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Limitations and Possibilities of Countering Human Smuggling.

Analyzing the investigative work of Hungarian authorities

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Abstract

Migration is among the most important challenges Europe has to face nowadays. Combating human smuggling networks facilitating illegal migration is, therefore, of key importance in the internal and external politics of both the European Union and the nation states.

Based on our research project financed by the European Union fund and conducted in 2016 and 2017, we intend to present how the Hungarian National Bureau of Investigation within the Rapid Response Police explores and investigates transnationally organized human smuggling networks. Examining the organizational characteristics of domestic law enforcement agencies, we focus on the methods used by the law enforcement system in order to explore smuggling groups operating as parts of a criminal network. Considering the issue of cognitive constraints as highly important, drawing on investigation theory we can hope to explore the cooperation and information flow within the existing organizational framework of law enforcement.

Keywords: transnational organized crime, human smuggling, theory of investigation, police organization, forensic science, Europol

Introduction¹

The phenomenon of migration has extensive literature as it can be examined from political, economic, anthropological, psychological, and many other aspects. It is therefore difficult to simply define this complex phenomenon, but the definition of migration usually focuses

¹ This study was funded by the EU within a research project led by the NUPS Faculty of Police Science (FPS), coordinated by the MoI within the framework of the Internal Security Fund, looking at the investigative work on organized crime from an information flow aspect.

on human behaviour, change of place of residence or modification of the social capital (HAUTZINGER et al., 2014). The wave of immigration to Europe is also a phenomenon widely covered in the media in the past years and decades. Migration-based human smuggling has also become the focus of not only the authorities but also public attention. Despite this, we do not have a clear picture of its actual extent, due to the forced limitation of statistical data on immigrants (HECKMANN, 2004) and the latency typical of human smuggling in the form of international organized crime.

Researchers try to explore human smuggling based on a variety of sources, so the phenomenon can be examined from angles of sociology, political science and criminology. On the one hand, judicial, police and border statistics are important sources. On the other hand, interviews with immigrants and experts, such as social workers dealing with immigrants, representatives of immigration offices and police officers, can be used as sources. Finally, court sentences and investigative documents on human smuggling are a prime source. Different sources provide opportunities for different analyses and highlight the mechanisms and nature of smuggling in different ways (HECKMANN, 2007). The aims of the sociological analyses include presenting the structure, social organization and dynamics of the smuggling networks, which emerges from the relationship between the prison service and the smuggling network. In addition, the relationship between smugglers and immigrants and the presentation of migrants' mindset are subject of examinations. Political science examinations, on the other hand, focus on the relationship between migration policies, prison service and the functioning of smuggling networks. Criminological approaches specifically focus on action against smuggling, both in terms of criminal law and criminology.

In our research, we primarily want to analyze the investigative work related to human smuggling. Our aim is to point out the organizational and sociological analysis of criminal investigation and police work to identify the possibilities and limitations of countering human smuggling. The significance of the analysis is that, unlike legal and political research, it shows the applicability of concrete legislation, the everyday reality discovered or experienced by the investigating authority, against statutory law. Criminal substantive law acts in the general context of continental jurisprudence as texts of normative legal regulations (VARGA, 1998: 283), the enforceability and the nature of which appears in the scientific literature to a rather limited extent (BÓCZ, 1998: 128–139). We wish to show how the national agencies of criminal prosecution, primarily the National Bureau of Investigation (NNI), having the legal status of a separate directorate under the Raid Police, detects and investigates internationally organized human smuggling networks. We attach great importance to the ways in which the law enforcement organizational system acquires information on smuggling groups working covertly. Although criminal methodology has considerable literature, this approach is marginal, or completely absent in the discourse on migration and smuggling of people. Additionally, the analysis of the specific investigative work related to the crime has also been little explored. In our study, we hope to contribute to this, and by presenting ways of co-operation and modes information flow between investigative theory and law enforcement organizational frameworks, we wish to take into account the cognitive barriers to human smuggling and the opportunities for overcoming them.

Human smuggling as organized crime

The most important foreign policy issue in Europe today is the wave of refugees coming to the European Union. Although this phenomenon is not given top priority in the public discourse, but in the wake of the increasing wave of migration illegal economies have grown strong. People smuggling is one of the lucrative branches of organized crime even without the presence of acute political risks and it is a major challenge for modern law enforcement agencies, which are the emblematic products of the modern nation states that prefer disciplining society, according to FOUCAULT (2000: 287–305). At the same time, the borderline between legal and illegal migration can be problematized in several aspects (HAUTZINGER, 2015) and different foreign and immigrant responses have been created to deal with the immigration wave. Regardless of whether the authority treats foreign citizens appearing at the border as illegal immigrants, as impostors or as asylum seekers, they all use the services of criminal groups and smugglers promoting their movement. However, the point at which activities facilitating migration are considered to be punishable also raises questions. As pointed out in the Helsinki Document (2015), the boundary between humanitarian aid and the smuggling of human beings is not clear for many. The transportation or facilitation of the movement of migrants is also punishable, but the intention to gain profit is also a qualifying circumstance in the case of smuggling. In addition, smugglers often hide their activities behind their legitimate businesses, and this makes it more difficult to detect their illegal operation (e.g. they disguise the coordination centre of people smuggling as a travel agency) (LEMAN–JANSSENS, 2012).

The crime of people smuggling is thus international by its very nature, so international cooperation is of the utmost importance to counteract it. The basis for this is created by uniform legal conventions that define the phenomenon on the one hand, and on the other hand define the possibilities for joint criminal action. The international conventions on organized crime have a greater history and are preceded by a number of conciliations (BEZSENYI, 2015). The document currently defining the various offenses of organized crime is the United Nations Convention against Transnational Organized Crime, signed in Palermo in December 2000, which entered into force on 29 September 2003. In Hungary, the concept of smuggling of human beings was first published in the Criminal Code in 1961, Section 204 contains its statutory definition in the chapter on crimes against public security and public order (MAYER, 2014). It was later amended several times, partly because of the implementation of international conventions (HAUTZINGER, 2015, GAAL, 2005, MAYER, 2014). At present, the Criminal Code defines criminal offenses related to smuggling in several paragraphs: criminal act of human smuggling (CC, Section 353), the promotion of illegal residence (CC, Section 354) and the abuse of establishing family relationships (CC, Section 355). In addition, in 2015, the legislator introduced the statutory definitions for the unauthorized crossing of the border barrier (Section 352/A) and the damaging of the border barrier (Section 352/B), which provide for punishing just those crossing the border, thereby abandoning the detection of the organization behind the action.

Hungary has a key role in dealing with human smuggling and illegal migration as a country bordering on the Schengen area (KOVÁCS, 2015). Our country appears as a transit country in relation to illegal migration routes and networks, as HNPHQ Instruction No. 21/2008 also states. Thus, citizens of countries facing economic difficulties move to coun-

tries functioning as destination countries with a relative advantage, mainly to Western European via our country. Several years of work by Anti-Illegal Migration Department of the NBI (AIMD, formerly MMD) supported these findings. Accordingly, international cooperation against smuggling of human beings is also crucial in Hungary, partly supported by the European Union, given the resources provided by the SOCTA (*Serious and Organized Crime Threat Assessment*) and other funds, as reported by a member of the investigating authority.²

Smuggling is generally a crime committed by organized crime groups. On the one hand, groups active in Hungary are of foreign origin (primarily Kosovar, Albanian, Serbian, Ukrainian) and Hungarian citizens, who usually only form the lower echelons of the larger international network. The structure of the smuggler networks and the different roles (supplier, walker) have been studied (NESKE, 2006). In Hungary, therefore, basically the lower legs of smugglers' networks, the easy-to-replace persons can be apprehended, while the main organizers live in Serbia, according to our interviewees, and typically do not cross the country's borders.

Due to the regulation of international criminal prosecution, the Hungarian investigating authority is primarily able to investigate crimes committed in the territory of the country or committed by Hungarian citizens, which is why it is possible that it can only act successfully against the middle and lower levels of the human smuggling networks. This fact also underpins the need for international co-operation, as the penal institutions of each nation state can cut off only one head of a dragon-like network, but they can only kill the dragon itself through joint action (HECKMANN, 2004). The basis for this cooperation is the effective and rapid liaison between the different national investigating authorities. Its important institutions are legal assistance and JIT (Joint Investigation Team), but actually they often slow down communication. On the other hand, the investigating authorities have succeeded in using the various national liaison officers as well as the CCP-s (common contact points) along the borders.

Investigative work on human smuggling in the European Union and Hungary

Crime related to human smugglers was investigated in Hungary by the detection and criminal investigation departments of the border guard until the integration of the police and the border guard in 2007 (KOVÁCS, 2015). Investigation of trafficking in human beings was given more emphasis by the National Bureau of Investigation in 2004 and after the integration mentioned above. Thus, the official action against human smuggling has also been transferred to the NBI within the current Raid Police. Due to the accession to the European Union's Schengen border and the necessary law enforcement work, HNP HQ instructions were issued to clarify the tasks related to the investigation of human smuggling (e.g. HNP HQ Instruction No. 21/2008). For the Department of Major Migration³ at the Organized

² Interview with an investigator of the AIMD, interviewer: Noémi Katona (2016. 08. 17).

³ Based on the current regulations, it continues to work as the Illegal Migration Department of the International Organized Crime Division

Crime Division of the National Bureau of Investigation, the above-mentioned HNP HQ Instruction also called for intensification of international criminal cooperation as an effective solution to the smuggling of people. Unfortunately, this instruction structures policing tasks in such a way that after defining the general objectives it continues with the control and the use of technical equipment and then mentions terrorism as a potential threat. In the instruction, information gathering activities only come as the last but one point before the summary statement, although in the absence of the decentralized organizational units necessary for the control of the internal and external borders and for the in-depth control, it would have been more important to focus more on the human intelligence line. However, last year RRP NBI Criminal Intelligence Department⁴ was created partly due to the growing number of migration issues.

The need for cross-border investigation was not only justified by the implementation of modern European law enforcement, but also by the fact that while the Criminal Directorate dealing with illegal migration within the Border Guard had a staff of 444, only 35 police officers continued after integration, working in the NBI against groups of human smugglers (BOROSS, 2009: 91). They were only able to rely on the detection departments and border police field offices of the border counties. By 2011, the police only partially corrected the staffing level of units involved in investigating crimes related to human smuggling, as a total of 72 people worked in some organizational unit (department, sub-department, team) in countering this specific type of crime (BOROSS, 2011: 29). At present, only 25 officers work in this department and they use a lot of intelligence gathered by the criminal intelligence departments and border police field offices of the county police headquarters. The low number of staff and the resulting increased workload largely determine the effectiveness of countering human smuggling.

The detection and investigation of human smuggling

The Act on Criminal Procedure⁵ regulates the procedures but does not systematize the various forms and antecedents of investigations into specific types of crimes, such as human smuggling. Criminal acts and groups of offenders may come to the knowledge of the authorities in several ways: 1. requests for legal assistance from foreign authorities; 2. own detection; 3. external detection; 4. based on the emergence of a new offender.⁶

Investigations on trafficking in human beings are the least frequent in the form of a request for international legal assistance by a counterpart authority in a foreign country, in which case the public prosecutor notifies the investigating authority of the request for legal assistance. In the second case, the investigation starts with the authority's own detection. There are two subcategories of this: when they stumble upon the operation of a group of people smugglers during everyday intelligence work and take "immediate" coercive measures

⁴ The Department has separate Intelligence, CID, Information and Prison and Custody Suite Intelligence Sub-Departments.

⁵ Act XIX of 1998 on the Criminal Procedure and its subsequent amendments.

⁶ A The typology was created by Lieutenant Colonel Zoltán Boross, a member of the National Bureau of Investigation Office of the Rapid Response Police, as a result of the investigative work of the head of the Illegal Migration Department.

to interrupt the act; or when surveillance is carried out in the context of covert information gathering – this is separated from the former, rather spontaneous version, by being very organized and targeted. The third version is to commence the investigation when detecting acts of human smuggling on the basis of external perception, that is, signalization by police, border police or, possibly, in-depth stop and search operations. This also includes reports by members of the public, or notices or reports of other authorities or foreign agencies. In these cases, the most important thing to do is to decide on how to proceed, i.e. decide on refusal to investigate, on supplementing the initial inquiry, or initiating the investigation. The fourth option is the initiation of investigation based on the emergence of a new offender. Due to a new offender arising from procedure underway for different reasons, it may be worthwhile to separate the act in question from the case in the main procedure. An example may be the presence of a smuggling organization in a drug trafficking investigation that may justify the separate processing of potentially discoverable and demonstrable illegal smuggling.

The smuggling investigations initiated in these ways will be determined until the end of the procedure, in many cases until the final judgment by the detection framework in which the case is initiated. Intelligence from the observations of patrol officers mainly affects the lower levels of the smuggling network and limits itself to one or two acts, so it is primarily the transporters or walkers. On the other hand, in the case of investigations initiated by own intelligence and often through legal assistance, the investigative authority focuses mainly on the middle and upper levels of smuggling networks, and their previous criminal acts may also be included in the indictment.

Human smuggling cases almost never involve sole perpetrators, so the investigative authority has a crucial task to find map out the network of offenders. For this reason, the examination of the offenders' communication is also crucial for the exploration and the proof. In this context, the difficulty of interpreting with which the investigating authority is faced, and which requires additional time and resources is highlighted. In addition, there is a difficulty in the investigation that, in contrast to trafficking in human beings, asylum seekers and smugglers have a shared interest, and the asylum seekers' participation in the procedure cannot be guaranteed in the long run, their testimony can often be of limited usefulness for the procedure.

Evidence of human smuggling: physical and personnel evidence and procedural acts

Due to the aforementioned difficulties, it is mainly the allegations made by the suspects that can be considered personal evidence. The investigating authority uses special interview and investigative techniques⁷ to make the various members of the given criminal network confess or make incriminating statements on one another, or to have pieces of information to succeed in making them confess.

⁷ In addition to simultaneously interviewing the suspects and the asylum seekers among the potential offenders, the real danger is that the investigative authorities intercept telephone conversations in a foreign language, the contents of which will be communicated weeks later by a translator, and by tracking information on cellular phone communication and by conducting surveillance operations the investigators track events whose outcome is dubious, because the so-called "sound bites" of wiretaps provided by the NSSS cannot help either.

In addition to personal evidence, material evidence is very important, which is partly gathered during procedural actions (house search, seizure of a motor vehicle). As we have mentioned in the four different cases, the execution of different procedural actions differs in the degree to which they are planned or spontaneous. If CIG (covert intelligence gathering) preceded the investigative work, the execution is always planned, and to ensure successful completion of the case the time and mode of execution is determined by the investigative plan.

Important material evidence is the retrieval of the wire transfers mentioned earlier (through which the various roles in the network can be investigated) and the telephone wiretaps carried out by the investigative authority during CIG and CDA (Covert Data Acquisition). For the sake of proof, this is partially de-classified, but the difficulties arising from interpreting are also raised here, and its time requirements are a great disadvantage for the investigative authority. In order to prove the legal classification of a criminal offense, it is also essential to reveal communication between members and to gather relevant evidence. Other important material evidences are data on the route and the transport, which are largely due to various vehicle registration data requests and toll registers.

In addition, proceeds from human smuggling can also be used as evidence, where it is possible to find out where the people involved in smuggling make investments. The investigative authorities thus investigate what is the top priority country for the network's main organizer where he invests his financial assets. In many cases this is not the source or the destination country, but other states such as Albania (LEMAN-JANSSENS, 2012). However, as mentioned above, the Hungarian investigative authorities are able to successfully investigate the lower layers of the network, which in many cases do not accumulate large financial assets during the smuggling process, so the asset forfeiture process is usually not typical of the investigation of human smuggling and does not provide evidence that can be used in criminal procedures.

The work of the Hungarian investigative authority is limited mainly in the case of perpetrators within our national borders and perpetrators of Hungarian citizenship, and this implies the fact that it has little impact on the arrest of the head or heads of a human smuggling network operating abroad. This has a number of consequences that hinder successful investigative work. On the one hand, these lower "legs" can quickly "regrow", so it is difficult to achieve long-term success in law enforcement. This is why the investigative authorities have an important purpose to find the widest possible exploration of organizations, but this cannot be entirely successful because of the clandestine way the criminals operate. On the other hand, as the leader of a criminal organization abroad is aware of the arrest of the members of the network, he is often informed of the criminal procedures against them, through the defendants' appointed defence counsel. By disclosure of the case files, he receives information on the investigative work and the means of evidence, and he accordingly changes the way of smuggling people in the foregoing (for example, human smugglers will avoid motorways from then on). A special case of human smugglers being informed of the investigative work is an Albanian example in which members of the personnel of the secret services of the pre- and post-transition period joined a criminal organization (LEMAN-JANSSENS, 2012).

The importance of investigative theory in knowing human smuggling

For the success and understanding of criminal action against human smuggling as an illegal organized crime activity, it is essential to know the structure and work of investigative bodies. Thus, the purpose of our study was to present the organizational and investigative methods of international and domestic police forces. This approach, however, also involves a kind of conceptual limitation, as the way in which a smuggling organization is detected and noticed determines the data that can be obtained, that is, the amount and quality of the information.

However, the acquisition of information on international human smuggling cases by the investigative authority is severely limited by the scarcity of the organization's resources compared to crime rates and the complexity and the time-consuming nature of investigative work. The successful completion of investigations is often prevented or hindered by the scarcity of human resources, such as the continuing shortage of active duty police job slots, and the scarcity of resources being further aggravated by the fact that the NBI IMD conducting the investigation usually uses its own personnel on surveillance teams or uses the personnel of the CID of the similarly overburdened border police headquarters. The cross-border nature of the crime can be considered as a further difficulty of a successful investigation, as opposed to investigative work based essentially on a nation-state structure. Various forms of international cooperation are designed to counteract this problem, but difficulties in the flow of information and the limitation of the powers of the different national agencies create additional obstacles. In addition, the personnel of the investigative authority are challenged by this race against the human smugglers, namely by the dynamics of mutual information gathering on each other's methods.

As the police are less open to making the limits of their investigative work available, researchers generally do not have access to the information on them. Consequently, however, research into human smuggling can deal only with the interpretation of the laws and the wording of the international conventions, less with the practical enforceability of legislation and the limits of law enforcement. With the present study we intend to contribute to remedying this deficit.

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