

The Migrant Smuggling Crime in Romania

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ABSTRACT: The study below is meant to focus on the migrant smuggling crime in Romania, in specially analysis of the migrant smuggling infraction provided in the Romanian Criminal Code. Being a component of the human trafficking activity, the illegal migration is a phenomenon that is continuously extending and harder to stop due to the involvement of the organized crime networks and also due the ingenuousness and maliciousness of the people and the criminals. Therewith, the migrant smuggling is highly connected with drug trafficking, terrorism etc., aspects that are connected with the organized crime. Legally, there are many differences between the source states, the transit states or the destination states, that is slowing the fight of the states for combating this scourge. During this fight of preventing and stopping the illegal migrant smuggling, the states that are involved aligned their own legal frame to the international one in the activity field, by elaborating and promoting the regulatory acts that have been putting the responsibility on the governmental and non-governmental institution in this activity field.

KEYWORDS: migrant, illegal migration, crime, organized crime, Romanian Criminal Code

1. Introduction

The migration of population is a phenomenon that exists since ever, starting with the Great Greek Colonization and the Roman conquests, to the Roman Empire and the

Great Migrations of the XIX century and the beginning of the XX century, continuing to nowadays, it is a challenge that needed an integrated management from all the world's states (Revista Pentru Patrie 2015, 1). The Illegal migration is the alternative used by the people who cannot use the legal way for departing from one country to another. Essentially, the migrant smuggling represents an activity that facilitates the entering of a person from another state, where this person is not a citizen or a permanent resident; a likewise illegal activity is often done for obtaining, directly and roundabout, of a material benefit or of another kind (Griga 2016, 60).

The incrimination of such a crime is justified through the high level of social danger exposed by the activities that are facilitating for other people in order to break the other states' border, namely, the trespassing through ways, other than the ones established for the state border crossing or by trespassing right through the places where such an operation takes place, but fraudulently. In some cases, the crime is committed in order to obtain some benefits (Griga 2016, 60).

According to the activity report of Directorate for Investigating Organized Crime and Terrorism – DIICOT, during 2016, out of the 121 cases to be solved with the migrant smuggling as an object of litigation, 68 new registered cases during the mentioned period, a number of 28 cases have been solved, compared to 32, solved in 2015. Out of all of them 3 have been solved through indictment and plea agreements compared to 10 cases, solved in 2015 (70% decreasing), with 15% indicted sent to court, compared to 75 of them sent in 2015 (80% decreasing), 13 out of them were held in provisional detention compared to 37 indicted held in provisional detention in 2015.

2. Analysis of the Migrant Smuggling Infraction Provided in the Romanian Criminal Code

The 263rd article represents a new criminalization in the Romanian Criminal Code. This article was adopted through Law no. 286 from 17th of July 2009 regarding the Criminal Code, published in the Official Monitor no. 510 from 24th of July 2009, coming into force by 1st of February 2014, with subsequent amendments.

2.1 Legal regulation – art. 263

(1) The recruitment, guidance, leading, transportation, transferring or harboring of a person for the purposes of an unauthorized crossing of the Romanian state border shall be punished by a term of imprisonment of between 2 and 7 years.

(2) *When the offense has been committed:*

- a) *With the purpose of obtaining directly or indirectly a patrimonial use;*
- b) *In ways that are endangering the migrant's life, integrity or health;*
- c) *By subjecting the migrant to inhuman or degrading treatment, the punishment shall be by the term of imprisonment of between 3 and 10 years and the disqualification from the exercise of certain rights.*

(3) *The attempt to this crime is punished.*

2.2. Pre-existing requirements

A. The legal object

The specific legal object is the real social value that is harmed by crime. This object category works for determining the individuality of a crime in a frame of a crime group. In our case, the special legal object is constituted the social relations whose existence and development must be protected by prohibiting the migrant smuggling.

The Material Object may exist the aggravated version, being represented by the person's body when the migrant is subjected inhuman treatment.

B. The criminal offense subjects

By the term of criminal offense, subjects represent, in the criminal doctrine, the people involved in the committing of a criminal offense, possibly by the actual committing of the criminal offense, or by bearing the consequences. Therewith, there are criminal offense subjects, both natural or legal person that did not obey the obligations in the criminal legal relationship of compliance and they committed the forbidden offense, on one hand, and the natural and legal person beneficiaries of the criminal law protection and that by the committing the criminal offense they bore the consequences, on the other hand (Mitrache & Mitrache 2017, 149-150).

a) **The active subject** of a criminal offense can be the natural or the legal person that committed the offense directly as an author or they participated in the offense as an instigator or as an accessory.

For the migrant smuggling, the active subject can be any person that fits the general requirements of criminal liability and who commits one of the incriminated actions. As I mentioned above, this crime can be committed in criminal participation. The criminal participation or the occasional plurality of offenders designates the situation that for the committing of a crime provided by the criminal law contributes with

common will more people than necessary, according to the nature of the offense or according to the will of the law (Mitrache & Mitrache 2017, 149-150).

According to the 46th article, 1st paragraph, the *author* is the person who commits directly an offense provided by the criminal law, also, according to the 2nd paragraph, the co-authorize the persons who directly commit the same offense provided by the criminal law.

According to the 47th article from the same Code, the *instigator* is the person that, intentionally, determines another person to commit an offense provided by the criminal law.

The *accessory* is the person that, intentionally, eases or helps in any way the committing of the offense provided by the criminal law. It is also an accessory the person that is promising, before or while committing the crime, that he will keep the goods, out coming from the crime or that he will help the offender, even if after committing the crime, the promise is not fulfilled – 48th article, Criminal Code.

b) The passive subject. In the criminal law doctrine, the passive subject of the crime is defined as a natural or private person, owner of the protected social value and who is damaged or endangered through the offense (Streteanu & Chiriță 2007, 72). In this case, this is the person subjected to the incriminated actions, sometimes with the consequence of subjecting the migrant to some inhuman or degrading treatments.

C. The place and the time of the crime

The place of the crime can be any place at the border of our state (a place that is not a border passing point), without the significance of the border trespassing, land, air or aquatic border. It is not excluded the option that by fraud the migrant smuggling to be committed by the border passing points. Therewith, given that the traffic would take place in one of the special border passing points placed in airports or seaports, the place of committing the crime is where the control point is placed. By *border*, we understand the natural or conventional line that separates the territory of a stat from another state's territory or aquatic settlements that do not belong to their territory (DEX 1998, 401).

According to the 1st article, 1st paragraph of the Emergency Ordinance of the Government no. 105 from 27th of June 2001 regarding the state border of Romania, the state border is the real or the imaginary line that passes, forthright from one border sign to another, or, for where the border is not marked to the land with border signs, from one coordination point to another; to the Danube river and the other flowing

rivers the state border is the one established through the accords, conventions and the agreements of Romania and other neighbor states, by taking into consideration the fact that the general principle accepted by the fluvial international law is that the border passes through the middle of the prime navigation way, also that the flowing rivers non-navigable, by the middle of the water line; for the Black Sea the state border passes by the exterior limit and the lateral limits of the territorial sea for Romania.

Within the phrase: *the illegal crossing of the state border* it is understood that the entrance and the exit by the illegal crossing of the state border of Romania must be accomplished in other places than the ones provided by the law or the entrance or exist take place in places designed for such a purpose but through fraud (Griga 2016, 56-57). The law does not condition in any way the existence of migrant smuggling by the time of its coming.

2.3. The structure and the legal content of the crime

A. The prerequisite for the migrant smuggling, under both legal options, implies the existence of certain special legal norms regarding the entrance or the way out of the country, that contain the rules that are mandatory to obey to. Therewith, the travel documents that must be submitted on the way in and the way out of the country are the passport or the identity card (only for EU citizens and the citizens of the states that signed agreements for the recognition of the identity card as a document suitable for crossing the border), the power of attorney or any other required document. As well, there are rules regarding the mandatory border crossing by certain devices and control points.

According to the 1st article, point i) of the Emergency Ordinance of the Government of Romania no. 105/2001, a *border crossing point* is any place organized and authorized by the Government of Romania for crossing the state border.

According to the 1st article, point k), of the same Emergency Ordinance, the *border control* is the activity carried out by the competent authorities' personnel, in order to ensure the compliance with the conditions provided by the law for the state border crossing of the people, transports, freight and other goods.

According to the 1st article, point k), of the same Emergency Ordinance, the *border control* is the activity carried out by the competent authorities' personnel, in order to ensure the compliance with the conditions provided by the law for the state border crossing of the people, transports, freight and other goods.

In the 17th article of the Emergency Ordinance of the Government of Romania no. 105/2001 it is shown that the border crossing control is conducted by a team consisting

in the personnel of the authorities provided by the 12th article, first paragraph, whose members have attributions according to the special legal provisions.

As an outcome of the coming into force of the Regulation no. 458/2017 for amending the Schengen Borders Code (Regulation no. 399/2016), adopted by the European Parliament and the Council of the European Union, the control authorities from the borders of the European Union's borders, including the Romanian Border Police, will conduct, starting with 7th of April 2017, systematic checkings on the way in and the way out of the member states' territory. These consist in checking the travel documents and checking the relevant databases regarding all the people, including those with right of freedom to movement according to the EU law (more precisely, the EU citizens and the family members of those who are not EU citizens) on the way in and the way out of the state, as well. The databases that will be checked include the Schengen Information System (SIS), the database of the Interpol regarding the travel stolen and lost documents (SLTD), also the national databases. The checks are allowing the member states to be ensured that those people are not a threat to the public, the internal security or to the public health, with the purpose of improving the European Union security and its citizens. This obligation is applied to all the external borders (air, maritime and land border) for the way in and on the way out, and also for the internal borders of the member states where the decision is not taken regarding the elimination of the internal control of their borders. (Point 9 of the Regulation no. 458/2017) (www.politiadefrontiera.ro).

We are mentioning the fact that the Romanian citizens do not need a visa for traveling to the European Union states members, such as: Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Leetonia, Lithuania, Luxemburg, Malta, United Kingdom, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Hungary. The criteria for the entrance and residence are those provided by the Directive no. 38 of the European Council from 29.04.2004.

B. The constitutive content he constitutive content of the crime designates all the criteria provided by the incrimination law regarding the forbidden act of conduct carried out by the offender or they become relevant to him committing the action or inaction (Bulai & Bulai 2007, 170).

a) The objective aspect designates all the criteria required by the incrimination norm regarding the act of conduct forbidden or ordained for the existence of the crime. The investigation of the objective aspect of the crime is carried out through the examination of its component elements, recognized in the criminal law doctrine as

the material element, the immediate outcome, the causality link between the material element and the immediate outcome. To these elements, there are added specific criteria as essential requirements to the material element (Dongoroz et al. 1969, 11).

The material element is carried out by one of the actions expressly indicated in the 1st paragraph of the 263rd article of the Criminal Code, which is the solicitation, the leading, the guidance, the transfer and sheltering of a person.

The solicitation means recruiting a person that wants to pass the state border illegal, being attracted with promises and pressuring.

The leading means showing the way to a person, directing to the right direction and indicating the manner in which he should proceed for crossing our state border.

The guidance means accompanying and leading the migrant persons so their border passing would be facilitated.

The transportation means displacing the migrants by an air, land or maritime transport.

The transferring consists in moving the migrants from one place to another in any way.

Sheltering a person means giving to involves making available for him certain spaces where he can live until the border crossing transfer.

Essential requirements. For achieving the objective aspect of the crime is it necessary that any of the actions through which the material objects can be achieved to meet two essential criteria. Therewith, it is mandatory that the actions to be directed to certain persons that happen to be the migrants themselves and any of the indicated actions to be committed by illegally crossing the state border.

The **immediate outcome** of the migrant smuggling, particularly, means creating a dangerous situation for the state's authority that has to ensure the surveillance and legal checking for the state border

The causality link is the glue between the causality element (the cause) and the immediate outcome (the effect) required by the law for the crime's existence. This turns out to be *ex re*, means that it is out of the offense's materiality.

b) The subjective aspect as an element of the constitutive content of the crime shall contain the totality conditions required by the law regarding the position of the consciousness and the will of the crimes against the offend and its outcome, for the characterization of the offending as a crime.

The subjective element is the psychological stance of the persons that committed an offense, against the offending itself and its outcome, stance that is expressed through the will required by the law for the existence of this crime. For both the options of the migrant smuggling crime, the culpability is the direct intention since the active subject

is activated by a special purpose characterized by the incrimination norm. Therewith, in the basic form, any of the normative modalities indicated by the law are achieved with the purpose of illegally crossing the state border. For the aggravated form in the 263rd article, the second paragraph, point a) on the Criminal Law Code, when the offense was committed with the purpose of obtaining directly or indirectly a material benefit, there is a qualified intention through the purpose.

In all the cases, the purpose as an **essential requirement** must exist in the psychological process of the offender, without giving importance if that purpose will be really achieved.

2.4. Forms. Modalities. Sanctions

A. Crime's forms

The preparation acts mean the first phase of the external time of the offense activity and consist in certain acts, data, and information procurement activities or adapting the resources or the tools that will be used for committing the crime and creating the favorable frame for committing it. For migrant smuggling, in particular, these are possible but not incriminating. Therefore, these are not ought to be punished.

The attempt rime variation that is situated, in the execution phase of the crime, before the start of the crime's performance that constitutes the material element of the objective aspect and creating the result that is socially dangerous (Mitrache & Mitrache 2017, 288).

According to the 32nd article, 1st of the Criminal Law Code, the attempt consists in executing the intention of committing the crime, execution that was interrupted or did not realize the effect. The migrant smuggling attempt is incriminated by the 263rd article, 3rd paragraph on the Criminal Law Code, for committing the offense and also for not causing the result.

The 'consummated act' crime is the crime that its result is produced at the same time with entirely committing the material element of the objective aspect. This includes the attempt to that crime. The **crime consumption** takes place in the moment of committing any of the activities that can make the material element and the immediate outcome was realized.

The 'exhausted act' crime means that crime form that consists in its prolonging after the consuming moment until the intervention of a contrary force or the end of the performance action caused by the offender's will or until the performance of the last

outcome. The prolonging can be caused by the amplification of the initial outcome or the continuation of the criminal activity (Mitrache & Mitrache 2017, 303).

The crime depletion of migrant smuggling takes place at the same time with its consuming moment.

B. The crime modalities

The normative simple modality is the one provided in the 263rd article, first paragraph, on the Criminal Law Code, meaning the *recruiting, leading, guidance, transporting, transferring or sheltering a person for illegally crossing the state border of Romania*.

The aggravating modality normatives are the ones provided by the 2nd paragraph of the same article, meaning *when the crime was committed*:

- a) *With the purpose of obtaining directly or indirectly a patrimonial use;*
- b) *Through ways that are endangering the migrant's life, integrity or health;*
- c) *By subjecting the migrant to inhuman or degrading treatment, the punishment shall be by the term of imprisonment of between 3 and 10 years and the disqualification from the exercise of certain rights.*

Aside from the above modality normatives there are **factual modalities**, in relation with the real way the indicted can create and complete the crime

C. The sanctions

According to the 112th article¹ of the Criminal Law Code, the court can rule as safeties measure the extended confiscation if it will find it complying with the legal requirements. The extended seizure consists in transferring to the state's property, forcefully and free of charge, the certain goods that could not be proven to be directly linked with the offense provided by the law, case that would require to order the seizure of the good obtained by a convicted individual, directly or through other persons, and that is self-evident that is disproportionate comparing to his illegal revenues (Mitrache & Mitrache 2017, 279).

2.5. Procedural aspects

The criminal proceeding is an activity covered by the law and conducted by the judicial bodies, with the participation of the lawyer, the parties and other trial subjects, with the purpose of determining completely and on time the offenses that represent crimes, so any individual that committed a crime to be punished according to its guilt and no other guilty individual to be not held liable (Neagu 2016, 1).

The prosecution the a phase of the criminal proceeding that has subject-matter the evidence collection regarding the existence of the crime and providing the criminal liability of them, for determining if it is the case or not to order the arraignment (Neagu 2016, 17).

The criminal prosecution represents the judicial tool through which the criminal law conflict is brought for resolution to the judicial bodies, for exposing the natural or private persons who committed crimes to the criminal liability (Neagu 2016, 102). According to the 36th article, 1st paragraph, point a) from the same Code, the first instance trial falls to the Court.

Conclusions

The migrant smuggling may be threatening the states' socio-economic stability and even peace and security. Moreover, this is one of the topics that have been constantly maintained present on the agendas and the political and social speeches in our European area, but also from occidental countries.

I must be underlined, therewith, the migrants' contribution that, in order to achieve the purpose of departing and leaving a better lifestyle in another country or under the force of threat and indications led by the traffickers, they prefer to keep quiet or to deny any connection with the people or the criminal groups that help them.

For the typical version, the migrant smuggling shall be punished by the term of imprisonment of between 2 and 7 years and for the aggravated version it shall be punished with the term of imprisonment of between 3 and 10 years and the disqualification from the exercise of certain rights, for example, the right of leaving the Romanian territory (66st article, 1st paragraph, point k) of the Criminal Law Code), the right to be in certain localities determined by the court (66st article, 1st paragraph, point k) of the Criminal Law Code.), the right to communicate with the victim or the victim's family members, with the individuals who committed the crime or any other individuals determined by the court or to get any closer to them (66st article, 1st paragraph, point n) of the Criminal Law Code) etc.

For the case of migrant smuggling, the criminal prosecution starts of its own motion. As the Criminal Law Procedure Code states, the criminal prosecution is for the competence of the investigating bodies of the judiciary police. This is consists in officers, police agents, specialized in carrying out the determination of the crimes, for gathering data with the aim of starting off the criminal prosecution and criminal investigation.

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