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CRIMINAL-LAW AND CRIMINALISTICS ASPECTS OF DISTINGUISHING PEOPLE SMUGGLING FROM HUMAN TRAFFICKING

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Abstract: *In general public, including the media, people smuggling is often identified with human trafficking or the significance of the essential differences between these two criminal phenomena is insufficiently highlighted. If comparing these two, differences in the criminal-law sense are most frequently pointed out, as they are standardized and, in that sense, incontestable. When it comes to expert and scientific public, criminological and criminalistics aspects of these criminal phenomena are of great importance for proper creation and implementation of crime prevention policies. They partly coincide, but they differ in a greater extent due to their specificities, as indicated in this paper. Bearing in mind that the criminal-law aspects play an important role in defining these specificities, the authors based their comparative analysis on the example of the Criminal Code of the Republic of Serbia, with the aim of providing a comprehensive analytical review of essential similarities and differences between the two related forms of criminality that have been present in different epochs of human existence, and which have become even more topical with the mass migrations in the recent years.*

Keywords: *people smuggling, human trafficking, criminal-law aspects, criminalistics aspects, criminality*

1. INTRODUCTION

The so-called migrant crisis, which has been world-wide present in the recent years, with the greatest effects in the Asian and African countries of origin and transit of migrants,

as well as in European countries as transit and ultimate destinations, is not only a political¹, legal² and economic³, but also a security problem. [Marković, 2016:21-26] Bearing in mind the consequences, particularly of illegal crossings of state borders, the security issue can be considered primary at the moment. Risks and threats to national security are multiple and complex, and they are most evident in actions that jeopardize the state border security, as well as in terrorist acts. Terrorism is not only a serious security risk, but also in numerous cases it is an accomplished threat to public security of transit and final destination countries. From the public security standpoint, serious risks include human trafficking, people smuggling, and other crimes that are a consequence of migrations⁴.

People smuggling and human trafficking are not solely related to migrations - these are criminal phenomena present in all parts of the world independently of whether the population feels the need to leave one and settle in another territory. These criminal phenomena are not only territorially widespread, but have also been present through various epochs of human existence. This only makes the significance of studying these phenomena even greater, and knowing their specificities is necessary for correct and successful creation and implementation of crime prevention policy. Both people smuggling and human trafficking are recognized as criminal by international legal acts [Protocol to Prevent, Suppress and Punish Trafficking, 2000] and countries have been required to incorporate the same practice in their national criminal legislations. There was no defined distinction between people smuggling and human trafficking in international law until 1990s. Legal distinction between these two was formally done with two Protocols to the United Nations Convention against Transnational Organized Crime (UNTOC). [Baird, 2013: 6] Human trafficking and people smuggling are content-related criminal phenomena because often, but not necessarily, people smuggling is one of the stages of human trafficking. On the other hand, persons illegally crossing a state border with the help of smugglers are potential victims of human trafficking, in all stages of moving.

The paper gives an analytical display of essential similarities and differences between these criminal phenomena, not only from the criminal-law standpoint, but also from the aspect of criminology and criminalistics. The aim of this comprehensive outlook of these criminal phenomena is their easier identification, and therefore application of efficient methodology in detecting and proving them.

1 Political circumstances are the main push factors in current migrations from Asia and Africa toward Europe, and the problems they are carrying, with numerous unsolved legal, economic and security issues, are reflected in political relations in transit and final destination countries, as well as in broader international community (European Union, first of all).

2 Issues of migrants' status, decisions on asylum applications, wherein special care is given to respect of human rights.

3 Poverty in migrants' countries of origin, largely caused by war devastation, but also by the politics of the most powerful countries in the world, is also an important push factor of migrations, while on the other hand high economy standard in destination countries represents a significant pull factor. Additionally, disbalance in labor markets in final destination countries and enormous expenses in all stages of migrations, have to be taken into consideration as economic problems of current migrations as well.

4 First of all, sexual, property and violent crimes.

2. CRIMINAL-LAW ASPECTS

Criminal Code of the Republic of Serbia [Krivični zakonik R. Srbije, 2005-2016] does not have people smuggling as an independent crime, but has it defined as one of the two basic forms of the Art. 350 crime - Unauthorized crossing of state border and people smuggling - which is part of the group of crimes against public peace and order (chapter XXXI). Two basic forms of this crime are unauthorized crossing of state border and people smuggling.

The first basic form, the unauthorized crossing of state border, pertains to a person (one or more of them) whose actual unlawful act is crossing or attempting to cross state border without regulated permission, wherein such person is armed or has used violence in relation to unauthorized crossing of state border. The law does not specify whether arms have to be used as a means to cross the border, yet this is implicit [Lazarević, 2006:865] because carrying weapons in such circumstances represents use of force on its own. The use of violence has to be related to the act of this form of the crime, and it implies the use of force or threat by force, regardless of whether it is directed at the authorized personnel controlling the state border crossings or another person related to unauthorized state border crossing. [Lazarević, 2006:865]

The act of the other basic form of this crime, the people smuggling, pertains to enabling another person to cross the state border in an illegal manner, or enabling illegal stay and transit through Serbia to a person who is not a citizen of the Republic of Serbia. For an act to be considered this form of the crime it is sufficient for at least one of the three unlawful actions to be done. Modes of execution can be different - transporting and bringing person to a place where illegal crossing will happen; hiding a person in a vehicle; enabling hiding until the moment of crossing the state border, or during illegal stay in the country; receipt of a person illegally entering the country; surreptitious transporting of a person across the state border; etc. The aim is earning a profit by enabling another person's illegal crossing of the state border, or rather their illegal stay or transit through Serbia. Hence, it is important to point out that the necessary condition is for these actions to be taken out of benefit, as it is also stated in the Protocol against the Smuggling of Migrants by Land, Sea and Air, which is also a supplement to the UN Convention against Transnational Organized Crime. [Zakon o potvrđivanju Konvencije UN, 2001] People smuggling, as the second basic form the Art. 350 crime in Criminal Code of Serbia, has qualified forms - if the crime is done by an organized group (consisting of at least two persons), if the crime is done by abuse of authority or jeopardizing life or health of persons being smuggled, as well as if the crime involves smuggling a larger number of persons (para. 3 and 4).

This very important international Convention was also complemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and was confirmed by the adoption of a special convention by the Council of Europe. [Council of Europe Convention on Action against Trafficking in Human Beings, 2006] By accepting these conventions, together with their additional protocols, [Zakon o potvrđivanju Konvencije UN, 2001] all countries have taken on the responsibility of incorporating defined international crimes into their respective national criminal legislations. In accordance with this, the current Criminal Code of Serbia has human trafficking defined as an independent crime (Art. 388) in chapter XXXIV - Crimes against humanity and other goods protected by international law. In line with the meaning of the phrase "human trafficking" specified

in the above-mentioned Protocol, the crime was instituted in the first paragraph, which also defines the basic form of this crime. [Krivični zakonik R. Srbije, 2005-2016]

All acts of execution are clear in meaning and independent from each other (they are stated alternatively) [Lazarević, 2006:985] - with the existence of other characteristics (modus operandi and the aim), only one of the regulated conducts suffices to make corpus delicti, and those are: recruitment, transport, transfer, handover, selling, buying, intermediation in sale, hiding or harboring another person. By covering most of the conducts within this crime, some other crimes' characteristics overlap. Crimes whose characteristics are actus reus of this crime cannot be concurrent with it, but are absorbed by it. [Lazarević, 2006:961] Modes of conduct are prominent and conceptually comprehensible - force or threat; misleading someone and keeping them in such state; abuse of authority, trust, of another person's dependence or difficult circumstances; retaining personal documents; giving or receiving money or other benefits. The aim of the mentioned conducts is exploitation of victims of this crime in sense of "forced labor, committing crimes, prostitution, or other types of sexual exploitation, panhandling, pornography, establishing slave or similar status, taking organs or parts of body or using in armed conflicts". [Krivični zakonik R. Srbije, 2005-2016]

More serious forms of this crime occur in case the victim is a minor, if the crime has severe bodily injury or death of a person for a consequence, as well as if the perpetrator is a member of an organized group or is doing human trafficking as a trade.

Considering that people smuggling can occur among actus rei of the crime of human trafficking (transport, transfer, handover, hiding or harboring another person), it is not an independent crime concurring with human trafficking, but is within this crime. In practice, a real concurrence may happen in case one or more of the same perpetrators take mentioned actions toward one or more persons with the aim of enabling illegal crossing of the state border, or rather their transit through the country or illegal stay in the country, while taking action towards other person(s) with the aim of exploiting them in prohibited manners. Because of the similarities in the modus operandi of people smuggling and human trafficking, the broader public often confuses these two crimes. However, what substantially differentiates and makes them independent crimes in a criminal-law sense is the aim (intent) - in people smuggling the aim is enabling another person to cross the state border illegally, i.e. to stay in or transit through Serbia illegally, whereby various ways of exploitation are the aim of the crime of human trafficking.

3. CRIMINOLOGICAL AND CRIMINOLISTICS ASPECTS

Varying criminal-law treatment of these two crimes is based on criminological aspects, both in regards to differentiating between its forms and in regards of its etiological background, especially relating to the victim.

One of the negative things about modern world processes is organized crime. Typology of criminal phenomena that are considered organized criminality today is much broader than the initial commerce forms and is connected with other various forms of criminal activities. [Lazarević, 2006:865] Human trafficking and people smuggling are considered the most profitable criminal activities in modern conditions.

Unlike people smuggling, which inevitably has an international character, human trafficking can occur within national borders, and victims can be solely domestic citizens. Still,

in reality it is more often the case that human trafficking goes outside of national borders, for earning a bigger profit and also for criminalistics reasons - making the investigations and search for victims that much harder.

People smuggling occurs in two main stages - hiring a smuggler, if possible a professional with already developed channels of smuggling, and then transit from the point of engagement to the point of requested goal. The second stage could be qualified as people smuggling in a narrower sense. In some cases, the engagement stage can actually be recruitment stage. Namely, etiological background of people smuggling are difficult economic living conditions, as well as threats to human rights and freedoms in home countries. Under such circumstances, the smugglers recruit potential clients, offering them their services of transporting them to another country, usually on the EU territory, often promising good contacts for job and accommodations. Proportional to the extent of smuggled persons coming into contact with the people smugglers and being recruited by them is the danger of them becoming victims of human trafficking instead of being taken to the promised destination.

Besides the poor economic conditions and life in war-devastated or undemocratic conditions in their home countries, the potential victims of human trafficking are often victims of domestic violence and generally difficult family and social circumstances. The three basic stages of human trafficking are recruitment of the victim, their transit to the place of exploitation (smuggling in a narrower sense) and the exploitation itself. [United Nations Human Rights - Office of the High Commissioner, 2014] With the circumstances that make the etiological background of this crime, during the recruitment the traffickers usually use deceptive ways to present themselves to the victim as their saviors, gaining their trust in that manner. Where such thing is not possible, they resort to violence in the recruitment stage, which cannot happen when it comes to people smuggling. When it is of international character, human trafficking unavoidably incorporates people smuggling because the transit stage crosses at least one state border, of course, in one of the illegal ways. From the criminalistics standpoint, the transit stage is the most sensitive and the most risky for the perpetrators of human trafficking - that is to say, the biggest odds for uncovering this crime and cutting the smuggling channel for victims of human trafficking is precisely at this stage. Human trafficking victims are in "open space" at that moment, they are in traffic, crossing the state border, exposed to contact with persons who are not from a criminal background, and most importantly, who are authorized officials. What makes the investigation more difficult at this stage is the fact that, depending on the way they were recruited, most often the victims of human trafficking are not aware of their status until the exploitation stage. This particularly pertains to persons who knowingly hired people smugglers for transfer across the state border and transport to a specified destination, while on that way they are in danger of falling victims to human trafficking. Namely, besides the aim that such criminal activities want to achieve, the key difference between people smuggling and human trafficking is the voluntary moment of the passive subject - the smuggled person/human trafficking victim. A smuggled person voluntarily allows people smugglers to transport them, wherein they have also given them a certain amount of money for their services. On the other hand, a human trafficking victim becomes such after being deceived or with the use of force. Because of that, if in the transit stage there are no direct indications that there is human trafficking, i.e. that the aim of people smuggling is bringing the smuggled persons into an exploited (slave) position, even police officers could be misled in qualifying the crime in such cases. In the

transit stage, one of the indicators that the persons are being smuggled and not victims of human trafficking is the behavior of people smuggler/human trafficker at the moment of cutting off the channel of smuggling. Without further thinking, people smugglers will try to run leaving the smuggled persons to the police. They already charged for their services before the departure, so there is no financial "loss". Besides this, they often advise their clients not uncover them to the police in case the channel of smuggling gets cut, promising them another attempt to transfer them across the state border on the same or the next day, but this time "free-of-charge". In critical situations, human traffickers will not easily let go of their "prey" to the police, but will try all means possible to take them with them in their escape. There are two basic reasons for such behavior - one is the fact that there is no profit for human traffickers before the exploitation stage, and the other one is the severity of the crime and dangers that loom in case the victims decide to testify.

Seen from criminological and criminal-law aspects, the exploitation stage makes a definite difference between people smuggling and human trafficking, because having in mind the aim of the criminal activity, this stage does not exist in the independent crime of people smuggling. From criminalistics aspects, this stage is the most complicated one for the successful outcome of the investigation because it consists of high level of conspiracy, clandestinity and corruption.

4. CONCLUSION

Because of the touch points, crossing of roads and similarities in the realization stages, the broader public is often unsure of the differences between people smuggling and human trafficking. Criminal-law aspects of differentiating are the most clear because they are expressed in legal norms. Still, the criminal-law norms are developed on criminological studies of etiological and phenomenological issues of criminality, so it is pertinent to understand these similarities and differences from a criminological standpoint. By viewing criminological aspects of criminality in a correct manner, criminalistics activity on its prevention, detection and solution is made easier. Etymological background of people smuggling and human trafficking is similar, yet it is broader and more complex when it comes to human trafficking. The basic stimuli for hiring people smugglers are difficult financial situations, undemocratic living conditions in home country, the state of war and peace. The stimuli are also present in cases of human trafficking victims giving themselves to the exploiters, but they are more complex because they usually include difficult family and general social circumstances a person is going through before becoming a victim to human trafficking. A person could become victim of human trafficking against their will, with significant deprivation of personal freedoms and right, often falling into a classic slave status. Persons who are smuggled become such with their own free will and retain that status for as long as they have that free will. Nevertheless, they are also potential human trafficking victims because, besides the financial factor, their relationship with the smugglers is based on trust. People smuggling in a narrower sense (transit of persons) occurs as the second stage of human trafficking when there is an exploitation stage after it, which makes a definite difference between these two crimes from the criminal-law and criminological aspect.

Knowing and understanding the criminological aspects of people smuggling and human trafficking significantly alleviates the differentiation between these criminal phe-

nomena, regardless of (not)knowing criminal law regulations. The aim of this comparative analysis of the essential aspects of differing between these crimes is precisely their demystification, i.e. removing doubts about identification, and therefore implementation of necessary measures.

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