

THE CRIME OF MIGRANT SMUGGLING IN TURKISH LEGAL SYSTEM IN THE LIGHT OF RECENT DEVELOPMENTS

GÜNCEL GELİŞMELER IŞIĞINDA TÜRK HUKUK SİSTEMİNDE GÖÇMEN KAÇAKÇILIĞI SUÇU

Peer-Reviewed Article

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ABSTRACT

As a result of the quality differences of living standards amongst countries, economic problems, repressive policies, civil wars or geographical discrepancies people wish to leave their own countries and to live in the ones having better social and economic standards. In cases where the legal ways of people to leave their own countries and enter the desired ones were not possible illegal ways come into question. The countries, based on various grounds such as to provide border or public security or human dignity, provide the crime of ‘migrant smuggling’ in their criminal laws to impede uncontrolled migrant flow.

In particular, Syrian migrants are trying to go to the different countries due to the Syrian civil war continuing for more than seven years for various reasons being to save their own and family lives and to live in higher economic standards. This struggle on the one hand gives way to fatal wounds in the lives and dignities of the migrants on the other hand causes the countries face insurmountable migration problems. Despite this problem primarily arise in countries sharing border with Syria. –to start with Turkey-it is also becoming a growing problem for the such European countries sharing no border with this country,

The crime of migrant smuggling, is prepared in the guidance of the definitions taking place in the additional protocols to The United Nations Convention against Transnational Organized Crime. Therefore, the crime of migrant smuggling is prepared (such as the crime of human trade) in the chapter of international crimes in the Turkish Penal Code system. The commission of that crime mostly reveals itself, through criminal organizations, to provide means to have people enter, stay or leave a country in illegal ways for financial profit, the migrants who fall in the hands of such criminal organizations which taking primary roles in the commission of the crime are suffered fatal losses in terms of money and physical integrity.

Keywords: Migration, Migrant, Migration Problem, Migrant Smuggling, Crime of Migrant Smuggling

ÖZ

Ülkeler arasındaki yaşam kalitesindeki farklılıklar, ülkelerde bulunan ekonomik sorunlar, uygulanan baskıcı politikalar, yaşanan iç savaşlar ya da coğrafi olumsuzluklar sonucunda insanlar kendi ülkelerinden ayrılarak sosyal ve ekonomik bakımdan daha ileri seviyedeki ülkelere gitmekte ve buralarda yaşamak istemektedirler. Kişilerin buldukları ülkelerden ayrılmaları veya gitmeyi arzu ettikleri ülkelere yasal yollarla girmeleri mümkün olmadığı durumunda ise yasa dışı yollara başvurulmaktadır. Ülkeler ise gerek sınır güvenliklerini ve kamu düzenlerini gerekse insan onurunu korumak amacıyla bu kontrolsüz göç akışını engellemek üzere ceza mevzuatlarında "göçmen kaçakçılığı" suçuna yer vermektedirler.

Özellikle yedi yılı aşkın bir süredir devam eden Suriye iç savaşı sonucunda Suriyeli göçmenler, kendilerinin ve ailelerinin can güvenliklerini sağlama, sosyal ve ekonomik anlamda daha müreffeh bir yaşama kavuşma arzusu gibi nedenlerle yasa dışı yollara başvurarak farklı ülkelere gitmeye çabalamaktadırlar. Bu çaba, göçmenlerin yaşam ve onurları bakımından onulmaz felaketlere kapı araladığı gibi ülkelerin başa çıkamadıkları göçmen sorunlarıyla yüzleşmelerine de neden olmaktadır. Bu sorun öncelikle -ve başta Türkiye olmak üzere- Suriye'ye sınır ülkelerde kendini göstermekle birlikte Avrupa ülkeleri gibi sınır ötesi ülkelerin de önemli bir sorunu haline gelmiştir.

Göçmen kaçakçılığı suçu Türk hukuk sistemindeki düzenlemeler incelendiğinde özellikle Sınır aşan Örgütlü Suçlara Karşı Birleşmiş Milletler Sözleşmesine ek olarak hazırlanan protokollerdeki tanımlar esas alınarak düzenlenmiştir. Bu bakımdan Göçmen Kaçakçılığı suçu (İnsan Ticareti Suçu gibi) Türk Ceza Kanunu sistematığında Uluslararası Suçlar kısmında düzenlenmiştir. Bu suçun işlenmesi sırasında maddi menfaat sağlamak amacıyla -genellikle de suç örgütleri eliyle- kişilerin yasal olmayan yollarla ülkeye sokulması, ülkede kalması ya da yurt dışına çıkmasına imkân sağlandığı görülmektedir. Bu suçun işlenmesinde öncü rol üstlenen örgütlerin eline düşen göçmenler ise mal varlığı ve beden bütünlüğü bakımından telafisi güç ya da imkânsız zararlara maruz kalmaktadırlar.

Anahtar Kelimeler: Göç, Göçmen, Göçmen Sorunu, Göçmen Kaçakçılığı, Göçmen Kaçakçılığı Suçu

INTRODUCTION

As a consequence of the Syrian civil war that has been going on for almost seven years, Syrian immigrants struggle to go to different countries by all illegal means possible, in order to save their own lives, or seek a more prosperous social and economic life. These efforts not only cause immigrants to face irreparable disasters in terms of their lives and dignity, but also leave the countries facing immigrant problems that cannot be coped with.

This problem naturally affects the border countries to Syria and especially Turkey, while it has become a major problem even in cross-border countries including Europe. There have been radical changes in law of countries regarding migrant smugglings such as international agreements, for instance readmission agreements, and update of immigration policies, which make the evaluation of the Turkish Legal System on migrant smuggling crimes an important issue.

In this study, after a brief exploration of immigrant issue, the Article 79 of the Turkish Penal Code regulating migrant smuggling is studied in detail in the light of current developments and emerging problems.

I. IMMIGRATION ISSUES

Migration is as old as human history. For this reason, from the past until today, the history has witnessed people moving from one place to another due to various reasons¹. Migration is a relocation of people from places they are born or live to other places temporarily or permanently due to economic, political, social or other reasons. As a result, migration is a concept that is perceived with its causes and consequences that describe its process rather than a stationary phenomenon². Immigrants, main actors of

1 KAYAALP, Mustafa, **Türk Hukukunda Göçmen Kaçakçılığı Suçu**, Yayınlanmamış Yüksek Lisans Tezi, Marmara Üniversitesi Sosyal Bilimler Enstitüsü, 2010, p. 1.

2 AKKUŞ, Ali Soner, **Türkiye’de Göçmen Kaçakçılığı ve Hukuksal Boyutu**, Yayınlanmamış Yüksek Lisans Tezi, Trakya Üniversitesi Sosyal Bilimler Enstitüsü, 2013, p. 5-6.

immigration are defined as “people who move to another country to be settled by departing from their own countries (person, family or community), refugees”³.

Nowadays, illegal immigration poses threat both nationally and internationally to the securities of countries, their economics and social structures, especially with respect to violations of human rights, it becomes a phenomenon directly related to whole humanity⁴. In recent years, the dramatic increase in the death number of immigrants on their way out has attracted the attention of the international communities significantly.

Especially, due to the civil war in Syria and Yemen, the conflicts in Iraq and the turmoil in African countries, there has been a massive migration trend particularly towards the European countries in recent years. According to the United Nations report, only in the Mediterranean, 3500 migrants died in 2014, 3771 in 2015, more than 5000 migrants in 2016 and 3,000 migrants in 2017⁵. In the statement made by the Geneva United Nations High Commission, it was noted that the majority of those who lost their lives were immigrants with the intention of moving to Italy from Africa, and it was stressed that prevention of marine incidents should be addressed urgently⁶.

The immigrant problem becomes more delicate when it comes to children refugees. According to the United Nations Children's Fund (UNICEF) records, there are 2.4 million refugee children, and although raising the education and living standards of refugees who are forced to leave their homes in childhood is a major problem, the biggest issue for children refugees is their survival⁷. As a matter of fact, as the news are reporting the increase of children death tolls on the way of migration, UNICEF has

3 See: Büyük Türkçe Sözlük, Türk Dil Kurumu http://www.tdk.gov.tr/index.php?option=com_bts&arama=kelime&guid=TDK.GTS.5a525ed5272318.13700287 (07 January 2018).

4 YENİGÜN, Bülent, **Göçmen Kaçakçılığı Suçu**, Yayınlanmamış Yüksek Lisans Tezi, Marmara Üniversitesi Sosyal Bilimler Enstitüsü, 2010, p. 1.

5 <http://www.haberturk.com/dunya/haber/1250703-iki-yilda-10-bin-gocmen-akdenizde-boguldu> (05 January 2018); <http://www.milliyet.com.tr/son-dakika-inanilmaz-rakami-dunya-2575471/> (05 January 2018).

6 <http://www.haberturk.com/dunya/haber/1250703-iki-yilda-10-bin-gocmen-akdenizde-boguldu> (05 January 2018).

7 http://www.bbc.com/turkce/haberler/2016/05/160516_cocuk_multeciler (05 January 2018).

warned that the deaths of children refugees may increase even further⁸. In a report dated 2017, UNICEF warns that children among the refugees originated from crisis regions Africa and the Middle East reaching first Libya to get to Europe via Mediterranean are exposed to widespread and systematic violence and sexual exploitations⁹.

Many asylum seekers who leave their countries by illegal means to get to the places they dream of, do not find the kindness they hope for. Indeed, the asylum seekers are put under difficult conditions by enforced permanent supervision and control under desperate conditions of not finding what they hoped for, they again look for and make plans and preparations leaving these countries¹⁰. This brings another problem to be faced in fighting migrant smugglings.

II. MIGRANT SMUGGLING CRIMES

A. A General Overview

Due to differences in qualities of life presented for people, economic problems, oppressive policies applied, civil wars, or geographical disadvantages among the countries, people leave their countries and prefer countries with better social and economic advantages compared to their owns.

In the case where people are not allowed to leave their own countries or enter the ones that they wish to be in legally, they attempt into illegal ways. Countries have defined the crime of “smuggling of migrants” in their criminal legislation in order to prevent any uncontrolled flow of immigrants, hence protecting their border securities and public orders and also human dignities¹¹.

8 <http://bianet.org/bianet/cocuk/175413-unicef-ten-akdeniz-deki-multeci-olumlerinin-artacagi-uyarisi> (05 January 2018).

9 <http://www.trthaber.com/haber/dunya/uniceften-kan-donduran-cocuk-multeciler-raporu-301363.html> (05 January 2018).

10 <http://tr.euronews.com/2016/06/09/suriyeli-siginmacilari-avrupa-da-da-zorlu-sartlar-bekliyor/> (05 January 2018).

11 YENİDÜNYA, Ahmet Caner / ALŞAHİN, “Mehmet Emin, Göçmen Kaçakçılığı Suçu”, **TBB Dergisi**, Year: 2009, Issue: 82, p. 1.

In this context, migrant smuggling is a process of illegal transportation of people who aim for better life opportunities, finding new jobs, getting away from political, economic and social instabilities in the countries they reside¹².

The crime of smuggling of migrants was entered into the Turkish law system for the first time and enacted by Law No. 4771 and Turkish Penal Code No. 765 with the additional regulation made in Article 201 / a dating back to 03.08.2002 via ““Protocol Against Smuggling of Immigrants by Land, Sea and Air” based on the “United Nations Convention Against Transnational Organized Crime” convention. Prior to this arrangement, in the event that the actions related to smuggling of migrants were committed within the scope of a criminal activity, an assessment was made under the guilt of establishing an organization to commit crimes pursuant to article 313 of the Turkish Penal Code No. 765. If the smuggling of immigrants was not carried out by an organizational structure, then the procedure towards the perpetrator was established in accordance with Article 36 of the Passport Law (Canceled: 4.4.2013-6458 / 124)^{13 14}. The current offense of migrant smuggling is covered in the section regarding “international crimes” in Article 79 of the Turkish Penal Code numbered 5237, with some amendments to the regulation under article 201 / a of the Turkish Penal Code No. 765.

However, international conventions relating to migrant smuggling crimes put obligations to the state parties to impose norms on their domestic laws ensuring that these acts are punished effectively, however, according to the principle of unlimited universal jurisdiction in case of migrant smuggling offenses committed abroad in the

12 AYDIN, Ömer Faruk, **Türkiye’de Göçmen Kaçkılığı Suçu ile Mücadelede Yasal Düzenlemelerin Rolü**, Yayınlanmamış Yüksek Lisans Tezi, Çanakkale Onsekiz Mart Üniversitesi Sosyal Bilimler Enstitüsü, 2015, p. 4.

13 Passport Law article. 36 (Canceled: 4/4 / 2013-6458 / 124 article.) Those who guide or direct land, sea or air vehicles, or take intentionally or guide with this intention passengers to places not designated by the Government for passport or legal document checking.

14 In addition, in order to fall into the Article 36 of Passport Law, the action should have be done via land, sea or air vehicle. In the case of crime of smuggling migrants, there are no such limitations. In addition, although the acts in both types are similar, though the act of “facilitating the stay of non-citizens in the country” exists in TPC, it did not appear in Article 36 of the Passport Law. See. AKKUŞ, 2013, p. 64-65.

absence of any links with Turkey, prosecution in Turkey is to the contrary to the international laws¹⁵.

B. Protected Legal Benefit

Protecting legal benefits in a crime for smuggling migrants combined nature¹⁶. Indeed, it is not always right to admit that only one legal value is violated as a result of a crime. In terms of some crimes, there may be a violation of many legal benefits of primary or secondary quality. In particular, smuggling of immigrants is a crime type of this quality.

Due to economic, social, cultural or political problems, states have to deal with the problems created by migrants who have entered into, resided or passing through their countries, such as coping with crimes committed or having potential to be committed, providing health coverage, preventing spread of diseases, hence being forced to make public spending, even trying to compensate jobs lost for their own citizens due to cheap labor introduced by illegal immigrants.

In addition to this, fake identity cards and fake travel documents are created in order to facilitate smuggling of migrants causing decrease in the trust towards these documents and especially if this crime is committed by a crime organization, then both public order and trust are also violated. Hence, it can be concluded that the primary legal benefit protected against migrant smuggling is the protection of public order and public trust¹⁷.

In process of illegal smuggling to other countries, immigrants face conditions that would not be suitable for human dignity and rights and further being taken advantage of their situations and desperations further they are partially or totally losing their assets, including their organs and spiritual mood. Another legal benefit protected by this type of

15 TURHAN, Faruk, **Yeni Türk Ceza Kanunu'nda Uluslararası Suçlar**, <http://www.ceza-bb.adalet.gov.tr/makale/101.doc> (Date Accessed: 05 January 2018).

16 TEZCAN, Durmuş / ERDEM, Mustafa Ruhan / ÖNOK, Murat, **Teorik ve Pratik Ceza Özel Hukuku**, 12. Baskı, Seçkin Yayıncılık, Ankara, 2015, p. 87.

17 ARSLAN, Çetin, "Göçmen Kaçakçılığı Suçları", **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Year: 2003, Volume: 52, Issue: 1, p. 118-119.

crime is material and spiritual existence (body integrity) and general and objective property of immigrants¹⁸.

Although immigrants are willing to give consent, it is not legally valid for people to give consent for limitation of their liberties in a manner incompatible with the human dignity. Yet, during processes of crimes, immigrants are deprived of their freedom of movement and are sheltered in crowded places not suitable for human lives. In addition, immigrants are treated like an object during the course of the action, hence all rights of human origin are being violated, subjected to humiliating movements, and thus their honor and dignities are clearly offended. In this respect, in order to legally protect freedom of movements and decent living conditions of people subjected to the crime, criminalization of immigration smuggling in laws becomes a necessity¹⁹ and hence constitutes a protected legal benefit towards this crime.

C. Material Elements

1. Perpetrator

Since the crime of smuggling of migrants is not in the category of specific crimes, anyone involved in such actions can be the perpetrator of this crime. As a matter of fact, in Article 79/1 of the Turkish Penal Code, the “person” clause is used to indicate the offender. In this respect, perpetrators do not feature in terms of this crime. However, for instance, in the case of a public officer using a state-owned ship to bring immigrants into Turkey illegally, that is using a tool given to his possession under the duty for processing the crime of immigrant smuggling will cause a raise in the penalty under the Article 266 of Penal Code. On the other side, crime of smuggling migrants can only be processed only by real people, and legal entities cannot be the offenders of this crime. However, if the offense is committed within the scope of the activity of a legal entity, then the security measures specific to the legal entities described in Article 60 of the Turkish Penal Code apply in accordance with Article 79 § 4 of the Turkish Penal Code.

18 ARSLAN, 2003, p. 119.

19 YENİDÜNYA / ALŞAHİN, 2009, p. 16-17.

2. Victims

Prior to the determination of victims in process of smuggling migrants, we need to focus first on the concepts of being victimized or harmed by this crime. The Penal Code clearly regulates the subject nature of the victims and of those who were harmed by the crime and significant rights are provided to them. A victim, subject being related to the crime, is the person who is exposed to injustice by a committed crime. A real person or a legal entity can be harmed by a crime during its process. The person who is harmed is not necessarily always the person who is victimized due to the crime committed. A victim is also a person who is harmed by a crime committed. The concept of being harmed by crime is broader than being victimized²⁰.

In doctrines, victims of illegal immigrant smuggling are everyone who constitutes the society, since primary legal benefit protected against smuggling of migrants is protection of the public orders and public safety, it has been argued that crime victims of this type are not foreigners or citizens constituting subjects of this crime but those who constitute the society²¹.

By another author sharing the same idea; the fact that immigrants are abducted by their own wills, provide material benefit to those committing these offenses, moreover they personally seek and request to enter and stay illegally in those countries should not be overlooked. Although in the 79th article of the Turkish Penal Code (TPC) is pointed out that victims of smugglings are immigrants, also in the Article 79/2 of the Turkish Penal Code added with Law No. 6008, the “victims” expression has taken place, the way that this wording has taken place is not understood that the victimization is in terms of the legality but in terms of socialization²²

The Article 5 of the Additional Protocol against Smuggling of Immigrants states that immigrants constitute the subject of the crime.

20 ŞAHİN, Cumhuriyet, **Ceza Muhakemesi Hukuku I**, 4. Baskı, Seçkin Yayıncılık, Ankara, 2013, p. 143-145.

21 YENİDÜNYA / ALŞAHİN, **2009**, p. 26.

22 EREL, Kemalettin, “Yargıtay Kararları Işığında Göçmen Kaçakçılığı Suçu” **TBB Dergisi**, Year: 2007, Issue: 71, p. 270.

As a matter of the fact, the Yargıtay had stated that crime victims are not immigrants but international communities²³. However, the very recent decisions of Yargıtay has recognized that immigrants are also victims of smuggling migrants²⁴.

In some doctrines, there are views that states are the victims²⁵ or citizens or aliens (immigrants) that are allowed to leave their countries or allowed to enter and stay in the foreign countries by illegal means are the victims²⁶.

As a result of smuggling migrants, it is clear that there are violations of rules and regulations regarding entrances, exits and residences of foreigners in other countries.

In this respect, it is certain that governments are in the position of suffering from these crimes because of public orders and securities which are core legal values protected from crimes²⁷. However, state are not in victim status because of this crime.

In the light of the above evaluations regarding victims of this crime; having the fact that 79th article of TPC points out that immigrants are victims of this crime and that the wording "victims" is included in the Article 79/2 of TPC amended with Law No. 6008 and the legal benefits protected in this crime include material and spiritual

23 "Immigrants who are in a state of being socially harmed are those who are not legally victimized by the smuggling of migrant smugglers, but they are the subjects of the crime, and legal victims are international communities,....." Yargıtay 8. CD. 25.04.2006. E. 2006/1242, K. 2016/3616.

24 "In addition to the international community order, the benefits of illegal immigrants should also be taken into account for the crime of migrant smuggling. If the victim of the crime is considered as a person who has the right or benefit protected by the law or has the authority to exercise the rights, among many legal rights protected in this crime, since there are immigrants' rights to be protected as well, there is no objection that immigrants can also be considered as victims of this crime. In Article 79 of the Turkish TPC, "In this crime, there is also a testimony that the real victims are people who struggle to get food because of desperateness and poverty." Finally, as it is seen in the amendments made in the Law No. 6008 and the Article 79 of the Turkish Penal Code, the legislator's view that immigrants are the victims of this crime are reflected in the article. Especially, the second paragraph of the article that reads as " a) constitutes a danger to the lives of the victims, b) subjects the victims to degrading treatment1 , the punishment shall be increased to two-thirds from the half, and imposes that the immigrants are given the title of victim". Yargıtay 12. CD. 21.10.2016. E. 2016/7328, K. 2016/12072.

25 ÖZBEK, Veli Özer, **TCK İzmir Şerhi, Yeni Türk Ceza Kanunu'nun Anlamı**, Volume: 2, Seçkin Yayıncılık, Ankara, 2008, p. 126; ARSLAN, **2003**, p. 122.

26 EVİK, Ali Hakan, "Göçmen Kaçakçılığı Suçu", **Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi (AÜEHFD)**, Year: 2005, Volume: IX, Issue: 3-4, p. 140-141; ARSLAN, **2003**, p. 122-123; YENİGÜN, **2010**, p. 74.

27 EREL, **2007**, p. 269.

existence of immigrants and their general and objective assets, we believe that as well as the international communities, the immigrants are also the victims of this crime.

Indeed, the fact that immigrants who are in helplessness and poverty, often with all their financials taken away, inhabited in an inhospitable environment, and whose lives and body integrities are infringed, being taken far away from their countries should be regarded as the victims of this crime, this will also serve to the right of legal benefit protection.

Not considering immigrants being financially benefited from as victims of this crime will cause negative consequences in terms of procedural provisions. In this case, it is not possible for immigrants to benefit from the rights of the Article 234 of the CMK, where the rights of the victims and the complainants are regulated. As a result of this, immigrants who are infringed on their values of properties such as losing all their valuables will not have the right to participate in any case against agents or appeal to any judgment²⁸. In this respect, we do not agree with the interpretations of the victim wording in the 79th article of the Turkish Penal Code context in social sense²⁹ rather than legal sense.

3. Subject of The Crime

In the case of immigrant smugglings, immigrants being exposed to attitudes and behaviors that are incompatible with human dignity and autonomy and exploited monetarily due to their desperation status is a matter of a crime.

In this respect, noncitizens (immigrants) being smuggled into and provided shelter in the country and providing assistance to both noncitizens and Turkish citizens to leave the country illegally constitute to the subject of this crime³⁰.

As noted above, the Article 5 of the Additional Protocol against Smuggling of Immigrants emphasizes that immigrants constitute the issue of smuggling of migrants.

28 YENİGÜN, 2010, p. 74-75.

29 EREL, 2007, p. 270.

30 YENİDÜNYA / ALŞAHİN, 2009, p. 26-27.

Although the title of "immigrant" is given to the article, besides immigrants, refugees, asylum-seekers and stateless people can also be considered as the subject of this crime³¹.

Considering that the object of crime is an object or a person³² being affected, it is concluded that immigrants are the subject of immigrant smuggling crime. In this context, we believe that immigrants are both victims and subjects of this crime³³.

4. Criminal Acts / Actus Reus

The Article 79/1 of the Turkish Penal Code (TPC) regulates the crimes regarding the smuggling of the immigrants is provisioned as “*Persons who directly or indirectly involve in order to obtain material benefit; a) Unlawful entry of a noncitizen into the country or facilitate his stay in the country, and b) Unlawful transfer of Turkish citizens or noncitizens abroad, are sentenced to imprisonment from three years to eight years and punished with a punitive fine up to ten thousand days.*”

In this context, migrant smuggling crime is classified as crimes with independent actions. Accordingly, if someone commits one of the independent actions, i.e. “*Unlawful entry of a noncitizen into the country*”, “*facilitate his stay in the country*”, or “*Unlawful transfer of Turkish citizens or noncitizens abroad*” mentioned in the article, he/she has committed a crime with independent action. In terms of punishment norms, in crimes with independent actions, although multiple independent actions are observed, one of them is realized. The realization of one or more actions in crimes with independent actions does not lead to a conclusion that multiple crimes are committed. In this direction, the fact that more than one of the actions stated in the article is realized does not constitute separate crimes but constitutes the same crime. In this case, the application of the chain of criminal provisions is also out of question.

No damage condition is required in determining whether or not the crime of immigrant smuggling has committed or not. In this respect, the fulfillment of one of the

31 YENİDÜNYA / ALŞAHİN, 2009, p. 27.

32 CENTEL, Nur, *Türk Ceza Hukukuna Giriş*, 2. Baskı, Beta Yayınları, İstanbul, 2002, p. 189.

33 See Similar TEZCAN / ERDEM / ÖNOK, 2015, p. 88.

independent actions stated in the text of the article is sufficient to constitute a crime, hence smuggling of migrants is a criminal offense. Moreover, since immigrant smuggling crimes are released by a limited number of acts these are dependent action crime types.

a. Unlawful Entry of A Foreigner To The Country

In the Article 79/1-a-1. of the Turkish Penal Code (TPC) “Persons who directly or indirectly involve in order to obtain material benefit; a) Unlawful entry of a noncitizen in the country or facilitate his stay in the country, ... are sentenced to imprisonment from three years to eight years and punished with a punitive fine up to ten thousand days.” takes place.

In this context, in order to get material benefit, if an illegal entry of an alien into the country is facilitated, then one of the independent actions is realized and thus illegal smuggling migrants’ crime will be committed. In order to determine whether this independent action has taken place or not, it is firstly necessary to determine the concept of the country and in which cases the entry of a noncitizen into the country is legal or illegal. A country refers to the whole territory under sovereignty of a state³⁴. This includes the entire land, sea and air area³⁵. Turkey is meant by the concept of the country in the Article³⁶. In this regard, since Turkey has borders with lands and seas, if an illegal entry of an alien into the country is realized through its internal water or internal air zones besides its land is facilitated, then this action will lead to realization of one of the independent actions. However, trade vessels in open seas, air vessels,

34 See. Büyük Türkçe Sözlük, Türk Dil Kurumu http://www.tdk.gov.tr/index.php?option=com_bts&arama=kelime&guid=TDK.GTS.5a51391c9e9354.22752608 (06 January 2018).

35 ÜNAL, Şeref, **Devletler Hukukuna Giriş**, Yetkin Yayıncılık, Ankara, 2003, p. 65.

36 ARSLAN Çetin / AZİZAĞAOĞLU, Bahattin, **Yeni Türk Ceza Kanunu Şerhi**, Asil Yayın Dağıtım, Ankara, 2004, p. 299; PARLAR, Ali / HATİPOĞLU, Muzaffer, **5237 Sayılı Türk Ceza Kanunu Yorumu**, Volume: 1, Ankara, 2007, p. 635.

continental scenes, or fixed economic zones are not regarded as country in terms of smuggling migrants³⁷.

Since the meaning of the word “entry” mentioned in the text of the Article means to get into something or in between³⁸, the concept “entry into country” should be interpreted as a noncitizen being smuggled by passing the borders of Turkey under a company of a perpetrator³⁹.

The independent action is realized in case an entry is through unlawful ways. According to the Passport Law numbered 5682, entry into the country is legal if a person uses a pre-determined access gate and a passport or a document equivalent to a passport, shows the presence of a valid entry visa, and is not forbidden to enter the country. If a foreigner satisfies the listed conditions above, then an entrance into the country becomes legal and a smuggling immigrant crime will not be the case⁴⁰.

Since facilitating an illegal entry of a noncitizen into the country through illegal ways is a smuggling immigrant crime done through an independent action type as soon as the entry into Turkey is realized this becomes an instantaneous crime. Then, the crime is considered to be completed at the time and place entering is realized.

It should be noted that; the realization of this independent action is only concerned with illegal entries of noncitizens into the country. Those who are citizens of the Republic of Turkey in case of an illegal entrance in to the country do not fall into a migrant smuggling crime case.

b. Facilitating An Unlawful Stay of A Foreigner In The Country

In the Article 79/1-a-2. of the Turkish Penal Code (TPC), the regulation “Persons who directly or indirectly involve in order to obtain material benefit;... facilitating a

37 YENİDÜNYA / ALŞAHİN, **2009**, p. 19; See on: It is also possible that the offense of smuggling of migrants can be committed at places considered as a country; PARLAR / HATİPOĞLU, **2007**, p. 635.

38 See on. Büyük Türkçe Sözlük, Türk Dil Kurumu, http://www.tdk.gov.tr/index.php?option=com_bts&arama=kelime&guid=TDK.GTS.5a5138b07626e0.54920915 (06 January 2018).

39 DOĞAN, Koray, **Göçmen Kaçakçılığı Suçu**, Seçkin Yayıncılık, Ankara, 2005, p. 116.

40 YENİDÜNYA / ALŞAHİN, **2009**, p. 20-21.

noncitizen's stay in the country, ... are sentenced to imprisonment from three years to eight years and punished with a punitive fine up to ten thousand days." takes place.

As states can put some restrictions for entering into their own countries, they may also put restrictions for those who already entered their countries legally for staying in. Indeed, living and settlement rights of noncitizens who entered legally into the country are regulated in detail by Turkish Law No. 5683 of Foreigners Act on Residence and Travel in Turkey, Law No. 5419 of Military Forbidden Zones and Security Zones and Law No. 442 of Villages. Accordingly, it is not legal to stay in the country contrary to the provisions of the laws mentioned above.

In this context, if someone facilitates a stay of a noncitizen who has entered the country legally but he/she has no permanent permission to stay any longer, then he has committed an illegal immigration smuggling crime. It is important to point out that while in the Article 201/a-2 of Law No. 765 of the Turkish Penal Code, the crime of facilitating staying of foreigners for material benefit was covering illegal entries, the Article 79/1-a-2 of Law No. 5237 does not cover the illegal entries.

To facilitate means to provide a favorable environment for a job to be accomplished successfully⁴¹. Although the term "facilitate" preferred by legislators is not that clear, actions such as providing shelter, jobs, illegal documents such as residence permits, or identification cards etc. to immigrants, finding a place to stay or to work for immigrants who are not permitted to stay even if they have entered the country legally, or hiding immigrants in order not to be caught correspond to facilitation⁴².

Immigrant smuggling is a continuing crime since it provides an opportunity for a noncitizen to stay in the country illegally which is one of the independent actions. Hence, whenever the continuity is disrupted and stopped, then the crime is completed⁴³. The execution of a completed crime continues as long as an alien remains in the country. If the alien cannot find a way to stay in the country, for instance, the law

41 YENİDÜNYA / ALŞAHİN, 2009, p. 22.

42 EREL, 2007, p. 274; PARLAR / HATİPOĞLU, 2007, p. 635.

43 ARSLAN, 2003, p. 128.

enforcement officers are aware of the situation and the deportation is taking place, then the crime is fulfilled.

Temporary hiding of an alien to be smuggled abroad will not constitute an act of facilitating the stay of a noncitizen in the country. Providing a temporary shelter for noncitizens in order to facilitate their smugglings into another country will not constitute an offense of smuggling migrants. Since perpetrators' intents are not about permanent stay of noncitizens, attempts to this crime will not be the case. However, providing shelter (at home, at a hotel, etc.) to an alien for a particular period of time in order to facilitate his/her smuggling to another country falls into the case of providing illegal facilitation to leave the country which is an action of crime under smuggling migrants⁴⁴.

As facilitating the entrance of a noncitizen illegally to the country is an independent act so is providing shelter and help for staying in the country. Clearly a citizen of the Republic of Turkey is not subject to any permission in staying in the country. There is a constitutional guarantee that citizens of the country cannot be deported⁴⁵. In this respect, the Turkish citizens do not enter into the issue of immigrant smuggling which is the result of an independent action.

c. Facilitating An Unlawful Transfer of Turkish Citizens or Noncitizens Abroad

In the Article 79/1-b of the Turkish Penal Code (TPC) “Persons who directly or indirectly involve in order to obtain material benefit; ... Unlawful transfer of Turkish citizens or noncitizens abroad, are sentenced to imprisonment from three years to eight years and punished with a punitive fine up to ten thousand days.” is regulated.

44 EREL, 2007, p. 275; “The act of providing illegal shelter such as housing, hotel or similar places for a temporary period of time to immigrants in order to smuggle them illegally abroad does not fall into the act of "facilitating the stay in the country" but it should be considered as one of the independent acts in the context of "facilitating to smuggle abroad ". In the law, “facilitating the stay in the country" is meant for a permanent stay not for a temporary stay.” Yargıtay CGK. 19.03.2013. E. 2012/8-1085, K. 2013/96.

45 See on. Constitution of Turkey, a. 23/6.

In this context, in order to obtain material benefit if an unlawful transfer that is providing an illegal document which is not a permit for exit from the country according to the provisions of the Passport Law Article 22 or laws of PC, or not using the legal doors assigned for departing from the country of Turkish citizens or noncitizens abroad is facilitated, then immigrant smuggling crime is committed⁴⁶.

In practice, this is the most occurring instance of migrant smuggling crimes. In text of the lawmaker, the expression "... providing the opportunity to go abroad" does not necessarily imply that the migrant is to be taken abroad in order for the crime to be completed but providing opportunity for this goal is just sufficient⁴⁷.

In the text of the article, the expression "facilitation" includes all forms of activities carried out in order for immigrants to leave the country illegally⁴⁸.

Accordingly, by providing transportation means, false passports, suitable paths for an exit through mountainous areas or showing sketches of lands without mines in order for someone to be able to leave the country without a passport and not through legal gates are sufficient actions to be considered as independent actions for this crime. It is not compulsory for a person who facilitates crossings through the borders to cross the border himself. The crucial part is just facilitation of an unlawful exit abroad⁴⁹.

It is necessary to point out that while in the regulation under Article 201 / a of the Turkish Penal Code No. 765, illegal immigrants who have been brought or entered into the country constituted the subject of this crime, but in the Article 79 of the Turkish Penal Code No. 5237, the entrance to the country by legal or illegal means is not important anymore in order for this crime to be committed.

46 ARSLAN / AZİZAĞAOĞLU, p. 300-301; "...since the only act was trying to take the noncitizens illegally abroad and captured at the customs, according to the Article 70/1-b of TPC the provision should had been facilitating an exit for a noncitizen..." Yargıtay 18. CD. 08.02.2017. E. 2015/33714, K. 2017/1433.

47 EREL, 2007, p. 277-278.

48 ÖZBEK, 2008, p. 136.

49 PARLAR / HATİPOĞLU, 2007, p. 635.

D. Qualified Cases

By amending the Law No. 6008 dated 22.07.2010 which reads as “The penalty to be imposed shall be increased by one half to two-thirds where it: a) constitutes a danger to the lives of the victims, b) subjects the victims to degrading treatment.”⁵⁰ to the Article 79 of the TPC, the quality of the crime has been adjusted if the crime is committed in some specified forms.

The fact that Article 79 of the Turkish Penal Code (TPC) did not provide a qualified case in its original was criticized in the doctrines⁵¹. Indeed, despite the fact that the Article 1 of the Law No. 4803 which was published⁵² in the Official Newspaper dated 04.02.2003 and numbered by 25014 accepted the protocol “Protocols Against Smuggling of Immigrants by Land, Sea and Air Supplementing the United Nations Convention Against Transnational Organized Crime” originated from the United Nations Conference held in Palermo on 12-13 December 2000 where the Article 6/3 envisions a decision for taking legal and other measures as cause of reticence towards migrant smuggling crimes committed in the specified forms, it was a shortcoming that Article 79 of the Turkish Penal Code No. 5237, which entered into the force after this protocol, was not arranged in the first case to cover this situation. As a matter of fact, this deficiency has been eliminated by the paragraph added to the Article 79 of TPC by Law No. 6008 dated 22.07.2010.

Due to the increase in controlling measures of borders taken by countries fighting illegal immigration, in order to overcome such measures, individuals who have previously been smuggling or are amateur smugglers have adopted novel ways such as getting more organized by dividing the tasks, investing more money, and increasing

50 The second paragraph has been added to come after the first paragraph of Article 79 of the Turkish Penal Code and the Law No. 6008 dated 22.07.2010, and the other paragraphs have been rendered accordingly.

51 DONAY, Süheyl, **Türk Ceza Kanunu Şerhi**, Beta Yayınları, İstanbul, 2007, p. 157.

52 <https://www.tbmm.gov.tr/kanunlar/k4803.html> (07 January 2018).

their incomes, hence getting more professional⁵³. As the globalization has made the developed countries a target and developing countries a source, the migrant smuggling which is a specific type of smuggling has attracted the interest of criminal organizations⁵⁴. Hence, if the crime of migrant smuggling is committed within an organization, then the qualified case is applicable. Accordingly, the Article 79/3 of the Turkish Penal Code states that “if this crime is committed within the framework of an organization, then the penalties are increased by half”.

For the existence of a criminal organization in the context of the Article 220 of the Turkish Penal Code, the number of members including the leader of the organization must be at least three, the aim and criminal acts of the organization should be compatible with the described actions in the article and both the number of its members and available tools should be appropriate for committing the crime. In order to be able to apply a qualified case to the crime, the existence of an organization under Article 220 of the Turkish Penal Code and the criteria⁵⁵ laid down by the Yargıtay should be established.

In this context, if no hierarchical relationship is established between more than one person who committed the crime of migrant smuggling and only a crime is committed as a result of a certain agreement, qualification approach will not be applied

53 KAHYA, Yahya, **Sınırşan Organize Suç Tipi Olarak Göçmen Kaçakçılığı: Türkiye’deki Kaçakçı Profili ve Organizasyonları**, Yayınlanmamış Doktora Tezi, Polis Akademisi Güvenlik Bilimleri Enstitüsü, 2012, p. 54.

54 CENGİZ, Mahmut / ŞEN, Bilal, “**Sınırşan Suçlar: Tanımı, Ortaya Çıkış Süreci ve Gelişmesi, Bahadır Küçükuysal and Oğuzhan Ömer Demir**” (Ed.), *Sınırşan Organize Suçlar: Kavramlar, Yöntemler, Eğilimler*, Adalet Yayınevi, Ankara, 2011, p. 14-15.

55 “An organization is not just an abstract union, but it is an organic and hierarchical structure in which the upper-lower relations and an order of chain command exists, due to this relation there is a dominant power over its members. It includes the relationship of parental authority, order and authority of instruction, the existence of external evidence indicating the existence of a hierarchy, the existence of hierarchies and the continuity of meeting to commit an indefinite number of offenses, and the organizational structure, members, and equipment for which they are intended. Whether or not the organization has these qualities in terms of attaining its objectives should be determined according to the concrete case. In our legislation, organizational crimes are organized in Article 7 of Anti-Terror Law No. 3713 and Articles 220, 314 and 78 of TPC No. 5237” Yargıtay 16. CD. 21.04.2016. E. 2015/4672, K. 2016/2330.

and responsibilities of perpetrators will be determined in accordance with the provisions of the association regulated in Article 37 of TPC⁵⁶.

It should also be noted that; if a crime of migrant smuggling is committed within the framework of an organization activity, in accordance with Article 79/3 of the Turkish Penal Code an increase of half in penalties can be applied and further a conviction must be given to perpetrators in accordance with the Article 220 of the Turkish Penal Code⁵⁷.

E. Subjective Elements / Mens Rea

Immigrant smuggling is a deliberate criminal offense. However, in terms of the formation of subjective elements of this crime, a general intent is not sufficient and it is necessary to find a "direct or indirect means of obtaining material benefit" for a perpetrator. In this case, crime can only be committed with a specific intent⁵⁸.

It is not possible for this crime to be committed by negligence. If the independent actions described in the article have occurred by the lack of attention and care responsibilities such as getting on a vehicle while the driver, the plane while the pilot or

56 YENİDÜNYA / ALŞAHİN, p. 33; "The formation of at least three persons in a hierarchical relationship for the acceptance of the "organization" as defined in Article 220 of the TPC, the fact that the organization of the organization is capable of handling the indefinite number of offenses aimed at the means and equipment and the number of members it has, cooperation with the merger, acting in an understanding of active sharing and acting in line with these aims and showing 'continuity'. As the organization requires continuity in terms of quality, it will be possible to mention the willingness of an affiliation, not the organization, if people come together to commit a certain crime or commit a crime Although the number of defendants is sufficient to form an organization, since there is no evidence that there is an even light hierarchical relationship and the willingness for a continuous desire in crime committing, the necessary conditions for an "organization to commit crimes" are not met... since the crime committed is not reached within the scope of the activity of the organization, the increase in the penalty allocated by considering the article 79/3 of TPC related to migrants smuggling is not possible..." Yargıtay 18. CD. 01.03.2017. E. 2016/14925, K. 2017/2282.

57 "Due to the article 79/3 of TPC, the first condition in increasing the sentence in accordance with article 220 of the Turkish Penal Code is that the existence of an organization has to be determined precisely, in other words a conviction for forming an organization should have been established first on the basis of Article 220 of the Turkish Penal Code ,"... Yargıtay 18. CD. 17.05.2017. E. 2017/3280, K. 2017/6006; See opposite. YENİDÜNYA / ALŞAHİN, 2009, p. 35; EVİK, 2005, p. 168.

58 ARSLAN / AZİZAĞAOĞLU, 2004, p. 302.

the ship while the captain are unaware of, and hiding in these places, then the crime will not occur⁵⁹. Thus, it is not possible to commit such a crime with a probable intent⁶⁰.

Material benefit realization is not also necessary for such a crime to be established. For instance, a complete money transaction is not a requirement for such a crime. Promises made between parties for direct or indirect monetary benefits are sufficient. If benefits are not directly canalized to offenders but to someone else, than still offenders are responsible for this crime. If the purpose of the offender is different than material gain such as taking advantage of immigration's sexual orientation, then this will not constitute a crime⁶¹.

Further, if immigrants, not directly for material purposes but for taking advantage in different forms such as forcing to work, making them to serve, making them slaves, forcing to prostitute, or taking advantage of their body organs are brought into the country, then the crime of human trafficking regulated in the Article 80 of the Turkish Penal Code will take place. Likewise, in the case if someone is brought into the country through illegal ways in order to provide support to terrorist organizations, then the committed crime will not be a crime of smuggling of migrants but instead a crime for helping terrorist organizations⁶².

F. Unlawfulness Element

If an action is forbidden through the whole legal system, then this action is called unlawfulness. On the other hand, compliance with law is that the unlawfulness existed at the time of crime occurred, however the result is in compliance with the law, and hence removing the violation of the law. The reasons for compliance with the law do not remove the condition of faultiness, but prevent it from being a crime. The cases of compliance with the law are not only applicable to criminal laws but also to all other

59 EREL, 2007, p. 281.

60 YENİDÜNYA / ALŞAHİN, 2009, p. 36.

61 EREL, 2007, p. 281.

62 PARLAR / HATİPOĞLU, 2007, p. 636.

branches of law, and in these situations offenders are neither punished nor compensated⁶³.

The compliance with law is not applicable to immigration smuggling offenses regulated by TPC or other laws. However, in the case of victim's consent, compliance of the law for these crime types must be examined separately. In this type of the crime, the victim's consent is already the element of the crime. In other words, since this crime is committed on the basis of voluntarism, the consent given for the formation of a crime cannot be accepted as the reason for the compliance with the law⁶⁴. In order for the consent to be valid, it had to be a person's natural right in his absolute disposal. The entry, exit or stay in a country is not that type of right. However, if the consent is obtained as a result of a perpetrator's fraudulent behavior, then this will no longer be a crime of migrant smuggling, but rather a crime of fraud⁶⁵.

G. Some Special Cases of Migrant Smuggling Crime

1. Attempt

The immigration smuggling crime was not regulated as an attempted offense at the first and original form of the Article 79 of the Turkish Penal Code but later by amending Article 6 of the Law No. 6008 dated 22.07.2010 to the first paragraph of the above mentioned article and adding the provision that reads as "punishment as if completed even if it is left in the stage of the crime attempt", this crime became an attempted crime. In this context, even if the crime remains in the stage of the attempt, the provisions of the attempt will not be imposed on the accused and the crime will be punished as if the crime has been committed⁶⁶.

63 BAKICI, Sedat, **5237 Sayılı Yasa Kapsamında Ceza Hukuku Genel Hükümleri**, Adalet Yayınevi, Ankara, 2008, p. 543.

64 EVİK, **2005**, p. 166.

65 EREL, **2007**, p. 282.

66 "According to the victim's declarations, defendant's defense and file scope, the Syrian nationality who wants to go abroad willingly by means of illegal ways contacted a person called İsmail who is a smuggler and his identity is unknown, later the defendant contacted people in his status willing to go abroad and had them contacted with İsmail for material benefit, two days before the defendant's return to İstanbul, the defendant took the victims to the beach in order to be smuggled abroad but due to the circumstances of the victims the smuggling did not take place, before the defendant's return to

Nevertheless, if actions of a crime have not been performed yet, solely “preparatory movements” such as helping for preparations for journeys or renting houses for immigrants are not subject to any punishment. If perpetrators voluntarily give up their criminal enforcement actions and prevent the crime from being completed or resulted, then due to perpetrators’ voluntary decisions these attempts will not be realized and thus perpetrators will not be punished⁶⁷.

On the other hand, if crimes of migrants smuggling occurred before the amendment made in the Article 79 of the Turkish Penal Code with the Law No. 6008, then this would be against the accused, and hence the dispute should be resolved according to the original version of the article before the amendment Law No. 6008⁶⁸.

2. Complicity

Immigration smuggling is subject to general provisions, not showing any features in terms of complicity. The provisions regulated by the Article 37 of TPC No. 5237 related to complicity are also applicable to this crime. In this context, smuggling of migrants can be committed either by a single offender or by multiple offenders jointly. In this case, the persons who perform this act jointly are liable on basis of complicities (TPC Article 37/1). In addition, those who do not take place in criminal enforcement actions but make perpetrators to decide, act and help to commit crimes are also to be

İstanbul, the defendant handed over the victims to İsmail for illegal transportation, the defendants offense is the attempt of the crime of migrant smuggling, and the crime falls under the Article 79/1 of the Turkish Penal Code as a complete offense under the last sentence,...”. Yargıtay 18. CD. 01.07.2015. E. 2015/30988, K. 2015/3863.

67 PARLAR / HATİPOĞLU, 2007, p. 637.

68 “The local court ruled that the defendants provided support to immigrants who entered the country from illegal ways to remain in the country for material benefit and that their actions were completed, the defendants provided shelter to immigrants for the sake of financial gain in order to help them to smuggle abroad, and in the day of this offense, the defendants offended the law by committing one of the independent acts " facilitating the smuggling of the migrants". Since the migrants were detained before they leave the country and the smuggling did not take place but only remained in the attempt phase, the independent act of the article was not realized. Hence, the local judge who fails to enforce the provision on the grounds that the offense has been completed should be judged to be unfit for the detention of the resistance.”. Yargıtay CGK. 19.03.2013. E. 2012/8-1085, K. 2013/96.

hold responsible by the provisions “instigator” (Article 38 TPC) and "help" (TPC a. 39) respectively. However, in order to be involved in crimes of smuggling of migrant smugglers, all offenders participating in the crime in the form of joint offender, instigator, or as an assistant must act with “direct or indirect material benefit” intent.

3. Session

Immigrant smuggling regulated by the Article 79 of the Turkish Penal Code is an independent criminal act. In this respect, whichever action described in the article is realized, the crime is assumed to be complete⁶⁹. Even in the case where more than one action is committed, these must be accepted as a single criminal action due to the quality of the crime of independent action. However, since manners in which offenses are committed is one of the crucial parts in determining fundamental punishment, if perpetrators carry out more than one independent action⁷⁰, then courts would take this into account and it is possible that according to the Article 61 § 1 (a) of the Turkish Penal Code the provision of penalty will be realized above the minimum limits.

Since immigrants are victims of migration smuggling crimes, if the number of immigrants is large while these crimes are committed, then it is necessary that criminal punishment is increased by applying the chain crime provisions in accordance with the Article 43 of TPC⁷¹.

Immigrant smuggling is not a property damage criminal offense, it is a crime of abstract danger, and it is not compulsory that immigrants suffer any harm, death, injury or physical pain in order for this crime to take place. In the event of deaths or injuries of illegal immigrants during the process of this crime, defendants will also be held

69 “Although the actions of the defendants were to allow illegal immigrants to leave the country, the main punishment was determined in accordance with article 79/1-a of the same law instead of article 79/1-b of the Turkish Penal Code...” Yargıtay 18. CD. 04.10.2017. E. 2017/3239, K. 2017/10266.

70 KOCA, Mahmut / ÜZÜLMEZ, İlhan, **Türk Ceza Hukuku Genel Hükümler**, 8. Baskı, Seçkin Yayıncılık, Ankara, 2015, p. 635.

71 “Although in the article 43/3 of TPC immigrant smuggling is not mentioned among the crimes counted, immigrant smuggling is among the possible crimes that can be committed as a chain crime. With the adoption that immigrants are the victims of the crime, in the act of smuggling more than one immigrant abroad with a single vehicle, the chain of criminal clauses mentioned in the Article 43/2 of TPC must be applied.” Yargıtay 18. CD. 04.10.2017. E. 2017/3239, K. 2017/10266.

responsible from the crimes or offenses related to the mentioned actions in accordance with the provisions of the actual sentence.

As in the case of illegal immigrants who were being laboured after they had been illegally immigrated to the country. Summation problem may rise between such crime and crime of human trafficking. In such case the way of punishing the perpetrator on both counts should be preferred⁷².

H. Prosecution and Sanction of Immigrant Smuggling Crimes

By referring to the Article 79 of the Turkish Penal Code that regulates the envisaged penalty sentences for migrant smugglings, courts that are charged to make judgments are criminal courts of first instance. Regarding prosecutions of these crimes, these are not a type of crimes that need to be reported by a person or party but instead investigations and prosecutions of these crimes are done as ex-officio. Accordingly, in the case of suspicion that a crime has being committed, necessary investigations and prosecution procedures should be carried out even if there are no notifications or complaints.

The envisaged sanction for this crime as regulated by the article is a sentence of imprisonment and forensic money. Accordingly, sanctions envisaged for the crime of migrant smuggling is from three years up to eight years imprisonment and up to ten thousand days of forensic punishment.

CONCLUSION

Human migration is a humanity problem, and their consequences are closely related to all countries. As a natural result, migrations have become an international phenomenon closely followed up by both international public and a topic of international laws⁷³. Since the 1980s, one of the most important features of immigration has been illegalities. Immigrants often settle in countries where they are not allowed to

72 TEZCAN / ERDEM / ÖNOK, 2015, p. 103.

73 AKKUŞ, 2013, p. 119.

stay legally by crossing the borders by illegal means and methods. As a natural consequence, they pursue their lives outside of the legal boundaries within the framework of possibilities offered to them. This not only makes immigration illegal, but it also puts immigrants to a place where they can easily get connected to crimes⁷⁴.

In our work, after laying out the concepts of illegal immigration and immigration problems, which has increased in recent years, especially after the civil war in Syria, we study immigration smuggling crimes that are considered in “International Crimes” section of the Turkish Penalty Code. Briefly, in this article, the Yargıtay’s recent precedents, the authors and the doctrines’ interpretations, related to immigrant smuggling crimes, in particular whether immigrants are victims or not, application of chain crime provisions, subject of the crime, action elements of the crime, subjective elements of the offense, quality cases, commitment of the crime within a frame of an organization are presented.

74 SAYIN, Hüdayi, **Uluslararası Hukuk ve Türk Hukuku Bakımından Göçmen Kaçakçılığı, İnsan Ticareti, Cinsel Sömürü Suçları ve Bunlarla Mücadelede Uluslararası İşbirliği**, Yayınlanmamış Doktora Tezi, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü, 2010, p. 548.

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