

Migrants' Smuggling is Knocking at the Danube's Door. Threats at the Romanian State Border

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Abstract: It is undeniable the devastating effect that the increase of the illegal migration has on the population, both in terms of access to the legal labor market and in socio-economic terms. This is the argument which supports our choice to analyze, through this scientific approach, the offenses of trafficking in migrants, an offense under art. 263 of the Criminal Code. We believe that the importance of the theme is special, especially because it represents one of the most acute manifestations of cross-border crime with consequences visible to victims and with side effects difficult to assess in the long term. The component of human trafficking, the illegal migration is a scourge increasingly widespread and difficult to contain due to the involved criminal networks, and the ingenuity of the offenders. Beyond the fact that this offense is committed, most often in the context of the organized crime (drug trafficking, arms smuggling, terrorism), the smuggling of migrants is a real danger to the socio-economic stability of states and even for peace and their security by disturbing the ethnic, cultural, demographic balance, by the inability of social protection mechanisms or public health, by exceeding the absorptive capacity of the market of legal work and implicitly, by upsetting the balance of forces between the control structures of legality and public order and the population channeled towards the criminal activities.

Keywords: traffic; migrants; cross-border crime; Danube, the inhumane treatment

Throughout the human history, the migration movements have built a constant phenomenon, so it was enough to say that the world history is the history of migration. (Herrero, 2003) The International population movements were caused by different reasons, according to the analyzed historical moment, focused in particular on the economic, political and religious circumstances.

Given that the Europe is facing an unprecedented wave of migrants after the Second World War, Romania may be the transit country for the populations from

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the Middle East, including the illegal crossing of the state border from the Bulgarian bank of the Danube.

The phenomenon is growing and it occurs more often the news about the capture of such groupings, the Galati and Tulcea cities being on the map of the migrants' smuggling from Syria, Afghanistan and Iraq. Recently, the seven migrants from Afghanistan and Sri Lanka and their guide were caught by the Ukrainian border guards in Tulcea, in the Danube Delta, after they crossed the river by boat, the locality Pardina, intending to reach the Schengen area. Also, the police in Mehedinti detected in Orșova, the members of a group formed by Turkish, Bulgarian and Romanian citizens would have recruited several Syrian and Iraqi citizens, that would be smuggled into Romania with a view of transport in Germany. Three of the group members are suspected of being held illegally crossing the state border from Bulgaria to Romania, transporting them from the Bulgarian bank of the Danube using boats. From this case it was drawn a criminal file for committing offenses for setting up an organized criminal group, illegally crossing the border state, the complicity in illegal crossing of the state border and smuggling of migrants.

Given that it is exposed the migration routes (legal and illegal) in Eastern Europe, originating in the countries of Middle East, Romania will have to face the challenge of migration phenomenon, especially from the perspective of the abolition of internal borders, from the date of application entirely of the provisions of the Schengen acquis.

We consider necessary the close monitoring of trends in immigration phenomenon and its consequences on the Romanian society, especially in socio-economic dynamic terms and difficult to predict – the global economic and financial crisis and the recent events in the Arab world. Thus, the Romanian authorities can adopt a pro-active policy of immigration management in Romania and further, at European Union level, taking into account the appropriate measures to integrate foreigners into the Romanian society. In addition, this process of knowledge, research and continuous collection of information on migration needs to be correlated with national mechanisms and instruments, sectoral, central and local assessment of integration policies by reference to relevant standards and indicators. (Alexe & Păunescu, 2011, p. 35)

Thus, this study aims mainly at the depth analysis of the crime of “trafficking in migrants”, as the violation of human rights, dignity and their freedom is a

phenomenon that exists and manifests itself in almost all countries, regardless of their degree of development.

Among the factors influencing the illegal migration there are: the population growth, uncontrolled, the economic situation in major “source” countries - producing migrants, the uncertain situation politically in some geographical areas, armed conflicts (which often have the effect of humanitarian crisis, the influxes of people in need of international protection), leading them to the conclusion that migration is continuously growing.

We can list the following *factors favoring* the smuggling of migrants:

- historical, economic and social context; shortcomings in the legal framework;
- the insufficiency of some mechanisms to combat and control;
- poverty (but not misery, but a relative state of poverty to relate compared to citizens of developed countries);
- ignorance - lack of adequate and well-structured information;
- negative influence from some current and foreign ideologies;
- spirit of adventure, etc.

Also, one should not neglect the *risk factors*:

- quantitative development of migratory phenomena, by multiplying the “source countries”;
- the substantial affecting the country strongly economically developed in the western and northern Europe, making them a favorite target for massive groups of migrants in disadvantaged areas (Africa, South Asia, Central America) or in areas of violent conflict (Iraq, Afghanistan, Pakistan, Sudan, Palestine, etc.);
- major affection of the transit countries, which lack of economic potential to host, even temporarily, the flow of migrants;
- the qualitative changes in the evolution of the migratory phenomenon which, because of self-protection measures taken by “target countries” or transit, it is lately manifested primarily through illicit ways.

Strictly relating to illegal migration, it was found that the Eastern Europe is a key attraction for migrants from different countries of the Asian continent, in the recent years and in the African one, for those dangerous person, wanted criminals by the Interpol, which are part of the terrorist groups, criminal organizations or they are involved in cross-border crime phenomenon. After joining the European Union and

NATO, Romania, from a source and transit country has become a target country, being subjected to increasingly higher pressures.

We should mention that the traffickers' activity is expressed especially through actions of recruitment, transportation, accommodation and illegal immigration of a state.

Mode of operation, for traffickers, is represented by trafficking of migrants from Eastern Europe achieved through legal exit as a tourist, staying illegally in the territory of another state, illegal entry on the states where it is necessary visa and smuggling of foreign origin citizens made through illegal entrance / exist (false passports, detours of border crossings, hidden in means of transport) legal entry / illegal exit (Chinese nationals and former Soviet space), passports, visas or invitations false (Moldovans, Ukrainians, Russians).

The Legal Content¹

According to art. 263 of the Criminal Code, it is crime of smuggling of aliens *the act of recruiting, mentoring, guidance, transportation, transfer or accommodation of a person, if committed for the purpose of illegal border crossing of the Romanian state.*

The deed is more serious if committed:

- a) in order to obtain, directly or indirectly, a patrimonial use;*
- b) by means which endanger the life, integrity or health of the migrant;*
- c) by subjecting migrants to inhuman or degrading treatment.*

The attempt is punishable.

The New Criminal Code in Relation to the Previous Criminal Law

The article 263 of the Criminal Code has no counterpart in the previous Criminal Code, but in art. 71 E.G.O, no. 105/2007. The content of the normative variants of the two texts is similar, being noticed few differences as well. Thus, as regards the basic version, the new Criminal Code expressly states other ways in which the act

¹ The offense was provided in a similar regulation in art. 71 of E.G.O. no. 105/2001 (Official Monitor No. 352 of 30 June, 2001), but this article was repealed by Law no. 187/2012.

can be committed the “transfer”, “*transportation*” and “*housing*”, complementing thus the objective content with components found in the judicial practice. Another completion regards the aggravated form of art. 263, par. (2), letter a) of the Criminal Code, which was not true in art. 71 E.G.O. no. 105/2001 and it will be retained when smuggling is committed to obtain, directly or indirectly, a patrimonial use. Also comparing the text of art. 263 of the Criminal Code, with previous suitable regulation still a difference related to the aggravated form, which was contained in art. 71, par. (3), E.G.O. no. 105/2001, “*the act resulted in the death or suicide of the victim*”. In the absence of such circumstances, under the new Criminal Code, for cases where migrant smuggling produces the indicated consequences, the competition of offenses regulations will apply.

The Pre-Existing Conditions

The Object of the Crime

a) the special legal object of the crime consists of social relations on respecting the public interests within the scope of the supervision and control activities of state borders, relations which include the acts of exploitation of migrants and their transformation into source of gain.

In Romania, the state border regime is primarily the E.G.O. no. 105/2001. In accordance with art. 1, letter a) of this act, the state border is the real or imaginary line passing in a straight line from one frontier mark to another or where the border is not marked on the ground with border signs, from coordinating point to another: the Danube and other rivers, the state border is determined by the agreements, conventions and agreements between Romania and neighboring states, taking into account that the generally accepted principle of international law river is that the border passes in the middle of the main waterway, and at the non-navigable rivers in the mid waterway; for the Black Sea the state border passes along the outer lateral limits of the territorial sea of Romania. Still E.G.O. no. 105/2001, art. 1, letter l) defines the concept of “border crime”, which is *the act defined by the law as being an offense committed for the purpose of illegal crossing the state border of persons, vehicles, goods or other property*. Meanwhile, illegal crossing of the state border is crossing the state border in circumstances other than those provided by the Romanian law.

As a general rule, the state border of Romania delimits the Romanian territory from the territory of each of the neighboring countries and Romania's territorial sea from

the contiguous zone. From the vertical side, the state border delineates the airspace and the basement of the Romanian state from the Romanian airspace and the basement of each neighboring states. The state border is established by law, in accordance with the international treaties stipulations, conventions or agreements concluded by the Romanian state and the neighboring states. The Romanian state border is marked, usually in the ground by border signs, whose topographic data are provided in the demarcation bilateral documents concluded by the Romanian state with the neighboring states.

b) The material object.

In simple form, the crime has no material object. As for the aggravated forms, it can be said that it is represented by the person in the market, i.e. the migrants whose life or safety is endangered by the act of the Traficant or who has been subjected to inhuman or degrading treatment. There are opinions according to which the offense has material object also in simple form, consisting in the body of the trafficked person.

The Subjects of the Offense

a) the active subject of the offense of trafficking in migrants can be any physical entity person, whether it is Romanian citizen who recruits, directs and guides one or more persons for the purpose of illegal crossing the state border or organizing this activity.

In order to be an active subject of this crime, the individual concerned must meet the general conditions of criminal liability in addition to the special provisions of the ordinance. Thus, it should be liable in terms of criminal law, to have committed the act with discernment.

The active subject may be also a legal entity. It will be criminally liable if the act was committed in the name and on behalf of the legal person, by its representatives or its bodies.

This offense may be committed in all forms of participation: co-authorship, incitement, complicity, so that it may be considered all those who participate in the activities of recruitment, mentoring and guidance, and also those who organize them.

b) passive subject of this crime is mainly the state, since he holds the social value affected by committing offense – the enforcement of the legal regime of border transit by the migrants. (Dobrinou, et al., 2014, p. 263)

The secondary passive subject is the person of the migrant, whether it is his life or health which is endangered by the activity conducted by the active subject. It can be any physical person, even criminally responsible. It is not necessary to have the citizenship of the State in which he enters or wishing to enter illegally or to have established residence in the territory of that state. Maybe there are several secondary passive subjects. All who are led, recruited or guided for the purpose of illegal crossing of the state border are responsible for the crime of illegally crossing the state border, if they meet the requirements required by the law in this regard. (Boroi, 2014, p. 324)

The Constitutive Content

The Objective Side

The material element of the objective side is, by law, in one of the alternative activities of recruitment, mentoring, guidance, transportation, transfer or accommodation of a person, if committed for the purpose of illegal border crossing of the Romanian state.

To recruit means to engage by promises, to lure, to discover a person and to make that person to illegally cross the state border. Recruiting or attracting action can be done not only by promises, but also by threats or pressure. If for the recruitment it was used physical or moral violence, threats, other forms of coercion, abuse of authority, fraud, within the meaning of the criminal law, then we will be in the presence of a series of offenses, unlike trafficking where most often, these crimes are absorbed in its content.

To guide means directing into the necessary direction, advising a person for illegal crossing of the state border. In order to register the guidance act, the following conditions must be met:

- the intent, which requires knowledge of the one who directs the illegal action which is to be executed by the guided, and also the fact that his act facilitates the offense;
- hiring the tutor to make available to the guided data and information such as: border line route, by describing the planimetric details of the place; place and time of the illegal crossing offense of the state border; monitoring and control device organized by border guards in the area of competence; the best places where you

can penetrate the device for the purpose of crossing the border. Hiring does not imply the guided companionship, moving towards the frontier.

Escorting is to accompany a person or group of persons as a guide. Thus, to escort is the act whereby a person, called escort, accompanying with direct intention one or more people towards the state border to show the way and give instructions needed in order to commit the crime of illegally crossing the border state. The difference between escorting and guidance is so in the fact that the person who escorts accompanies directly the guided person on the way to the state border.

Transport. Crossing the border to the destination country is achieved by the use of recruiters or smugglers. In most cases, during transport, victims are civilized treated, providing them decent accommodation and meals, they can get in touch with the family. Routes and modes of transport depend on geographical circumstances. Migrants are transported by plane, boat, train, ferry, car, or simply on foot to reach the destination country.

Often traffickers will manufacture false documents for victims and they will accompany them during the transport phase to ensure their protection.

“*Sheltering*” means hiding migrants, settling them in safe places.

All these activities should be performed for a specific purpose, namely illegal immigration into the Romanian state.

In the specialized literature, the “illegal crossing” means the entry or exit to / from the country without the knowledge or approval of the competent authorities (bodies of the border control points, from the low traffic points or for simple crossing). Under these circumstances it is illegal if it is performed:

- in places other than checkpoints for crossing the border;
- by the checkpoints for crossing persons across the border, but surreptitiously or secretly (by the physical hiding of the person).

We believe that the crime of trafficking in migrants is consumed in the movement of illegal border crossing, without being necessary to achieve this goal to meet the constituent elements of this crime. Thus, in the case where, through the activity of recruitment, mentoring, guidance, transportation, transfer or accommodation of a person proceed to help it to pass fraudulently state border should be retained in the contest and abetting the latter offense (or authorship if the dealer also accompanies the migrant for illegally crossing the border).

An issue in the judicial practice is the link between the crimes of human trafficking, child trafficking, and trafficking in migrants. Indeed, there is a situation where it is desired entering or exiting the country illegally exploited persons, victims of crimes of human trafficking or child trafficking. It was retained in this situation the contest of offenses between the offenses of migrants trafficking and trafficking in minors.¹ In another case it was not retained along with the crime of trafficking of migrants the crime of human trafficking, but not on the grounds of incompatibility of legal classification, but because it was not proved that the act was committed in any other ways required by the legislator (threat, violence or other forms of coercion, abduction, fraud or deception, abuse of authority or taking advantage of the person's inability to defend themselves or express their will, or by offering, giving or receiving payments or benefits to achieve the consent of a person having control over another person).² We believe that the social relations protected by the incrimination of these acts being different, the act of a person who recruits, transports, transfers, harbors or receives a person for purposes of exploitation, by passing illegally across the state border meet the constitutive elements of both the crime of human trafficking or trafficking in minors and the offense of trafficking in migrants.

The immediate result is the basic form where an illegal entry or exit, i.e. the country of people who do not have this right and thus it creates a state of danger for the public interests in the supervision and control activity of crossing the state border. At the aggravated forms, the immediate consequence is represented by the production of the result prescribed by the law, namely the person causing harm to the migrant person by subjecting it to some inhuman or degrading treatment [par. (2), letter c)] or by means which endanger the life, integrity or health of the migrant [par. (2), letter b)].

The Causation Connection

Between the action of the perpetrator and the immediate result it must be a causation connection. This is achieved in the case of the simple form of the offense by the very commission of the offense described in the incrimination rule, as it is a crime of danger. But when it comes to aggravated forms of smuggling migrants, the causation connection must be established, as the trafican's actions must be

¹ I.C.C.J., Criminal Division, Decision no. 5278/2004 (www.legalis.ro).

² I.C.C.J., Criminal Division, Decision no. 6985/2006 (www.legalis.ro)

taken to endanger the life or safety of the migrants or the death or suicide of the victim.

The Subjective Aspect

The form of guilt required by the incrimination norm is direct intent as in the basic version and in the aggravated one the active subject is animated by a special purpose characterized by the incrimination rule. In the basic version, either of the normative ways indicated by the legislator are achieved in order to cross the state border of Romania. If the purpose of these acts is different, the committed act is no longer eligible to be in the category of trafficking in migrants, being able to retain, if appropriate, another crime. For example, if the migrant housing is carried to its operation (in the sense of art. 182 of the Criminal Code), the committed act is no longer trafficking in migrants, but human trafficking (art. 210 of the Criminal Code). If, however, after its exploitation in the country, the victim is transported illegally across the border, we consider that the two crimes may forfeit the contest.

Equally, when it is found committing the offense in order to obtain, directly or indirectly, a patrimonial use, we will retain the aggravated variant provided by art. 263, par. (2), letter a) the Criminal Code.

The Aggravating Variants

The first aggravating variant is referred to in article 263, par. (2), letter a) of the Criminal Code and it consists of the act of recruitment, mentoring, guidance, transportation, transfer or accommodation of a person whose purpose is to pass fraudulently the state border of Romania, if committed in order to obtain, directly or indirectly, a patrimonial use. Thus, in order to achieve this kind of aggravating form be fulfilled the essential condition, namely that the act of recruitment, mentoring, guidance, transportation, transfer or housing to be committed with a purpose, namely to obtain a patrimonial benefit, that is to get a monetized advantage. The patrimonial benefit can be obtained either directly by the author, but also by an intermediary help.

The second aggravating variant is referred to in article 263, par. (2), letter b) of the Criminal Code and it consists of the act of recruitment, mentoring, guidance, transportation, transfer or accommodation of a person, if committed for the

purpose of illegal border crossing of the Romanian state by means which endanger the life, integrity or health of migrants.

In making this aggravating form pursued by the offender is provided in variant type, namely the purpose of illegal crossing of the State border. A feature of this aggravating form, however, constitutes the means used for committing criminal activity, means likely to cause the injury of the migrant, putting them at risk its life, integrity or health.

A third aggravating variant is foreseen in article 263, par. (2), letter c) Criminal Code and it consists in the act of recruitment, mentoring, guidance, transportation, transfer or accommodation of a person, if committed for the purpose of illegal border crossing of the Romanian state by subjecting the migrants to inhuman or degrading treatment.

As in the case of the two versions, the aim of the perpetrator in achieving the criminal activity is provided in the variant type, i.e. the purpose for illegal crossing the border state except that the act was committed by subjecting the migrants to inhuman or degrading treatments.

The inhuman and degrading treatment are widely condemned as gross violations of human rights in the official documents of international organizations dealing with these civil rights.

The Forms. The Penalties

The preparatory acts, although possible, are not punishable.

Consuming this offense does not involve producing a material consequence – the illegal crossing of the state border - by the people recruited, coached, guided, transported, transferred or kept, but it occurs when there has been a first activity of recruitment, mentoring, guidance, transportation, transfer or sheltering them.

The moment of consuming the offense corresponds to that where is committed as the last act of recruitment, mentoring or with that it stops the action guidance, transportation, transfer or sheltering them.

The aggravated form of the offense in par. (2) consumes when life or security of the migrants are effectively put into danger, or when it was committed and its first act of obedience to inhuman or degrading treatment. Exhaustion occurs when these acts cease.

Regarding the offense of trafficking in migrants through continuous form, in the previous legislation it could apply, *mutatis mutandis*, an appeal on points of law pronounced by the Supreme Court, under the laws in force before the adoption of the current Criminal Code in matters of crime of trafficking in persons in that it subsists the continuous form and in the situation where the offense regarded more passive subjects and it was committed under the same terms of place and time.¹ In the new regulation one of the conditions of the continuous offense is represented by the passive subject (article 35 of the Criminal Code). According to article 35 of the Criminal Code, provided that the passive subject unit is considered satisfied if: a) the assets constituting the object of the crime is under co-ownership of several persons; b) the offense affecting the secondary passive subjects, but the main passive subject is unique. As the smuggling in migrants has as mainly passive subject the state, and as secondary passive subject the trafficking migrant, and the traffic offense committed on a plurality of secondary passive subjects should, according to the text of the law, generate a single offense of trafficking in migrants.

Some of the incriminated actions, such as transportation, transfer, harboring, involve activities of a certain duration, an extension of time, which stresses the fact that the offense of migrant trafficking committed in these variants, is continuous offense. Consequently, there will be a moment of exhaustion, which is where the action ceases.

Penalties

The punishment provided for the offense of trafficking in migrants in the variant type is imprisonment from 2 to 7 years. The penalty applicable for the offense in aggravating forms is imprisonment from 3 to 10 years and deprivation of certain rights. The attempt is punished.

¹ I.C.C.J., United Sections, Decision no. XLIX / 2007 [appeal on points of law for the interpretation and unitary application of the provisions of art. 33, letter a) and art. 41, par. (2) Criminal Code on the offense of trafficking provided by Law no. 678/2001, aimed more passive subjects under the same place and time]. (Official Monitor, No. 775 of 15 November 2007). The court ruled that the trafficking in persons incriminate by the provisions of art. 12 and 13 of Law no. 678/2001 committed on several passive subjects under the same conditions of time and place, constitutes a single offense, in a continuous form, and with multiple offenses under competition.

Conclusions and Recommendations

The Black Sea and Danube function as natural barriers against the wave of migrants from Asia and Africa, and this would be one of the reasons why Romania should not consider building fences to prevent illegal migration, as happened in Greece, Hungary and Bulgaria.

According to Border Police, last year tried to enter or leave illegally Romania 1,232 foreign citizens, with the help of migrants' smugglers and organized, generally, in groups that have started three or from three-four to 132 people.

According to the conducted analysis performed in this study, we find that the immigration phenomenon in Romania has intensified in the recent years, expecting an upward trend of this phenomenon, especially in terms of our country's accession to Schengen area, as we believe it will become easier the immigration of the population towards our country and further to EU countries.

Romania is in the path of three migration routes to Western Europe: borders with Ukraine and Republic of Moldova on the east route of migration, the border with Serbia on the migration route of the Western Balkans and the land route Eastern Mediterranean, which is separated by Bulgaria. The latter includes the Greece-Turkey area, where the most migrants arrive legally in Turkey, where then passed illegally into Greece or Bulgaria.

If in 2012, most foreigners who try to illegally enter Romania were caught by border guards on the border with Serbia, in 2015 over 50 percent were caught at the border with Bulgaria.

Border Police officials claim that compared to the wave of migrants who invaded other countries of the European Union, Romania has the advantage of natural boundaries, such as the Danube and Black Sea.

To stop trafficking in migrants at the Black Sea, the border police in Romania identifies members from Romania of networks, their arrests having including the role to discourage their accomplices.

In order to obtain a concerted effort of all stakeholders who should be involved in managing this phenomenon - government institutions, NGOs, associations of migrants, etc. - and achieving a communication unit at national level, the first goal will be being to develop a true partnership between these actors, who, together and separately, have an important role in the legislative framework, in building action plans needed to implement laws to identify weaknesses in the system and optimal

solutions to remedy them. Thus, given that cooperation can be constructive and objective partnership can be achieved with maximum efficiency if it is based on good communication, we consider it necessary to make a framework for cooperation and collaboration at the national level, at all levels of activity in the immigration domain.

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