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Migrant smuggling : an overview the legitimacy of our choices

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MIGRANT SMUGGLING: AN OVERVIEW OF ITS MATERIAL LEGITIMACY

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Context: defining the conduct

There are a few concepts that must be differentiated prior to properly defining the conduct:

- **Migration –** implies the movement of a person from one territory to another location, but without it being intrinsically regular or irregular
- **Irregular migration –** the entry or stay in one State's territory, without authorisation or in violation of the rules established by it. It is important to distinguish between the two moments in time – the entry and the stay – because one can enter a State's territory regularly, and then become irregular (e.g., visa renewal); or one can enter a territory irregularly and then become regular (e.g., asylum)
- **The last two concepts, human trafficking and migrant smuggling**, are the most similar. To differentiate between them, we usually resort to the Palermo Protocols, two additional Protocols to the UN Convention against Transnational Organised Crime. There are five elements in which this set of conducts will differ:

  - **Consent –** a trafficking victim never gives his/her consent, while migrants consent to their own smuggling;
  - **Intent –** the trafficker intends to exploit the victim at the destination, whereas the smuggler's intervention ends when the migrant reaches

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the destination
- **Status –** while the trafficked person is always a victim, the migrant can also be seen as an object of the crime
- **Transnationality –** trafficking does not imply a transnational element, whereas migrant smuggling is, by its very nature, a transnational activity
- **Profit –** the profit gained by the trafficker stems from the exploitation of the person, and the smuggler agrees to a fee with the migrant for the services provided.

Relationship with the Functions of ECL

With that in mind, I have established, for several reasons, that European Criminal Law should have a two-pronged approach with respect to its function, upon identification of the interest behind the specific criminalising norm. The quality of the interests would be determined with regard to the responsibility for its protection (whether it be the Member States or the EU).

- When the interest is proper (that is, belonging to the EU itself), or a common interest already subject to preemption, the most appropriate criminalisation principle is the protection of legal goods;
- When the interest is simply common, then the harm principle should be used. This will allow for more flexibility, coherence, and will effectively direct European Criminal Law towards the criminalisation of conducts that harm or jeopardise the interests of its citizens; it should also reduce interventions directed at prevention (anticipatory, regarding the commission of the conduct) and prevent a paternalistic approach.

So, what are we trying to protect with the criminalisation of migrant smuggling?

We have to start by analysing the norms that we have.

This is what results from the Facilitators Package, as the European legislation became known:

Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

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

Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State **may** decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

The corresponding Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, establishes some circumstances that will increase the maximum sanction (in Art. 1(3)):

3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:
   — the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA (1),
   — the offence was committed while endangering the lives of the persons who are the subject of the offence.

The EU, given the way it opted to criminalise the conduct, reveals a security-oriented and mainly preventive approach, with the clear intention to stop migration flows from reaching the territory.

Some aspects should be made salient: there is no mandatory need for financial gain in order for the conduct to be a crime (unlike the assistance to residence), which immediately raises the possibility of sanctioning people who act without any criminal intent, whether it be for humanitarian reasons, or because they are legitimately pursuing their business. This is aggravated by the fact that the European legislation does not possess a general safeguard clause, mentioning just the *possibility*, for MSs, to choose not to criminalise humanitarian aid regarding entry and transit (not residence), as defined in Art. 1(2) of the Directive.

As for the Framework Decision, it must be noted that what is used in the Protocol as a necessary requirement for criminalisation appears in the FD as an aggravating factor; it is also worthy of criticism that only the migrant's life is mentioned, and not other relevant interests (such as physical integrity) as well. Concerning the criminalisation of the migrant himself, there is no mention in the European legislation.

The understanding of the Institutions is that there is a double motivation behind the criminalisation of migrant smuggling: to combat illegal immigration and, through that, to combat the exploitation of human beings; there is also an evident concern with the security of the Union.

The question we must pose is: what should the real interest behind the criminalisation of migrant smuggling be?

The criminalisation process

Any European criminalisation should follow a three-step process:

- the **first phase** would be dedicated to identifying the interest that is meant to be protected through criminalisation (or the prevailing interest), in order to know if it is a proper interest of the EU or a common one, and the level of harmonisation it already presents or requires.

The interests in this case are:

- **Territory** – a common interest not yet subject to pre-emption. It is true that the EU has its own territory, but the territories that make up the totality of it existed before the EU and they belong primarily to the sphere of competence of each State, which is demonstrated by the ample powers that remain in the Member States. But is it really what is meant to be protected here? What would be at stake would rather be the *security* of it – in which case the interest will be security – or the cohesion of the European territory and respective population, in which case the interest would be the *immigration policy*.
- **Common market** – namely when it comes to employment: the presence of a great number of immigrants in a situation of irregularity in one or multiple Member States could lead to a distortion of the common market in this sector. This is a markedly European interest, and therefore the responsibility for its protection is primarily (if not exclusively) attributed to the EU. But this is not the most salient connection within the criminalisation of migrant smuggling: its impact is not only distant (with regard to the conduct that is criminalised), but its dimension is also uncertain.
- **Immigration policy** – as an interest, it is clearly a common interest, since Member States retain a great part of their sovereignty regarding immigration, with the EU being attributed only some aspects of it, such as granting some short-stay Schengen visas. The European approach is, in this case, proactive, because it seeks to prevent *potential* acts of illegal entry, stay or residence, thus pushing back the unwanted migrants. But this stance

is also questionable from the point of view of the temporal sequence of events: how can migrants already be deemed "illegal", before they enter, stay or reside in the territory of a Member State in violation of its rules? The argument could be made that it is rather the sovereignty of the State itself that is at stake here (as suggested by the research carried out by Prof. Valsamis Mitsilegas). Sovereignty, as an interest to be protected by criminal law, is however much more questionable and problematic than even the immigration policy, since *any* disrespect for *any* norm could trigger disrespect for that interest and, therefore, criminal liability, which is not at all considered legitimate in a State governed by the rule of law.

- **Security** – what is usually relevant for criminal law is the *negative* dimension of security, furthering the adoption of restrictive measures with the ultimate goal of protecting security as a stately and collective interest. When evaluated with regard to the EU, this interest must be considered a common interest: European security (from a supranational point of view) encompasses the security of every MS and it is therefore a true "common security". On the other hand, there are multiple dimensions of security that coexist within the European space: the internal security of each MS and the internal and external security of the EU.
- **Migrants' rights** – finally, it could be that we should be trying to protect the violation of the rights of the people involved in the smuggling. Evidently, these are not proper interests of the EU, nor are they sufficiently harmonised to determine their preemption.

The second phase

- The **second phase** is devoted to the analysis of the interest through the optics of one of the criminalisation principles connected with material legitimacy: the legal good if the interest is proper, or a preempted common interest; the harm principle for the simply common interests, the ones whose protection cannot be solely ascribed to either entity (EU / Member States).

The only interest susceptible to leading to the analysis according to the principle of protection of legal goods would be the common market; however, this does not seem to be the offended interest. Therefore we will proceed with the analysis of the requirements of the harm principle, since all of the other interests are merely common.

The harm principle presents four elements: a conduct (1) that causes or it is likely to cause harm (2) to others (3), requiring an adequate intervention from the State in its prevention and repression (4).

The conduct must be one that entails an actual harm, be it for the State or migrants; or a prospective harm, in the sense of posing an immediate risk to the interests which are meant to be protected.

We will first focus on the State's interests:

- Security as an interest is susceptible to many criticisms: first, it is not possible to narrow down the conduct that would harm such an all-encompassing interest; as a feeling, it is also extremely hard to demonstrate its empirical existence, and it furthers the adoption of harsher measures to appease general feelings of insecurity; it also leads to the erosion of the symbolic function of criminal law. Therefore, security cannot be considered a legitimate (autonomous) interest to be protected by criminal law.
- When it comes to the immigration policy, the unlawfulness of the conduct stems from crossing a State's border without the authorisation to do so – so the unlawfulness of migrant smuggling relies not on the author's own conduct, but rather on the help he provides others to commit an illegal act. This means that there is no existential harm in this conduct (in fact, migrants must only regulate their situation for there to be no crime), so immigration policy cannot legitimately motivate the criminalisation of migrant smuggling.
- With regard to the migrants, there are some interests that could be risked by their smuggling: physical and / or moral integrity, human dignity (exploitation), and even their life. The illicit character of the conduct now stems from the very act of smuggling: when the smuggler acts in a way that is detrimental to those interests, thus violating one of them (which in turn will be criminally relevant if it is indefensible). In this case there is no ulterior action capable of erasing that unworthiness: all exploitation is, by definition, unfair.

The second requirement is that "others" suffer the identified harm – even if some stately interest was considered legitimate (which it was not), we now faced a new obstacle: the harm principle does not consider the State to be a victim. We could eventually (but it would be problematic as well) consider the community the holder of those interests (even so, as a collective right to security or the right to exclude someone – freedom of association), but still both were considered illegitimate, so we are left only with the migrants as potential victims of the crime. In order to avoid a paternalistic framing of the norm, migrant smuggling would be a crime only when:

  - There was no agreement between the parties
  - There was no informed consent

- There was a violation of human rights
- The smuggler unnecessarily endangered the migrant's interests
- There is exploitation of the migrant's situation

The final requirement leads us to consider what conduct demands an intervention of the State in penal terms: the simple fact of introducing someone into a given territory should not be considered a crime (the migrant who intentionally takes the risks inherent to the decision he/she *freely* opts for should not be criminalised as well) – these conducts should be liable to an administrative sanction only.

So, the only conduct that should be criminally censured is the introduction, facilitation of transit or residence of a foreign person in a Member State's territory of which he is not a national, nor of which he possesses an authorisation to do so, in order to obtain a financial or material illicit advantage, or violating the migrant's human rights in the process. Any other variation of this behaviour should be decriminalised (at least at the European level).

The third phase

- Finally, the **third phase** focuses on every other criminalisation principle that must be respected in such processes: the legality principle, proportionality, subsidiarity, *ultima ratio*, effectiveness and respect for fundamental rights.

As we have found a legitimate version of migrant smuggling, these other principles must now be assessed. With this new version of the crime, all of them are respected, particularly *ultima ratio* and respect for fundamental rights. Effectiveness is the only one that would remain unchanged, since migrant smuggling has proved to be indifferent to risk fluctuations (including the risk of criminal prosecution).

Conclusion: the adequacy of the new norm

The objective of having a clear function fulfilled by criminal law is not only important to bestow legitimacy upon the norm, but also to rationalise legislative activity. Let us see if the main problems would be solved after this:

- The lack of profit would obviously be solved with the new mention to it for there to be a crime. This, in turn, would mean that the criminalisation of **humanitarian acts**, as well as the help one provides family or friends (or the migrant himself) would now be excluded as criminal offences.

Commercial operatives (transports and housing sector) would also be excluded, as long as they would charge the normal profit (not exploiting the migrant's situation);
- It would clarify, across the EU, what exactly migrant smuggling is;
- It must also be mentioned that humanitarian help, or the one provided by family or friends, should also be excluded from a possible administrative sanction if the irregular migrant is given the right to legally reside in the territory (many times they have no other option to reach those territories other than an illegal one);
- And finally, all of the fundamental interests of the migrant would be protected, not just life (such as physical and moral integrity).

In conclusion, there is a legitimate version of the crime that would comply with the fundamental principles of criminal law – just not the one that was adopted. It must also be pointed out that other possibilities would be open for the Member States, as long as they would not run counter the established norm at the European level.

If this is a norm that is necessary, given the existence of other legal instruments that already criminally punish the relevant behaviours (namely those pertaining to human trafficking, for example), is a whole new question. Indeed, it appears that it may not be needed at all. However, since there is no possibility to remove it entirely from the legal orders of the Member States or of the European Union (given the lack of an actual power to decriminalise on the part of the EU, and the consequent lack of power of the Member States to remove a criminal law disposition that originated in the EU from their respective legal orders without disrespecting the constitutional principles of the EU), this would at least be a way to make migrant smuggling as legitimate as can be, while the problem of decriminalisation is not definitively resolved at the EU level.

Migrant smuggling should thus be reformed according to the function of European Criminal Law, not least because it would be extremely important for the EU to remain true to its values and provide a better example when it comes to the exercise of its criminal power, especially during a time when there is an untenable relaxation regarding the protection and upholding of those very values.