

TÜRKİYE’NİN GÖÇMEN POLİTİKALARI VE GÖÇMEN KAÇAKÇILIĞI SUÇU

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Öz

Göç, demografik, antropolojik, sosyolojik, ekonomik ve politik yönleri bulunan, insanlık tarihi kadar eski bir olgudur. Göç yasal olabileceği gibi yasa dışı da olabilir. Yasa dışı göç; bir kişinin, yasal veya yasa dışı olarak bulunduğu ülkeyi terk edip başka bir ülkeye yasa dışı yollardan girmesi, yasal yollardan girdikten sonra süresi içinde ülkeyi terk etmemesi anlamına gelmektedir. Kendi ülkelerini terk edip başka bir ülkeye izinsiz girmek isteyenler, hedeflerine ulaşmalarını sağlamak için göçmen kaçakçılarına güvenme eğilimindedir. Kaçak göçmenler, çalışabilecekleri ve güvenliğe sahip olabilecekleri “vadedilmiş bir ülkeye” ulaşma umuduyla genellikle hayatlarını, geçimlerini ve ailelerinin hayatını ipotek etmek durumunda kalmaktadır. Çalışmada yasa dışı göç kavramı ve Türkiye’de göçmen kaçakçılığı suçu izah edildikten sonra bahse konu suçun insan ticareti suçu ile mukayesesi yapılacaktır. Son olarak Türkiye ile Avrupa Birliği arasında imzalanan Geri Kabul Anlaşması ve yasa dışı göç ilişkisi açıklanacaktır.

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Anahtar Kelimeler

• Göç • Göçmen Kaçakçılığı • İnsan Ticareti • Geri Kabul Anlaşmaları • Uluslararası İş Birliği

TÜRKİYE'S MIGRANT POLICIES AND CRIME OF MIGRANT SMUGGLING

Abstract

As one of the oldest phenomena in the history of humanity, migration involves demographic, anthropological, sociological, economic, and political aspects. Migration can occur legally as well as illegally. Illegal migration signifies leaving a country, whether legally or illegally, and entering a new one through illegal ways or not leaving the new country after the permitted time limit has elapsed following legal entry. People who have left their territories to enter another country without the necessary permissions tend to circumvent these requirements by relying on migrant smugglers. In most cases, illegal migrants are forced to risk their lives and savings, as well as the lives of their families, in the hopes of reaching some promised land where they will be secure and able to work in a decent job. While states have generally developed migration policies to protect their border security and fight against illegal migration, Türkiye prioritizes human rights in the framework of its migration policies. In this context, the study will first discuss Türkiye's migration policy and its effects on the crime of migrant smuggling between Türkiye and the European Union.

Keywords

• Migration • Illegal Migration • Migrant Smuggling • Readmission Agreements • International Collaboration

INTRODUCTION

People leave their home countries and migrate to raise their life standards in a more developed country in terms of economic conditions for various reasons such as economic crises, civil wars, geographical features, and employment opportunities.¹ The International Organization for Migration (IOM) defines migration as follows:

¹ **KFİR**, Isaac: *International Law and Human Smuggling: Trying to Make Sense of A Convoluted Framework*, Coyne, John/ Nyst, Madeleine (Editors), *People Smugglers Globally*, 2017, p. 57; **RODRÍGUEZ**, Laidiana Torres/ **PAEZ CUBA**, Lisett D./**MAR-TÍNEZ HERNANDEZ**, Liliana Margarita: "Migration and the crimes of People smuggling and trafficking, Technical-legal analysis", *Technium Social Sciences Journal*, Volume 5, 2020, p. 34; **BAIRD**, Theodore: "Understanding human smuggling as

An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.”²

Immigration activities can be organized in compliance with the law. For example, a labor immigration movement occurred from Türkiye to some European countries under labor agreements in the 1960s.³ Conversely, circumstances might occur in which migration is deemed illegal (i.e., irregular migration). People puts often their lives in peril while trying to migrate as a result of inhumane travel conditions. The photograph of the dead body of 3-year-old Alan Kurdi, who drowned when the inflatable boat on which he had been trying to cross from Türkiye to Greece on September 2, 2015 with his family sank, painfully demonstrated to the world how desperate the conditions these people have to bear are.

Most of the time, irregular migrants get help from migrant smugglers to illegally trespass to the territories of another state. Conceptually, a clear difference exists between migrant smuggling and irregular migration. Migrant smuggling covers smugglers' activities that facilitate the forms of irregular migration for financial or other material benefits, while irregular migration implies the conduct (and status) of the migrants themselves. The conditions of irregular migration are deemed to be fulfilled when at least one of three principal conducts take place: illegally entering a country, illegally residing in a country, and illegally working in a country.

a human rights issue”, Danish Institute for International Studies, 2013, p. 1-2; **PARLAK**, Bekir: “Küresel Düzeyde Göç Gerçeği ve Uluslararası Göç Örgütü”, TESAM Strateji, Issue 5, 2023, p. 12.

² For IOM's definition of migration, see: <https://www.iom.int/about-migration> Date of Access: 9/27/2023).

³ For examples on this issue, see: “Agreement between the Government of the Republic of Türkiye and the Government of the Federal Republic of Germany on the Employment of Turkish Workers in Germany” dated October 30, 1961, “Agreement between the Republic of Türkiye and the republic of Austria on the Turkish Labor Subpoena to Austria and the Employment of Turkish Workers in Austria” dated May 15, 1964, “Agreement between the Government of the Republic of Türkiye and the Australian Commonwealth Government on the Residence and Work of Turks in Australia dated October 5, 1967.

Migrant smugglers should be emphasized to not necessarily accompany the migrants during their travels. On the other hand, the offense of migrant smuggling can involve some side offenses. For example, a migrant smuggler may provide false documents (e.g., passport, visas, residence permits, or labor contracts) to facilitate irregular entries and/or residences in these countries.⁴

International cooperation has an important role in fighting against illegal migration and migrant smuggling. Migrant smuggling is defined as follows in Subparagraph (a) of Article 3 titled "Use of Terms" in the Protocol Against the Smuggling of Migrants:⁵ "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 or a permanent resident."

Different motivations are found to force people to migrate, such as political instability, economic conditions, and transport facilities, in particular for those who live in Africa, the Middle East, Asia, and Eastern Europe.⁶ Given that Türkiye is on the corner of the Asian, European, and African continents and is a political and economic bridge between emerging states and European countries, it has become a transit country for irregular migrants. In addition, because of the enormous wave of migration that has exponentially expanded in recent years, Türkiye has evolved from a transit country to a destination country for third country citizens due its advantageous conditions for irregular migrants.

Moreover, internal conflicts and political complications in the countries of the Middle East, the Caucasus, and Balkans have triggered an even greater mass influx into Türkiye. Political uprisings such as the Arab Spring (a political and social change movement that started in 2010 and took place in Middle Eastern and North African countries) have influenced many people to flee from their countries and migrate to others

⁴ TUDOR, Corina Maria: "Migrants Smuggling European Phenomenon or Crime?", AGORA International Journal of Juridical Sciences, No: 2, 2021, p. 81. See: UNODC, Global Study on Smuggling of Migrants 2018, United Nations Publication, p. 20.

⁵ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime was adopted at the conference held in Palermo within the framework of the United Nations on December 12-13, 2000. Türkiye approved the Protocol with Law No. 4803 dated January 30, 2003.

⁶ ŞAHİN, Güngör: "Göç Kapsamında Avrupa Güvenliği ve Tehdit Analizi", TESAM Strateji, Issue 5, 2023, p. 11.

such as Türkiye. Since the 1980s, Türkiye has not only remained a migrant sending country but has also become a migrant receiving country. The freedom for communication and travel globalization promoted has accelerated the movement of migration, from which Türkiye has also been substantially affected. Türkiye has accepted many irregular migrants for humanitarian reasons and provided them shelter, health services, education, and employment opportunities. However, the increased pressure of migration flows on its borders have forced Türkiye to adopt new policies related to migration. As a result, Türkiye has become more willing to take part and enhance its international cooperation in international conventions devoted to solving the migration crises.

In this context, the Department for Combating Irregular Migration was established by Presidential Decree No. 4 published on July 15, 2018 in order to increase the efficiency of policies on downshifting irregular migration flows and to mitigate their effects.

Türkiye prepared an action plan to fight against irregular migration and encouraged further studies to achieve the strategic goals it has determined in this context. Lastly, the Strategy Document and National Action Plan for Combating Irregular Migration, which covers the period of 2021-2025, has been drafted and entered into force.

Since deporting irregular migrants is insufficient on its own for solving the irregular migration problem, a voluntary return scheme has taken a critical position in Türkiye's strategies to prevent irregular migration as well. Voluntary return schemes prevent migrants who've been deported from coming back to Türkiye and seek to achieve improved conditions for irregular migrants in their home countries and to ensure they leave Türkiye on a voluntary basis beforehand in accordance with human dignity and international standards. Numerous legal arrangements have been made in this context. As the legal basis of the Nationally Supported Voluntary Return Mechanism, an additional regulation was promulgated under Law No. 6458 (On Foreigners and International Protection) on December 24, 2019. This regulation envisages that the support determined by the Voluntary Return Regulation will be offered to irregular migrants, victims of human trafficking, and foreigners in the international protection application process who want to voluntarily leave the country. Because the return of irregular migrants will be carried out on a voluntary basis with this mechanism, they are expected to spend less time in removal centers, thereby eliminating

administrative cases arising from disputes between the government and the foreigners and reducing the financial burden of the government regarding return procedures.⁷

I. TÜRKİYE'S POSITION AND MIGRANTS

European countries are final destinations for immigration routes because of their high level of development and promising employment opportunities. Meanwhile, Türkiye has been a transit country along these routes. However, one should note that the increased numbers in migration have transformed Türkiye into a target country as well.⁸

Like many states who struggle with such problems, migration policies have been developed and legal arrangements formed in order to prevent illegal migration in Türkiye. Protocols in relation to the United Nations Convention Against Transnational Organized Crime and its annexes on Migrant Smuggling and Human Trafficking were signed in Palermo, Italy on December 13, 2000. With an amendment made to the Turkish Citizenship Law in June 2003, the section that allowed direct acquisition of Turkish citizenship by way of marrying a Turkish citizen was abolished, thus forestalling sham marriages that had been made solely for becoming a citizen. On September 6, 2003, the Law on the Work Permit for Foreigners No. 4817 entered into force to prevent illegal work and the low-paid employment of foreigners. This law intended to ensure legal control over illegal migration and regulation of migration for employment as instruments for solving unregistered employment.

States also include the offense of migrant smuggling in their criminal codes to inhibit uncontrolled migration flows. In this context, the offense of migrant smuggling is regulated in Section 79 of the Turkish Criminal Code No. 5237. Pursuant to Law No. 6008 dated July 20, 2010, the relevant section was amended to punish the offense as if it had been carried out, even if the smuggling was only in the attempt phase. By the same token and pursuant to Law No. 7445 dated March 28, 2023, the

⁷ See: <https://www.goc.gov.tr/turkiyenin-duzensiz-gocle-mucadelesi> Date of Access: 3/9/2023).

⁸ The destination country is the country where an migrant is trying to reach illegally or where they had entered legally but continue to stay illegally; transit country refers to a country that is entered legally or illegally and used as for temporary transit to reach the destination country from the source country (<https://www.goc.gov.tr/duzensiz-goc-hakkinda> Date of Access: 4/27/2023).

minimum prison sentence for migrant smuggling was increased from three years to five years in Paragraph 1 of Article 79.

The Law on Foreigners and International Protection No. 6458 was enacted to regulate Türkiye's policies regarding migration and to govern related issues more effectively. With the authority given by this Law, the General Directorate of Migration Management was established within the organization scheme of the Ministry of the Interior in order to concentrate on irregular migration and to implement the necessary measures. The General Directorate began operations on April 11, 2014.

The issue of seizure of the tools used in migrant smuggling is regulated in the amended section to the Law on Foreigners and International Protection No. 6458 pursuant to Article 6 of Statutory Decree No. 690 as published in the Official Gazette on April 17, 2017.⁹

The overwhelming pressure from migration in combination with a number of economic reasons and political problems such as civil wars has affected not only target countries such as Germany and Scandinavian countries, but also smaller European Union (EU) states.¹⁰ Türkiye's position has also become more prominent than ever as a transit and destination country for migrants and asylum seekers who seek better economic and social conditions.¹¹ According to the statistics of the Directorate General of Migration Management, three different types of significant characteristics are found regarding irregular mobility. These are (i) groups coming from neighbor countries to Türkiye, (ii) groups that see Türkiye as a destination country or a transit country to third countries despite not coming from a neighboring border, and (iii) groups coming from Central Asian states.¹²

The concept of illegal migration and the offence of migrant smuggling are some of the most significant problems for Türkiye. Figure 1 shows the number of migrant smugglers caught in Türkiye each year. As such, 1,711 migrant smugglers were caught in 2010, 1,292 in 2011, 1,484

⁹ See: <https://www.goc.gov.tr/turkiyenin-duzensiz-gocle-mucadelesi> Date of Access: 4/10/2023).

¹⁰ İÇDUYGU, Ahmet/KOSER AKÇAPAR, Şebnem: "Türkiye", Migrant smuggling data and research: A global review of the emerging evidence base (Eds. Marie McAuliffe & Frank Laczko), IOM, 2016, p. 151.

¹¹ İÇDUYGU/KOŞER AKÇAPAR, p. 152.

¹² SAĞIROĞLU, Ali Zafer/ ÜNSAL, Ramazan/ ÖZENCİ, Furkan: Türkiye Migration and Human Mobility Annual Report 2021, AYBÜ-GPM, Ankara 2022, 1st ed.; p. 80.

in 2012, 1,469 in 2013, 1,506 in 2014, 4,471 in 2015, 3,314 in 2016, 4,794 in 2017, 6,357 in 2018, 9,102 in 2019, 4,358 in 2020, 7,942 in 2021, 9,149 in 2022, and 2,017 as of April 14, 2023.¹³

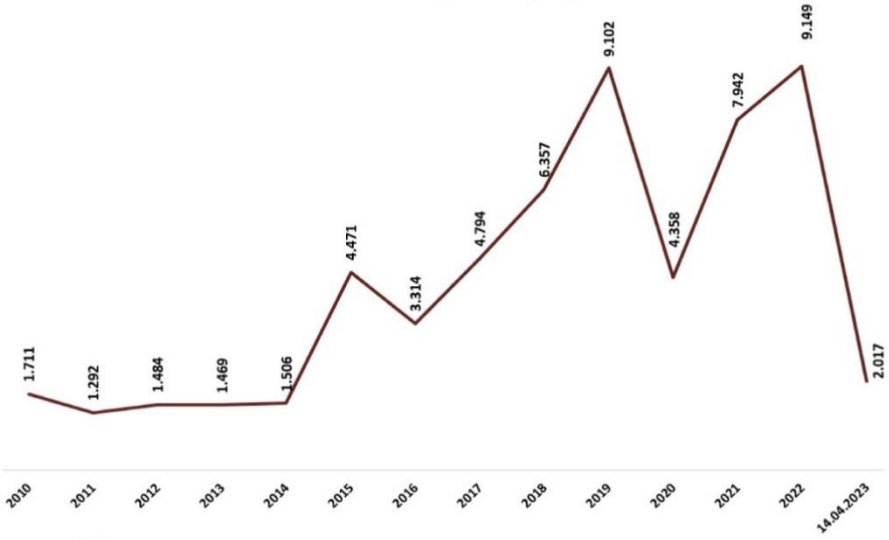


Figure 1. Migrant smugglers apprehended per year (as of April 14, 2023; Presidency of Migration Management, 2023a).

Figure 2 shows the statistics on irregular migrants who'd been apprehended in Türkiye each year. As such, 32,667 irregular migrants were apprehended in 2010, 44,415 in 2011, 47,510 in 2012, 39,890 in 2013, 58,647 in 2014, 146,485 in 2015, 174,466 in 2017, 268,003 in 2018, 454,662 in 2019, 122,302 in 2020, 162,996 in 2021, 285,027 in 2022, and 39,560 as of April 13, 2023.¹⁴

¹³ <https://www.goc.gov.tr/duzensiz-goc-istatistikler> (Date of Access: 4/20/2023).

¹⁴ <https://www.goc.gov.tr/duzensiz-goc-istatistikler> (Date of Access: 4/20/2023).

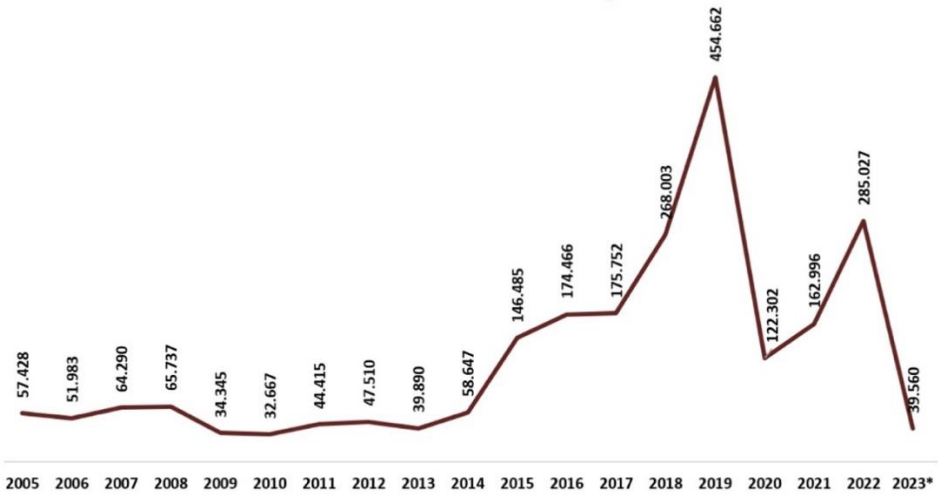


Figure 2. Number of irregular migrants apprehended per year (Presidency of Migration Management, 2023b).

The fact that migrant smuggling actually realized as such an organized activity shows up in networks established on social media. Social media platforms are used in various ways in the context of migrant smuggling, with consumer forums being where social media is commonly used. Due to the significant gap between the information that is shared with migrants and the actual facts in such relationships, migrants usually try to fill in the missing information by using social media tools to research smugglers, as well as the possible conditions of the journey they plan to make. Social media platforms are also used to divulgate critical information about routes and prices for organizing the trip, as well as positive or negative comments regarding the migrant smugglers themselves.¹⁵ In destination countries, illegal migrants publish their feedback regarding the smugglers and the service they'd received. thus, revealing cases where smugglers have failed, cheated, or mistreated migrants. Migrants and refugees also comment on their experiences in the countries to which they've migrated, as well as the administrative procedures for remaining in that country. Furthermore, smuggling can also be promoted through social media platforms. To do this, advertisements are usually posted on Facebook or other forums migrants normally use for exchanging views and experiences. Smugglers usually

¹⁵ UNODC, Global Study on Smuggling of Migrants 2018, United Nations Publication, p. 44.

attach attractive visual materials and convey their offers in their posts. They provide information on payment methods afterwards and may ask potential customers to contact them directly through different kinds of messaging services, some of which also offer the benefit of anonymity.¹⁶

From the perspective of comparative law, the offense of migrant smuggling is observed to generally be sanctioned under specific codes. As a matter of fact, German law regulates migrant smuggling not under its criminal law, but rather in a specific code that also involves the conditions of residency for foreigners in Germany. The offense of migrant smuggling is incorporated under Section 9 titled "Provisions Regarding Penalties and Misdemeanors" of the Code on the Residence, Work, and Integration of Foreigners in the Federal Country (*Aufenthaltsgesetz*) dated July 30, 2004. Article 95 of this Code stipulates the penalties regarding illegal entrance to the country.

II. THE OFFENSE OF MIGRANT SMUGGLING IN TÜRKİYE AND ITS ELEMENTS

One should not overlook the unprecedented international expansion of the volume of migration flows as being a direct consequence of globalization, poverty, and armed conflicts.¹⁷ For this reason, some regulations have been adopted regarding illegal migration in Turkish law, just as in many other states. One of these regulates migrant smuggling as an offense according to the Turkish Criminal Code. Paragraph (b) in Article 2 of Law No. 4771 dated August 3, 2002, amends Paragraph (a) in Article 201 of Turkish Criminal Code No. 765, thus making the first regulation in the Turkish Criminal Code concerning migrant smuggling. This modification has its roots in Article 6 of the Protocol Against the Smuggling of Migrants by Land, Sea, and Air, which obliges party states to regulate migrant smuggling as an offense.

Firstly, making migrant smuggling an offense intends to protect states' public order and security. However, the facts that the protected legal interest of this crime not being limited thereto and having a hybrid nature are worth noting. The protected legal interests of this offense can have various aspects such as the inviolability of the victim's bodily

¹⁶ UNODC, Global Study on Smuggling of Migrants 2018, United Nations Publication, p. 44.

¹⁷ ÇİOROBĂI, Ervin: "Smuggling of Migrants Threat to National Security", Research and Science Today, Volume 13, Issue 1, 2017, p. 64; RODRÍGUEZ/PAEZ CUBA/MARTÍNEZ HERNANDEZ, p. 32.

integrity and protection of their property and human dignity, as well as the protection of social and economic public order and the international community order. As can be observed here, making this an offense seeks to preserve both the common interests of the national and international communities, as well as the individual interests of those who are subject to this crime¹⁸.

Migrant smuggling also affects state sovereignty with regard to border security.¹⁹ In fact, migrant smuggling, whose *actus reus* has a transnational nature, is essentially an offense classifiable under state security offenses. It threatens not only national security but also the security of Europe and the world and as a consequence is forbidden by international conventions.

In Türkiye, Article 79 of Turkish Criminal Code No. 5237 sanctions the following acts within the scope of the crime of migrant smuggling:²⁰

¹⁸ **KOCA**, Mahmut/**ÜZÜLMEZ**, İlhan, Türk Ceza Hukuku Özel Hükümler, Ankara 2024, 10th ed.; p.75; **DOĞAN**, Koray, Göçmen Kaçakçılığı Suçu, Ankara 2008, 2nd ed.; p.89.

¹⁹ **ARTUK**, M. Emin/**GÖKCEN**, Ahmet/**ALŞAHİN**, M. Emin/**ÇAKIR**, Kerim, Ceza Hukuku Özel Hükümler, Ankara 2024, 21th ed.; p.14; UNODC, Global Study on Smuggling of Migrants 2018, United Nations Publication, p. 19.

²⁰ The decision is unlawful and should be overturned when evaluating the legal articles above with the current case. Dismissing the case is unlawful due to the lawsuit previously filed against the accused and a verdict having been given with written justification, regardless of the fact that the defendant had been caught by the Greek Coast Guard Police on October 7, 2008 while illegally cruising to take 20 foreign nationals by boat from the Kuşadası Coast to Greece by sea; the court in Greece had tried the defendant and punished him for the crime of migrant smuggling. If the defendant's actions are proven, the crime is considered to have occurred as soon as the migrants had left Türkiye, and thus the crime is deemed to have been committed in Türkiye. The defendant being tried in Greece does not prevent him from being tried again in Türkiye for the same crime; a certified copy of the case file in Greece should be brought and evaluated alongside all the evidence available in the case, and the legal status of the defendant should be evaluated and determined in accordance with these. In the case of a conviction, according to Turkish Criminal Code Article 16, the time spent in detention, observation, or conviction in a foreign country will be deducted from the sentence to be imposed in Türkiye for the same crime (18th Criminal Chamber of the Court of Cassation Ruling No. E. 2015/134 K. 2015/48 dated March 30, 2015). To convict instead acquitting is illegal without considering the defendant's claim and accepted action in accordance with the scope of the case, which consists of illegally taking foreign nationals from Greece to other European countries and does not constitute the crime of migrant smuggling as regulated in Article 79 of the Turkish Criminal Code. (9th Criminal Chamber of the Court of Cassation Ruling No. E. 2012/5789 K. 2013/3031 dated February 26, 2013).

(a) bringing a foreigner into the country illegally (Art. 79 para. 1a), (b) enabling a foreigner to stay in the country illegally (Art. 79, para. 1a), and (c) enabling a Turkish or a foreigner to go abroad illegally (Art. 79, para. 1b).²¹

Although the most frequent conduct under this offence involve assisting in the illegal entry into another country or exit from a country of a foreigner, enabling a foreigner to remain in the country without complying with the national requirements of this state also satisfies the *actus reus* element of the offense of migrant smuggling. Therefore, a person who enables a foreigner who had initially legally entered a country to remain in the country despite being required to leave the

²¹ ARTUK/GÖKCEN/ALŞAHİN/ÇAKIR, p.13, 14; TEZCAN, Durmuş/ERDEM, Mustafa Ruhan/ÖNOK, R. Murat, Teorik ve Pratik Ceza Özel Hukuku, Ankara 2023, 21th ed.; p. 92, 93; KOCA/ÜZÜLMEZ, p.75; EVİK, Ali Hakan, "Göçmen Kaçakçılığı Suçu", Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi, Issue 3-4, 2005, p.125; DOĞAN, p.89. "To decide that defendants who are caught while transporting migrants who've entered Türkiye illegally and want to go to Europe with the vehicles under their administration should be punished in accordance with Article 79/1-a of the TCC instead of Article 79/1-b of the same law, which complies with the defendants' actions, is illegal. For this reason, the judgment should be reversed. Because this issue can be corrected according to Article 322 of Criminal Procedural Law without a retrial, the article of law applied while determining the basic penalty should be removed and replaced with Article 79/1-b of the TCC; the other aspects of the provision that had been found to be in accordance with procedure and law should be corrected and approved (9th Criminal Chamber of the Court of Cassation Ruling No. E. 2013/17330 K. 2014/1074 dated February 3, 2014). Although the Court of First Instance accepted that the defendant had illegally brought migrants into Türkiye, allowed them to stay, and thus had completed the action, due to the defendant's unprovable defense that he had brought the migrants who'd entered Türkiye illegally to Istanbul and also due to the passports located on the defendant that had been prepared on behalf of the migrants having been found to be fake according to the expert report, as well as the absence of any evidence that the migrants who'd entered Türkiye illegally had been brought into the country by the defendant, the defendant's actions are understood to constitute the optional act of "enabling a Turkish or a foreigner to go abroad illegally" in the face of the facts that no evidence could be obtained regarding migrant smuggling and that the act remained at the stage of an attempt due to the defendant having been caught before the migrants were taken out of the country. For this reason, the Court of First Instance's "decision of insistence" regarding its decision that had mistakenly accepted the act of the defendant as "to allow migrants to enter the country illegally and allow them to stay" and had not applied a "decision of persistence" regarding fulfillment of the attempt to commit the crime was inaccurate and should overturned. (The General Assembly of the Criminal Chamber of the Court of Cassation Ruling No. E. 2012/8-322 K. 2012/221 dated June 5, 2012).

country due to the absence of any permanent residency right will be also deemed to have committed the offense of migrant smuggling if the other elements of the crime are also fulfilled. Accompanying this conduct are certain financial opportunities that are provided to the illegal migrant in order to allow them to remain in the country.

Anyone can commit the crime of migrant smuggling. The nationality of the perpetrators (i.e., whether they are a Turkish citizen or foreigner) does not matter. The victim of the crime of migrant smuggling is each person in the society. Although immigrants are not victims of migrant smuggling in terms of criminal law, they may become the victims of other accompanying offenses during the smuggling process. The crime of migrant smuggling involves migrants likely being exposed to inhumane treatment and suffering from this offense as a result of financial exploitation and abuse of their desperate positions.

As advised by Protocol Against the Smuggling of Migrants by Land, Sea, and Air, regulating migrant smuggling as an offense should be stated to not criminalize the migrants but rather to solely punish the smugglers acting for material benefit. In addition, Article 5 of this Protocol clearly states that migrants cannot be prosecuted for being smuggled. Most migrants and refugees have a relationship with the migrant smugglers, with the consensus being that they deserve protection.²²

In terms of migrant smuggling, putting the life of a victim in danger, exposing victims to degrading treatment while committing the offense, or committing the crime within an organizational activity require more severe punishment.²³ The perpetrator of the crime of of migrant smuggling acts directly or indirectly to procure material benefit²⁴. However, the crime of human trafficking has been committed if the offender intends to force the victim into work, servitude, slavery, or another similar practice; to coerce them into providing their organs; or to force them into prostitution. Unlike in the crime of human trafficking, because the victim voluntarily takes part in the smuggling, coercion is not an element of the offense of migrant smuggling.

²² **KFİR**, p. 58.

²³ **ARTUK/GÖKCEN/ALŞAHİN/ÇAKIR**, p.25; **ALJEHANİ**, Abdelnaser: "The Legal Definition of the Smuggling of Migrants in Light of the Provisions of the Migrant Smuggling Protocol", *Journal of Criminal Law*, Volume 79, Issue 2, 2015, p. 131.

²⁴ **ARTUK/GÖKCEN/ALŞAHİN/ÇAKIR**, p.10, 11; **KFİR**, p. 58.

The fact that material interests are considered an element of the offense²⁵ clearly indicates the Protocol Against Migrant Smuggling by Land, Sea, and Air to be focused on fighting against individuals – particularly organized crime groups – who seek material benefit from smuggling. This policy is also confirmed in the *travaux préparatoires* of the Protocol, which indicated that the activities of organized crime groups for profit are to be included, whereas the activities of those who provide support to immigrants for humanitarian reasons or based on close family relations are to be excluded.²⁶

Lastly, Article 6 of the Protocol Against Migrant Smuggling by Land, Sea, and Air bares the title of Criminalization. This article indicates that states shall punish any attempt at migrant smuggling in compliance with their fundamental legal concepts. However, the Protocol should be noted to not explicitly indicate that any attempt at migrant smuggling should be punished as a completed crime of migrant smuggling. Instead, the Protocol states that the Party States should regulate this issue within framework of their own legal system. In this context, Paragraph 1 of Article 79 of the Turkish Criminal Code sanctions the attempt of migrant smuggling with the same punishment as the completed crime of migrant smuggling.²⁷

²⁵ In the current case, to decide on a conviction instead acquittal regardless of not having definitive and convincing evidence and not being free from any doubt is unlawful; the evidence that was considered sufficient for his conviction was that “the defendant obtained directly or indirectly material benefit or commits the crime for this purpose” when he was caught at the border control in İpsala Customs Office during the time the defendant took his brother-in-law V. and his friend’s brother M. abroad with his vehicle (9th Criminal Chamber of the Court of Cassation Ruling No. E. 2014/2101 K. 2014/4908 dated April 21, 2014).

²⁶ UNODC, Global Study on Smuggling of Migrants 2018, United Nations Publication, p. 18.

²⁷ As of the date of the crime, according to the additional sentence of Article 79 Paragraph 1 of the Turkish Criminal Code No. 5237 enacted on the same day as Article 6 of Law no. 6008 dated 7/25/2010 as established in Official Gazette No. 27652, the incomplete penalty necessitated to reverse a verdict that did not consider the act of a defendant that had remained at the stage of attempt should be punished as a completed crime with the determination of an incomplete penalty instead of reducing the basic penalty that had been sentenced in accordance with Article 35 of the TCC (18th Criminal Chamber of the Court of Cassation Ruling No. E. 2015/53 K. 2015/6 dated March 30, 2015). The defendants were caught due to a popped tire on the vehicle while they were carrying 41 migrants who’d entered Türkiye illegally and wanted to go to Greece; the act is understood to constitute the crime of attempting to allow

III. EFFECTS OF MIGRATION POLICIES ON THE CRIME OF IMMIGRANT SMUGGLING

Turkey's immigration policy is an important factor affecting the crime of immigrant smuggling. It would be appropriate to increase the penalty for the crime of smuggling in order to prevent strict border controls and illegal immigration and to classify it as a crime that falls within the jurisdiction of the high criminal courts. Increasing penalties may be effective in the fight against smuggling. However, restricting immigrants from entering the country legally could lead to increased smuggling. Additionally, the uncertainty of migrants' situations and their lack of social integration can increase their risk of exposure to trafficking. Therefore, Turkey's migration policies require a careful balance in terms of both preventing smuggling and protecting the rights of immigrants.

Border controls have an important place in terms of the effects of Turkey's immigration policy on the crime of immigrant smuggling. Türkiye has tightened border control measures to prevent migrant smuggling. Let us point out that social integration also needs to be given importance. When sufficient support is not provided for the integration of immigrants, social exclusion and economic difficulties are among the factors that increase the crime of immigrant smuggling. When Türkiye does not effectively enforce the laws that protect the rights of immigrants, immigrants may be exploited by people who commit the crime of smuggling. Türkiye hosts a large number of refugees. The uncertainty of the situation of refugees is another factor that leads to an increase in smuggling. If this balance is not established, Turkey's immigration policy may increase illegal immigrant mobility, so all policies must be carefully evaluated and implemented. For example, it is obvious that the internal turmoil in Syria triggered irregular migration, and the increase in the number of irregular immigrants also caused an increase in the crime of immigrant smuggling²⁸. In addition, other conflicts and internal turmoil

illegal migrants to leave the country as defined in Article 79 Paragraph 1-b of the TCC, to disregard Article 35 of TCC regarding the necessity of a reduction in sentence is unlawful (9th Criminal Chamber of the Court of Cassation Ruling No. E. 2012/9413 K. 2014/478 dated 15.01.2014).

²⁸ **UZAN, Yıldız/ AKGÜL, Derya:** Türkiye'nin Göçmen Kaçakçılığı İle Mücadelesi ve Suriyeli Düzensiz Göçmenler Üzerine Bir Değerlendirme, Fırat Üniversitesi, İİBF Uluslararası İktisadi ve İdari Bilimler Dergisi, Volume 6, Issue 1, 2022, p.208.

in the world are becoming more difficult due to the diversification of the nationalities of people migrating to Turkey²⁹.

However, by ensuring an environment of peace and stability in Syria, irregular migration to Turkey and the crime of immigrant smuggling can be prevented. For this reason, it is obvious that ensuring a peaceful order in the countries of origin will be beneficial in preventing immigrant smuggling³⁰. In Turkey's migration policies, administrative measures taken to prevent immigrant smuggling can also increase the effectiveness of the trials and practices carried out within the scope of the Turkish Penal Code. Stricter inspections and border controls could make smuggling-related crimes easier to detect. In addition, legal regulations on the rights and security of immigrants and policies for the protection of immigrants can reduce the risk of these people being exposed to smuggling. Immigration policies can also affect the investigation and prosecution of immigrant smuggling crimes. Legal uncertainties and concerns can make it difficult for immigrants to testify or cooperate.

IV. CRIMES POSSIBLY ACCOMPANYING MIGRANT SMUGGLING CRIME

Migrant smugglers organize illegal migration paths for migrants in exchange for material benefit. Although migrants are the beneficiaries of this service, they may be exposed to inhumane treatment during the activities of migrant smuggling.³¹ Many migrants are physically harmed or lose their lives due to the dangerous conditions of their journeys. These migrants are frequently observed to be taken to another country than the one they had contracted or to be abandoned in a transit country.

Migrants who arrive in their destination country fall into a desperate situation due to lack of legal protection in that country. The crime of migrant smuggling imposes high risks to migrants' personal property, physical integrity, dignity and honor, and freedom.³² Moreover, the transnational feature of migrant smuggling threatens international community order.

²⁹ UZAN/ AKGÜL, p. 208.

³⁰ UZAN/ AKGÜL, p. 218.

³¹ KHAN/KHAN/NİSAR/KHAN, p. 1512.

³² DE MASSOL DE REBETZ, Roxane/ VAN DER WOUDE, Maartje: "A socio-legal analysis of the Belgian protective legislation towards victims of aggravated forms of migrant smuggling", *Crime Law and Social Change*, Issue 78, 2022, p. 373; RODRÍGUEZ/PAEZ CUBA/MARTÍNEZ HERNANDEZ, p. 42; BAIRD, p. 3.

While carrying out the crime of migrant smuggling, migrants may become injured or even lose their life. In this case, the responsibility of the perpetrator is determined according to their intention, and the offender is punished for both migrant smuggling as well as assault or homicide. Other offenses may also occur that go hand in hand with migrant smuggling. For example, a person who smuggles a foreigner into the country and starts to illegally employ this foreigner without the permission of the relevant local authorities should be examined for violating the elements of the crime of human trafficking. Similarly, the person who illegally smuggles foreigners using forged documents in their actions should be punished for forgery in addition to migrant smuggling. After committing the crime of migrant smuggling, a perpetrator who acquires themselves of the profit arising from this crime through money laundering practices should also be charged with money laundering as well. Similar to armed smuggling, drug trafficking is also one of the most common crimes committed during migrant smuggling.³³

Problems also occur regarding the social adaptation of illegal migrants in destination countries. Migrants are observed to usually disrupt public order by becoming involved in numerous criminal activities in these countries.³⁴

When evaluating the crime of migrant smuggling and its elements with regard to Türkiye, human trafficking should also be considered due to its international feature. While similarities exist between human trafficking and migrant smuggling, they also have divergent points. Migrant smuggling differs from human trafficking in several aspects. First of all, consent from the transported people is present in migrant smuggling.³⁵ The migrant being illegally transferred has consented to this action. Even though illegal immigrants are not responsible for the crime of smuggling, they may face administrative sanctions due to their illegal entry into the country. For example, according to Paragraph 1h in Article 54 of the Foreigners and International Protection Law No. 6458, governors may render decisions to deport those who violate provisions regarding legal entry into and legal exit from Türkiye.³⁶ Furthermore, the consent of

³³ Frontex Risk Analysis for 2022/2023, Warsaw 2022, p. 28.

³⁴ VG Köln (13. Kammer), Urteil vom 08.03.2022 – 13 K 326/21, § 34, § 536.

³⁵ UNODC, Global Study on Smuggling of Migrants 2018, United Nations Publication, p. 19; **KFİR**, p. 58.

³⁶ **DE MASSOL DE REBETZ/VAN DER WOUDE**, p. 364.

an illegal migrant can be questioned because of economic pressure. Because illegal migration is generally triggered by economic distress, they are deemed to have escaped from their countries as a result of poverty and unemployment.³⁷

The crime of migrant smuggling by its very nature requires crossing a country border and thus involves physical movement. In this respect, an action must be performed in at least two countries for this offense to have occurred, namely the source country and the destination country.³⁸ Therefore, migrant smuggling carries an international feature.³⁹

In human trafficking, the perpetrator's purpose is to abuse the victims,⁴⁰ while the purpose of migrant smuggling is to facilitate the irregular entry or residence of a person in order to obtain a financial gain.⁴¹ Another difference between human trafficking and migrant smuggling is the source of the offender's profit. In human trafficking, profits come from the exploitation of victims. In migrant smuggling, the source of income is payment from the migrants in return for the service of being smuggled. In EU Law pursuant to Directive No. 2002/90/EC, migrant smuggling is considered a crime even when no material benefit occurs.⁴²

That the victims are different in terms of these crimes is worth mentioning. Human trafficking involves the abuse and implicit victimization of a person. Therefore, the victim of this crime is the person who has been exposed to this abuse.⁴³ However, migrant smuggling affects the sovereign rights of states regarding their borders and public order. Therefore, immigrants are not classified as victims. Nevertheless, immigrants quite possibly can become victims of other crimes while being smuggled, which has been frequently observed. As we have stated, the presence of threats, pressure, violence, and coercion transforms the offense from migrant smuggling into human trafficking.⁴⁴

³⁷ ALJEHANI, p. 132.

³⁸ RODRÍGUEZ/PAEZ CUBA/MARTÍNEZ HERNANDEZ, p. 33.

³⁹ TUDOR, p. 77; KFİR, p. 58.

⁴⁰ RODRÍGUEZ/PAEZ CUBA/MARTÍNEZ HERNANDEZ, p. 37.

⁴¹ DE MASSOL DE REBETZ/VAN DER WOUDE, p. 363.

⁴² TUDOR, p. 77; KFİR, p. 58.

⁴³ TUDOR, p. 77

⁴⁴ KHAN, Abdus Samad/KAHN, Taza/ NISAR, Adnan/ KHAN, Riaz Ahmad: "Understanding the Human Trafficking Doctrine from a Legal Perspective", International Journal of Early Childhood Special Education, Volume 14, Issue 7, 2022, p. 1512.

Although the difference between human trafficking and migrant smuggling can be distinguished in theory, the structure is quite problematic. To suggest that migrant smuggling is a more tolerable offense compared to human trafficking would imply an underestimation and tolerance of immigration law violations. Moreover, distinguishing between human trafficking and migrant smuggling is difficult in practice.⁴⁵

Finally, Figure 3 presents the numbers for the crimes of migrant smuggling and human trafficking in Türkiye (pursuant to Arts. 79 & 80 of the Turkish Criminal Code). As such, Türkiye had 2,430 convictions in 2009, 2,644 in 2010, 2,546 in 2011, 2,754 in 2012, 4,463 in 2013, 3,667 in 2014, 4,985 in 2015, 7,234 in 2016, 7,030 in 2017, 10,551 in 2018, 13,537 in 2019, 10,692 in 2020, and 15,111 in 2021.⁴⁶

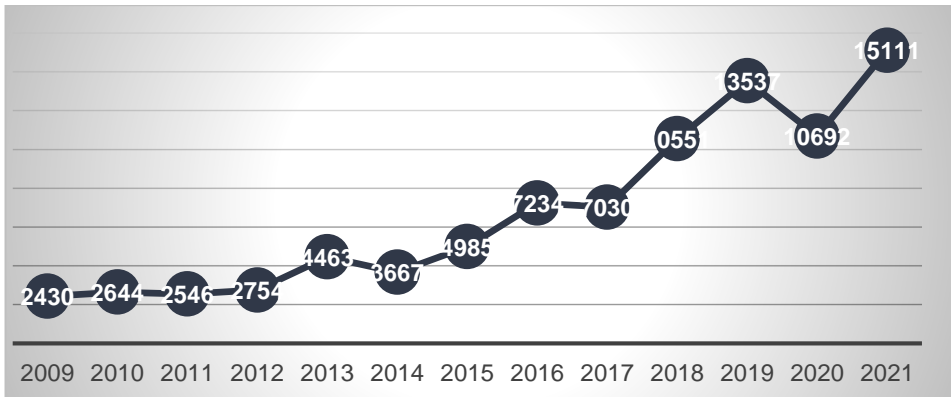


Figure 3. Conviction decisions regarding migrant smuggling and human trafficking crimes in Türkiye (Articles 79 & 80 of the Turkish Criminal Code).

V. ILLEGAL MIGRATION AND READMISSION AGREEMENTS

A. General Outline

⁴⁵ MARTİN, Philip/MİLLER, Mark, "Smuggling and Trafficking", *International Migration Review*, Volume 34, Issue 3, 2000, p. 975.

⁴⁶ Forensic Statistics, General Directorate Of Criminal Records And Statistics, <https://adlisicil.adalet.gov.tr/Home/SayfaDetay/adl-istatistikler-yayin-arsivi> (Date of Access: 12/23/2022).

Irregular migration is such a huge problem exceeding the capabilities of states that solving it without international cooperation is rendered impossible. In this context, states try to fight against irregular migration by forming bilateral, regional, and global entities. Türkiye also collaborates with national and international institutions such as the International Organization for Migration (IOM), United Nations High Commissioner for Refugees (UNHCR), and International Centre for Migration Policy Development (ICPMD), as well as various national non-governmental organizations, in order to increase its effectiveness in the fight against irregular migration. The specific concept of migration diplomacy has also emerged, which involves how states and international actors use migration as an instrument in diplomatic negotiations.⁴⁷

At the beginning of January 2006 and with the participation of 53 participator and four observer countries and 13 international organizations, Türkiye assumed presidency of the Budapest Process, which aims to prevent irregular migration, find permanent solutions in the fight against irregular migration, and develop sustainable policies in the field of migration management. During this Process, Türkiye led the establishment of the Silk Road Region Working Group for gathering the home countries of migrants, and the transit and destination countries along migration routes. Türkiye has also contributed to the Mediterranean Transit Migration Dialogue initiative carried out by the International Centre for Migration Policy Development (ICPMD) by signing the Memorandum of Understanding with Frontex (EU Border Security Unit) to prevent irregular migration on the May 28, 2012.⁴⁸

B. Readmission Agreements for Combating Irregular Migration

Irregular migration and the crime of migrant smuggling affect societies socially, politically, and economically. The need to protect international public order has required countries to act in cooperation to combat illegal migration and migrant smuggling. Security is also one of the main concerns of migration diplomacy because of how it affects the stability of states⁴⁹. For this reason, many international conventions and

⁴⁷ ÖZDAL, Barış/ARGALI, Medihanur: "Göç Diplomasisi", TESAM Strateji, Issue 5, 2023, p. 19.

⁴⁸ See: <https://www.goc.gov.tr/turkiyenin-duzensiz-gocle-mucadelesi> (Date of access: 13.02.2023).

⁴⁹ ÖZDAL/ARGALI, p. 22.

documents have been signed with the endeavor of implementing policies to prevent irregular migration.⁵⁰

Because of the substantial rise of irregular and illegal immigration and how migration has started being seen as a worrisome threat and prominent problem, initiatives to control migration have been launched in Europe.⁵¹ The EU uses many systems to take migration under control. The Schengen Agreement (1985) and the 1990 Convention implementing that agreement⁵² have determined common external borders, as well as visa and border security policy. The EU has developed policies to strengthen its external borders and to ensure uniformity on visa and asylum policies with a free movement plan within the common external borders.⁵³ One set of policies developed in this context are readmission agreements. Based on the competence provided by the Amsterdam Agreement, the EU is able to sign readmission agreements in order to return these migrants to transit countries or to their home countries if the EU detects migrants crossing the border or residing in the country illegally. Returning illegal immigrants is expected to affectively combat irregular migration.⁵⁴

These returned persons can be citizens of the receiving country, citizen of a third country who uses the receiving country only as a transit country, or they can be stateless.⁶³ In addition to the agreements that have been signed with the EU, bilateral readmission agreements can be signed as well. In fact, Türkiye has signed readmission agreements with Syria,

⁵⁰ BAIRD, p. 2.

⁵¹ ŞAHİN, p. 10.

⁵² "The Schengen Convention supplements the agreement and lays down the arrangements and safeguards for establishing an area without internal border controls. It was signed by the same five countries on 19 June 1990 and entered into force in 1995. The agreement and the convention, along with the related agreements and rules, together form the 'Schengen acquis,' which was integrated into the framework of the EU in 1999, becoming EU legislation. The Lisbon Treaty made the 'area without internal frontiers, in which the free movement of persons is ensured' an EU goal." (<https://eur-lex.europa.eu/EN/legal-content/glossary/schengen-agreement-and-convention.html> Date of Access: 4/20/2023).

⁵³ NAS, Çiğdem: "Türkiye-AB İlişkilerinde Geri Kabul ve Vize Serbestliği: Hareketliliğin Yönetimi", *Marmara Avrupa Araştırmaları Dergisi*, Volume 23, Issue 2, 2015, p. 177.

⁵⁴ NAS, p. 179.

⁶³ EKİNCİ, Mehmet Uğur: *Türkiye-AB Geri Kabul Anlaşması ve Vize Diyalogu*, SETA Rapor, 2016, p. 12.

Greece, Kyrgyzstan, Romania, Ukraine, Pakistan, Russia, Nigeria, Bosnia and Herzegovina, Yemen, Moldova, Belarus, Montenegro, Norway, and the EU since 2001.⁵⁵

Readmission agreements are risky for the transit and home countries because of their costly consequences. For this reason, the EU offers some advantages by relating some specific issues in order to incentivize states to become party to the agreement. One of these advantages is visa facilitation. Some processes facilitating the ability of the citizens of the signing country to obtain visas are offered in return for signing and implementing a readmission agreement. The content of the visa facilitation framework is determined specifically for the party state with the stipulation of certain criteria and a road map defining compliance for the visa facilitation process.⁵⁶ Another incentive that can be offered to convince states to sign readmission agreements is financial support offered from the EU for sharing financial burdens as a result of returning migrants. Nonetheless, a specific fund for this purpose within the EU budget does not exist. Even though no reference to funding is found in the wording of readmission agreements, Article 23 titled “Technical Assistance” in the Readmission Agreement between Türkiye and the EU stipulates the following which thus paves the way for providing funds to Türkiye⁵⁷.

Europe is the final destination for irregular migrations these days. Because Türkiye is a transit country for migrations to Europe, the EU

⁵⁵ See: <https://www.goc.gov.tr/turkiyenin-duzensiz-gocle-mucadelesi> Date of Access: 14/9/2023).

⁵⁶ **EKİNCİ**, p. 12. Migration diplomacy is a concept that states that international actors are to look after their own interests and to use migration and immigrants as bargaining chips. See **ÖZDAL/ARGALI**, p. 21.

⁵⁷ See: **BATIR**, Kerem: “Avrupa Birliği’nin Geri Kabul Anlaşmaları: Türkiye ile AB Arasında İmzalanmış Geri Kabul Anlaşması Çerçevesinde Hukuki bir Değerlendirme, Yönetim Bilimleri Dergisi”, Volume 15, Issue 30, 2017, pp. 595–606. “Within the framework of the Turkey-EU Joint Migration Action Plan of which the Readmission Agreement is a part, the European Union has guaranteed to accelerate the allocation of 3 billion Euros of financial resources on a project-based basis for the needs of Syrians in Turkey at the Turkey-EU Summit held on March 18, 2016. After the use of the 3 billion Euros resource, an additional 3 billion Euros was foreseen to be provided until the end of 2018 in regard to the Asylum Seeker Financial Facility. According to the report of the European Union Commission, only 1.5 billion Euros of the 3 billion Euros envisaged had been budgeted as of the end of February 2017. Only 750 million Euros of this figure has been paid.” See: **Batir**, p. 600.

wanted to expand its cooperation with Türkiye in order to combat illegal and irregular migration and protect its borders. According to Frontex,⁵⁸ Türkiye is a transit country for two different main migration routes that reach the EU, one from the Eastern Mediterranean and the other from the Western Balkans.⁵⁹ In addition, due to being located at the junction of two continents, Türkiye has also become a destination country for migration routes.

The issue of signing a readmission agreement between Türkiye and the EU emerged in the early 2000s. The EU presented an agreement proposal to Türkiye on March 10, 2005, and negotiations started on May 27, 2005. Shortly after, the negotiations halted for a while due to some disagreements but were brought back to the agenda in 2009. Agreement between the EU and the Republic of Türkiye for readmitting persons residing without authorization was signed on December 16, 2013 and entered into force on September 1, 2014. After the refugee crisis in 2015, the Joint Action Plan was accepted on November 29, 2015 as a result of the negotiations that took place at the request of the EU for completely implementing the framework of the agreement. Following this Plan, the Agreement entered into force completely on July 1, 2016. The transfer of illegal migrants to Europe through Türkiye as a transit country had intensified in 2015, with more than 800,000 asylum seekers and migrants being detected crossing from Türkiye to Greece. In 2016, this figure decreased to 123,246. After enacting the Readmission Agreement between Türkiye and the EU, a limited number of people was observed to have been returned to Türkiye from EU countries. Most of the returned migrants were said to have given up their asylum claims voluntarily.⁶⁰ According to the statement from the Ministry, the number of irregular migrants who had been returned to Türkiye within the scope of the Readmission Agreement between Türkiye and the EU was 1,093 as of May 2, 2017.⁶¹

⁵⁸ "Frontex is a centre of excellence for border control activities at the EU's external borders, sharing intelligence and expertise with all Member States and with neighbouring non-EU countries affected by migratory trends and cross-border crime" (<https://frontex.europa.eu/about-frontex/who-we-are/tasks-mission/> Date of Access: 4/27/2023).

⁵⁹ Frontex Risk Analysis for 2022/2023, Warsaw 2022, p. 10; NAS, p. 178.

⁶⁰ EKİNCİ, p. 7, 17; BATIR, p. 599.

⁶¹ See: https://ab.gov.tr/ab-bakani-omer-celikin-turkiye-ab-geri-kabul-anlasmasina-iliskin-aciklamasi_50778.html Date of Access: 14/9/2023).

Given that cooperation with Türkiye for border security and control is an important measure for preventing illegal migrants from coming to Europe, the EU has accepted to negotiate visa liberalization with Türkiye in exchange for signing the Readmission Agreement. In addition, due to the lack of sufficient capacity for readmission during the signature phase of the Agreement, Türkiye was granted a three-year period to increase capacity and sign readmission agreements with third countries. A new measure was also developed to temporarily control irregular migration until the Readmission Agreement would be entered into force. Türkiye agreed to take back the illegal migrants who had crossed from Türkiye to the Greek islands in the Aegean from March 20, 2016 and onwards. With implementation of this measure, and based on the readmission agreement between Türkiye and Greece, returns were expected to be expedited. In addition, this implementation was intended to deter migrant smuggling and irregular migration over the Aegean Sea and to prevent loss of life. The decision was made that the EU countries would take one Syrian refugee for each Syrian refugee Türkiye accepted back.

According to the Readmission Agreement between Türkiye and the EU, EU countries can request Türkiye to readmit its citizens as well as the stateless people and third-country citizens who've enter their borders illegally or who fail to meet the legal requirements for staying there.

Article 3 titled "Readmission of Turkey's Own Nationals" in the Agreement regulates how Türkiye readmits its own citizens, providing the following⁶².

⁶² See: "2) Turkey shall also readmit: minor unmarried children of the persons mentioned in Paragraph 1 of this Article, regardless of their place of birth or their nationality, unless they have an independent right of residence in the requesting Member State or if the said independent right of residence is held by the other parent who has legal custody of the children concerned; spouses, holding another nationality, of the persons mentioned in Paragraph 1 of this Article, provided they have the right to enter and stay or receive the right to enter and stay in the territory of Turkey unless they have an independent right of residence in the requesting Member State or unless it is demonstrated by Turkey that according to its national legislation the marriage in question is not legally recognised. 3) Turkey shall also readmit persons who in accordance with Turkish legislation have been deprived of, or who have renounced, the nationality of Turkey since entering the territory of a Member State, unless such persons have at least been promised naturalisation by that Member State. 4) After Turkey has given a positive reply to the readmission application or, where appropriate, after expiry of the time limits laid down in Article 11(2), the competent consular office of Turkey shall, irrespective of the will of the person to be readmitted,

The readmission of third-country citizens and stateless persons is regulated in Article 4 of the Agreement, titled "Readmission of Third-Country Nationals and Stateless Persons" and stipulates the following⁶³.

In accordance with the principle of reciprocity, EU countries will also accept back their citizens who are illegally in Türkiye, as well as irregular migrants crossing to Türkiye from the EU region. The EU considers the Readmission Agreement essential in order to control irregular migrations and the refugee crisis, and the Agreement is also crucial for Türkiye. The agreement has an accelerating effect on allowing the legal and institutional developments and practices related to migration and border policies to reach international standards. Visa liberalization negotiations are also an incentive for signing the Agreement.

within three working days, issue the travel document required for the return of the person to be readmitted with a period of validity of three months. In case there is no consular office of Turkey in a Member State or if Turkey has not, within three working days, issued the travel document, the reply to the readmission application shall be considered as the necessary travel document for the readmission of the person concerned. 5) If, for legal or factual reasons, the person concerned cannot be transferred within the period of validity of the travel document that was initially issued, the competent consular office of Turkey shall, within three working days, issue a new travel document with a period of validity of the same duration. In case there is no consular office of Turkey in a Member State or if Turkey has not, within three working days, issued the travel document, the reply to the readmission application shall be considered as the necessary travel document for the readmission of the person concerned."

⁶³ See: "3) After Turkey has given a positive reply to the readmission application or, where appropriate, after expiry of the time limits laid down in Article 11(2), the Turkish authorities, if necessary, shall within three working days, issue the person whose readmission has been accepted with the 'emergency travel document for aliens' required for his or her return with a period of validity of at least three months. In case there is no consular office of Turkey in a Member State or if Turkey has not, within three working days, issued the travel document, it shall be deemed to accept the use of the EU standard travel document for expulsion purposes. 4) If, for legal or factual reasons, the person concerned cannot be transferred within the period of validity of the 'emergency travel document for aliens' that was initially issued, the Turkish authorities shall within three working days extend the validity of the 'emergency travel document for aliens' or, where necessary, issue a new 'emergency travel document for aliens' with the same period of validity. In case there is no consular office of Turkey in a Member State or if Turkey has not, within three working days, issued the travel document, it shall be deemed to accept the use of the EU standard travel document for expulsion purposes."

CONCLUSION

People try to migrate due to economic, social, and political reasons such as war, unemployment, and poverty. However, migration does not always occur legally. People who do not fulfil the legal conditions for migrating apply to migrant smugglers. Because migration has social importance for both the destination and transit countries, developing migration policies and criminalizing migrant smuggling are important for preventing uncontrolled migration and taking preventative measures. While designing migration policies, how to both prevent the issue of migrant smuggling as well as respect migrant rights should be taken into consideration. While some improvements have occurred with respect to human rights in the context of migration, some problems still exist as a result of migration becoming a matter of national security.⁶⁴ However, as long as these economic, social, and political reasons persist, ending illegal migration and migrant smuggling should be stated to appear impossible.

Migrant smuggling is frequently confused with the crime of human trafficking. Despite some similarities, they differ in terms of matters such as consent, purpose, and source of profit. While the crime of migrant smuggling has the migrant's consent, the crime of human trafficking involves victims who are under threat and oppressions, with migrants' desperation being exploited through the use of force and violence. While the purpose of human trafficking is to abuse the victims, the purpose of migrant smuggling is the illegal transfer of migrants between countries. Migrant smugglers earn money directly from migrants in return for the illegal service they provide them. However, the abused person is not the source of material benefit in the crime of human trafficking; profits are instead gained by exploiting these persons. Also, the crime of human trafficking can be committed in only one country; however, the crime of migrant smuggling must involve at least two countries (i.e., the destination and source countries) in order to be committed.

Smuggling is not solely limited to the crime of migrant smuggling; it may also be intertwined with other crimes. In particular, migrants who are subjected to inhumane treatment are much more likely to experience injury or death. Moreover, crimes like forgery and money laundering can also be co-committed with the crime of migrant smuggling.

⁶⁴ KÖNİ, Hasan: "Uluslararası Göç", TESAM Strateji, Issue 5, 2023, p. 8.

That the problems integrating illegal migrants in the destination or transit countries are reflected in the rate of migrant crime in these countries is also worth mentioning.⁶⁵ Thus, migrant smuggling cannot be reduced to just smuggling. On the contrary, smuggling triggers many crimes, both during smuggling activities and after arrival in the transit and destination countries.

Given that migrant smuggling has a transnational feature, it is usually committed by organized international criminal organizations, concerns international community order, and entails international cooperation. By ensuring the coordinated actions of relevant states, national and international institutions will surely uphold the struggle against illegal migration and migrant smuggling. In this context, the dissemination of readmission agreements is important for promoting cooperation in the international sphere. Through readmission agreements, states endeavor to prevent uncontrolled migration and ensure the return of illegal migrants to their home or transit countries. In this context, advantages such as visa liberalization are offered to incentivize the increased popularity of readmission agreements.

Although Türkiye has been criticized for not taking sufficient action to prevent migrant smuggling and illegal migrants to Europe, as well as for not removing the geographical reservation⁶⁶ that was imposed upon it when it became a party to the 1951 Geneva Convention, it has experienced overwhelming pressure from migration; hence, cooperation is obviously the one and only solution to this problem.

Lastly, the readmission agreements that regulate the return of irregular migrants and the admission of qualified migrants to Europe should be stated to prove that European states prioritize their border security, while Türkiye follows a human rights-based policy in this regard.

⁶⁵ See: The behavior of immigrants that pose a risk to social order and disrupt public peace, together with uncontrolled immigration. VG Köln (13. Kammer), Urteil vom 08.03.2022 – 13 K 326/21, § 535, § 545.

⁶⁶ The geographical reservation made by Türkiye when it became a Party to the 1951 Geneva Convention is about the implied obligation in the Convention to provide international protection only to refugees from Europe, and this reservation is a right recognized by the Convention. See: NAS, p. 182.

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