

European Union Law and Migrant Crisis

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Abstract

In the European Union (EU), there are two models of illegal maritime migration; the Western model, similar to the model of piracy in the Straits of Malacca, and the Eastern - Greek one, quite similar to the model of piracy off Somalia. Migrant smugglers in the Mediterranean make use of a sophisticated and frequently innovating methodology and their illegal commerce looks like the cultural goods one. Council Regulation (EC) 2007/2004 of 26 October 2004 led to the establishment of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, known as FRONTEX. After the establishment of FRONTEX, interception operations were still executed by EU Member States, which had the relevant authority and responsibility, yet were principally planned and coordinated by FRONTEX. The aforementioned Regulation was repealed by Regulation (EU) 2016/1624 of 14 September 2016, which established FRONTEX, the European Border and Coast Guard Agency. The agency works closely with European Fisheries Control Agency (EFCA) and European Maritime Safety Agency (EMSA) to implement multipurpose operations. In the matter of the migrant crisis, through three sentences of 28 February 2017, on the EU-Turkey Declaration, the European Union Court of Justice denied that the presence of all members of the European Council in the meeting with the Turkish Prime Minister on 18 March 2016 had to do with the European Council. Therefore, the judges avoided to interfere in the development of a serious existential crisis of EU, in a very similar way to their informal abstentionism in the financial crisis of the Union. Last but not least, on their decision of 7th March 2017 X and X vs. Belgium, they turned down the applicability of the EU law, in spite of the fact that the Advocate General had signaled that the consecration of the legal way of access to the international protection resulting from article 25 par. 1 of visas code was imposed by EU law itself.

Keywords: European Union Court of Justice, European Union Law, FRONTEX, migrant crisis, Regulation (EU) 2016/1624 of 14 September 2016

I. Introduction: Migrant Smugglers

The principle of freedom of the high seas and its corollary of flag State exclusivity may appear to be obstacles in the effort to combat several contemporary maritime threats, such as migrant smuggling by sea¹. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against

¹P. Mallia, *Migrant smuggling by sea*, Martinus Nijhoff Publishers, 2010.

Transnational Organized Crime defines migrant smuggling. Thus, this phenomenon consists of “... the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national”.

The present paper aims at highlighting aspects not only of the characteristics but also of the “Tactics, Techniques and Procedures (TTPs)” of migrant smugglers, nowadays.

Firstly, it focuses on a comparison between the practices of piracy and slavery. Then, it refers to the main characteristics of smugglers and afterwards to their TTPs and to the phenomenon of migrant interception.

II. Piracy and Slavery: The War Characteristic in Common

Piracy is an economic crime, as a general principle not a political one, which was classified by Aristotle among the socially acceptable jobs. Indeed, even though pirates are generally described as *hostishumanis generis*, there has been a time when piracy was not a crime as such, when lawful and unlawful pirates did effectively coexist². Nowadays, since the creation of competent international organizations and its resurgence in the 70’s, piracy has become a major security issue³. It is important to remember that legal international standards can only emerge when the interests of many States coincide. Piracy constitutes a perfect example, especially while the United Nations worked on the law of the sea from 1973 to 1982 and created the 1982 Montego Bay Convention on the Law of the Sea (UNCLOS).

Pirates in ancient times were considered as a separate international community, comparable with the sovereign countries. Upon the Roman state, pirates were involved in an undeclared war with states, like itself. The war concept is a stereotype one, having to do with the terminology and the wider approach to the phenomenon of piracy. Finally, it brings it together with the other typical crime of international public law, the slavery. This practice is considered to have emerged from the exploitation of prisoners of wars, in prehistoric times. Nowadays, because of poverty it is proved to be actual on five continents, exemplified by the child markets in Haiti⁴.

Anyway, piracy has been historically connected with bondage, mainly because pirates made use of their captivated persons as slaves or sold them into slavery. The abolition of bondage has been a gradual conquest, from the French Revolution, and on. Although the Revolution was not orientated to such a radical measure from scratch, a part of the French citizens made this decision in favor of the inhabitants of their colony, Haiti, in view of the dramatic facts of the rebellion of blackpeople. The irony of the history is, as already signalized, that Haiti is the main point of reference of modern slavery, at least as for minors.

Piracy is the “forgotten” international law crime, against public opinion, which mainly Military Navy forces have to cope with. It has been put into publicity mainly

²D. Gaurier, *The Pirate’s Path: Becoming the Enemy of All Mankind*, pp. 25-40, in H. Ch. Norchi, G. Proutière –Maulion, *Piracy in comparative perspectives: Problems, Strategies, Law*, Paris,-Londres, Pedone – Hart, 2012.

³C. Leboeuf, *France’s action against maritime piracy and the Contact Group on Piracy off the Coast of Somalia (CGPCS): interests, interactions and priorities*, Neptunus, e.revue, vol. 21, 2015/1, p. 2.

⁴E. Benjamin Skinner, *A crime so monstrous: Face-to-Face with Modern-Day Slavery*, NY, Free Press 2008.

since the emergence of piracy criminality in 90s, in the Straits of Malacca and the wider region. The main region of piracy risk is located off Somalia, implicating international anti-piracy interventions, such as the European Union operation “Atalanta” and the NATO operation “Ocean Shield”.

Even officials of Libya invoked the piracy risk, to avoid international intervention against their power. Following the Muammar al-Gaddafi regime’s targeting of civilians in October 2011, NATO answered the UN’s call to the international community to protect the Libyan people⁵. A son of the dictator declared to media that if the regime collapsed, the Mediterranean Sea would become full of pirates, reaching the Italian coasts and Crete. Anyway, migrant smuggling has produced a very serious concern since the beginning of the ongoing revolutionary domino crisis, called “Arab Spring”, put into practice from December 2010 and on, and exemplified by the Libyan case. In Tunisia, the point of beginning of this set of rebellions and civil wars, the authoritarian government was overthrown in January 2011.

In 2009, Libya’s leader signed a deal with Italy to stop the flow of illegal immigrants from northern-Africa to its shores and warned the waters might “*turn black because of illegal immigrants*”. Nowadays, ISIS backs up what he promised would happen if the regime fell – there would be pirates in Crete, and on the Italian shore. Libya would become another Somalia. In February 2015, Italian officials already believed that militants of ISIS were working with experienced seamen – the human traffickers shipping tens of thousands of migrants to Europe every month⁶. This seems one of the versions of the links between migrant smuggling or human trafficking and terrorist organizations and similar armed movements, like ISIS.

III. Migrant Smugglers’ Characteristics

Migrant smugglers are professionals promoting the migration, to gain benefit for themselves. First of all, it is to clarify that the term “human trafficking” has to do with transporting individuals from one place to another, either against their will or under some sort of false pretense. Just the opposite, the term “smuggling” involves an agreement between the smuggler and his customer, in form of a transportation contract. This distinction is detected in the Trafficking and Smuggling Protocols (known as the Palermo Protocols), passed by the UN Convention on Transnational Organized Crime. It is evident that smugglers seem to cause, as a general principle, less nuisance to the legitimate interests of their customers than human traffickers do against their own victims, as trafficking victims are often involved in a cycle of ongoing exploitation. The recognition of trafficking persons as “victims” but of smuggled migrants as “objects” of a process is a principal point of difference between how international law treats trafficked and smuggled migrants. However, smuggled migrants can still be victims of crime – whether this is theft, fraud, sexual assault, deprivation of liberty or even human trafficking⁷.

⁵Anonymous, *NATO and Libya (archived)*, http://www.nato.int/cps/en/natolive/topics_71652.htm.

⁶H. Roberts, *ISIS could become the pirates of the Mediterranean and bring havoc to European waters after taking coastal towns in Libya*, Mailonline 2015, <http://www.dailymail.co.uk/news/article-2959848/Warning-ISIS-pirates-Mediterranean-bring-havoc-European-waters-taking-coastal-towns-Libya.html>.

⁷A. Gallagher, F. David, *International Law of Migrant Smuggling*, 2014, p. 72.

Anyway, it is to underline that smugglers' customers may be refugees, whose experience is shaped by trauma, dislocation and loss. Refugee men and women have often endured and witnessed extraordinary amounts of violence in the process of becoming a refugee, including armed conflict in their country of origin, while crossing borders in refugee camps and in detention⁸. So, the smugglers' role is delicate and may be proved to be crucial for human rights of this sensitive target group.

There are various types of minor and major players within smuggling scene. For instance, the term "Snakehead" refers to the underground players who operate in facilitating the illicit transport of Chinese migrants from China into states like the Western countries.

IV. Migrant Smugglers' TTPs

In European Union there are two models of illegal maritime migration, the "Western" one, comparable with the model of piracy in the Straits of Malacca (operations made by relatively big ships), and the "Eastern- Greek" one, rather quite similar to the piracy model off Somalia (operations made by small speedboats)⁹.

On the one hand, the Western model is located off Spain and Malta and has to do with big sea distances between the country of origin and the country of destination, the use of big ships and the transport of a great number of smuggled migrants "on block".

On the other hand, the Eastern model includes short sea distances, a thoroughly different *modus operandi* of the criminals' networks and a big number of incidents with the use of ships of various types, which can carry wide range numbers of smuggled migrants.

As for migration from Turkey to Greece, the first step of this process is the external syndicate structure that transports migrants from other countries towards the Greek borders. The major center of these crime groups is Turkey, though not only Turkish nationals participate. In the major cities of Turkey, and particularly Istanbul, Izmir, Bursa, Edirne and Mersin, as well as all the ones close to the tri-border corridor with Iran, Iraq and Syria, well-formed smuggling networks quickly assemble prospective "clients" and arrange transfers. Depending on the economic situation of each immigrant, his time schedule and the number of groups assembled, a long march via trucks, vehicles and trains takes form onwards to the Aegean shores. Nevertheless, this land route is still active to an extent. The sophistication and influence of the smugglers can be shown by the fact that they tend to be always equipped with the necessary means of transportation and have ample human resources. Besides, yachts from Turkey have been noticed traveling the entire Aegean and Ionian seas to reach groups of immigrants massed at specific points, and then take them across to Italy. The same can be said for speedboats, included luxurious, "unsuspicious" ones. Back on land, an unknown number of warehouses in both Turkey and Greece are rented for the purposes of hiding people, while thousands of vehicles are used for transport¹⁰.

⁸G. Mason, M. Pulvirenti, *Former refugees and community resilience 'Papering Over' Domestic Violence*, Brit. J. Criminol. 2013, 53, pp. 401-418.

⁹Ministry of the Merchant Navigation, Aegean and Insular Policy, *A synoptic presentation of the phenomenon*, <http://www.yen.gr/wide/yen.chtm?prnbr=32021> (in Greek).

¹⁰I. Michaletos, Ch. Deliso, *The Illegal Immigration Industry in Greece in 2015: a Strategic Overview*, Balkananalysis.com, <http://www.balkananalysis.com/greece/2015/03/25/the-illegal-immigration-industry-in-greece-in-2015-a-strategic-overview/>.

It is to pay special attention to the fact that an alternative route to the Thracian land border along the River Evros has been greatly reduced due to fences constructed by Greek and Bulgarian authorities. It is about a very important innovation, of technical nature, which initially raised severe criticism in Greece, as for the protection of the human rights of the persons involved, such as migrants and refugees. This development led the smugglers' networks to make use almost uniquely of the maritime transports instead of the safer route of Evros. In 2015, the migration movement from Eastern countries, especially from Syria due to the civil war and to the barbarism of the ISIS involvement, via Turkey to Greece raised drastically. Smuggling, at least with the tolerance, if not with the encouragement, of the Turkish authorities has provoked the loss of many human lives in the Aegean Sea and, as a result, great emotion on international scale. Despite this fact, the Greek government has no political will to create a passing point in the land of Evros, with the pretext that in this region migrants would run the risk of passing through mine fields.

Anyway, once arriving in Greece, the vast majority of migrants and refugees want to leave the country, mainly for Central Europe. So, another type of smuggling network is activated, to transport people from Greece, particularly from Athens, further into Europe, by making use of forged papers, such as identity cards and passports.

V. European Union Law Against Illegal Migration

Amongst the extraterritorial immigration control techniques, a primary role is attributed to interception, a term which aptly describes “*measures applied by States outside their national boundaries which prevent interrupt or stop the movement of people without the necessary immigration documentation from crossing the borders by land, sea or air*”. In the maritime context, interception of this kind has attained even more vigor the last years in the light of the adoption of the aforementioned Protocol against the Smuggling of Migrants by Land, Sea and Air, as well as of the relevant practice of States, like Australia (laws commonly referred to as ‘Pacific Strategy’), United States and various European States. This has also been the recent activity of the European Union and more specifically of the European Agency for the Management of External Borders (FRONTEX), which was established in 2004 to help Member States in implementing community legislation on the surveillance of EU borders. After the establishment of FRONTEX, interception operations are still executed by EU Member States, which have the relevant authority and responsibility, yet are principally planned and coordinated by FRONTEX. Anyway, extraterritorial rescue operations concerning migrants at sea cannot be disconnected from the duty of safeguarding the human rights of the persons subject to these measures¹¹. The aforementioned Regulation was repealed by Regulation (EU) 2016/1624 of 14 September 2016, establishing Frontex, the European Border and Coast Guard Agency. The agency works closely with European Fisheries Control Agency (EFCA) and European Maritime Safety Agency (EMSA) to implement multipurpose operations. In the matter of the migrant crisis, through three sentences of 28 February 2017 on the EU-Turkey Declaration, of 18 March 2016, the European Union Court of Justice denied that the presence of all the members of the European Council in the meeting of the declaration day, with the Turkish Prime Minister had to do with the European Council. Therefore, the judges avoided to interfere in the development of a serious

¹¹Ef. Papastavridis, *Extraterritorial Immigration Control. The responsibility of States for Human Rights Violations*, *Annuaire International Des Droits de l’Homme* VI/2011, pp. 315-344.

existential crisis of EU, in a way similar to their informal abstentionism in the financial crisis of the Union¹². Last but not least, on their decision of 7th March 2017 X and X vs. Belgium, they turned down the applicability of the EU law, in spite of the fact that the Advocate General had signaled that the consecration of the legal way of access to the international protection resulting from article 25 par. 1 of visas code was imposed by EU law itself.

VI. Final Remarks on Smuggling

As long as smugglers do not play the role of human traffickers, they could be compared with another kind of criminals, those involved in illegal commerce of cultural goods. Indeed, antiquities looting, and illegal exportation of goods are considered as a rather “fine” kind of sophisticated activity. Indeed, it is not about a dangerous for human life and health commerce, exemplified by the weapons market and the drugs one. Italy is the point of entrance of very important quantities of both smuggled migrants, particularly coming from North Africa, and smuggled antiquities, particularly the ones coming from the land or the bottom of the seas of Greece¹³. Of course, the illegal trafficking of monuments is eventually related to the phenomenon of piracy in a metaphorical sense, having to do with the violation of intellectual property rights, and the problem of alteration or lack of the scientific knowledge on matters of history and archeology¹⁴. In cases of smuggling (immigration as well as antiquities looting), Italy receives the major part of inputs through maritime transports and remains often a country of passage to other countries.

Smuggling is a crime of specific characteristics (transnational organized crime with a different *modus operandi* within the Eastern – Greek model from the Western model one), making it difficult to cope with. Like the antiquities traffickers, smugglers tend to adopt sophisticated and frequently innovative techniques to accomplish their mission. During the past years, there have been important developments in both cases of legal migration and smuggling (upgrade of FRONTEX, state fences in the land of Evros...).

¹²C. Yannakopoulos, *La Cour de justice de l'Union européenne et la crise de la zone Euro : « La Trahison des images »*, Constitutionalism.gr, 02-04-2017, p. 19.

¹³A. Maniatis, *Les mesures de protection des biens culturels*, RSC 2010 Janvier / Mars, pp. 303-306.

¹⁴A. Maniatis, *Sea and see piracy*, pp. 1385-1394, in D. Vrontis, Y. Weber, E. Tsoukatos (Eds.), 8th Annual Conference of the EuroMed Academy of Business Innovation, Entrepreneurship and Sustainable Value Chain in a Dynamic Environment, 2015.

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Δίκαιο της Ευρωπαϊκής Ένωσης και μεταναστευτική κρίση

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Περίληψη

Στην Ευρωπαϊκή Ένωση (ΕΕ), υπάρχουν δύο μοντέλα θαλάσσιας λαθρομετανάστευσης, το δυτικό, παρόμοιο με το μοντέλο της πειρατείας στα Στενά της Μαλάκας, και το ανατολικό - ελληνικό μοντέλο, παρόμοιο με εκείνο της πειρατείας στη Σομαλία. Αυτοί που διαπράττουν παράνομη διακίνηση μεταναστών στη Μεσόγειο κάνουν χρήση μιας πολύπλοκης και συχνά καινοτόμου μεθοδολογίας και το παράνομο εμπόριό τους μοιάζει με εκείνο των πολιτιστικών αγαθών. Ο κανονισμός (ΕΚ) 2007/2004 του Συμβουλίου της 26ης Οκτωβρίου 2004 οδήγησε στη σύσταση του Ευρωπαϊκού Οργανισμού για τη Διαχείριση της Επιχειρησιακής Συνεργασίας στα Εξωτερικά Σύνορα των κρατών μελών της Ευρωπαϊκής Ένωσης, γνωστού ως FRONTEX. Μετά την ίδρυση της FRONTEX, οι επιχειρήσεις απώθησης ξεακολουθούσαν να εκτελούνται από τα κράτη μέλη της ΕΕ, τα οποία είχαν τη σχετική εξουσία και ευθύνη, ωστόσο αυτές καταρχάς σχεδιάζονταν και συντονίζονταν από τη FRONTEX. Ο προαναφερθείς Κανονισμός καταργήθηκε από τον Κανονισμό (ΕΕ) 2016/1624 της 14ης Σεπτεμβρίου 2016, ο οποίος καθιέρωσε τη FRONTEX, δηλαδή τον Ευρωπαϊκό Οργανισμό Συνοριοφυλακής και Ακτοφυλακής. Ο οργανισμός συνεργάζεται στενά με την Ευρωπαϊκή Υπηρεσία Ελέγχου της Αλιείας (EFCA) και τον Ευρωπαϊκό Οργανισμό για την Ασφάλεια στη Θάλασσα (EMSA) για την υλοποίηση πολυδύναμων επιχειρήσεων. Όσον αφορά τη μεταναστευτική κρίση, με τρεις αποφάσεις της 28ης Φεβρουαρίου 2017, σχετικά με τη Δήλωση ΕΕ-Τουρκίας, το Δικαστήριο της Ευρωπαϊκής Ένωσης αρνήθηκε ότι η παρουσία όλων των μελών του Ευρωπαϊκού Συμβουλίου στη συνάντηση με τον Πρωθυπουργό της Τουρκίας στις 18 Μαρτίου 2016 είχε να κάνει με το Ευρωπαϊκό Συμβούλιο. Ως εκ τούτου, οι δικαστές απέφυγαν να αναμειχθούν στην εξέλιξη μιας σοβαρής υπαρξιακής κρίσης της ΕΕ, κατά πολύ παρόμοιο τρόπο με την ανεπίσημη αποχή τους από την οικονομική κρίση της Ένωσης. Τελευταίο αλλά εξίσου σημαντικό, με την απόφασή τους της 7ης Μαρτίου 2017 X και X κατά Βελγίου, απέρριψαν τη δυνατότητα εφαρμογής του δικαίου της ΕΕ, παρά το γεγονός ότι ο γενικός εισαγγελέας είχε επισημάνει ότι η καθιέρωση του νόμιμου τρόπου πρόσβασης στη διεθνή προστασία που απορρέει από το άρθρο 25 παρ. 1 του κώδικα θεωρήσεων εισόδου επιβαλλόταν από το ίδιο το δίκαιο της ΕΕ.

Λέξεις-Κλειδιά: Δικαστήριο Ευρωπαϊκής Ένωσης, Δίκαιο της Ευρωπαϊκής Ένωσης, FRONTEX, προσφυγική κρίση, Κανονισμός (ΕΕ) 2016/1624 της 14^{ης} Σεπτεμβρίου 2016