

## CRIMINAL LEGAL ASPECT OF HUMAN TRAFFICKING AND MIGRANT SMUGGLING IN REPUBLIC OF MACEDONIA

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**Abstract:** In the last few years, in the world, even in the Republic of Macedonia, the current topic are the migrants, who are migrating from a lot of countries around the world, mostly because of the wars that are occupied in those areas, or from an „economic point of view., because of the bad economic situation.

However, it should be noted that in practice, the distinction between human trafficking and migrant smuggling is not always easy to establish and maintain. , many trafficked persons, men and women, begin their journey as smuggled migrants – concluding a contract with an individual or group to assist in the movement as a return illegail financial gain.

In many cases, the cruelest forms of exploitation – slavery, forced labor, child labor, and forced prostitution – are nonconsensual where the victims are forced to work in deplorable and unsafe conditions or engage in sexual acts entirely against their will.

In a classical situation of migrant smuggling, the relation between migrant and smuggler is a voluntary, short and ends after the arrival of migrants in the country on the destination. However, some smuggled migrants are forced to pay high transportation expenses. Exactly at this late phase the ultimate goal of human trafficking becomes apparent (debt relationship, extortion, force use, forced labour, forced crime, forced prostitution).

The International legal rules on jurisdiction in situations of human trafficking and migrant smuggling are defined in the major international and regional agreements. Their goal is to reduce or eliminate judicial safe zones for traders by providing all parties in crime that can be punished, no matter where the crime is committed.

Extremely important is to work on taking actions that will deepen the activities, which were operationalized of prevention with the sole intention of preventing this form of organized crime. In this article we will try to give an overview of the manner in which the criminal legislation in the Republic of Macedonia criminalize this activities of human trafficking and smuggling of migrants.

In the Republic of Macedonia, continuing are the efforts to follow and implement the international standardas in this field. Republic of Macedonia heretofore has ratified the most important multilateral agreements in the fight against crime.

**Keywords:** migrant, smuggling, human, trafficking, organized crime.

### 1. INTRODUCTION

With the new amandmans in the criminal law in 2002, there is a new criminal offence „Human trafficking“ (Article 418 – of the Criminal Code)<sup>240</sup>, while in 2004 are incriminated the actions on migrant smuggling (Article 418 – of the Criminal Code) and organizing a group and inciting the commitment of the actions for human trafficking and migrant smuggling(Article 418 – of the Criminal Code). In January 2008 there were changes, the criminal sanctions increased, and also a new criminal act was introduced in the Article 418 – of the Criminal Code: “Minors trafficking”. The latest amendments to the Criminal Code in September 2009 a stricter punishment was introduces under the European Convention for the fight against human trafficking. Law on Amending the Criminal Code from 15.01.2008 (OG of RM No. 7/08), changes were made in addition to the description of the essence of the crime. These amendments to the law, for the enabled person of the criminal act or the user, is asked “to knew or was obliged to know” that the person is a victim of human trafficking. Furthermore is introduced a new article by which the attempt to commit the act of human trafficking is punishable, as well as specifying that the immovable objects that were used when executing the action is deducted. Law on Amending the Criminal Code from 14.09.2009 (OG of RM No. 114/09) an article is added which tightens the threatened punishment for and official person who will do the action in performing of the service at least 8 years in prison. Amending the Law on Asylum from 17.07.2015 the foreinger is allowed, crossing the border or inside the territory of the Republic of Macedonia to the police officer to express intention that will apply for asylum application and to be reffered within 72 hours to apply for asylum

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<sup>240</sup> Article 418 of the Criminal (Penal) Code of Republic of Macedonia.

application in front of an authorized official of the Department for Asylum at the **premises of the Reception Center for asylum seekers. Further by adopting by laws is determined the form of the expressed intention of applying for asylum application, the form for asylum application, the method of fingerprinting and photographing of asylum seekers. By adopting these solutions will exceed or will prevent the problem of illegal migration on the one hand, and on the other hand will facilitate the potential asylum seeker access to the authority managing the procedure for recognition of the right of asylum.** For example For example, the U.S. government understands human trafficking as the larger issue in its annual Trafficking in Persons report, in which forced labor and transnational human trafficking are characterized as subsets of human trafficking overall<sup>241</sup>.

- *Migrant smuggling*

Article 3 of the Protocol for smuggling determines that the migrant smuggling includes the following elements:

- providing illegal entry of another person;
- in other country;
- for financial or material gain.

Article 3 (b) further defines “illegal entry” as the crossing of (international) borders without complying with the necessary requirements for the legal entry onto the receiving State.

Article 6 from the Protocol for smuggling, among other things seeks to incriminate the migrant smuggling offense.

## 2. RESEARCH METHODS

In this paper it is used a method of analysis of the criminal legal framework related to these crimes. There are various national and regional initiatives to collect data on human trafficking, but the differing methodologies make it difficult to analyze the data<sup>242</sup>. The information is thoroughly analyzed and endorsed with articles from the relevant domicile and international legislation. With the Criminal Code are incriminated the acts of human trafficking and migrant smuggling, on chapter thirty-four that contains CRIMINAL ACTS AGAINST HUMANITY AND THE INTERNATIONAL LAW, that the provisions of criminal offenses:

- human trafficking (article 418 – a),
- migrant smuggling (article 418 – b),
- organizing a group and inciting the commitment of the crimes human trafficking, minors trafficking and migrant smuggling (article 418 – c),
- minors trafficking (article 418 - d).

The crime “human trafficking” provides “A person who on force, serious threat, deceit or other forms of coercion, abduction, fraud, abuse or pregnancy, helplessness or physical or mental inability to another, or giving or receiving payments or benefits to achieve the consents of a person having control over another person or otherwise recruits, transports, transfers, buys, sells, harbors or accepts persons for the purpose of exploitation through prostitution or other forms of sexual exploration, forced labor or servitude, slavery, forced marriages, forced fertilization, illegal adoption or similar adoptions or illegal transplantation of human body” to be punished with imprisonment of at least 4 years (Article 418 – a paragraph 1 of the Criminal Code). Furthermore, the consent of the victim is of no relevance to the existence of the crime and is provided a higher sentence of at least eight years in prison if the crime is committed by an authority while performing his duty (Article 418 – a paragraph 4 and 5 of the Criminal Code).

With “Migrant smuggling” are incriminated the acts of “a person who on force or serious threat that will attack the life or body, with kidnapping, fraud, greed, abuse of the official position or using of the powerlessness of the other who illegally transfers migrants across the state border, as well as the one who produces, acquires or possesses fraudulent travel documents for such purposes” is provided a prison sentence of at least four years (Article 418 – b paragraph 1 of the Criminal Code). Stricter sentence or imprisonment of at least eight years is provided if the crime is committed with minor person, and imprisonment of at least ten years if the crime is committed by an official person in performance of the service (Article 418 – b paragraph 4 and 5 of the Criminal Code). The crime “Organizing a group and inciting the crimes human trafficking, minors trafficking and migrant smuggling” provides organizing group, gang or other association for committing crimes of human trafficking, migrant smuggling and minors trafficking to be punished with imprisonments of at least eight years (Article 418 – c paragraph 1 of the

<sup>241</sup> See U.S. Department of State (2001-2007).

<sup>242</sup> For a detailed overview of current research and data availability on human trafficking, see Laczko and Gozdzik (2005).

Criminal Code). The crime “Minors trafficking” are incriminated the acts of “ a person who recruits, transports, transfers, buys, sells, harbors or receives a minor for the purpose of exploitation through prostitution or other forms of sexual exploitation, forced labour or servitude, slavery, forced marriages, forced fertilization, illegal adoption or similar relation or illicit transplantation of human body parts” and thus, is provided a prison sentenced of at least eight years (Article 418 – d of the Criminal Code). Committing the act “by force”, serious threats, deceit or other forms of coercion, abduction, fraud, abuse of position or pregnancy, helplessness or physical or mental disability of another one, or by giving or receiving money or other benefits to achieve the consent of a person having control (Article 418 – d paragraph 2 of the Criminal Code)”. And in this criminal act, the consent of the minor is of no relevance to the existence of the crime, and also it is provided higher sentence of at least ten years imprisonment if the crime is committed by an authority while being on duty (Article 418 – d paragraph 5 and 6 of the Criminal Code).

### 3. RESULTS AND INTERPRETATION/DISCUSSION

#### 3.1 UN protocol for migrant smuggling

The purposes of the *United Nations Protocol against Migrant Smuggling by land, sea and air, which supplements the United Nations Convention against Transnational Organized Crime*:

- Preventing and fighting against migrant smuggling, as well as promoting cooperation among States-Parties for that purpose.

The main obligations of the States-Parties to the Protocol are as follows:

- To incriminate the “migrant smuggling”, useage of fraudulent travel or identification documents (due to smuggling) and helping the migrants smuggled illegally to stay in a country – whilst recognizing that migration itself is not a crime;
- To encourage the international cooperation to prevent migrant smuggling and to seek out and prosecute the smugglers;
- To adopt such legislative and other measures as are necessary to facilitate stricter sentence when the activities of the smugglers endanger or likely to endanger the life or safety of the concerned migrant; will either withdraw inhumanly or will degrading behavior, including exploration of those migrants;
- To exchange mutually, in accordance with their respective domestic legal and administrative systems, relevant information on matters relating to routes, modus operandi and identity of organized criminal gangs involved in migrant smuggling as well as the legislative experiences and practices, and scientific-technical experiences useful for law enforcement to improve the ability for preventing, detecting, exploring those activities and prosecute the offenders;
- To strengthen border controls as may be necessary to prevent and detect the migrant smuggling, without injuring the international commitments to the free movement of people.

#### 3.2. Regional specific agreements for human trafficking/ migrant smuggling

Human trafficking and migrant smuggling are two of the fastest growing transnational criminal activities and are thought to be the most lucrative form of organized crime after the drug trade<sup>243</sup>. The International legal framework for human trafficking include special agreements concluded between regional groupings of States. One very important example of the *Council of Europe for action against human trafficking from 2005 (European Convention on trafficking) which came into force in February 2008*. This Convention has the potential to bind more than forty countries of Western, Central and Eastern Europe at much higher level of commitment, particularly in respect of the protection of victims of what is required under the UN Protocol for trafficking. All participating countries applied the convention – Albania, Bosnia and Herzegovina (BiH), Croatia and Montenegro in 2008 and Serbia and the former Yugoslav Republic of Macedonia in 2009. There is no specific regional agreement for migrant smuggling. However the Police Cooperation Convention for Southeast Europe (PCC) covers all aspects of international cooperation between the agencies for law enforcement in relation to all forms of crime – including the human trafficking and migrant smuggling. PCC was ratified by all participating countries, with the exception of Croatia and Romania, and is in various stages of implementation by the parties. The Convention obliges the Contracting Parties to strengthen cooperation in the fight against threats to public safety and/or order as well as the prevention, detection and police investigation of criminal offenses. Although the regional agreements impose obligations only on countries that are their parties, they can provide to all countries useful insights into the

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<sup>243</sup> Shelley, L. (2014). *Human Smuggling and Trafficking into Europe: A Comparative Perspective*. Washington DC: Migration Policy Institute

developing standards. They can contribute to the development of customary international law on a particular issue or field. In many cases, the cruelest forms of exploitation – slavery, forced labor, child labor, and forced prostitution – are nonconsensual where the victims are forced to work in deplorable and unsafe conditions or engage in sexual acts entirely against their will. Nonconsensual forms of exploitation involve an element of coercion, fraud, or deception, whereas consensual exploitation typically results from a lack of other economic opportunities and leads to the unfair treatment of the exploited<sup>244</sup>. In legal terminology, nonconsensual exploitation requires wicked consent. Under contract law, wicked consent invalidates any contract, and various situations are recognized where consent is wicked, most notably in instances of coercion, deception or fraud<sup>245</sup>. International organizations, governments, and non-governmental organizations (NGOs) have sponsored an array of research initiatives and programs to locate and assist victims. And an increasing amount of money has been allocated to tackle trafficking and slavery, both domestically and internationally<sup>246</sup>.

### 3.3. Jurisdiction questions on the migrant smuggling and human trafficking cases

The rules for the criminal jurisdiction application are an important aspect of the international cooperation rules. These determine the circumstance under which a country may or is required to assert its criminal justice authority over particular situation. The application of these rules on human trafficking and migrant smuggling can be more complicated than for many other crimes because they often involve carrying out multiple offenses in two or more countries where the alleged perpetrators or victims are not citizens of the same country<sup>247</sup>. Another concern is to ensure the effectiveness of the mechanisms for coordination in cases where more than one country may have grounds for jurisdiction. The main rules extracted from the major agreements on human trafficking and migrant smuggling are as follows:

- The state *is required* to establish jurisdiction for acts of human trafficking and migrant smuggling when the act is committed in the territory of that state, or by vessel with the state flag or aircraft registered under its laws (principle of territoriality).
- The state *can* implement a jurisdiction over the cases on human trafficking and migrant smuggling when such acts are committed outside the territorial jurisdiction of that state against one of its citizen (the principle of passive personalization).
- The state *can* implement a jurisdiction over the cases on human trafficking and migrant smuggling when such acts are committed outside the territorial jurisdiction of that state by one of its citizen (the principle of citizenship).
- The state *can* implement a jurisdiction over the cases on human trafficking and migrant smuggling when such acts are committed outside the territorial jurisdiction of that state but are related to serious crimes and money laundering planned to be committed in the territory of that state.
- The state *must* establish its jurisdiction over the act of human trafficking and migrant smuggling when the perpetrator is present on the territory of that state and the state does not extradite the perpetrator on the basis of citizenship (the principle of: “extradition or prosecution”).

Bearing in mind the transnationality on the occurrences of human trafficking and migrant smuggling, it is possible more than a country to be able to have jurisdiction over a particular trafficking case. Consultation and cooperation are important from the outset in order to coordinate actions, in particular, to determine the most appropriate jurisdiction within which to prosecute a case. In some cases, the most effective would be a country to prosecute all perpetrators, and to receive support and assistance from other involved countries. On other cases, it might prefer one country to prosecute some participants, while one or more other countries prosecute others. Questions like: Citizenship; location of witnesses; applicable legal framework; availability of resources; and location of perpetrator

<sup>244</sup> Nonconsensual exploitation is essentially equivalent to the Palermo Protocol definition of human trafficking.

<sup>245</sup> See Perez Solla (Forthcoming).

<sup>246</sup> In the United States, antitrafficking efforts are shared between the Departments of State, Labor, Justice, Health and Human Services, USAID, Homeland Security, and local police departments (Wylar 2013). Between fiscal year 2001 and fiscal year 2010, the US government authorized a total of \$1.45 billion for domestic and international antitrafficking programs—allocations that increased dramatically each year during this time period (Siskin & Wylar 2013, pp. 55–60). The cumulative figure does not include costs for administration or for law enforcement. Expenditures by other governments and by international organizations have been substantial as well (Hoff 2014).

<sup>247</sup> Human trafficking and migrant smuggling, UNODC, February 2014, pg 9

during arrest, will have to be considered. In cases where several jurisdictions are involved, UNTOC stipulates that signatory states should consider transferring the case to the competent best place in the “interest of the proper administration of justice” and “due to concentrating the prosecution”.

### **3.4. Forms of international cooperation for human trafficking/migrant smuggling cases**

There are different forms of international cooperation. These forms include informal processes such as cooperation “police with police” and formal processes such as MLA and extradition. These Guidelines concentrate on certain aspects of international cooperation in the manner as described above, and the relevance of these aspects on the human trafficking and migrant smuggling cases is summarized below. In the Chapter 3 is given a comprehensive description and analysis of MLA.

- *UN protocol on smuggling*

Aside the provisions for international cooperation, which mutatis mutandis apply to the UN Protocol on smuggling, the UN Protocol on smuggling also exposes in details the forms of cooperation that are particularly useful in the migrant smuggling cases. These forms of cooperation include:

- Exchange of information on suspects or carrying out smuggling gangs;
- Exchange of information on routes, carriers and vehicles used by smugglers;
- Exchange of information on misuse of travel documents;
- Exchange of information on means and methods of concealment and transportation of persons;
- Connections for, and exchange of, legislative experiences and practices as measures for preventing and combating migrant smuggling;
- Sharing scientific-technological information useful to the authorities for law enforcement to enhance the capacity for prevention, detection and investigation on migrant smuggling;
- Strengthening cooperation between border control agencies, inter alia, by establishing and maintaining direct channels of communication.

### **3.5. Police procedures on migrant smuggling**

Migrant smuggling – way of working and profile

*Way of working* (Modus operandi)

The smuggled migrant and smugglers avoid the controls at national borders, migrations regulations and visa requirements mostly through:

- a) Avoiding marked border crossings; OR
- b) Fraud of the representatives of border services.

Avoiding marked border crossings:

- Smuggled migrants are hidden in vehicles traveling at the border traffic. Anything is possible. Migrants have been found hidden in the cars seats and truck tires.
- The smugglers transfer migrants by foot through “green border lines”.

Fraud of the representatives of border services:

- Using forged documents (by replacing the picture in the passports or replacement of a few pages of it)

- Forged seals for crossing the border
- Misuse on tourist visas or other legal visas
- Use of stolen passports and vacant visas

Once they cross the border, the smuggled migrants may be accompanied to a safe house or some other place for meeting where they wait before they are being taken to the next part of their journey. This is also the moment when a police officer may encounter on smuggled migrants.

- *Profile*

The largest groups of smuggled migrants are identified by Macedonian authorities from Albania and Afghanistan, but also from the Middle East (Turkey, Syria, Iran and Palestine), African countries (Somalia, Ghana, Ethiopia, Nigeria, etc.) and Asia (China). Anyway, the migrants profile who transit through our country is subject to constant change depending on the global migration trends.

## **4. CONCLUSION**

The government of the Republic of Macedonia, reacting resolutely against human trafficking and illegal migration, wanting to reach higher levels of efficiency and joint action on fighting these phenomena in the country, adopted a Decision on the establishment of a National Commission to Combat Human Trafficking and Illegal

Migration in Macedonia<sup>248</sup> On the basis of this Decision, the Government adopted a solution on appointing a national coordinator and members of the National Commission. (Solution, Official Gazette of RM, 2002). According to the Decision, the National Commission have a task to monitor and analyze the state of human trafficking and illegal migration and to coordinate the activities of the competent institutions, international and non-governmental organizations involved in solving the problems in this field. The Secretariat is the body that operates under the National Commission, the Secretary realize the decisions of the Commission and represents this body, which includes the representatives from international non-governmental organizations and experts from the government institutions.

The National Commission established a subgroup to combat children trafficking. The strategy to Combat Human Trafficking and Illegal Migration in the Republic of Macedonia, aims to set guidelines and priorities to tackle this criminal phenomenon and giving encouragement to reduce this type of crime. The Constitutional provisions on fundamental rights and freedoms of man and citizen and respect of the generally accepted norms of international law are established as fundamental principles of the constitutional order, and given the Stabilisation and Association Agreement and the United Nations Convention against the transnational organized crime with the protocols, the Republic of Macedonia adopted a National Programme for Combat Human Trafficking and Illegal Migration in 2002 with the sole intention to be actively involved in the efforts of the international community to prevent and Combat Human Trafficking, as one of the most severe forms of organized crime. A striking example of the confirmation of this attitude in the permanent legislation which no matter how much is aligned has limited value, if there is no support from the ruling structures and political will for its immediately and unconditional application. In this direction and activities that are undertaken, primarily due to concerns that the state takes the safety and personal integrity of the citizens on order to protect them from the activities of criminal organizations dealing with human trafficking and migrant smuggling, which, in turn, represent another segment, among others, the drafting of the National Programme to Combat Human Trafficking and Illegal Migration. Due to complexity of the phenomenon of human trafficking, implying a correlation with other forms of organized crime due to globalization and the absence of borders between Member States of the European Union, which allows its transnationality, as necessity arises need a national strategy in future to be founded on a multidisciplinary methodological approach in using the experience from the practice and experience of other countries in the region and beyond in order to be more successful combat against this most severe form of sophisticated slavery. The Republic of Macedonia, from the establishment of the National Commission, has gone through several stages and has made significant steps to align the legislative framework with EU standards in the fight against Human Trafficking. Extremely important is to work on taking actions that will deepen the activities, which were operationalized of prevention with the sole intention of preventing this form of organized crime. In this sense, the future activities will address allocation and reduction of economic and social factors that affect the representation of victims of human trafficking.<sup>249</sup>

#### REFERENCES/BIBLIOGRAPHY

- [1] UN Convention on illicit Narcotic Drugs and Psychotropic Substances Trafficking (1993), the European convention on Transfer of Sentenced Persons (1999), the European Convention on Mutual Assistance in Criminal Matters (1999) and the Second Protocol (2001), the European Convention on Extradition (1999), Criminal-Legal Convention on Corruption (1999), and Civil-Legal Convention on Corruption of the Council of Europe (2002), Convention on Laundering, Search, Seizure and Confiscation of Criminal Proceeds (2000), the Rome Statute of the International Criminal Court (2002). There is ongoing procedure for ratification of the United Nations Convention against Transnational Organized Crime, together with the protocols relating to human trafficking and the fight against migrant smuggling.
- [2] Criminal (Penal code) of Republic of Macedonia
- [3] Human trafficking and migrant smuggling, UNODC, February 2014
- [4] The Decision was published in “Official Gazette of RM” no.18/2001
- [5] The Solution was published in “Official Gazette of RM” no. 19/2001, 26/2002
- [6] <http://www.nacionalnakomisija.gov.mk>
- [7] Nonconsensual exploitation is essentially equivalent to the Palermo Protocol definition of human trafficking.
- [8] See Perez Solla (Forthcoming).

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<sup>248</sup> The Decision was published in “Official Gazette of RM” no.18/2001

<sup>249</sup> <http://www.nacionalnakomisija.gov.mk>

- [9] In the United States, antitrafficking efforts are shared between the Departments of State, Labor, Justice, Health and Human Services, USAID, Homeland Security, and local police departments (Wyler 2013). Between fiscal year 2001 and fiscal year 2010, the US government authorized a total of \$1.45 billion for domestic and international antitrafficking programs—allocations that increased dramatically each year during this time period (Siskin&Wyler 2013, pp. 55–60). The cumulative figure does not include costs for administration or for law enforcement. Expenditures by other governments and by international organizations have been substantial as well (Hoff 2014).
- [10] Shelley, L. (2014). Human Smuggling and Trafficking into Europe: A Comparative Perspective. Washington DC: Migration Policy Institute