

II. MIGRATION, TRAFFICKING IN PERSONS, TERRORISM AND CRIMINAL LAW

Criminal law faced with the migratory phenomenon

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Abstract:

Migration is accompanied by forms of crime which criminal law is not prepared his respond.

Yet, migration favours, apart from the threat of terrorism, other forms of criminality as well, such as human trafficking, illegal border crossing, migrant smuggling, crimes which came into the target of organized criminal groups.

We shall confine ourselves to showing how the Romanian criminal law influences the granting of the right of asylum and the refugee status, as well as the criminalization of the criminal acts regarding migrant smuggling

Migration cannot be stopped by the means of coercion specific to criminal law, but, nevertheless, criminal law should provide solutions to combat crime that develops alongside migration or as a result of it.

Keywords: migration, refugee status, right of asylum, temporary protection; migrant smuggling.

1. On migrations in general

The migration of populations, even if in the last years it increased to such an extent that it has become a cause of some concern, is not a new phenomenon. Population studies regarding the DNA show that, some 70 000 years ago, a human flow had set off from Africa through what is nowadays the Middle East and had poured out in Europe and elsewhere.

Why would be go back so far in the past? Because now, as always, migrations have had and still have as their cause either the search for food or violent clashes among various populations (wars) or both.

In relation to the causes of migration, it can be either voluntary, when caused by seeking better employment, unemployment, family reunion etc., or forced, when determined by religious or political persecution, civil wars, natural disasters etc.

Migrants have always aroused feelings of insecurity among the local, sedentary populations. The huge wave of immigrants who assail the shores of Europe risking their own lives has generated serious problems, not only political, but also of an economic, social and cultural kind in all European countries.

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The feelings of human solidarity with those forced to flee from territories shattered by wars are opposed by feelings of fear generated by the wave of terrorist attacks caused in the name of the Jihad, although the existing data show that terrorists originate mainly from the Muslim population raised, settled and radicalized in Europe.

From the data of the International Centre for Counterterrorism in The Hague, out of the estimated 4 000 Europeans who have become ISIS fighters, the majority of them come from urban areas in France, Belgium, Germany or England.¹

The relocation of the refugees in EU countries, apart from the fact that it is met with hostility by some countries, can only be, in our opinion, a mere palliative, a temporary solution, a stop on their way to countries with a high standard of living, such as Germany, England or the Nordic countries.

The political solution should be sought in their countries of origin, by supporting those political forces that can restore peace in those territories and by offering economic aid for rebuilding the destroyed infrastructure and the resumption of the economic activity.

The International Covenant on Civil and Political Rights from December 16th 1966, adopted by Romania in 1974², enshrines the right of everyone to leave any country, including his own. The above-mentioned right shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others (Article 12).

If the voluntary migration from outside the European Union is subject to visa and temporary, the forced migration entitles the migrants to several forms of international protection such as the right of asylum and the recognition of the refugee status.

The provisions of criminal law may influence the granting or withdrawal of the right of asylum.

Yet, migration favours, apart from the threat of terrorism, other forms of criminality as well, such as human trafficking, illegal border crossing, migrant smuggling, crimes which came into the target of organized criminal groups.

We shall confine ourselves to showing how the Romanian criminal law influences the granting of the right of asylum and the refugee status, as well as the criminalization of the criminal acts regarding migrant smuggling.

2. Refugee status, right of asylum and temporary protection

According to data released by the General Inspectorate for Immigration, at the end of the first quarter of last year, 59 000 foreigners from third countries had the right to stay in Romania, most of them coming from Moldova, Turkey and China, either as family members, or as people studying or being employed in our country.

Approximately 700 people have received a form of protection in Romania – refugee or subsidiary protection, the approval rate being 45%. Most asylum seekers come from Syria, Afghanistan and Iraq.

Romania is not, and is unlikely to become a new route of the wave of migration originating from the Middle East, both because of the border security measures and of

¹ stiri.tvr.ro/cateva-mii-de-europeni-lupta-pentru-isis-cei-mai-multi-provin-din-franta-g (accessed 5.04.2016)

² Published in the Official Bulletin no. 146 of 20.11.1974.

the legislative measures which provide for thorough verification of the applications for access in the country.

Romanian law provides adequate means to enable the selection of migrants, several regional centres functioning under the subordination of the Romanian Immigration Office for the verification and accommodation of asylum seekers and of those who have been granted some form of protection in Romania.

The right of asylum is affirmed by Article 14 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10th 1948.

According to these provisions, everyone has the right to seek asylum and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

The legal status of refugees is regulated by the Refugee Convention, adopted on July 28th 1951 by the UN Conference in Geneva, joined by Romania in 1991,³ and under which the States Parties recognize the social and humanitarian character of the refugee problem.

The legal status of foreign citizens found on Romanian territory is defined by the provisions of Article 18 of the Constitution, of the Emergency Ordinance no. 194/2002 governing the status of foreigners in Romania,⁴ and of Law no. 122/2006 governing the right of asylum in Romania.⁵

According to the Emergency Ordinance no. 194/2002, aliens are refused entry on the Romanian territory if: they do not possess a valid travel document, which is accepted by the Romanian state; they have been notified by international organisations to which Romania is a member, as well as by institutions specialised in combating terrorism that they finance, prepare, support in any way or commit acts of terrorism; there are indications that they are part of organised criminal organisations at international level or that they support in any way the activity of such groups; there are serious reasons to assume that they have carried out or taken part in carrying out acts of violation against peace and humanity or war crimes or crimes against humanity, as provided by international agreements to which Romania is a party; they have committed offences during previous stays in Romania or other states, against the Romanian state or against a Romanian citizen; they have introduced or attempted to introduce illegal aliens to the territory of Romania; they suffer from serious illnesses which may severely endanger the public health, as defined by Order of the Minister of Public Health.

Foreigners and stateless persons living in Romania shall enjoy the general protection of people and property, guaranteed by the Constitution and other laws (Article 18 para. (1) of the Constitution).⁶

A law specific to foreigners only, and covered by the Constitution, is the right of asylum which, according to Article 18 para. (2) of the Constitution, is granted and withdrawn under the law, in compliance with international treaties and conventions to which Romania is a party.

Law no. 122/2006 governing the right of asylum in Romania has been amended in order to transpose into national law:

³ Published in the Official Journal, Part I, no. 148 of 17 July 1991.

⁴ Republished in the Official Journal, Part I, no. 421 of 5 June 2008.

⁵ Published in the Official Journal, no. 428 of 18 May 2006.

⁶ I. Chelaru, A-L. Chelaru, *Străinii în România. Regim juridic*, Universul Juridic, 2016, p. 122 -132.

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of effort between Member States in receiving such persons and bearing the consequences thereof, published in the Official Journal of the European Communities, series L, no. 212 of 7 August 2001;

- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, published in the Official Journal of the European Union, series L, no. 251 of 3 October 2003;

- Article 2 letter (f), Article 12 para. (3a) and (3b), and Article 19a para. (1) and (2) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, published in the Official Journal of the European Union, Special Edition 2007, Chapter 19 – “Space freedom, security and justice”, Volume 6, as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, published in the Official Journal of the European Union, series L, no. 132 of 19 May 2011;

- Directive 2011/95/ EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, published in the Official Journal of the European Union, series L, no. 337 of 20 December 2011, except for Articles 7 and 9 para. (3);

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), published in the Official Journal of the European Union, series L, no. 180 of 29 June 2013, except for Article 49;

- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), published in the Official Journal of the European Union, series L, no. 180 of 29 June 2013, except for Annex I.

The forms of international protection regulated by law are as follows: recognition of the refugee status; granting of subsidiary protection or temporary protection, and right of asylum.

Refugee status is recognized, upon request, for the alien who, as the result of a well-founded fear of being persecuted because of race, religion, nationality, political opinion or membership to a particular social group, is outside of the country of origin and cannot or, owing to this fear, does not want the protection of this country, as well as the stateless person who, being out of the country where he had his usual residence due to the same reasons mentioned above, cannot or, due to the respective fear, does not wish to return and to whom do not apply the grounds for exclusion from the recognition of the refugee status, in accordance with the law. Refugee status entitles that person to remain on Romanian territory and to obtain residence permits and travel documents for crossing the state border.

The refugee status is not recognized for aliens and stateless persons in relation to whom there are serious reasons to believe that: they have committed, incited or been accomplice to a crime against peace and humanity, a war crime or another offence defined according to the relevant international treaties to which Romania is a party; they have committed a serious common law offense outside Romania, before being

admitted on Romanian territory; or have facilitated or participated in the commission of terrorist acts.

Subsidiary protection is granted to the alien or stateless person who does not fulfil the conditions to have refugee status recognized and regarding whom there are well founded reasons to believe that, in the case of returning to the country of origin, respectively to the country where he has his usual residence, will be exposed to a serious risk, such as conviction to a death sentence or the execution of such a sentence; torture, inhuman or degrading treatments or punishment; or a serious, individual threat to one's life or integrity, as a result of generalized violence in situations of internal or international armed conflict, if the applicant is part of the civilian population, and who cannot or, due to such risk, does not want the protection of that country to whom do not apply the grounds for exclusion from the granting of this form of protection, mentioned above.

Subsidiary protection is also granted, on request, to family members who are on Romanian territory or in the applicant's country of origin.

Temporary protection is an exceptional procedure meant to ensure, in the case of a massive influx or imminently massive influx of people displaced from third party countries who cannot return to their country of origin, immediate and temporary protection for such people, especially if there is a risk that the asylum system cannot process this influx without negative side effects to its efficient operation, in the interest of the aforementioned people and other people who need protection.

The duration of the temporary protection lasts one year and can be automatically extended by periods of 6 months, for up to one year maximum. Temporary protection can be granted under the conditions in which Romania proposes that the Council issue a decision, through which it can ascertain the existence of a massive influx of displaced persons. The proposal will include a description of the specific groups of people upon whom temporary protection will be applied, the date when temporary protection starts as well as an estimation of the scale of movement of displaced persons. Temporary protection ceases when the maximum limit of the period is reached; or at any moment, through a decision of the Council of the European Union, adopted to this effect.

The asylum application is submitted as soon as the applicant has presented himself/herself at a checkpoint to cross the state border, including in the transit area; at the Romanian Immigration Office if the applicant entered the Romanian territory or in the country of origin of the foreigner having the right to stay in Romania had occurred events that have determined him to seek protection. Applications for asylum submitted outside Romania are not admitted.

An appeal can be lodged, against the decision through which the application to receive access to a new asylum procedure has been denied as inadmissible, within 10 days from it being communicated. The appeal falls under the jurisdiction of the court in whose territorial radius the qualified structure of the Romanian Immigration Office, which issued the decision, is found.

The refugee status ceases when its beneficiary has voluntarily availed himself/herself back of the protection of the country that he/she is a citizen of; or after losing citizenship, he/she voluntarily reacquired it; or gained new citizenship and enjoys the protection of the state whose citizenship he/she gained; or has voluntarily resettled back in the country he/she left or outside which country he/she lived, as a result of the reasons for which refugee status was recognized; or can no longer continue to refuse the protection of the country whose citizenship he/she has due to the fact that the

circumstances as a result of which refugee status was recognized have ceased to exist and can no longer claim compelling reasons that refer to previous persecutions in order to motivate this refusal.

The refugee status is cancelled if the person whose refugee status has been recognized has made false statements, omitted to present certain data or used false documents, which were decisive in the acknowledgment of the form of protection and there are no other reasons to lead to maintaining refugee status; or if, after granting the form of protection, it was discovered that the alien is in one of the situations which excluded them from the granting of such status.

The rights of the beneficiaries of any of the forms of protection provided by law are recognized without discrimination, regardless of race, nationality, ethnic group, language, social class, convictions, gender, sexual orientation, age, handicap, non-contagious chronic disease, HIV infection or belonging to a disadvantaged class, of material circumstances, status at birth or status gained or any other distinction.

The asylum seeker cannot be expelled, extradited or forcibly returned from the border or from Romanian territory, except for the cases mentioned in Article 44 of Law no. 535/2004 regarding the prevention and fight against terrorism.

The person who has been recognized as a refugee or who has been granted subsidiary protection is protected against expulsion, extradition or the return to the country of origin or any state in which one's life or liberty has been placed in danger or would be subjected to torture, inhuman or degrading treatment.

The person who has been recognized as a refugee or who has been granted subsidiary protection can be removed from Romanian territory if there are sound reasons for the person in question to be considered a danger to the security of the Romanian state; or the person in question, being convicted of a serious criminal offence by final decision, is a danger to public order in Romania. A serious criminal offence is considered any crime for which the law requires the punishment to deprivation of liberty with a special maximum sentence of over 5 years.

A strict control of the conditions for granting any of the forms of international protection can prevent the access into the country of people who do not justify the need to grant such protection.

3. Migrant smuggling

Migration is accompanied by various forms of crime, ranging from simple illegal immigration to forms belonging to organized crime, the criminal organized groups finding a great source of income from the exploitation of the desire for immigration from both those immigrating forcibly and those migrating in the search for a job.

Romania's Criminal Code incriminates the act of entering or exiting the country by illegally crossing the state border (Article 262), offense which is punishable by imprisonment from 6 months to 3 years or a fine. The offense is more serious if the act is committed for the purpose of circumventing criminal liability or serving a sentence or educational measures, privative of liberty, or by a foreigner declared undesirable or who has been prohibited in any way from entering or staying in the country, in which case the punishment is imprisonment from one to 5 years. The attempt is also punished. The act committed by a victim of human trafficking or by minors is not punished.

From the data provided by the General Inspectorate of the Border Police in relation to the influx of migrants which has affected the territories of European countries, EU

State Members, as well as third countries such as the Western Balkans, the number of migrants apprehended at the borders of Romania in 2015 remained at the level of the previous years. In 2015, at the Romanian borders were detected 2 488 people crossing or attempting to cross the border illegally, out of which 255 people originating from countries producing migrants, who have applied for the granting of the asylum status to the structures of the border police at the moment of the detection of their illegal passage of the border⁷.

As ways to attempt illegal entry into Romania, the ones used more often by migrants were crossing or attempting to cross illegally the green border and hiding in vehicles, and as ways to attempt illegal exiting from the country, the most used were hiding in vehicles, crossing or attempting to cross the green border, as well as the use of false documents.

Distinct from human trafficking for the purposes of their exploitation, the Romanian Penal Code incriminates migrant smuggling of migrant trafficking.

Migrant smuggling consists in the recruitment, mentoring, guidance, transportation, transfer or harbouring of a person for the purpose of illegal border crossing, and is punished with imprisonment from 2 to 7 years. The offense is more serious if the act is committed in order to obtain, directly or indirectly, a patrimonial gain, by means which endanger the life, integrity or health of the migrant, or by subjecting the migrant to inhuman or degrading treatments, in which case the penalty is imprisonment from 3 to 10 years and deprivation of certain rights.

The data of the Border Police show that, in 2015, a total of 1 959 people were involved in illegal migration, 1 481 were apprehended when crossing/attempting to illegally cross the border (936 aliens trying to enter and 545 trying to exit the country). Out of these numbers, 175 have served as guides or carriers, 60 being Romanian citizens and 115 foreigners⁸.

The cases settled reveal that most often smuggling is organized abroad, the migrants transiting the territory of Romania.

For example, on 11 April 2015, at the Border Road Crossing Point of Nădlac, has presented himself for clearance border a Turkish citizen, driving a truck with trailer registered in Hungary, with the help of which he was carrying pieces of furniture from a company in Turkey to a company in France. The Romanian border police carefully examined the respective means of transportation and discovered 74 people (53 men and 21 women) of Arab origin, who did not speak Romanian and had no identity documents. The hidden people were Syrian and Iranian citizens, who intended to illegally reach France.

There are also cases where the Hungarian or Austrian police discovered migrants transported by Romanian citizens.

In order to prevent such acts, the Romanian Penal Code (Article 264) has incriminated the act of a person who facilitates, by any means, the illegal stay on Romanian territory of a person, victim of a crime of human, minor or migrant trafficking, who does not have Romanian citizenship or residence in Romania, an act punishable by imprisonment from one to 5 years and deprivation of certain rights.

The crime is more serious if the act is committed in order to obtain, directly or indirectly, a patrimonial gain or by a public servant during the performance of service, in

⁷ <https://www.politiadefrontiera.ro/> (accessed on 3.06.2016).

⁸ <https://www.politiadefrontiera.ro/> (accessed on 3.06.2016).

which case the penalty is imprisonment from 2 to 7 years and deprivation of certain rights.

It also constitutes crime evading the obligations imposed by the competent authorities by the alien against whom has been ordered the removal from the Romanian territory or against whom has been issued an order that prohibits their right to stay, a crime which is punishable by imprisonment from 3 months to 2 years or a fine.

4. Conclusions

Migration cannot be stopped by the means of coercion specific to criminal law, but, nevertheless, criminal law should provide solutions to combat crime that develops alongside migration or as a result of it.

Exploiting the suffering of people whose lives were put in danger in their home countries constitutes a serious violation of the obligations for human solidarity in the face of which the authorities of any other country cannot remain in a state of passivity.

The solutions for deterring the influx of forced migration can only be political and economic, and must be sought and implemented in those countries that generate this migration.