting the offended C, L, L, L, G, L, L, L, C, C. and L. 4. The accused E. knowingly used as an instrument for the commission of the crime the vehicle license plate PB 1069, Toyota Hiace style, year 2001, green color, which is his property, as an instrument for the commission of the crime". (c fr. folios 43 to 45). As follows

of the judgment, the Court considered the following to be accredited: " 1.

On March twenty-ninth of the year two thousand seven, the accused E, in the minibus license plate PB 1069 Toyota Hiace, transported C, L, L, L, G, L, L, L, L, C, C. and L, all illegal immigrants, to a place that has not been determined. On March twenty-ninth, two thousand seven, at twenty-six hours at the entrance to Cuajiniquil, Guanacaste, the accused E. was detained by the police when he was traveling in the minibus license plate PB 1069, heading from south to north, transporting C, L, L, L, L, G, L, L, L, L, C, C. and L." (ctr. folio 184). In this regard, the judgment of merit states: "[...]. And in this sense, the representative of the Public Prosecutor's Office himself has pointed out in

his conclusions that

None of the accused facts (sic) have been intended to fit in this clause of article 245, so suffice it to say that, after reviewing the accusation, the accused is not in fact attributed with having transported or led these persons of Chinese nationality to enter or leave our country. The point under discussion in this particular matter is in relation to paragraph b) of article 245 of the aforementioned Law. In that provision the criminal act described in this norm is to harbor, conceal or cover up, and gives us two assumptions, namely: Whoever hides, harbors or conceals foreign persons entering the country; and the second assumption given by the law is whoever hides, harbors or conceals persons who remain illegally in the country. Now, the rule is also clear that any of the assumptions that we have mentioned so far must be for the PURPOSE OF ILLICIT TRAFFICKING OF PERSONS. That is to say, it is not enough to comply with the elements of the criminal type that a person hides, lodges or harbors a foreigner who enters the country or stays illegally in our country, but those actions must be for the PURPOSE OF ILLICIT TRAFFICKING OF PERSONS. Therefore, it is necessary to define what the norm refers to with this expression. If we look in the Migration and Foreigners Law, we see that there is no definition of illicit trafficking of persons, in fact, what according to our legislation is considered illicit trafficking of persons is precisely described in article 245 of the Migration Law [...] we see that by means of law 8314 of September 16, 2002, the Legislative Assembly approved the PROTOCOL AGAINST ILLICIT TRAFFICKING OF MIGRANTS.

BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST ORGANIZED CRIME

TRANSNATIONAL. Article 3 (a) of the above-mentioned international instrument defines what is to be understood by smuggling of persons. The aforementioned provision states: "(a) 'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident". Therefore, in the understanding that the illegal trafficking of persons has been defined as the facilitation of the illegal entry of a person into a State of which said person is not a national or permanent resident for the purpose of obtaining, directly or indirectly, a financial or other material benefit, we must conclude that the only crime defined in Article 245 (b) of the Migration and Foreigners Law is the one defined in Article 245 (b) of the Migration and Foreigners Law, when the active subject lodges, hides or conceals foreign persons who enter the country, or when he lodges, hides or conceals foreign persons who remain illegally in the country, but in both cases those actions must be directed to a certain end, which consists of facilitating the entry or exit of the country illegally (that is to say without complying with the migratory requirements)[...]....] Let us break down the fact that now concerns us. What is being accused is that on a certain day the accused showed up at the house where the illegals were staying (lodging that, as was clear in the previous point, he did not provide them). He says that he arrived in a minibus, and also states that he arrived with the intention of transporting them for the purpose of illicit trafficking, and further on he says that he did that transportation covering up the illegal stay of the illegals in our country, having knowledge that they were undocumented, and finally, he says that he did it with the intention of transporting them for the purpose of illicit

trafficking.

that by doing so, the defendant ensured that the illegal aliens remained in the country.

illegally in our country. The indictment does not state that he transported the undocumented immigrants with the purpose of taking them out of the country, and therefore this fact cannot be adjusted to the provisions of paragraph 1) of article 245, and in relation to the concealment (which is the other *verb* indicated in the indictment), it says that what the accused intended to achieve was that the illegal immigrants remained illegally in the country. Therefore, the indictment nowhere states that the transportation or concealment of the undocumented immigrants was done by the defendant to take them out of the country, and consequently, even if it is true that he transported the illegal immigrants, and that he concealed or covered up the illegal immigrants, there is no allegation that it was done to bring them into or out of the country. Thus, even if it could be demonstrated with the evidence that we have that the intention of the accused was to take them out of the country illegally, the Court could not consider this fact as proven, much less base a conviction on it, since it would flagrantly violate the necessary correlation between the accusation and the sentence. It is here where the representative of the Public Prosecutor's Office incurs in an incorrect appreciation of the Court's decision, and affirms that with it a law is repealed, and we affirm that this is an error because the problem is not the analysis of the type made by the Court, but that the Public Prosecutor's Office has not accused important elements for the conduct accused to be adequate to the criminal type, and these deficiencies cannot be validly made up for by the court, and we must limit ourselves to the facts as they were accused. The other two accused facts, in fact, are situations that have no relevance to the case at hand, or rather to the analysis that has been made.

The fact that it indicates the manner in which the accused was detained with

the group of illegal aliens and the vehicle used for this purpose. As a corollary of what has been said at this level of analysis, we must conclude that, even if the accused facts are true, they do not fall within the criminal type provided in article 245 of the Migration and Foreigners Law, since the purpose of the accused is that the illegal migrants remained illegally (sic) in the country, and nowhere in the accusation is it stated that the purpose of the accused was to illegally take them out of our national territory...." (folios 190 to 196). In accordance with the factual framework, as well as the acquittal conclusion reached by the Court, it is necessary to make the following considerations. In the first place, article 245 of the Immigration and Foreigners Law establishes: "Article 245.-

A prison sentence of two to six years shall be imposed on whoever: a)- For the purpose of illicit traffic, drives or transports persons to enter or leave the country through places not authorized by the General Directorate, evading the established immigration controls or using false information or documents. b)-. Whoever, for the purpose of illicit trafficking of persons, lodges, hides or conceals foreign persons who enter the country or remain illegally in the country. The penalty established in this article shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes". According to this numeral and to what is stated in the judgment, the judges considered that the accused facts were atypical, because they did not specifically attribute to the accused, to have transported or led the illegal Chinese immigrants to enter or leave our country (folios 191 and 192). They reach this conclusion, by resorting to the definition of the concept "for the purpose of smuggling of

persons".

which is not contained in the Migration Law itself, but they resort to the one expressed in article 3 paragraph a), def Protocol mentioned in the sentence, to say therefore, that the content of paragraph b of numeral 245, must be understood as long as the verbs of the type are adjusted to the purpose of facilitating the entry or exit of the country illegally, seen this last, as a concrete action that must also be executed by the active subject. However, such conclusion is incorrect, since the concept of "illicit trafficking of persons" is in fact already contained in paragraph a, confusing the postulates of both paragraphs. From a reading of the norm in question, it is clear that our legislator established those assumptions in which, apart from punishing the concrete action of procuring the driving or transportation of illegal persons to enter or leave the national territory, by evading the established immigration controls, or using false documents (paragraph a), it also penalizes those situations where, while such persons are already in the country illegally, the active subject seeks to lodge, hide or cover up illegal immigrants, who have already evaded those controls, in order to ensure their illegal stay (subsection b), without requiring, for this second case, that the purpose is to facilitate the illegal entry or exit of the offenders from the country, If this were required - as the Court does - it would be a contradiction in terms, given that precisely this purpose is stipulated in the first clause. What is contained in paragraph b, is to sanction any person who, knowing that there are already subjects who have entered the country illegally, or who remain in the country under that status, even if he has not facilitated their entry or exit, tries to maintain such status. illegal stay, through any of the actions indicated in the following paragraphs.

verbs contained in said subsection, as the prosecutor makes it clear, when he states that the verbs contained in subsection b, "apply when the persons are already in the country" (ctr. folio 170). In the same sense, the jurisprudence of this Chamber has held: "However, taking up again what is described by the subsection

a) and b) of numeral 245 of the Migration and Foreigners Law, it is deduced that there is a difference with respect to the conducts that are sanctioned, in terms of time and space. In the first section, it punishes those who, for purposes of illegal trafficking of persons, drive or transport them to enter or leave the country, that is to say, the agent's action is aimed at passing from one country to another, persons with the purpose of facilitating their entry or exit from that place, illegally. However, we note that in the second clause, there is a modification in the conduct and the status of the immigrant person, since it punishes whoever, for purposes of illegal trafficking of persons, lodges, hides, conceals, covers up or maintains foreign persons entering the country, i.e., it does not link the active subject with the person's immigration status, does not link the active subject with the action of entering the foreigner, but rather alludes to those foreigners who enter the country and the active agent provides lodging, hides or conceals, for the purpose of their illegal entry or stay in the country [...]". Resolution 2008-00115, Third Chamber of the Supreme Court of Justice, San Jose, at 9:41 a.m. on February 15, 2008. The norm in question must be seen in conjunction with what is established in numeral 1 of the Immigration Law: "The present law shall regulate the entry of Costa Rican and foreign persons to the territory of the Republic, and the exit from it, as well as the permanence of foreign persons in the country". (emphasis added). It is

clear, as indicated by the same Court in its decision, that all conducts must have as a precise purpose, the illicit traffic of persons, but obviously, they must

The distinction that the law itself contains must be made, inasmuch as said purpose is fulfilled under the assumptions already explained. In addition, the typical content of both paragraphs is duly differentiated, although they complement each other, since what is certain is that the content of paragraph b) stipulates the "harboring", "hiding" or "concealing" of undocumented persons who entered or were in the country illegally, that entered or were in the country illegally, without appreciating from the norm, the requirement from which the a quo in its erroneous interpretation is based, that is to say, that such action is executed with the determined purpose of facilitating the entry or exit of such persons from the country, in an illegal manner. As the cited jurisprudential precedent clarifies, "... in the second clause, only the lodging, concealment, concealment or permanence of foreigners who illegally enter or remain in the country is sanctioned, eliminating the sanction for the case of egress, since there would be no competence to know facts executed in another country, since the foreigner is already located in another territory. This distinction makes a difference in time and space with respect to criminal prosecution". In the case in question, it has been proven that the Chinese nationals entered the country illegally, and that in that capacity, they remained in our country, being that in the evening hours of March 29, 2007, they were transferred by the accused E, heading south to north, So that when passing through the post of Cuajiniquil, Guanacaste and when the authorities of the Public Force stationed in the post of the North Command, required the respective documentation, they realized that these are people who are illegally in terms of their immigration status, being that what the accused is accused of, is to transport undocumented immigrants, in order to cover up their illegal stay in our country.

The Court's assessment, as indicated by the appellant, violates the provisions of the law in question, since it does not matter in the second case what the destination of these foreigners will be, since it is sufficient to demonstrate that they had already entered or remained illegally in our country, as was proven in this case. Based on his erroneous interpretation of paragraph b of numeral 245, the a quo acquitted E , because he considered that the Public Prosecutor's Office did not refer that the accused had transported the undocumented immigrants with the purpose of taking them out of the country, nor that the "concealment" was done for that purpose, but on the contrary, this last action was carried out by the accused so that the immigrants would remain illegally in the country (ctr. However, this last conclusion is precisely what is sanctioned by the cited numeral, that is to say, that the action of concealment or concealment that according to the accusation, the accused intended to carry out, was with the purpose of procuring the illegal permanence of the immigrants in our country, always in compliance with the purpose of maintaining the illegal traffic of persons, thus incurring in contradiction with the cited norm. In this regard, see resolution 2008-00115, Third Chamber of the Supreme Court of Justice, of 9:41 a.m. on February 15, 2008, cited above. The Court, contrary to what it expresses in its decision, does incur in an error regarding the analysis of the type, erroneously attributing omissions and deficiencies in its accusation to the Public Prosecutor's Office, because it did not require elements of the crime.

the conduct attributed to the accused to fall within the type of conduct attributed to the accused.

The Court found that, contrary to what the judges stated, the prosecutor correctly and with clear knowledge of the content of numeral 245, attributed to the accused the concrete actions that, in his opinion, are in accordance with said norm. Based on the correct interpretation of what is contained in the Migration Law and according to the accused factual framework, the Court should have assessed whether the manner in which Mr. E was detained when he was transporting a group of illegal Chinese citizens at night in a vehicle with tinted windows, as referred to by witness L, an officer stationed at the Cuajiniquil Post (cfr. folio 186), was with the purpose of covering them up in order to guarantee their illegal permanence in our country, determining in turn, if such actions were for the purpose of illicit trafficking of persons, it is evident from the challenged decision, that such assessment was omitted, and furthermore, the analysis made by the a quo of paragraph b of numeral 245 of the cited law, violated the rules of sound criticism, since it did not adjust to the descriptive and normative parameters of said norm. Thus, being in the presence of the alleged defect, the appeal must be accepted for the form, ordering the annulment of the sentence and the debate that preceded it, insofar as it refers to the acquittal in favor of the accused E, for the crime of illegal trafficking of persons contemplated in the Immigration and Foreigners Law and ordering the resubmission for new substantiation in accordance with the law.

Par Tanto:

The cassation appeal filed by Ricardo Quiros Vargas, prosecutor, is hereby declared admissible. The sentence and the debate that gave rise to it are

annulled and it is hereby

orders the respective trial of remission before the corresponding Court, for a new substance of the process in accordance with the Law. NOTIFY.

Magda Pereira V.

Jesus Alberto Ramirez QAlfonsoChaves R. Carlos Chinchilla S.

Lilliana Garcia V. (Alternate Mag.) Exp. N° 10-4/4/4-

08

Res: 2008 -0 0115

THIRD CHAMBER OF THE SUPREME COURT OF JUSTICE. San Jose, at nine o'clock forty-one minutes on February fifteenth, two thousand eight.

Appeal in cassation filed in the present case against J, major, residence card number ~~xxx~~. neighbor of La Cruz for the crime of illicit trafficking in persons, committed to the detriment of public safety. The following intervene

In the decision of the appeal, Magistrates Jose Manuel Arroyo Gutierrez, President, Jesus Alberto Ramirez Quiros, Alfonso Chaves Ramirez, Magda Pereira Villalobos and Carlos Chinchilla Sandi. Also intervening in this instance is Jose Manuel Gonzalez Fonseca, who appears as the defendant's private defense attorney. The representative of the Public Prosecutor's Office was also present.

Resulting:

1.-That by means of sentence **No.** 127-07, dictated at sixteen o'clock on August sixteenth, two thousand seven, the Criminal Trial Court of Guanacaste,

Headquarters Liberia, resolved: "THEREFORE: In accordance with the foregoing, Articles 39 and 41 of the Political Constitution, Articles 1, 30, 31, 45 of the Code of Ethics, Articles 1, 30, 31, 45 of the Code of Ethics, and Articles 39 and 41 of the Constitution.

Penal Code, 245 of the Migration and Alien Law, articles 1, 6, 141, 142, 144, 184, 360, 361, 363, 364, 365 and 366 of the Code of Criminal Procedure, J is ABSOLVED of all penalties and responsibility for the crime of ILLICIT TRAFFICKING OF PERSONS, to the detriment of the MIGRATION AND FOREIGNER LAW. -

"(sic). Fs Rafael Saborio Jenkins, Rodrigo Campos Esquivel, Juan Gerardo Quesada Mora.

That against the above pronouncement the Prosecutor Ricardo Quiros Vargas, filed a cassation appeal alleging lack of application of article 245 of the Immigration and Foreigners Law. He requests that the sentence be annulled and sent back to the Court of origin for a new trial.

3.-That after the respective deliberation, the Chamber raised the questions formulated in the appeal.

4.-That the relevant legal requirements have been observed in the procedures.

Judge Chinchilla Sandi reports, and;

Whereas:

Appeal in cassation filed by Lie. Ricardo Quiros Vargas, Prosecutor, against the sentence of the Criminal Court of the First Judicial Circuit of Guanacaste #

127-07, dated August 16, 2007. In his

(a) The appellant alleges a failure to apply the provisions of article

245 of the Migration Law, and due to an erroneous assessment, the judges acquitted the accused, since: "[...] According to the Court, the fact that the accused has lodged the undocumented foreigners and charged them money for transporting them illegally does not constitute a crime since it was not intended to facilitate the entry of the immigrants into the country[...]". He requests the annulment of the sentence, and the order for a new trial. As it is appropriate, the plea is accepted. In the present case, the Public Prosecutor presented accusations against J, for contacting two undocumented Nicaraguan immigrants, "[...] "and knowing that they had entered the country illegally that day and did not have any permit to remain in Costa Rica, he offered them to take them to Liberia in exchange for forty five thousand colones with the promise that he could circumvent the police posts[...] (cfr. 101).)" (cfr. 101). According to the judgment under appeal, the Court considered the following facts as proven: "[...] 1.

On September twenty-fourth, two thousand six, a subject who could not be identified, drove C and J, of Nicaraguan nationality, to enter the country, without having the established migratory documents, evading the migratory controls. That on the same day, but having already entered the country, in Costa Rican territory, the undocumented foreigners Cy JI, both, contacted the accused J. who promised to transport them to Liberia, charging the sum of forty five thousand colones. That the accused J. took the undocumented immigrants to his house, located in La Cruz, Guanacaste, and lodged them in that place, allowing them to sleep in a vehicle parked in the patio of the accused's house. 4.-

That in the early morning of September 25, 2006, the accused together with the illegal immigrants, left the house of the former and went to Liberia, and at a police checkpoint located at the entrance to Cuajiniquil they were discovered by the officers of the Public Force, who took the illegal immigrants out of the vehicle and allowed the accused to leave the place. [...]" (cfr. 102). In order to consider these facts as accredited, the Court relies on the declarations of the two illegal immigrants, whose statements were taken by means of jurisdictional evidence, which was incorporated by reading (see folio 102). According to the a quo: "[...] "From what the witness said, it is clear how the immigrants entered the country, and it is also clear that it was not the defendant who drove or transported them to enter the country, but that the person who carried out that conduct was an unknown subject, and that he has not been identified in this case. [...]" (cfr. 104). Likewise, regarding the offer of the accused to the immigrants, so that they would sleep in the patio of his house, in order to continue their trip the following day, the judges highlight the statement of the immigrant J, in the following terms: "[...] With this statement given by the witness it is clear that the contact that the undocumented immigrants had with the accused was already in Costa Rican territory, and consequently already when they had entered the country illegally, and the accused committed himself to transport them to Liberia. {... (ctr. 104). The judges are clear that according to the statements of the foreigners, there was a charge by the accused to facilitate their arrival to Liberia. In this sense, they stated: "[...] "Both witnesses are also unequivocal in stating that the accused did not charge the foreigners to get to Liberia.

the sum of forty-five thousand colones, delivering to him twenty thousand colones

when he was contacted and the other twenty-five thousand colones in the early morning of the day they were arrested, just when they started the route to Liberia. [...]" (cfr. 104 back). For its part, Article 245 of the Migration Law establishes: "Article 245.

A prison sentence of two to six years shall be imposed on anyone who: a) For the purpose of illicit trafficking, drives or transports persons to enter or leave the country through places not authorized by the General Directorate, evading the established immigration controls or using false information or documents. B) Whoever, for the purpose of illicit trafficking of persons, lodges, hides or conceals foreign persons who enter the country or remain illegally in the country. The penalty established in this article shall be increased by one third when the perpetrator or accomplice is a public official, or when minors are used to commit these crimes". In accordance with these regulations, the judges considered that the conduct described in the indictment against the accused J.[[accused], did not constitute the action described in paragraph a) of the aforementioned numeral, because "[...] it is never accused that the accused had transported or led the illegal immigrants to enter or leave the country. [...]" (cfr. 106). In effect, the prosecuting authority makes a clear relation in time and space, of the circumstances in which the illegal immigrants come into contact with the accused, whether in the national territory, in the border zone of Penas Blancas. Therefore, the judges' consideration that paragraph a) of numeral 245 of the cited law could not be applied is supported by the analysis of the described conduct and the accused facts. Now, subsection b) of article 245 of the Migration and Naturalization Law is not applicable.

Foreigners penalizes anyone who illegally harbors, conceals, harbors, conceals or maintains,

persons entering the country for the purpose of illegal trafficking. The a quo, in order to define the concept of smuggling of persons, the Protocol against the Smuggling of Migrants by Land, Sea and Air, which complements the United Nations Convention against the Smuggling of Migrants by Land, Sea and Air.

Land, Sea and Air, which complements the United Nations Convention against Transnational Organized Crime, approved by Law number 8314. Article 3 of the Protocol defines smuggling of persons as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident". The Court therefore concludes that the normative element contained in subparagraph (a) of Article 6 is the same as that contained in Article 6(1) of the Convention.

b) of numeral 245 of the law of comment, according to the definition given in the international instrument, adopted by our country through law 8314, does not adjust to the description of the conduct accused against the defendant, considering that "[... It has been demonstrated in this case that the accused did indeed lodge the foreign immigrants in his house, and it has also been demonstrated that these persons remained in the country illegally (since they did not have any migratory status), however, those actions are not criminal either, since they were not intended to facilitate the entry of the immigrants into the country, and so much so that, according to the immigrants themselves, hours before contacting the accused they had already entered the country illegally. Consequently, the facts that have been taken as proven are atypical, and consequently, in accordance with the principle of legality, the accused J must be acquitted of all penalties and responsibility, as

...]" (cfr. 107, turned). In the case at hand, we

We are dealing with a crime that is usually committed with the concurrence of several individuals, stationed in different territories, who seek the border crossing of persons, bypassing the immigration procedures of the destination country, i.e., it is transnational organized crime. In this order of ideas, it is not surprising that there is a concurrence of wills, which although without prior notice, are presented successively to ensure the achievement of the unlawful result. In this way, it must be considered that the consummation by the illegal immigrants of the irregular entry to the country, depends on the fact that they also circumvented the checkpoints and controls of the administrative police, located near the border zone, and precisely located to monitor the passage of persons and detect those who do not comply with the corresponding migratory procedures. In relation to the checkpoints located in the border zone, witness R, an officer of the Public Force (see folio 99), according to the judgment, stated: "[...] At the checkpoint, the functions of trafficking of undocumented persons, transfer of gunpowder, firearms, and drugs are carried out. Each occupant is asked for his documents. That post is a mobile checkpoint, we were four policemen, there was another group in the fixed post, there were seven or eight of us in total [...] They entered from Nicaragua to Costa Rica and the version they give is that they had offered to pass them to Liberia. [...]" (cfr. 103). This version of the obstacles that the illegal immigrants must overcome, which are located in a determined space around the border zone, is clearly described by Mr. C, in his statement visible on folios 17 and 18 of the case file, when he states: "[...] we passed through the farms on the Costa Rican side, we passed through three

In every farm you have to leave money, otherwise they take it out with a machete,

to pass through a small piece of road you have to pay twenty c6rdobas. From there we paid another gentleman, we paid him one thousand four hundred colones to pass us to this side, I don't know his name, I don't know who he is, since there are so many people and people say "I help you, I help you".

Yesterday we were at the border and at about three o'clock, on this side we had contact with this gentleman (points to the accused). They know that he comes without documents, he knows that you are paying him for, you tell them that he is undocumented. As he knows well and the posts where the immigration is, he helps us to pass. [...]" In this sense, as indicated by the Nicaraguan immigrant, their entry into the country was not assured until they finished circumventing the checkpoints and arrived in Liberia, and for this purpose, and with full knowledge of the irregular situation of the two foreigners and their objective of passing the checkpoints unnoticed, the accused offered himself for a sum of money, for which he hid them for a night in the backyard of a house, to begin the second phase of the journey the following day. The foregoing is supported by Mr. J's statement on pages 19 and 20, when he declared: "[...] I clarify that as a

At six o'clock in the evening he brought us to La Cruz, we entered a house, supposedly from him, this is because he was there at dawn, [...] Today, we left at about four in the morning for Liberia, we were in the same vehicle, he was driving it, the three of us were going [...]". To recapitulate, according to the Court's evidence, the accused lodged in his house the foreigners who were staying in the country illegally, he charged a sum of money to transfer them to Liberia, however, they consider that this fact is not a crime, since it is not intended to facilitate the entry of immigrants into the country. However, taking

up

as described in paragraphs a) and b) of section 245 of the Migration Law, and

In the first section, it is deduced that there is a difference with respect to the conducts that are sanctioned, in terms of time and space. In the first section, it punishes those who, with the purpose of illicit trafficking of persons, drive or transport them to enter or leave the country, that is to say, the agent's action is directed to pass from one country to another, persons with the purpose of facilitating their entry or exit from that place, in an illegal manner. However, we note that in the second clause, there is a modification in the conduct and the status of the immigrant person, since it punishes whoever, for purposes of illegal trafficking of persons, lodges, hides, conceals, covers up or maintains foreign persons entering the country, i.e., it does not link the active subject with the person's immigration status, does not link the active subject with the action of entering the foreigner, but rather alludes to those foreigners who enter the country, and the active agent provides lodging, hides or conceals, for the purpose of their illegal entry or stay in the country. It is clear, as indicated by the trial court, that all the conducts must have a purpose, the illicit trafficking of persons. Another element that allows to consider with greater clarity the difference between the two described conducts, is that in the first clause, both the illegal entry and exit of immigrants is sanctioned, in both cases the active agent from this territory facilitates the passage through the border, either to enter or leave the territory. But, in the second clause, only the lodging, concealment, concealment or permanence of foreigners who illegally enter or remain in the country is sanctioned, eliminating the sanction for the case of egress, since there would be no competence to know facts executed in another country, since the foreigner is already in another territory. This distinction makes a difference in time and space,

with respect to criminal prosecution. On the other hand, as stated by the court a quo, the

The agent's purpose must be intrinsic to the conduct, and in this case it is demonstrated that the subject charged a sum of money, which included the lodging and transportation of the immigrants, who he knew were in an irregular situation, and who intended to evade the checkpoints. In this sense, the Protocol against the Smuggling of Migrants by Land, Mary Air, in its article 3 paragraph a), considers within the conduct of facilitating the illegal entry of a person to a State, "with the purpose of obtaining, directly or indirectly, a financial or other material benefit", purpose that is accredited in the case, on the part of the accused. In the present case, for the Court, the fact accused by the representative of the Public Prosecutor's Office, namely, "[...]"¹.

". In that fact the accused is accused that: "On September 24, 2006 the accused J. between three and four o'clock in the afternoon approximately contacted in Penas Blancas Border with Nicaragua the undocumented Nicaraguans J. and C. and knowing that they had entered the country illegally that day and had no permit to stay in Costa Rica, offered to take them to Liberia in exchange for forty-five thousand colones with the promise that he could circumvent the police posts.(...]" (ctr. 105 back and 106), does not constitute a crime, because he is not the one who introduces them to the country, ruling out the application of paragraph a) of the cited numeral 245; and because the accused did not have the purpose of facilitating the entry of immigrants to the country, since they were already inside the national territory, eliminating, also, the possibility of framing this conduct in paragraph b) of said article. However, according to the analysis made of the two paragraphs of numeral 245 of repeated quotation, which are

The Court's referral, in order to rule out the application of the

b) does not conform to the descriptive and normative parameters of the criminal offense in question.

THEREFORE:

The appeal filed by Ricardo Quiros Vargas, representative of the Public Prosecutor's Office is hereby declared admissible and the case is remanded to the competent court for a new trial. NOTIFY.

Jose Manuel Arroyo Gutierrez, Jesus Ramirez Quiros, Alfonso Chaves Ramirez, Magda Pereira Villalobos, Carlos Chinchilla Sandi.