

TRAFFICKING IN MIGRANTS AT EUROPEAN LEVEL

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Abstract

The last years are witnessing the phenomenon of migration of some important people masses from one country to another, for various reasons. The study shows the phenomenon of migrant trafficking, with the European Union facing the increase of illegal border crossings in recent years. The study also presents the situation in recent years as well as the risks faced by European states in 2018. At the same time, the crime of trafficking of migrants in the context of cross-border organized crime is analyzed.

Keywords: migration, trafficking in migrants, criminal law, human rights.

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1. Introduction

At international level, the states have committed themselves to respecting human rights and fundamental freedoms and, in this context, to taking effective measures to combat practices that undermine these obligations. There is today, more than ever before, the 70th anniversary of the adoption of the Universal Declaration of Human Rights, the concern to promote and protect human rights as widely as possible. Thus, the idea of creating a World Human Rights Court under the umbrella of the United Nations.¹

Because the field faced by states across the globe in the last few years, namely, migration, even if it is undeniable that the movement of people has permanently marked the history of humanity, knowledge, promotion and protection of human rights is essential. It must be remembered that migration has a permanent impact on society as a whole, but especially on that of receiving countries. As is well known, immigration is the process by which people or groups of people move to another state for the purpose of settling in their territory.

And in this field, international and regional instruments have to be interpreted in the current context, applied in the situation of this situation. The causes that have generated an unprecedented number of illegal migrants, for

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¹ See Human Rights: a World Court? (2018), ECHR, EICHR, IACL, IIHR, „Comparative human rights”, Strasbourg.

example at the borders of the European Union, do not seem to be able to be removed too soon. We believe that, although internationally stipulated, human rights guarantees have not been fully applicable in all countries of the world.

Doctrine and practice in the field to which we refer have evolved considerably in the present millennium. We cite as an example the UN Convention on Transnational Organized Crime, adopted in New York on 15 November 2000², plus the two Additional Protocols on the Illegal Migration and Trafficking in Persons. They first set out the distinction between trafficking in human beings on the one hand and the illegal introduction of migrants on the other.³

2. Trafficking in migrants and transnational organized crime

In the Protocol against the Illicit Traffic of Migrants by Land, Air and Sea, Additional to the United Nations Convention against Transnational Organized Crime, the Preamble states that "migrants must be treated with humanity and their rights must be fully protected".⁴

Fundamental rights can be affirmed by any person, "the principle of equality is the cardinal idea of the struggle for human rights (Zlătescu, 1994). The objectivity of human rights science "is guaranteed by the independence of human rights in relation to any school of thought or any interpretation of reality (Zlătescu, 2015).

According to the above-mentioned document, the expression "illegal trafficking of migrants" means ensuring, for the purpose of obtaining, directly or indirectly, financial benefit or other material benefit, the illegal entry into a State Party of a person who is neither a citizen nor a resident permanent of that state.⁵

The Office of the United Nations High Commissioner for Refugees (UNHCR, 2016) called for a comprehensive reform of the commitment to protect people moving to the European continent. Thus, solutions have been proposed to "rebuild trust through better management, partnership and solidarity". At the same time, these issues were also highlighted at a European regional level in the Fundamental Rights Report 2016 of the Fundamental Rights Agency, underlining that in the absence of alternatives, many people in need of protection resort to smuggling networks to look for safety. As a consequence, it is believed that legal channels should be made available to allow people in need of protection to reach

² Called the "Palermo Convention".

³ The United Nations Convention against Transnational Organized Crime replaces the phrase "criminal organization" with "organized crime group". Thus, according to art. 2 lit. a) a "structured criminal group" is a "structured group composed of three or more persons who have been in existence for a certain period of time and are acting in the cartel for the purpose of committing one or more of the serious offenses or crimes prescribed by this Convention to obtain, directly or indirectly, a financial advantage or other material advantage."

⁴ Text published in the M.Of . no. 813/8 November (2002).

⁵ See article 3.

safety, without bearing the risks of abuse and exploitation while they are on the road (European Union Agency for Fundamental Rights 2016).

The Treaty of Lisbon, in Chapter IV, Article 83 (Title V), refers to the fact that the European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may have minimum rules on the definition of offenses and penalties in areas of serious gravity and cross-border crime resulting from the nature or impact of such offenses or from the special need to combat them, starting from a common ground (Zlătescu & Marinică, 2017).

The terms illegal or clandestine migration are used to indicate the same situation: people who have used illegitimate ways to facilitate their entry or stay in the territory of a state other than their own. In general, there is a more frequent use of the term "irregular" in recent years.

Illegal migrants violate various regulations in the field, through illegal entry, thus fraudulent border crossing, evading border control, or entry using false / counterfeit documents. Also, illegal immigrants are also those whose entry was legal, but the stay has become illegal, exceeding the visa term as well as those who no longer qualify for a new residence permit.

Human rights protection mechanisms, through universal or regional international norms, establish the State's obligation to protect all categories of persons within its territory. The rights of persons requesting protection are established "in legal categories, granting them a protection regime." The International Court of Justice has determined that "the protection afforded by human rights conventions does not cease in the event of armed conflict, given the effect of the derogations this, which is found in Article 4 of the International Covenant on Civil and Political Rights."⁶

The right of a person to leave the state of origin is the expression of international law, governed by Article 12, paragraph 1, of the International Covenant on Civil and Political Rights as follows: "Everyone is free to leave any country, including his own country".

The Declaration of Human Rights states that "Every human being has the right to life, to the freedom and security of his person" and at the same time proclaims that "No one shall be held in slavery or servitude; slavery and slave trade are forbidden in all their forms".⁷

Migration trafficking is a form of organized crime,⁸ a global phenomenon, possesses the features of this type of crime, has an identical essence and obeys the existence laws of its own phenomenon.

⁶ International Court of Justice (2004), Legal Consequences of Building a Wall in the Occupied Palestinian Territory, Consultative Opinion, para. 106.

⁷ Declaration of Human Rights - Adopted by the General Assembly of the United Nations on 10 December (1948) by Resolution 217 A at the 3rd United Nations General Assembly session - Article 3 and Article 4.

⁸ A first definition of "organized crime" is found in the World Plan of Action against Transnational Organized Crime, adopted by United Nations General Assembly Resolution no.

In 2016 and 2017, the decrease in the number of illegal border crossings in the European Union was due to a lower number of illegal crossings with the external borders with Turkey and the Western Balkan countries. However, with over half a million illegal crossings in 2016, the figure is still significantly higher than any annual total between 2010 (104,060) and 2014 (282 933) (FRONTEX, 2017). This indicates pressure on the Union's external borders.

In 2017 204,219 people crossed an EU border illegally compared to 511,074 in 2016 and 1.8 million in 2015.

In 2018, the irregular migration pressure on our southern borders in the Mediterranean will remain at a very high level.⁹

The migratory pressure at the EU's external borders with Turkey has been easing since October 2015. We appreciate that an important aspect in this regard is the EU Turkey statement in which Turkey agreed to secure its maritime and land borders and accept the return of irregular migrants from Greece.

In terms of nationalities, for the fourth consecutive year, people claiming to be Syrian nationals (17% of total EU) represented the highest share of irregular migrants entering the EU in 2016. They were followed by Afghans (11%), who accounted for the second largest number of illegal border crossings.

In 2017, the total number of illegal border-crossings into the EU dropped to its lowest in four years, especially due to a fall in detections on the Eastern Mediterranean and Western Balkan routes.

While the comparison on the annual basis shows that the Eastern Mediterranean and Western Balkan routes had the biggest decline in absolute numbers, the most significant development of last year was the sudden plunge in the number of illegal border crossings on the Central Mediterranean.

Corresponding to the changes on the migratory routes, the relative share of African nationals increased compared with 2016, driven by fast-growing numbers of migrants from Maghreb countries (notably Morocco, Algeria and Tunisia) in the second half of the year. As a result, African nationals accounted for almost two-thirds of irregular migrants arriving at the shores of the EU.

Risk Analysis for 2018 also presents various indicators related to the EU's external borders and migration in 2017. These include: 204 700 detections of illegal border crossings between border-crossing points (down

49/159 of 23 December 1994. The UN General Assembly thus attempted to give a first definition by reference to the illegal activities committed, ranging from international vehicle theft to the sale of nuclear products, illegal immigration, environmental crime, crime computer piracy, trafficking in women and children, and up to corruption. Organized crime is a continuous, self-sustaining criminal conspiracy, having an organizational structure maintained by fear and corruption, motivated by greed (Hedeşiu, 2015, p. 15).

⁹ Frontex Executive Director Fabrice Leggeri - Risk Analysis Report for (2018), in Brussels, Belgium February 20.

60%), 183 500 refusals of entry (down 15%), 151 400 effective returns by member states (down 14%). Frontex assisted more than 14 000 returns (up 33%), 10 200 detections of people smugglers/facilitators (down 19%)

Risk Analysis for 2018 concludes that the sea, especially along the Mediterranean routes, will remain the most active path for illegal crossing of the EU external borders, but also one of the most dangerous for migrants. Frontex, the European Border and Coast Guard Agency, is leading the way to expand the cooperation among various authorities, contributing to combatting various cross-border crimes, as well as additional coordination in search and rescue efforts.

Viewed in its totality as a whole, with its specificity and perspectives, the national and international connotations of this growing scourge now acquire a series of interrelated, unprecedented dimensions of social, economic, and legal nature.

In a socio-human perspective, migrant trafficking demonstrates the deep violation of fundamental human rights and is becoming a constantly aggravating problem, expanding with the involvement of an increasing number of people.

Although there is unprecedented advancement in scientific knowledge and technological applications, including in the field of psychological sciences, much of the members of society do not go beyond education, a primitive mentality by which the human being is treated as a commodity.¹⁰ Thus, trafficked persons are gradually dehumanized, traumas suffered irremediably evolving.

Based on the analysis of the determinant causes and the existing and potential effects, it is a phenomenon that has far exceeded the projections of its magnitude. Although the studies and reports in the field present migrant traffic as a worrying reality by the degree of encompassment and the accentuation of the risk factors, the contradictory estimates cannot provide exact data on the phenomenon size.

Illegally collected collateral money cannot be taxed, damaging social and health insurance budgets, which are hard to estimate, so that the drama of trafficked persons is further deepened.

The offense of trafficking in migrants can also be seen from the perspective of public order and national security as a form of crime, migrant trafficking brings serious touches to states, controlled migration and criminal activity involving an illegal crossing of the border.

Migrants trafficking may involve individuals (recruitment agents, smugglers, accomplices who have abused their position within the administrative authorities), but also legal entities (hotel, show, travel agencies, transport companies, etc.).

Occasional trafficking occurs in the conditions of migrant transport by unoccupied or low-income guides, which ensure their existence by committing crimes.

¹⁰ The Council of Europe, (2009) Action against Trafficking in Human Beings, p. 3.

Trafficking in organized groups¹¹ occurs when traffickers are well organized and specialized in trafficking citizens across borders using the same routes. It is obvious that the way of recruitment differs from the trafficker to the trafficker, from one grouping to another or from one regional to the other.

Transnational crime has an international dimension in terms of the fact that a criminal group acts on the territory of several states and a transnational dimension that refers to the collaboration of criminal groups of different nationalities, designed to control certain geographical areas (Iacob, 2009). The fundamental purpose of these groups is the continuous capitalization, the accumulation of resources through illegal means.

In order to adopt the most effective measures to prevent and counteract the phenomenon of migrant traffic it is necessary first to know the causes and conditions that generate and favour this activity. Whether personal or micro-or macro-social contexts are deeper in the knowledge of these causes, it is essential to find ways to combat, in addition to criminal ones, the definition and criminalization of the crime.

Generally, the factors determining migrant traffic can be classified into two main categories: structural factors (extrinsic) and proximal (intrinsic) factors.

Structural factors are mainly economic (poverty, globalization with its effects, free markets and fluctuations, labour migration, etc.), social (education, social discrepancies, age and gender discrimination, prostitution, etc.) (racism, xenophobia, cultural stereotypes, etc.) and politics (riots, civil wars, military operations, regional wars, etc.).

Proximity factors are determined by public policy issues related to justice (inadequate national or international legal regimes, precarious and defective law enforcement, inappropriate migration and immigration laws, gaps in legislation and firm enforcement of laws and standards in the field of lucrative activities etc.), failure to comply with the law or its client application (corruption, state aid to illegal activities, support of underground networks by state representatives, illegal entrepreneurial activities), and the lack of a solid partnership between the state and civil society.

The hindering of legal migration opportunities in the countries of destination, as well as the rather restrictive regulations imposed by developed countries, countries targeted by trafficking victims, favour migrant traffic considerably.

¹¹ According to art.2 letter a of Law no. 39 / 2003 "the organized criminal group is that structured group consisting of three or more persons who exist for a period of time and act in a coordinated manner for the purpose of committing one or more serious offenses in order to obtain, directly or indirectly, a financial benefit or other material benefit; a group formed on an occasional basis for the purpose of committing one or more offenses and which has no predetermined continuity or structure or predetermined roles for its members is not a criminal group.

Naturally, migrant traffic is directed from the poor to the rich. In fact, trafficking networks are blossoming on the basis of political, economic, social instability in these countries.

Every year, around the world, old conflicts are getting worse, new ones are emerging, and isolated situations are improving. Victims, as always, are civilians caught in the middle, armed conflict having devastating consequences for their lives.

In this context, it is necessary to formulate coherent policies for preventing and combating the trafficking of migrants, but this process has a number of difficulties resulting first of all from the lack of knowledge of the real dimensions of the phenomenon, due to the very high mobility, the intense movement over the frontiers of the persons and goods, and second, the obscurity of the phenomenon.

Evidence of the fact that the person is considered to be the supreme value of society is also the evolution according to the continuous improvement of the legislation of the democratic states, the main purpose of which is to prevent and combat any form of attack on the human being.¹²

Criminal law has a specific status within each national law system, adapted from a regional and zonal point of view, although measures adopted to prevent and combat trafficking in human beings are similar.

The main argument in favour of legislative approximation in this area of criminal law has always been that offenders can take advantage of the differences between different criminal systems in order to escape the rigor of the law, more specifically, the difficulties encountered by authorities when offenders are planning crimes in a country and committing them in another country, or committing them in a country and then fleeing to another country (Mazâlu, 2009).

We quote as an example the New Romanian Penal Code that marks an evolution in the regulation of human trafficking crimes in our criminal law. The legislator attempted to systematize these crimes, for the first time devoted a distinct chapter within the more comprehensive category of crimes against the person (Title III, Chapter II - State border offenses) (Hotca, 2014).

In accordance with art. 263 of the Romanian Penal Code, the trafficking of migrants represents the rehabilitation, guidance, guidance, transportation, transfer or housing of a person, for the purpose of fraudulently crossing the Romanian state border, shall be punished by imprisonment from 2 to 7 years. When the act was committed:

¹² See also paragraph 5 of the Vienna Declaration and Program of Action adopted at the (1993) World Conference on Human Rights (UN / A / CONF.157 / 23): "While it is important to keep taking into account the significance of national and regional characteristics and the various historical, cultural and religious contexts, it is the duty of the states, irrespective of their political, economic and cultural systems, to promote and protect all human rights and individual freedoms "

a) In order to obtain, directly or indirectly, a patrimonial benefit;
b) By means that endanger the life, integrity or health of the migrant;
c) By subjecting the migrant to inhuman or degrading treatment, the penalty is imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights. The attempt is punished.

The active subject of the offense may be any natural person who is legally required, responsible and who, at the time of the act, has the freedom to decide and act (Ungureanu, 1995).

The active subject can be both a natural person and a legal entity (Udroiu, 2014).

Generally speaking, the recruiters are young, neat young people, who are telling success stories about their own success, as well as those who have gone abroad, especially in Western European countries, highlighting the attractiveness of working conditions and, especially, the sums earned (Mateut, 2005).

The passive subject of the offense is the person who holds the protected social value and who is injured or threatened by the offense (Mitrache, 2010), in the case of the trafficking offense of the migrant is therefore the person against whom the trafficking action is directed.

Victims are accompanied by a recruiter to ensure crossing the border so that they can later be taken over by another network member or sold to a network. Many victims have not travelled abroad, often do not know what state they are in the travel document being confiscated by the trafficker as a guarantee of subjection, the victims thus becoming dependent on the person accompanying them.

Conclusions

During the journey, victims are often and in many ways violating fundamental rights and freedoms, being subjected to physical and psychological abuse, rape, torture, threatening.

The prevention and countering of the phenomenon requires a global and international approach from all countries (home, transit, destination), a growing and permanent concern for the adoption of effective measures to limit the phenomenon.

Issues related to migrant trafficking are very broad and difficult to see from a simple glance, requiring an in-depth analysis of the current regulations in the field, for example in the case of Romania and other countries the provisions of the international treaties to which the state has also adhered to the provisions of the domestic criminal law in force.

Obviously this phenomenon can only be limited by an effective cooperation of the authorities entitled to intervene when the most important social values are violated. Prevention and combat requires the effort of all, both state institutions and civil society.

Bibliography

1. European Union Agency for Fundamental Rights, (2016) *Fundamental Rights Report*, [http://fra.europa.eu/sites/default/files/fra_uploads/fra-\(2016\)-fundamental-rights-report-2016-2_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-(2016)-fundamental-rights-report-2016-2_en.pdf).
2. FRONTEX, (2017) *Risk Analysis for (2017)*, Warsaw (not published).
3. Hedeşiu, E. (2005) *Combating organized cross-border crime*, Bucharest: UNAP.
4. Hotca, M.A. et. al. (2014) *New Criminal Code, Notes, Correlations, Explanations/ Noul Cod penal, note, corelații, explicații*, Bucharest: Ch.Beck.
5. *Human Rights: a World Court?* (2018), ECHR, EICHR, IACL, IIHR, Comparative Human Rights, Strasbourg.
6. Iacob, A. (n.d.), *The Concept of Criminality Organized in European Law*, available at <http://fs.procuror.ro/1fe13917596cfa50d52ae4f335a08a.pdf>.
7. Mateuț, G. (2005), *Traficul de ființe umane, infractor, victimă, infracțiune*, Iași: Asociația Alternative Sociale.
8. Mazălu, I. (2009) “Approximation of the criminal laws of the European Union”, *Curierul Legislativ*, no. 1.
9. Mitache, C. (2010), *Romanian Criminal Law, General Section/Drept penal roman. Partea generală*, Bucharest: Universul Juridic.
10. Moroianu Zlătescu, I. (2015), *Human Rights, a dynamic and evolving process*, Bucharest: Pro Univresitaria.
11. Moroianu Zlătescu, I., Marinică E. (2017) *European Union Law/Dreptul Uniunii Europene*, Bucharest: Academic Publishing House/Editura Universitară.
12. Udriou, M. (2014), *Criminal Law. The Special Part - The New Criminal Code/Drept penal. Partea specială – Noul Cod penal*, Bucharest: C.H.Beck.
13. UNCHR (2016) *Better Protecting Refugees in the Eu and Globally*, <http://www.refworld.org/docid/58385d4e4.html>.
14. Ungureanu, A. (1995), *Romanian Criminal Law, General Part/Drept penal roman. Partea generală*, Bucharest: Lumina Lex.
15. UNO (1994) *World Plan of Action against Transnational Organized Crime*, General Assembly Resolution no. 49/159.
16. Zlatescu, V.D., Moroianu Zlatescu, I. (1994) *Human Rights in Action*, Bucharest: Romanian Institute for Human Rights.