

CRIMINAL LAW RESPONSES TO SMUGGLING OF PEOPLE IN CROATIA AND SERBIA WITH THE ANALYSIS OF SITUATION AND TRENDS*

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Abstract

The paper deals with the criminal law aspect of smuggling people as a global problem of illegal migration. The legislative framework starts from relevant international documents at a multilateral, regional and bilateral level. On this basis, the national *de lege lata* solutions in the Republic of Croatia, as a member of the EU, and the Republic of Serbia, as an applicant for membership, have been critically reviewed. The authors have investigated the situation and trends of smuggling of people in the countries on the Balkan Crime Route. More detailed were analyzes data on the number of reported, accused and convicted persons for the crime of smuggling of people in the Republic of Croatia and the Republic of Serbia in the last two years. Anticriminal solidarity of states is a prerequisite for comprehensive international criminal justice cooperation in the detection, prosecution and punishment of perpetrators of these criminal offenses. The final part of the paper presents *de lege ferenda* proposals with an aim of improving the normative framework and procedures for combating smuggling of people.

Keywords: smuggling of people, criminal legislation, analysis of situation and trends, Croatia, Serbia and EU.

1. INTRODUCTION

In recent years, the modern world has been plagued by the worrying migrant waves of people from the region of North Africa and the Middle East. This process was preceded by

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the *Arab Spring* as a form of resistance of people to totalitarian regimes in some countries, with the help of great powers and their allies. In the meantime, civil protests and demonstrations of dissatisfied people came out of this box and things became far more serious. On the one hand, there was a domino effect and spreading of dissatisfaction to a large number of countries, and on the other hand, dissatisfaction has received a form of war conflicts. This is particularly true of the events in Libya, where the former President Gaddafi was removed from power, as well as Syria where a civil war began that continues to this day. The conflicts escalated when NATO got involved in the war in Libya on the side of one of the participants, while in Syria situation became unbearable after the failure of negotiations for a peaceful resolution of the conflict under the auspices of the United Nations (Geneva). *Arab Spring* was echoed in the US and the developed Western European countries in the form of smaller civil protests, under the slogan *Occupy Wall Street* (Browsers 2009).

The mentioned processes have led to the rise of religious (Islamic) terrorism, refugees and unprecedented migration of entire peoples from war-affected areas. Refugee migrant wave first swept the neighboring countries of Turkey and Greece, then Italy on the maritime route to the EU and other European countries. Members of the ex Yugoslavia, Macedonia, Serbia, Croatia and Slovenia, Montenegro, and Bosnia and Herzegovina, also found themselves on the refugee migration routes. With increased intensity of the war conflicts, the refugee wave has become increasingly bigger, so migrations have received an illegal character with the characteristics of criminal offenses. The Migrant Wave has strongly threatened Europe, especially the EU states, which are the ultimate destination for migrants.

Smuggling of people is one of the most difficult consequences of these processes, which has affected the countries that have found themselves on land, sea and air routes of smugglers. In the fight against smuggling of human beings, with the measures at the national level of states, full international cooperation of the states and international organizations of the Region and the EU is needed. There is also a significant bilateral cooperation between the countries, thus aspects and forms of cooperation between Croatia and Serbia in combating smuggling and joint response to the current migrant waves have been pointed out. Cooperation is particularly important because of Serbia's current application for EU accession and the harmonization of relations between Croatia and

Serbia, unfortunately still burdened by past war conflicts (Nikač, Božić 2016, 193-220).

2. ILLEGAL MIGRATION - CONCEPT, ETIOLOGY AND PHENOMENOLOGY

Migrations of people are a well known phenomenon from the history of human civilization, which has recently gained intensity due to changed social, economic and other circumstances. In pursuit of a better life, millions of people moved to richer and safer countries, as was the case in the 20th century when the largest migration to the United States was observed (Ignjatović 2007, 172). War conflicts and other extraordinary events have

particularly influenced the strengthening of migration in the world, as was the case in the former SFRY.

Migration (*lat. migratio*) refers to relocation that encompasses different forms of human mobility. Domestic migration involves the relocation or displacement of the population within the borders of one state, while international migration means the relocation of people from one state to another (Mastilo 2001, 228). The International Organization for Migration defines migration as a movement of people or groups of people across and beyond borders, regardless of the distance that they travel and the causes and circumstances under which the movement is taking place (IOM Glossary 2011).

The natural causes of migration are geographical, geological, climatic, hydrological, but also natural disasters and emergency situations (incidents, accidents, technical-technological events, infectious diseases, war consequences). Social causes of migration are conflicts, confrontations and wars especially based on racial, religious and ethnic grounds, while economic causes are poverty, unemployment, low standard and criminality (Žarković et al 2009, 185-202).

The emerging forms of migration are different depending on the division criteria. In the context of the topic, there is a significant division of legal and illegal migrations, according to the legal basis of migration flows (Babović 2006, 5-6). Legal migrations are regular and are conducted according to state regulations, while illegal are irregular and contrary to national regulations.

Illegal migrations are a type of relocation and movement of people that are contrary to the laws of the states of origin, transit and destination. The most important element is the unlawfulness according to the regulations of the states of departure, transit and destination. For states of departure unlawfulness is the crossing of the state border without a valid travel document, contrary to administrative and other conditions for leaving the country. For transit and end destination, unlawfulness is observed through non-fulfillment of the conditions for entry, stay or work in these countries.

According to the manner of execution of illegal migration, they may be unorganized, semi-organized and organized. Unorganized are self-initiated migrations of individuals or small groups of people, semi-organized are characterized by a lower degree of organization by criminal groups and organized migrations are a result of organized criminal groups with the support of corrupt civil servants (Filipovski 2002, 40).

3. INTERNATIONAL LEGAL SOURCES FOR COMBATING OF PEOPLE SMUGGLING

a) UN Convention against Transnational Organized Crime (UNCATOC 2000, vol.2225) is one of the most important legal sources for combating organized crime and people smuggling. According to the Second Supplementary Protocol against the Smuggling

of Migrants by Land, Sea and Air (Nikač 2015, 265-290),⁵⁸ migrants are treated as persons whose personal situation is abused for material gain and other lucrative motifs, on the basis of which a distinction is made between the criminal offense of trafficking in human beings and smuggling of migrants (Nikač, Božić 2016, 193-220).

b) *Recommendations Principles and Guidelines on Human Rights and human Trafficking* are an important document adopted by the UN High Commissioner for Human Rights. Human trafficking is treated as more than an organized movement of people for profit, while an additional basis for distinction from people smuggling is fraud, force or coercion for exploitation (UN HCHR 2002, 9).⁵⁹ One of the regular consequences is the deterioration of health and loss of life of people (migrants) who are in unbearable hygienic, sanitary and health conditions (Hansen, Donohoe 2003, 153-164). The most serious consequences are produced by exploitation of migrants by criminal organizations, which is most often manifested in the form of forced labor and sexual exploitation.

c) *Other significant sources include:* *Council of Europe Convention on Action against Trafficking in Human Beings*, (Warsaw 16/05/2005, CETS No.197), *Council Directive 2004/83/EC* of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ EU L 304/12), *Directive 2004/38/EC* of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ EU L 158/77), *Directive EU 2002/90/EC* of 28 November 2002, (OJ EU L 328/17), *Directive 2011/36/EU* of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ EU L 101/1), *Council Framework Decision of 15 March 2001 (2001/220/PUP)* on the Standing of Victims in Criminal Proceedings, (OJ EU L 82/1) and *Directive 2008/115/EC* of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country (OJ EU L 348/98).

4. PEOPLE SMUGGLING AS A CRIMINAL OFFENSE AGAINST PUBLIC ORDER AND PEACE IN THE NATIONAL LEGISLATION OF CROATIA AND SERBIA

a) *Criminal Code of Croatia* (OG 125/11, 144/12, 56/15, 61/15) provides for criminal offense of illegal entry, movement and residence in the Republic of Croatia, other

⁵⁸Serbia has signed and ratified UNCATOC and the Additional Protocols, OG SRJ – IA 06/01, OG SCG-IA 11/05 and Croatia OG 14/02,13/03, 11/04.

⁵⁹Recommended Principles and Guidelines on Human Rights and Human Trafficking, available at: <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf> (25/03/2018).

Text presented to the Economic and Social Council as an addendum to the report of the UN High Commissioner for Human Rights (E/2002/68/Add.1).

EU Member State or signatory of the Schengen Agreement referred to in Article 326 of the Criminal Code of the Republic of Croatia.

The criminal offense was adopted in the context of the harmonization of the Republic of Croatia's norms with EU law before becoming a full EU member, which Republic of Croatia became on 1 July 2002. The Criminal Code of the Republic of Croatia is in conformity with the EU Directive 2002/90/EC of 28 November 2002 (OJ EC L 328/17) on the definition of the facilitation of unauthorized entry, transit and residence,⁶⁰ by which Member States have been instructed to incriminate actions to assist a person other than a national of a Member State to enter or cross the territory of a Member State or reside in its territory.

The criminal offense of illegal entry, movement and residence in the Republic of Croatia, another EU Member State or Signatory of the Schengen Agreement exists in the event that the perpetrator for personal gain allows or helps another person to illegally enter, leave, move or reside in the Republic of Croatia or another EU Member State or signatory of the Schengen Agreement, for which a prison sentence of six months to five years is prescribed. The aggravated form is prescribed if during the commission of the crime life or body of a person who illegally enters, moves or resides in the Republic of Croatia or another Member State of the EU or signatory of the Schengen Agreement was endangered, or the person was subjected to inhuman or degrading treatment, or if an official person has committed a criminal offense in the performance of official duty, in which cases the perpetrator shall be punished by imprisonment for one to eight years (art.326.par.2. CC of Croatia).⁶¹

In order for a criminal offense to be perpetrated, the perpetrator is required to know or that he had to know that it is about providing or assisting a person other than a citizen of the Republic of Croatia to enter, leave, move or reside in that territory and that his intention (*dolus*) was aimed towards the realization of benefits that need not be realized (Božić 2015, 845-874). There is no criminal offense if a person (without any assistance) is illegally entering, leaving, moving or staying in the Republic of Croatia or another EU Member State or Signatory of the Schengen Agreement, but it is a misdemeanor for which the person shall be held accountable.

If the criminal offense referred to in art.326 Par. 1 of the CC is committed within a criminal association, the law provides for a prison sentence of one to ten years, while for the aggravated form from par. 2 a prison sentence of three to twelve years is prescribed (art. 329. par. 1-3, CC).

The Aliens Act (OG 74/13, 69/17) is aligned with the solutions of the Criminal Code, harmonized with EU standards (Art. 1) which define the status of an alien as a person who is

⁶⁰ Each Member State shall adopt appropriate sanctions on: (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

not a citizen of the Republic of Croatia (Art. 2) and which specifies the cases of unlawful entry of an alien into the territory of the Republic of Croatia (Art. 39). Other important regulations in this area include the Law on State Border Control (OG 83/13, 27/16) and the Law on International and Temporary Protection (OG 70/15, 127/17).

b) *The Criminal Code of Serbia* includes the criminal offense of illegal crossing of the state border and people smuggling from Art. 350 of CC of Republic of Serbia (OG 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16).

The criminal offense exists when the perpetrator enables another person to cross the border of Republic of Serbia or unauthorized stay or transit through the Republic of Serbia in order to obtain unlawful (material) gains (art.350.par.2.) to themselves or others, which carries a prison sentence of six months to five years just like in Croatia for the basic form of the criminal offense. If a criminal offense has been committed by an organized criminal group, the perpetrator shall be punished by imprisonment for a term between three and twelve years. The solution is similar to a solution from the Criminal Code of Republic of Croatia that is harmonized with EU law, which is important because of the application of Republic of Serbia for EU accession.

For the aggravated form of this criminal offense perpetrator shall be penalized by imprisonment for a term between one and ten years (par.3) if the offense is committed by a group, abuse of official position or in a way that endangers the life or health of persons whose unauthorized crossing of the border, stay or transit in Republic of Serbia has been facilitated or if a large number of persons has been smuggled.

Other laws such as the Aliens Act (OG 24/18), according to which any foreigner who does not have the citizenship of Republic of Serbia (Art. 3) is an alien, are also harmonized with the solutions of the Criminal Code. Aliens are allowed to enter and stay with a valid travel document, with a visa or residence permit, unless otherwise provided by law or international treaty. In the context of the Criminal Code, Articles 8 to 9 of the Aliens Act are concerned with the issue of control of movement, entry, stay and exit of aliens, on the basis of which the request for entry or exit from the Republic of Serbia may be rejected under certain conditions. In this regard, it is specified in more detail which cases are considered cases of illegal entry into the Republic of Serbia (Art. 10), as well as cases when the measure of temporary ban on leaving Republic of Serbia (Art.13) is imposed.

Other important regulations in this area include the Border Control Act (OG 24/18) and the Asylum and Temporary Protection Act (OG 24/18).

Comparative legal analysis of the solutions in the Criminal Code of Republic of Croatia and Republic of Serbia should point to the evident difference in the incrimination. Art. 350 Par.1 of the Criminal Code of Republic of Serbia specifies imprisonment for up to one year when the perpetrator without a prescribed permit crosses or attempts to cross the border of Republic of Serbia, armed or with the use of violence. It is a privileged form of the criminal offense of *Unauthorized Crossing of State Border and People Smuggling*, referring to a perpetrator who personally crosses or attempts to cross the border of Republic of Serbia

without the necessary permission, armed or with the use of violence. Namely, in the criminal legislation of the Republic of Croatia this incrimination in the domain of a misdemeanour.

5. RESEARCH AND ANALYSIS – PERSONS REPORTED, ACCUSED AND CONVICTED OF A CRIMINAL OFFENSE OF HUMAN TRAFFICKING IN THE REPUBLIC OF CROATIA AND THE REPUBLIC OF SERBIA

a) In Republic of Croatia

Table No.1 indicates the number of reported, accused and convicted persons for the criminal offense of illegal entry, movement and stay in Croatia, other EU Member State or Signatory of the Schengen Agreement for 2015 and 2016.

Table No.1. Reports, accusations and convictions for criminal offense from Art.326 CC of Croatia⁶²

Art.326. CC of Republic Croatia Illegal entry, movement and residence in the Republic of Croatia, another EU Member State or Signatory of the Schengen Agreement			
	2015	2016	%
Reported	72	135	+ 87.50
Charged	64	98	+ 53.13
Convicted	54	94	+ 74.08

In 2016 there was a noticeable increase in the number of reported (87.50%), accused (53.13%) and convicted persons (74.08%) compared to 2015. We are of the opinion that the increase in the number of reports, accusations and convictions in 2016 for smuggling of people came about due to the current migration crisis that began in late 2015 and increasingly intensified. In the context of the suppression of the migrant wave, Croatia acted in co-operation with other EU member states.

b) In Republic of Serbia

Table No.2 shows the numerical status of reported, accused and convicted persons for the criminal offense of Illegal State Border Crossing and People Smuggling for 2015 and 2016.

⁶² Adult criminal offenders, reports, charges and convictions in 2015 and 2016, the Central Bureau of Statistics, Zagreb

Table No.2. Reports, accusations and convictions for criminal offense from art.350 CC of Serbia⁶³

Art.350 CC of Republic Serbia			
Unauthorized crossing of the state border and smuggling of people			
	2015	2016	%
Reported	605	409	- 32.40
Charged	441	350	- 20.63
Convicted	407	204	- 50.13

Compared to Croatia, in Serbia, we can see a noticeable decrease in reported (32.40%), accused (20.63%) and convicted persons (50.13%) in 2016 compared to 2015. We are of the opinion that the number of reports, accusations and convictions has declined due to the different position of Serbia in relation to Croatia and other EU countries, given that Serbia is a country of transit and not so interesting to migrants as the country of final destination. However, it should be noted that the number of reports, accusations and convictions in 2015 and 2016 is considerably higher in relation to the above mentioned number in Croatia due to the increased incrimination for people smuggling that includes unauthorized crossing of the state border, which is not the case in the Criminal Code of Croatia.

6. CONCLUSION

Illegal migration today is one of the biggest global problems. With the escalation of the war conflicts in Syria and Afghanistan, the migrant wave struck the territory of Europe as refugees from the war-affected areas tried to find a refuge in one of the countries of Western Europe. The problem of illegal migration gains significance due to the fact that Islamic radical elements can be found and hiding among the potential migrants, the so-called sleepers, mostly ISIL members and members of related terrorist organizations. The progression of illegal migrants has led to the emergence of organized crime groups that have begun to deal with people smuggling, transferring them from one state to another, ensuring fast, unlawful and enormous profits with minimal risk.

In response to an unprecedented refugee wave, the EU states tried to react, but administrative and other obstacles prevented an effective response. The passage of time and the oncoming lines of refugees were not an ally of the EU in solving this problem, so some countries have tried to find and offer individual responses, while some, such as Hungary, were radical, creating in its border zone wire fences as a physical barrier.

⁶³ Adult perpetrators of crimes in the Republic of Serbia in 2015 and 2016, reports, charges and convictions, Statistical Office of the Republic of Serbia, Belgrade

The Balkan route used by smugglers is a problem not only for the countries of the region but also for the EU countries and the international community as a whole. Therefore, at the international level, several documents were adopted that were the basis for adopting national legislation. The situation improved somewhat after the agreement between the EU and Turkey in 2016, in which Turkey took on the obligation of a restrictive approach to this issue, and the EU in turn promised current financial assistance.

The states of the region also demonstrated anti-criminal solidarity and intensified their mutual communication and cooperation in the form of information exchange, joint work of border police, customs and other relevant services. Regardless of the political differences due to the events of the neighboring countries of Croatia and Serbia, these states reacted in the same way and established full co-operation during the current migration crisis.

From the research carried out, it can be concluded that a significantly higher number of reports, charges and convictions for the mentioned criminal offense on the territory of the Republic of Serbia, is attributable to the fact that the Criminal Code of Republic of Serbia, along with people smuggling, also incriminates unauthorized border crossing as well as attempts at crossing without the necessary permission, using violence or weapons.

In the fight against illegal migration and people smuggling, it should be considered that the Criminal Code of the Republic of Croatia introduces incrimination of illegal crossing of the state border and not to let it remain a misdemeanor. Serbia, as a candidate for EU membership, should align its criminal legislation in this area with the EU standards in the coming period. On the criminal intelligence level it is necessary that the state and the international organizations exchange data daily, primarily those related to the criminal route, the perpetrators and the means of execution and forfeiture of the proceeds of crime. Finally, on a wider plan, it is necessary to influence the removal of the very causes of illegal migration.

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PREFACE

As Dean of the Faculty of Law – Kicevo, “St. Kliment Ohridski” University – Bitola, I must emphasize that it is a special honor and pleasure that finally came to the realization of the idea of organizing an international scientific conference by our faculty, as an opportunity for our affirmation in the international arena, for establishing contacts with our colleagues from home and abroad, contacts with various higher education and research institutions, as well as making a serious contribution to the scientific thought both in the Republic of Macedonia and in wider context. This is also reflected by the high interest shown both by home and foreign authors and participants, who applied for participation in our conference, as evidenced by the accepted and published articles in this book.

The choice of the main topic for our first international scientific conference was made carefully, thereby taking into account all internal and international developments in the legal and socio - political processes, by precisely locating the basic postulates for the efficient, fair and democratic constitution and functioning of the modern democratic legal and political systems. Hence, the rule of law, democracy and polycentric development were the main operative postulates.

Namely, the rule of law is perceived by common people as existence of laws, their implementation and whether the government respects them. These rules have been and still are important tools for limitation of the absolutistic comportment of public authorities, i.e. confining the acting of the state in general. However, the concept of the rule of law is much broader and is associated with good governance, functional democratic institutions, security and human rights. The link between the concepts and realization of democracy and rule of law is indubitable.

That is to say, building a society with strong rule of law does not represent just a technical activity, but a process that includes radical reforms of the laws, strengthening of the central and local government’s institutions, establishment of balance between the political and economic elites on one hand and the common people on the other. That means creating ambient of trust between the governing elite and the citizens, which implies substantial realization of the principles of democracy in general.

Hence, it is easy to reveal the operational components of democracy and of a certain current aspect – the polycentric model of organization, government and development. For both concepts, citizens’ participation in central and local decision making processes is enhanced by the inter-communication among all societal, governmental, non-governmental or business actors. In that sense, polycentrism basically means existence of a decision making system that stems from multiple centers, which acting formally and independently, aspires to deal with common

challenges, thus diminishing the gap between the traditionally predominant metropolises or important business centers and the rest of the cities-regional centers. The polycentric development should ensure institutional possibilities for citizens' involvement in the governing system for the purpose of realization of their preferences and the common good.

Finally, I must express my deep gratitude to the members of the most involved team members who worked tirelessly in the direction of successful organization and realization of our first international scientific conference, to the colleagues from our faculty who unselfishly supported this project, to the management of "St. Kliment Ohridski" University – Bitola for their proactive support and all those well-wishers who understood the significance of this project both as an advantage for our faculty and as an investment in the global scientific thought.

Let this conference be the beginning of the path that we started to trace together with a single purpose – Towards a better future!

Dean of the Faculty of Law – Kicevo
Prof. Dr. Sc. Goran Ilik

Bitola, 2018

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