# Конституционное право и административное право

# Constitutional law and administrative law

*УДК 342.7*

## ПРАВА ЧЕЛОВЕКА В БОРЬБЕ С ОРГАНИЗОВАННОЙ ПРЕСТУПНОСТЬЮ И ПРОБЛЕМА НЕЛЕГАЛЬНОЙ МИГРАЦИИ В ЕВРОПЕ

***Т. КРЮССМАН***[1)]

[1)]*Грацский университет им. Карла и Франца, Университетштрассе, 15/C3, 8010, г. Грац, Австрия*

Анализируются некоторые правовые проблемы, связанные с соблюдением прав человека в борьбе с транснациональной организованной преступностью и нелегальной миграцией в Европе. Автор выделяет признаки, отличающие торговлю людьми от нелегальной миграции, и поднимает ряд дискуссионных вопросов, связанных с необходимостью криминализации контрабанды людей, защитой и соблюдением прав мигрантов, установлением ответственности за незаконные въезд и проживание, а также допустимостью криминализации содействия миграции со стороны неправительственных организаций, которые проводят гуманитарные поисково-спасательные операции в Средиземноморье.

***Ключевые слова:*** транснациональная организованная преступность; торговля людьми; мигрант; незаконный ввоз мигрантов; нелегальная миграция.

**Образец цитирования:**
Крюссман Т. Права человека в борьбе с организованной преступностью и проблема нелегальной миграции в Европе. *Журнал Белорусского государственного университета. Право.* 2020;3:24–29 (на англ.).

**For citation:**
Kruessmann T. Human rights in combating organised crime and the problem of «illegal» migration in Europe. *Journal of the Belarusian State University. Law.* 2020;3:24–29.

**Автор:**
***Томас Крюссман*** – доктор юридических наук, профессор; старший научный сотрудник, координатор проекта «Модернизация магистерских программ для будущих судей, прокуроров, следователей с учетом европейских стандартов в области прав человека» (CRIMHUM) Института уголовного права, уголовного процесса и криминалистики.

**Author:**
***Thomas Kruessmann***, doctor of science (law), full professor; senior researcher, coordinator of the project «Modernization of master programmes for future judges, prosecutors, investigators with respect to European standard of human rights» (CRIMHUM), Institute of Criminal Law, Criminal Process and Criminology.
*kruessmann.thomas@gmail.com*
*https://orcid.org/0000-0003-3973-6173*

# HUMAN RIGHTS IN COMBATING ORGANISED CRIME AND THE PROBLEM OF «ILLEGAL» MIGRATION IN EUROPE

***T. KRUESSMANN***[a]

[a]*University of Graz, 15/C3 Universitätsstraße, Graz 8010, Austria*

The article analyses a number of legal problems related to the observance of human rights in the fight against transnational organised crime and illegal migration in Europe. The author highlights the features that distinguish human trafficking from illegal migration and raises a number of controversial issues related to the need to criminalise people smuggling, protect and promote the rights of migrants, establish responsibility for illegal entry and illegal residence, as well as the permissibility of criminalising by the assistance to migration by non-governmental organisations that conduct humanitarian search and rescue operations in the Mediterranean.

***Keywords:*** transnational organised crime; human trafficking; migrant; smuggling of migrants; illegal migration.

## Introduction

The threat of transnational organised crime has become a potent force in mobilising law makers over the past 20 years. Undoubtedly, the spectre of East European organised crime groups, no longer contained by the Cold War and supposedly set free to roam across Europe, had been used as a wake-up call for tougher measures against «borderless crime», but also to demand long-overdue investment into police forces, their infrastructure and equipment all over Europe. Unlike the fight against corruption, however, the issue of legal measures against transnational organised crime had hardly been «prepared» by using comparative regional experience. Indeed, there are no regional instruments under international law that would be dedicated specifically to the fight against transnational organized crime. Instead, the international community chose to move directly onto the universal level and negotiated and adopted United Nations Convention against transnational organized crime (UNTOC), signed in December 2000 and entered into force in 2003. Currently, there are 190 parties to this convention (as of 26 July 2018)[1].

UNTOC is thus the main instrument in the global fight against transnational organised crime, with three additional protocols supplementing the convention: 1) Protocol to prevent, suppress and punish trafficking in persons, especially women and children (UN Anti-THB Protocol); 2) Protocol against the smuggling of migrants by land, sea and air (Un Anti-Smuggling Protocol); 3) Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. We shall take a closer look at the first and second Protocol, in particular with a view to the question, how trafficking in human beings (THB)[2] and smuggling of migrants are distinguished and what human rights implications the regulation of the two areas entails[3].

## Trafficking in human beings

Whereas the UN Anti-THB Protocol is a clear expression of concern over transnational organised crime, there are a few other tributaries that flow, metaphorically speaking, into the river of the international legal framework against THB, as we know it today[4]. Slavery is perhaps the oldest type of practice that is conceptually linked to THB. The Slavery convention of 1926 in art. 1(1) defines slavery as the «status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised»[5]. The notion of slavery is obviously closely linked to the practice of slave trade, comprising «all acts involved in the capture, acquisition or disposal of a person with intent to reduce him [or her] to slavery»[6]. Slave trade

[1]To get the information about convention ratifications see: United Nations treaty collection [Electronic resource]. URL: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en (date of access: 23.06.2020). For commentary, see: *McClean D.* Transnational organized crime: a commentary on the UN convention and its protocols. Oxford : Oxford Univ. Press, 2007. 576 p.

[2]The term «human trafficking» is used interchangeably. However, the attribute «human» does not refer to the supposed humaneness of the activity, but to the object of the trafficking, i. e. human beings.

[3]For a wider human rights perspective see: *Obokata T.* Combating transnational organised crime through international human rights law // Internatl. Human Rights Law Review. 2019. No. 8. Vol. 1. P. 1–37.

[4]Generally, see also controversy between J. C. Hathaway (*Hathaway J. C.* Human rights and human trafficking: quagmire or firm ground? // Virginia Journ. of Internatl. Law. 2008. No. 49. Vol. 1. P. 1–59) and A. T. Gallagher (*Gallagher A. T.* Human rights and human trafficking: quagmire or firm ground? A response to James Hathaway // Virginia Journ. of Internatl. Law. 2009. No. 49. Vol. 4. P. 789–848).

[5]Slavery convention [Electronic resource]. URL: https://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx (date of access: 23.06.2020).

[6]Ibid.

is to be criminalised under art. 3 of the Supplementary convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery of 1956[7]. According to the Global Slavery Index 2018, an estimated 40.3 million people were enslaved globally in 2016, with North Korea having the highest number of slaves at 2.6 million people (one in 10)[8]. Given these numbers, it would have been more logical from a human rights point of view to consider modern slavery the major target for international initiatives and include into this approach both slave trade («black trade») and THB («white trade»). By focusing only on those who are trafficked transnationally, a large number of modern slavery situations is now actually outside the main focus of international initiatives[9].

Still, in the particular post-UNTOC consensus on THB, as it emerged, a few other European initiatives stand out that were developed against the background of the legally binding provisions of the UN Anti-THB Protocol.

1. The Council of Europe has perhaps the longest pedigree of dealing with THB, however, it originally took a different angle. As early as 1991, it emphasised the dangers of trafficking for sexual exploitation, focusing on the risks for children and young adults[10]. Later, the notion of sexual exploitation was broadened to include the issue of violence against women[11]. In this way, the Committee of Ministers became the driver of an anti-THB agenda that finally led to the adoption of the Convention on Action against Trafficking in Human Beings in 2005 (CoE Anti-THB Convention). The convention entered into force in 2008 with a total of 47 ratifications and accessions, including from Ukraine and Belarus as a non-member of the Council of Europe.

2. In 2002, the EU adopted a Framework Decision on combating THB[12]. The history of this initiative goes back to the same idea of protecting children from sexual exploitation[13] and subsequently widened to comprise the full agenda of anti-THB. In the recitals to the decision, the EU explains that «the important work performed by international organisations, in particular the UN, must be complemented by that of the European Union». This earlier framework was later replaced by Council directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims[14].

3. Finally, in 2003 the OSCE set up the post of the special representative and coordinator for combating trafficking in human beings to help participating states develop and implement effective policies for combating human trafficking. The office of the special representative is in charge of watching over the implementation of the OSCE Action plan to combat trafficking in human beings which was adopted in the same year[15]. In doing so, the OSCE, through its dedicated infrastructure[16],

[7]Supplementary convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery [Electronic resource]. URL: https://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx (date of access: 23.06.2020).

[8]Global Slavery Index [Electronic resource]. URL: https://www.globalslaveryindex.org/2018/findings/highlights/ (date of access: 23.06.2020).

[9]J. C. Hathaway speaks of «unjustified privileging» of victims of trafficking over those who are in a slavery situation without having been trafficked earlier (*Hathaway J. C.* Human rights and human trafficking: quagmire or firm ground? // Virginia Journ. of Internatl. Law. 2008. No. 49. Vol. 1. P. 1–59). See also the response by A. T. Gallagher (*Gallagher A. T.* Human rights and human trafficking: quagmire or firm ground? A response to James Hathaway // Virginia Journ. of Internatl. Law. 2009. No. 49. Vol. 4. P. 789–848).

[10]Committee of Ministers Recommendation No. R (91)11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults [Electronic resource]. URL: https://archive.crin.org/en/library/legal-database/council-europe-recommendation-no-r-91-11-concerning-sexual-exploitation.html (date of access: 23.06.2020).

[11]Committee of Ministers' Recommendation No. R (2000)11 on action against trafficking in human beings for the purpose of sexual exploitation [Electronic resource]. URL: rm.coe.int/16804fda79 (date of access: 23.06.2020) ; Recommendation rec (2001)16 of the Committee of Ministers to member states on the protection of children against sexual exploitation [Electronic resource]. URL: childhub.org/en/child-protection-online-library/recommendation-ree200116-committee-ministers-member-states (date of access: 23.06.2020) ; Recommendation rec (2002)5 of the Committee of Ministers to member States on the protection of women against violence [Electronic resource]. URL: search.col.int/cm/pages/result_detai/s.aspx?ObjectID=09000016805e2612 (date of access: 23.06.2020).

[12]Council framework decision of 19 July 2002 on combating trafficking in human beings [Electronic resource]. URL: https://eur-lex.europa.eu/legal-content/EN/TXX/?uri=CELEX%3A32002F0629 (date of access: 23.06.2020). For background see: *Galli F.* The content and impact of approximation: the case of trafficking in human beings // Approximation of substantive criminal law in the EU. The way forward / F. Galli, A. Weyembergh (eds). Bruxelles : Editions de l'Université de Bruxelles (IIE), 2013. P. 189–218.

[13]97/154/JHA: Council joint action of 24 Feb. 1997 adopted by the Council on the basis of Article K. 3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children [Electronic resource]. URL: https://eur-lex. europa.eu/legal-content/EN/TXX/?uri=CELEX%3A31997F0154 (date of access: 23.06.2020).

[14]Directive 2011/36/EU of the European Parliament and the Council of 5 Apr. 2011 on preventing and combating trafficking in human being and protecting its victims, and replacing Council framework. Design 2002/629/JHA [Electronic resource]. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2011:101:TOC (date of access: 23.06.2020). See also: *Obokata T.* Evolution of the EU action against trafficking of human beings // Research handbook on EU criminal law / V. Mitsilegas, M. Bergström, T. Konstadinides (eds). Cheltenham: Edward Elgar, 2016. P. 422–438.

[15]Decision No. 557 of the OSCE Permanent Council PC.DEC/557 of 24 July 2003 [Electronic resource]. URL: https://www.osce.org/what/trafficking/55512 (date of access: 23.06.2020).

[16]See: Combating human trafficking [Electronic resource]. URL: https://www.osce.org/combating-human-trafficking for a full picture (date of access: 23.06.2020).

has become most active in trainings and simulations, fostering international co-operation.

Subsequently, the UN, on the initiative of Belarus, also adopted a global plan of action to combat trafficking in persons[17].

The human rights dimension of THB manifests itself in two areas. First of all, by reducing the trafficked person to a commodity, the practice of trafficking is essentially at odds with human dignity (even if the source of the commodification of human beings is not the state, but a private party!)[18]. The UN Anti-THB Protocol in art. 3 lit a) defines trafficking as any type of recruitment, harbouring or physical relocation, not necessarily via state boundaries, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. The hallmark of this definition is therefore the involuntary submission into dependency from the point of view of the victim and the perpetrator's goal of using the person for purposes of exploitation. The central rule is to criminalise this type of conduct (art. 5(1) of UN Anti-THB Protocol, art. 18 of CoE Anti-THB Convention) including the attempt to commit it, participation and aiding and abetting (art. 5(2) of UN Anti-THB-Protocol, art. 21 of CoE Anti-THB Convention (omitting joint participation)). Both UN Anti-THB Protocol and CoE Anti-THB Convention are also unanimous in that consent of the victim of trafficking to his or her intended subsequent exploitation shall not remove the criminality of the perpetrator (art. 3 lit. b) of UN Anti-THB Protocol, art. 4 lit. b) of CoE Anti-THB Convention). Secondly, in art. 6 ff. of UN Anti-THB Protocol, art. 10 ff. of CoE Anti-THB Convention human rights are expressed in the requirement to State Parties to create conditions which are safe and conducive to the well-being of the victims of trafficking («protection and promotion of rights»).

In transforming these prescriptions into national law, there is little disagreement about the first part, i. e. the criminalisation. The second part, by comparison, is more contentious, as state parties may be hesitant to commit resources to the well-being of persons who are in most cases not its citizens. As the Council of Europe explains in the preamble to the CoE Anti-THB-Convention, there is still a need to prepare a comprehensive international legal instrument focusing on the human rights of the victims of trafficking.

## Smuggling of migrants

The smuggling of migrants has gained prominence primarily after the events of the Arab Spring and the unleashing of conflicts in the Middle East and North Africa. It would be wrong to say that the adoption of the UN Anti-Smuggling Protocol had been an entirely theoretical exercise, but when the Protocol entered into force in 2004 the whole thrust of problems emerging in the years hence could not be anticipated. And there is not yet another binding legal instrument beyond the UN Anti-Smuggling protocol that would create a more advanced legal framework in a universal context. Indeed, so far there is only the UN Global Compact for Safe, Orderly and Regular Migration (GCM), adopted by Resolution of the UN General Assembly on 19 December 2018, which creates a more elaborate (but legally non-binding) framework.

In theory, there are a few features that distinguish THB from smuggling migrants. On the one hand, the smuggling of migrants necessarily involves the crossing of a state border and is by its nature irregular (if not illegal according to that state's laws). On the other hand, agreeing to be smuggled is a voluntary decision, not affected by deceit, threat, coercion or even violence. The legal definition of smuggling given in art. 3 lit. a) of UN Anti-Smuggling Protocol focuses on 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». It is therefore wrong to speak of «victims of smuggling», as the migrants who contract a smuggler are his clients. However, a situation of smuggling can easily turn into THB when the smuggler takes advantage of the helplessness of his or her clients, deceiving them and bringing them into a situation where they are subject to exploitation.

Using the framework established above for THB, despite the fact that there is no cogent human rights background and in the face of academic criticism[19], there is obviously agreement about the need for criminalisation of human smuggling. Art. 6(1) lit. a) of UN Anti-Smuggling Protocol calls on state parties to adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit, the conduct of «smuggling of migrants». In addition, art. 6(2) of UN Anti-Smuggling Protocol calls for the criminalisation of the attempt to commit an act of smuggling migrants, participating as an accomplice and (or) or-

[17]Resolution adopted by the General Assembly [Electronic resource]. URL: https://www.unodc.org/documents/human-trafficking/United_Nations_Global_Plan_of_Action_to_Combat_Trafficking_in_Persons.pdf (date of access: 23.06.2020).

[18]This is clearly spelled out in the preamble to the CoE Anti-THB Convention: «Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being…».

[19]J. C. Hathaway argues that the initial focus on THB created a «legal slippery slope» for criminalising human smuggling as well.

ganising or directing the commission of the act. The second dimension, i. e. protection and promotion of the rights of migrants, is the much more critical one. Despite the fact that certain rights of migrants are regulated in a variety of International Labour Organisation (ILO) conventions[20], the issue has become enormously contentious. In general, the rights-based approach to migration is heavily contested by the securitisation approach which sees migrants first and foremostly as a security threat to be countered by means of law enforcement. The UN Global compact for sale, orderly and regular migration is the latest attempt by the UN to define common principles and ensure a human rights-based approach to the legal position of migrants. However, a number of populist governments have rejected the GMC and work actively against it.

The question which lies at the heart of this approach is whether it is permissible to criminalise migrants themselves, i. e. those who agree to be smuggled, and for which conduct exactly[21]. There is not, as in the case of THB, the objectification of a victim, i. e., the turning of him or her into a commodity to be used for the purposes of exploitation. On the contrary, the migrant takes advantage of his or her legal capacity to engage in a transaction with a smuggler, with the major difference being that the individual migrant is hardly able to set the conditions of the deal. From an aiding and abetting point of view, the migrant would clearly be criminally liable for the criminal conduct of the smuggler. Assuming that his or her bid to be smuggled is causal for the smuggler's decision to engage in the transaction, the migrant would thus incur criminal responsibility. However, art. 5 of UN Anti-Smuggling Protocol is straightforwardly clear on this question: «Migrants shall not become liable to criminal prosecution under this protocol for the fact of having been the object of conduct set forth in article 6 of this protocol».

However, this statement, as welcome as it may seem from a human rights point of view, does not prevent countries from establishing the crime of illegal entry and illegal residence. And even in the EU, as the case of the Return directive[22] shows, there is an ongoing conflict between those who interpret the Return directive broadly to limit member states in their freedom to use criminal law as a means of deterring illegal entry or residence, and those who seek to advance the residual competences of the member states in the area of public order and security. Needless to say, member states remained enthusiastic proponents of criminal law measures in the area of irregular migration[23].

A second set of issues that has become important for Europe is whether under the current global rules it is permissible for EU member states to criminalise the facilitation of migration by non-government organisations (NGOs) who conduct humanitarian search and rescue (SAR) operations in the Mediterranean. As we have just seen, the UN Anti-Smuggling Protocol allows for the criminalisation of aiding and abetting in human smuggling, including participating as an accomplice. To hold an NGO and its respective crew aboard ship criminally liable for operating in tacit agreement with smugglers is probably something nobody would argue against. But this is a constellation that police and criminological research have not come across in practice. Instead, the question raised by many across Europe is whether the uncoordinated presence of SAR operations in the Mediterranean is not *de facto* facilitating the business model of human smugglers. By increasing the chance of being rescued and taken to EU member states to claim asylum, the humanitarian NGOs are indeed making it more attractive to risk one's life and hope for a lucky outcome.

In EU law, the so-called «facilitators' package» provides for a regulatory approach in line with the UN Anti-Smuggling Protocol. The package includes, on the hand, Council Directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence (Facilitators' directive)[24]. On the other hand, it includes Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (Facilitators' framework decision)[25]. For competence reasons,

[20]Migration for employment convention (revised) of 1949 No. 97, Migrant workers (supplementary provisions) convention of 1975 No. 143, Equality of treatment (social security) convention of 1962 No. 118, and Domestic workers convention of 2011 No. 189.

[21]See also: *Mitsilegas V.* EU criminal law after Lisbon. Rights, trust and the transformation of justice in Europe. Oxford : Hart Publishing, 2016. P. 92.

[22]Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member states for returning illegally staying third-country nationals [Electronic resource]. URL: https://eur-lex. europa.eu/legal-content/EN/TXX/?uri=CELEX%3A32008L0115 (date of access: 23.06.2020).

[23]See for this purpose: *Mitsilegas V.* The changing landscape of the criminalisation of migration in Europe: the protective function of European Union law // Social control and justice: crimmigration in the age of fear / M. J. Guia, M. van der Woude, J. van der Leun (eds). The Hague: Eleven International Publishing, 2013. P. 87–114 ; *Afia Kramo Y.* The European Union's response to irregular migration and the problem of criminalisation // New Journl. of Europ. Criminal Law. 2014. No. 5. Vol. 1. P. 26–57 ; Criminalisation of migrants in an irregular situation and of persons engaging with them [Electronic resource]. Available from: https://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them (date of access: 23.06.2020).

[24]Council directive 2002/90/EC of 28 Nov. 2002 defining the facilitation of unanthorised entry, transit and residence [Electronic resource]. URL: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0090 (date of access: 23.06.2020).

[25]2002/946/JHA: Council framework decision of 28 Nov. 2002 on the stungthening of the penal framework to prevent the facilitation of unanthorised entory, transit and residence [Electronic resource]. URL: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002F0946 (date of access: 23.06.2020).

it is the directive that sets the task of harmonising the Member states' definition of the offence of facilitation of unauthorised entry, transit and residence until 5 December 2004[26], and it is the Framework Decision that defines the member states' obligations to create a legal framework for prosecution and cross-border cooperation[27], to become effective by the same date.

The central provision of art. 1 of the directive, entitled «General infringement», reads as follows:

«1. Each member state shall adopt appropriate sanctions on:

(a) any person who intentionally assists a person who is not a national of a member state to enter, or transit across, the territory of a member state in breach of the laws of the state concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a member state to reside within the territory of a member state in breach of the laws of the state concerned on the residence of aliens.

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

When it comes to facilitating irregular entry, one difference between the Facilitators' Directive and the UN Anti-Smuggling Protocol is that the former changes the wording from «participating as an accomplice» to «intentionally assisting». Arguably, both terms are coming from the realm of international and European law and need to be transposed into national law to be able to ascertain what exactly is meant. Being an accomplice indicates the need for a criminal conspiracy, at least in the sense of a mutual agreement. «Intentionally assisting» is arguably less because it describes only the one-sided perspective of the facilitator. A criminal enterprise like smuggling could thus be intentionally assisted even without a conspiracy between the facilitator and the main perpetrators of the crime.

The second surprising feature of the Facilitators' Directive is that it treats the *means rea* requirement of intent «to obtain, directly or indirectly, a financial or other material benefit» coming from the UN Anti-Smuggling Protocol in a nuanced way: in the case of facilitating irregular entry an intention to obtain financial gain is no longer needed which makes any humanitarian SAR mission potentially criminally liable. The counterbalance to this is found in para 2: member states may optionally exclude criminal liability in case of humanitarian assistance missions.

Given the fact that the UN Anti-Smuggling Protocol purports to define minimum requirements for criminalisation, it is clear that the EU, despite speaking of «supplementing» other relevant instruments[28], is going beyond such minima by allowing the criminalisation of facilitative conduct that is not conspiracy-based and not done with intent to receive a financial or other material benefit.

## Conclusion

In the areas of THB and the smuggling of migrants, we see a strong desire by states to create for themselves, via international agreements, the authority to criminalise certain conduct, albeit in a coordinated fashion and with a view to facilitating judicial cooperation. What becomes clear from the foregoing is that such international or EU law criminalisation obligations are *leges imperfectae* in that they rely in their transposition to a large degree on the doctrinal approaches of the national criminal law. For example, concepts such as «aiding and abetting» are taken from common law and used internationally in a rather carefree manner. But when it comes down to national law, there is no blueprint what «facilitation» means and how it will fit into the concepts of national criminal law.

Thus, analysing selected issues of criminal law reform in the light of the interplay between international law, in particular human rights law, and European law is a fruitful approach, but it is not sufficient to exhaust the problems. What is needed to see is how the concepts get transposed into national law and what the courts' approach will be, possibly even asking the Court for Justice of the EU for a preliminary ruling. EU member states have been eager to use criminal law as part of some securitisation strategy. Human rights are interwoven into the respective proposals, but often only to the extent that the initiatives pay lip-service to them. In order to «go against the grain» and create a robust methodology for analysing innovations in criminal law, it is therefore necessary to develop a strong human rights focus.

*Received by editorial board 09.07.2020.*

[26]Based on art. 79(2) (c) of TFEU.
[27]Based on art. 83(2) of TFEU.
[28]Para 5 of preamble of Facilitators' directive.
[29]For a more broadly defined criticism, see *Mitsilegas V.* The normative foundations of the criminalization of human smuggling: exploring the fault lines between European and international law // New Journ. of Europ. Criminal Law. 2019. No. 10. Vol. 1. P. 77.