

**Hrvoje FILIPOVIĆ, PhD\***  
Assistant professor  
Police College in Zagreb

**Dragana ČVOROVIĆ, PhD\*\***  
Associate Professor  
University of Criminal Investigations and  
Police Studies, Belgrade

**Review Scientific Article**  
UDK: 343.341-054.72(497.5)  
Received: 5 January 2022  
Accepted: 20 February 2022  
<https://doi.org/10.47152/rkkp.60.1.6>

## ILLEGAL ENTRY OF FOREIGN NATIONALS AS CRIMINAL OFFENCE

*The paper analyzes the criminal offense of illegal entry, movement and stay in the Republic of Croatia, another Member State of the European Union or a signatory state to the Schengen Agreement under Article 326 of the Criminal Code and its connection with the misdemeanor of the prohibition of assisting a third-country national from Article 43 of the Law on Foreigners with regard to the difficulties and implications that may arise during their delimitation. In particular, the implementation of Council Directive 2002/90/EC on the definition of facilitation of unauthorized entry, transit and residence as well as its harmonization is analyzed. The differentiation between the misdemeanor in question and the criminal offense is not simple and includes a number of factors that in fact depend on each individual case, but when it comes to the classification of criminal offences, the decisive factor is greed, whereas recent case law shows that when it comes to criminal offenses under Article 326 of*

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\* E-mail: [hfilipovic@fkz.hr](mailto:hfilipovic@fkz.hr)

\*\* E-mail: [dragana.cvorovic@kpu.edu.rs](mailto:dragana.cvorovic@kpu.edu.rs)

*the Criminal Code, these are well-organized groups that, upon detection, do not shy away from attacking police officers in pursuit of their goals.*

**Key words: illegal entry, greed, foreigners, border.**

## 1. Introduction

The control of external borders is not just an internal matter of the state. Article 3 (2) of the Treaty on European Union offers citizens the area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to *external border control*, asylum, immigration and the *prevention and combating of crime* (Filipović, Radman, 2015: 57). The latter provision is as important as other international sources which show that the external border control and the prevention and combating of crime represent a category of international law as well as asylum and that older notions of division into categories of international and domestic law for these areas have been abandoned. This is also the case according to Regulation (EU) 2016/399<sup>1</sup> which in the provision of its Article 13 states that the main purpose of protecting the state border is to prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally, whereas the person who has crossed the border illegally and who has no right to reside in the territory of the Member State in question shall be apprehended and made subject to procedures in accordance with Directive 2008/115/EC<sup>2</sup>. Different adjectives are used in the literature and documents: "irregular", "illegal", "unregistered", "unauthorized", "not allowed", which are then combined with different nouns: "migrants", "immigrants", "foreigners", "foreign nationals". The report of the Global Commission for International Migration, established within the UN, accepted the term "migrants with irregular status" (Đukanović, 2013: 480-481).

The subject of this paper is the criminal offense of illegal entry, movement and stay in the Republic of Croatia, another Member State of the European Union or a signatory state to the Schengen Agreement under Article 326 of the Criminal Code<sup>3</sup> (hereinafter referred to as: CC).

The paper uses a descriptive method and a case study method that allow us to describe in detail, discover new and important knowledge (Vukosav, Sindik,

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1 Council Regulation 2016/399 of 9 March 2016 on the Union Code on the rules governing the movement of persons across borders, OJ 77, 23.3.2016 (hereinafter: Schengen Borders Code).

2 Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 348, 24.12.2008.

3 Criminal Code, Official Gazette, No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19.

2014: 109). The verdicts were carefully selected and graded from the basic criminal offenses to the most serious ones, which were committed as part of a criminal organization.

The case study method was chosen for the reason that it is necessary to answer the main question from the research, which is the delimitation between the criminal offense from Article 326 of the CC and misdemeanors under Article 43 of the Law on Foreigners<sup>4</sup> (hereinafter referred to as: LF). The case study was also chosen because it is focused on specific events.

*Three case study strategies* were also used in the paper (Vukosav, Sindik, 2014: 109). The first refers to normative sources, the second to explanations by recent authors, and the third to case descriptions.

*The design* of the case study research itself contains five elements (Yin, 2007: 34). *The issue of the study* has already been mentioned, and it refers to the differentiation (delimitation) between the criminal offense from Article 326 of the CC and the misdemeanor under Article 43 of the LF. Then follow the *possible assumptions of the study*, according to which it is necessary to answer how the competent authorities act when finding persons who allow or help another person to enter, leave, move or stay in the Republic of Croatia or another EU Member State. *The unit of analysis* is the (first) component which refers to the first presumption that there is no boundary between a criminal offense or misdemeanor, and the second refers to the fact that the perpetrators of misdemeanors from Article 43 of the LF were not adequately punished. According to the *logic that connects the data with the assumptions*, it is necessary to make an analysis of criminal offences from Article 326 of the CC and the misdemeanors under Article 43 of the LF and partly answer the question of differences between particular acts. The last factor of the case study is the *criteria for interpreting the findings* (Yin, 2007: 35) and includes analyzes and proposals *de lege ferenda*.

## **2. Illegal entry, movement and stay in the Republic of Croatia, another EU Member State or a signatory state to the Schengen Agreement**

Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence<sup>5</sup> is especially important because the criminal actions that have been implemented in the legal order of the Republic of Croatia are listed.

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4 Law on Foreigners, Official Gazette, No. 130/11, 74/13, 69/17, 46/18, 53/20.

5 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, OJ 328/17, 5.12.2002.

Thus, Article 1 (1) of the Directive punishes any person who intentionally assists a person who is not a national of a Member State to enter or cross the territory of a Member State and thereby violates the laws of that State on the entry and transit of aliens. Article 1 (2) punishes any person who, for financial gain, intentionally helps a person who is not a national of a Member State to reside in the territory of that Member State and thereby violates the laws of that State on the residence of aliens.<sup>6</sup>

The criminal offense under Article 326 (1) of the CC incriminates enabling and assisting<sup>7</sup> in illegal border crossing, movement and residence in the Republic of Croatia or illegal transfer across the state border of persons from the Republic of Croatia, out of greed (Turković et al., 2013: 401). The offense referred to in paragraph 1 is a *delictum communium*, which means that it can be committed by any person. Prof. Turković and other authors state that the proposal of some county state attorney's offices to incriminate other ways of enabling illegal crossing of the state border, which do not literally represent the act of transferring across the state border, but is really about enabling and assisting illegal crossing, was thus adopted (Turković et al., 2013: 401). The act of committing is to enable or help a foreign person to enter, move or stay in the Republic of Croatia (Pavlović, 2012: 705). To enable means to create conditions for crossing the border or to move or stay in Croatia without hindrance, and help can be provided in various ways - providing a means of transport, shelter, etc. (Pavlović, 2012: 705). When a person himself or herself enters, moves or resides illegally in the specified area, he or she does not commit this criminal offense (Božić, 2015: 850).

Article 326 (2) of the CC contains qualifying circumstances in which the life or body of a person who illegally enters, moves or stays in the Republic of Croatia is endangered, in which he or she was treated in an inhuman or degrading manner or the act was committed by an official in the performance of official duties (Pavlović, 2012: 705). Paragraph 2 takes into account a number of concrete, sometimes tragic cases when people were transported across the border in a way full of danger for those people (overcrowded small ships, a large number of people crammed into a truck, etc.). Pavlović further states that the commission of an act by an official in the performance of official duties (*delictum proprium*) is a delict with a corruption character. Pavlović also states that this part of the

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6 Article 1 (1 and 2) of Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence

7 It is not necessary for an act of assisting to be present for every action related to the criminal offense referred to in Article 177 (1) of the CC because, according to the content of the previous agreement, his act of assisting referred to the previously promised concealment of a criminal offense (SCRC, III Kr-431/01 of 31 May 2005).

incrimination should have been separated into a separate paragraph because it has nothing to do with the acts committed under paragraph 2, while paragraph 3 incriminates the attempt (Pavlović, 2012: 705).

Persons seeking assistance for transit, transportation, accommodation can easily end up as victims of human trafficking (Kovčo-Vukadin, Jelinić, 2003: 666). For example, victims of trafficking look for ways to get to Western or Central European countries and are trafficked out of the country by false promises and deceptions, taking them into an unfamiliar environment where they are then isolated and forced into prostitution, forced labor and service to another person (Veber, Koštić, 2011: 204). Some trafficking activities include criminal groups organized by ethnicity and kinship, while in other groups they are formed on a territorial basis and are based on previous acquaintances of the perpetrators (Veber, Koštić, 2011: 205). This statement can be found in selected case studies in this paper from Article 326 of the CC and Article 43 of the LF, in which the defendants state that they helped foreigners to cross the state border illegally due to their nationality and kinship.

At the time of the beginning of the identification, the police officer still does not have enough data and facts to be able to judge whether a person is a victim and whether in this particular case any of the elements of the criminal offense/violation in the formal sense are excluded (Derenčinović, 2010: 65). According to Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air<sup>8</sup> migrants shall not be subject to persecution due to the fact that they are the object of smuggling. The clause of avoiding initiating proceedings or punishing these persons (Filipović, 2018: 171) is also stated in Article 26. of the Council of Europe Convention on Action against Trafficking in Human Beings<sup>9</sup> and in Article 8 of the Directive 2011/36/EU on the prevention and combating of trafficking in human beings and the protection of victims<sup>10</sup> according to which it is determined that States parties must ensure the possibility of impunity for victims of trafficking in human beings when they were involved in illegal activities, as long as they were forced to do so (Munivrana-Vajda, Dragičević-Prtenjača, Maršavelski, 2016: 991-1009). Crepeau points out the importance of not linking migration to smuggling

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8 The Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime, General Assembly Resolution No. 55/24 of 15 November 2000

9 The Council of Europe Convention on Action against Trafficking in Human Beings was adopted on 16 May 2005 in Warsaw.

10 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 and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, L 101/1 of 15.4.2011.

and human trafficking in order not to get the false impression that illegal migration is a criminal offense like smuggling and trafficking (Crépeau, 2013: 190).

The importance attached to the necessity of the greatest possible degree of detection and proof of this category of criminal offenses in the EU countries is best illustrated by the position of the German legislator expressed in Section VIII of the Criminal Procedure Code (StPO)<sup>11</sup> according to which the provisions on special investigative activities (seizure of items, telecommunications surveillance, computer comparison of personal data, use of technical means, use of undercover investigators and search) also apply to two criminal offenses of this character from the Law on Residence of Aliens (transfer of aliens to the Federal Republic Of Germany under paragraph 96 (2) and the transfer of aliens to the territory of the Federal Republic of Germany with fatal consequences and the business of transferring aliens pursuant to paragraph 97).<sup>12</sup> According to this legal text and in the case when there is a necessary degree of suspicion about the commission of these two as well as other serious crimes<sup>13</sup> the possibility of temporary seizure of objects or otherwise ensuring their safekeeping is allowed, provided that they are of importance for proving in the investigation. Items that include driver's licenses can also be forcibly confiscated if the person holding them refuses to hand them over. Exceptions to this are acts or other documents officially kept by a state body or official if their highest body states that publishing the contents of those acts or documents may have negative consequences for the common good of the federal state or one of the German provinces. The issuance of an order to confiscate an item is within the jurisdiction of the court, unless there is a danger of delay in which case the confiscation may be ordered by both the prosecution and the prosecutor's office investigator (Paragraph 152 of the German Courts Act). However, in such a case, the person who seized the item without a court order is obliged to request a court confirmation within three days, provided that the person from whom the seizure was made or an adult member of his family was not present during the seizure as well as in the case they explicitly opposed the seizure of the object. In case the item was seized by the prosecution or the investigator in the prosecutor's office after filing a public lawsuit, they are obliged to inform the court about the seizure within three days and hand over the seized items to the court, which is another proof of the importance attached to this evidentiary action (Roxin, 2006; Kühne, 2010; Beulke, 2008). Also, in order to

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11 Bundesgesetzblatt , Part I p. 1074, 1319]; (BGBl. I S. 3799); (BGBl. I S. 410). available at: [https://www.gesetze-im-internet.de/englisch\\_stpo/](https://www.gesetze-im-internet.de/englisch_stpo/)

12 Par.100 a st.5. StPO

13 For offenses that fall into the category of serious offenses within the meaning of this section of the StPO, see para. 100a paragraph 2. of the StPO

clarify the crime or determine the whereabouts of the person wanted for the purpose of criminal proceedings, computer comparison of data from one criminal procedure with other data that are automatically stored for prosecution, execution of criminal sanctions or prevention of danger is allowed. Also, for this purpose, it is allowed to confiscate postal consignments and telegrams that are sent to the suspect, and are located with a person or company whose business activity is the provision or participation in the provision of postal or telecommunications services. In addition, it is allowed to confiscate postal consignments and telegrams in which the existing facts indicate that they originate from the suspect or are intended for him and that their content is important for the investigation. Confiscation of the item is within the jurisdiction of the court, unless there is a danger of delay when the prosecutor's office is also authorized.

Observed in the above context, special attention should be paid to the fact that in this group of crimes the application of one of the most debatable measures of this character is allowed from the aspect of relevant international legal acts guaranteeing freedoms and rights of citizens (Meyer-Grossner, 2006: 563-569; Roxin, Schünemann, 2012). It is the measure of surveillance and recording of telecommunications without the knowledge of the person being supervised. There are three preconditions for the possibility of applying this action of proof. In addition to the facts that justify the suspicion that someone as a perpetrator or accomplice committed any of the crimes in this category or tried to commit an act whose attempt is punishable, it is necessary that in this case the crime is serious enough to justify the application of the measure and that establishing of the facts or the suspect's whereabouts are otherwise unlikely to succeed or are significantly hampered. In case the required preconditions are met, the order for the application of the measure is issued by the court at the request of the prosecutor. The exception is the case when there is a danger of delay when the order can be issued by the prosecutor's office, but it ceases to be valid if it is not confirmed by the court within three working days. In both cases, the order can refer only to the suspect or a person who, based on certain facts, is suspected of receiving and forwarding messages on behalf of the suspect or from the suspect, or that the suspect uses his connection. In the case of issuing an order, it is the obligation of all entities whose activity is to provide or participate in the provision of telecommunications services to enable the court, prosecutor's office and their investigators in the police to implement the measure and submit the necessary information without delay.

In addition to the above, there is another specificity of this measure. It is reflected in the fact that the order can last up to a month, with the proviso that its extension is allowed beyond that period, provided that the conditions from the order are met in terms of the results obtained by the investigation. In the event

that the duration of the order is extended to a total of six months, its further extension shall be decided by the Supreme Provincial Court.

Observed in the context of this measure, two more facts deserve attention, which also speak of the criminal-political justification of its undertaking in this group of criminal acts as well. These are:

First, even without the knowledge of the person to whom the measure applies, it is allowed to take photographs outside the apartment in which the technical device for eavesdropping and recording is installed and the use of certain technical means for other special purposes of observation;

Second, in the case of a person suspected of having committed a criminal offense as a perpetrator or accomplice or who is suspected of having committed an act of aiding and abetting after the committed criminal offense, the criminal offense of preventing criminal prosecution or concealment, search of the apartment and other premises may be undertaken, as well as a personal search or search of items belonging to him both for the purpose of his arrest and in the event that the search is likely to reveal evidence.

### **3. Legal continuity of criminal offenses related to illegal entry, movement and residence**

The forerunner of the criminal offense under Article 326 of the CC was first in the provision of Article 203 of the Basic Criminal Code<sup>14</sup> entitled *Illegal crossing of the state border* (Pavišić, 1993), and later in Article 177 of the Criminal Code of 1997 (hereinafter referred to as: CC/97)<sup>15</sup> (*illegal transfer of persons across the state border*), but the legal continuity of the crime has been preserved. However, there has been a minor modification of the same criminal offense, but the protection is focused on the same legal good, illegal transfer of persons across the state border, so that greed is not a qualifying element of the offense, but the basic offense (Garačić, 2009: 988).

The issue of legal continuity was discussed at the Sisak County Court<sup>16</sup> between the criminal offense under Article 177 of the CC/97 and the one under

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14 Article 203 of the Basic Criminal Code of the Republic of Croatia read: (1) Whoever, without the prescribed permit, crosses or attempts to cross the border of the Republic of Croatia armed or using violence, shall be punished by imprisonment for a term not exceeding one year. (2) Whoever engages in the illicit transfer of other people across the border of the Republic of Croatia or who, out of greed, enables another to cross the border illegally, shall be punished by imprisonment for a term between six months and five years. Basic Criminal Code of the Republic of Croatia, Official Gazette, No. 31/1993; Law on the Promulgation of the Law on Amendments to the Criminal Code, Official Gazette, No. 8/1990.

15 Criminal Code, Official Gazette, No. 110/97

16 Sisak County Court, Kć-193/11 of 12 December 2013



Article 326 of the CC, so that the factual situation is subsumed under the essence of the relevant criminal offense and it is determined that Article 326 of the CC does not recognize the commission of the said criminal offense within the group, for which criminal offense the defendants were found guilty and punished. Considering that the stated criminal offense from Article 326 of the CC does not recognize the commission of a criminal offense within the group, the defendant's appeal was accepted and the case was returned for retrial (Garačić, 2009: 990). However, the contested verdict was examined by the Supreme Court<sup>17</sup> in the light of the applicable CC. In relation to the criminal offense under Article 177, paragraphs 1 and 2 of the CC/97, there is a criminal legal continuity in the criminal offense of illegal entry, movement and residence in the Republic of Croatia under Article 326 of the CC, with the proviso that the commission of an act in a group is now not a qualifying element that would be prescribed in the said article. However, this qualifying element is regulated in Article 329 of the applicable CC, which in this case is not more lenient for the accused, and therefore the criminal law in force at the time of the commission of the offense was applied (Garačić, 2009: 990).

#### **4. Investigation of the criminal offense referred to in Article 326 of the CC on case studies**

The research was conducted using the case study method on six selected cases from Article 326 of the CC. The first, second and third case studies relate to the basic commission of the criminal offense under Article 326 (1) of the CC, fourth on Article 326 (1), in which the criminal report was rejected due to lack of evidence, but it was selected on the grounds that a misdemeanor report (indictment proposal) from Article 43 of the Law on Foreigners should have been filed, the fifth refers to Article 326 (2) of the CC in which the qualifying element of committing a criminal offense is apparent, and the sixth on Article 326 of the CC in which a criminal association is organized (Article 329 of the CC).

##### *4.1. Illegal entry, movement and stay and damage to another's property*

The case study in question was chosen because it is a criminal offense under Article 326 of the CC and the criminal offense under Article 235 of the CC.

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17 Supreme Court of the Republic of Croatia, KŽ-us-17/13 of 20 March 2013

From the brief description of the event it is evident that the defendant<sup>18</sup> M. J., BiH citizen, was guilty for coming to the territory of the Republic of Croatia and taking over a previously parked VW Golf III car in Županja on March 27, 2019, in order to gain undue material benefit, by prior agreement, for a monetary reward in the amount of EUR 400.00. He arrived in the immediate vicinity of the Babina Greda toll stations by car at around 8.30 pm, where four Chinese nationals were waiting for him whom he placed in the above mentioned car with the goal of enabling further illegal movement of foreign nationals, even though he was aware that the above Chinese nationals were foreigners who have come to the territory of the Republic of Croatia illegally and who do not meet the conditions for entry and stay. He then entered the A3 motorway at around 9 pm and was driving in the direction of Zagreb, but near the town of Popovača, he was spotted by police officers who *tried to stop him using light and sound signals* that he deafened *and continued at high speed driving between other vehicles moving in the direction of Zagreb* and without stopping, agreeing to cause damage, he ran into the front ramp of an automatic ramp owned by Croatian Motorways. Therefore, out of *greed*, the defendant allowed other persons to *move illegally* in the Republic of Croatia and damaged someone else's property thus committing the criminal offence from Article 326 (1) and Article 235 (1) of the CC.<sup>19</sup>

In the second case study, the defendants<sup>20</sup> S. V. and H. Š., citizens of BiH, are guilty that on March 29, 2019, on the route Dvor na Uni - Velika Gorica, in order to *gain illegal material benefits*, they agreed with unknown persons to

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18 "In his testimony, the defendant M. J. stated that he fully admitted to having committed the crimes in the manner described in the factual description of the indictment. He explained that he committed the acts due to poverty or the difficult financial situation in which his wife and he currently live. They are the parents of a minor child with health problems, the defendant's mother lives with them, and his wife and he lost their jobs in October last year, so he agreed to transfer Chinese citizens for 400 euros to provide the family with a livelihood. Everything in the factual description of the indictment is true, he committed the acts exactly as described there. Namely, it is true that at one point he noticed that a vehicle was following him, and then he noticed that it was the police officers when they turned on the rotating lights. He did not stop because the Chinese citizens he was transporting started attacking him in the vehicle, shouting in unintelligible English that they did not have passports and not to stop the vehicle, so he continued to move ... " Zagreb Municipal Criminal Court, number: 4 K -659 / 19-8 dated May 9, 2019.

19 Pursuant to Article 326 (1) of the CC, the accused M. J. is sentenced to imprisonment for a term of one year, on the basis of Article 235 (1) of the CC M. J. is sentenced to imprisonment for a term of 5 months. Pursuant to Article 51 of the CC, the defendant is sentenced to a single term of imprisonment of 1 year and 2 months. Pursuant to Article 57 of the CC, the defendant MJ is sentenced to a partial suspended sentence in such a way that 6 months of imprisonment is served from the sentence to which the defendant M.J. was sentenced, and part of the 8-month prison sentence will not be executed if the defendant does not commit a new offense in the period of four years.

20 The defendants waived their right to appeal. Municipal Court in Velika Gorica, number: 24 K-65/2019 of 18 April 2019.

transport four citizens of the Republic of Turkey for a sum of at least 100.00 euros to each defendant. Namely, in the morning in the village near Dvor na Uni, the first defendant placed the citizens of the Republic of Turkey H.M., I.A., A.C. and I.H.S. in an Audi A3 vehicle, knowing that the named were illegally in the territory of the Republic of Croatia and drove towards Velika Gorica. While he was driving, a Mercedes type C220, driven by H. Š., was moving in front of his vehicle as the so-called "vehicle precursor" with the aim of spotting police patrols on the section of their movement and warning the first defendant, but they were stopped by police officers - the first defendant at 8.50 am in Buševac, and the second defendant at 9.55 am in Ogulinac. Therefore, out of *greed*, they enabled other persons to *move and stay illegally* in the Republic of Croatia, thus committing the criminal offense under Article 326 (1) of the CC.<sup>21</sup>

In the third case study, the defendants<sup>22</sup> V. G. and Z. B., the citizens of the Republic of Croatia, and S. B., a citizen of North Macedonia, are guilty that from an unspecified day during the month of July 2018 to July 25, 2018 in Jablanovac, they placed four Iranian citizens – L.R.S., N.K., H.M. and V.M. who did not have formal and legal conditions for residence in the territory of the Republic of Croatia in order to gain illegal *material benefits* for the amount of 400 euros. The defendants, knowing that the citizens of Iran are *staying illegally* in the territory of the Republic of Croatia and that they do not have the required visa, provided accommodation for the mentioned persons until July 25, 2018, when they were found at the address by police officers. Therefore, the first defendant, the second defendant and the third defendant out of *greed* enabled and helped other persons to move and stay in the Republic of Croatia, thus committing the criminal offense under

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21 The court sentenced the first defendant S. V. and the second defendant H. Š. pursuant to Article 139 (2) of the CC to imprisonment for a term of 1 year each, and on the basis of Article 56 of the CC, the court imposed a suspended sentence, so the imprisonment sentence imposed on the first defendant S.V. and the second defendant H. Š will not be executed if the defendants do not commit a new criminal offense within 3 years of the verdict becoming final, otherwise a suspended sentence will be revoked. Municipal Court in Velika Gorica, number: 24 K-65/2019 of 18 April 2019.

22 The defenses of all the defendants are in conflict with each other and oppose each other. The first defendant, V. G., stated in his statement that he did not consider himself guilty; he first states that he went to visit the building often and that he also went upstairs, only to later change his statement and state that he did not go that often nor did he go to the first floor. He further states that he often reported burglaries in that facility and suggested that the police request proof of this, but a document was submitted by the police that he had done so only twice, not during this or the previous year. The second defendant Z. B. states that he did not feel guilty and did not present his defense until the hearing, in which he partially harmonized his defense with the other defendants, and in a way that was partly similar to what others had stated at the hearing. The third defendant S.B. stated that he did not feel guilty, he also testified differently in his defenses given during the proceedings, thus denying that he went to the 1st floor where the migrants were caught, but did not explain how his old ID card was found there if he did not go to the 1st floor nor came to the Republic of Croatia since 2016. Municipal Court in Novi Zagreb, number: 57 K-470 / 18-25 from 21 January 2018.

Article 326 (1) of the CC. Therefore, the first defendant V. G. was sentenced to 1-year imprisonment, the second defendant Z. B. to 2 years' imprisonment and the third defendant S. B. to 2 years' imprisonment. Therefore, the first defendant V. G. was sentenced to 1-year imprisonment, the second defendant Z. B. to 2 years imprisonment and the third defendant S. B. to 2 years imprisonment.<sup>23</sup> In all the mentioned case studies, greed is present, i.e. the acquisition of material gain.

The first and second case studies show the recklessness of the perpetrators because they disobey the orders (Filipović, 2011: 67) of police officers, do not want *to stop at mandatory stop signs even when the police use light and sound signals and continue driving at high speed between other vehicles* (Filipović, 2011: 238), and they also use the "vehicle precursor" with the aim of spotting police patrols on the section of movement and avoiding them, which is certainly an indication that these are possible organized groups, but which has not been proven in these cases.

#### *4.2 Illegal entry, movement and stay - dismissal of criminal charges*

The case study in question was chosen because it concerns the rejection of a criminal charge in relation to the criminal offense under Article 326 of the CC. The criminal charge states that on May 24, 2019, at around 12:35 pm, a police patrol stopped a personal car driven by the suspect S. A. A., and there were three people in the front and back passenger seats. The report states that the interviews conducted established that the passengers in the vehicle did not hire S. A. A. for illegal transfer from the territory of the Republic of Croatia to the territory of the Republic of Slovenia, and were returned to the territory of Bosnia and Herzegovina on the same day from where, according to their own testimony, they came illegally to the territory of the Republic of Croatia. The defendant S.A.A. in his defense, which he presented during the interrogation before the on-duty Deputy State Attorney, denied that he had committed the criminal offense for which he is charged, stating that he visited Zagreb County because he moved to Croatia with his family seven months ago. At one point, while driving through a wooded area, three people unknown to him "jumped" onto the road and stood in front of the car so that he was forced to stop. It was about two men and one woman, who asked him where he was from because they obviously concluded from his physiognomy that he could be their compatriot or a person who understood Arabic. Then a

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23 Municipal Court in Novi Zagreb, number: 57 K-470 / 18-25 dated 21 January 2018

woman in tears begged him to take them to the car and drive them part of the way, showing her legs which were very swollen, so he finally agreed, only to be stopped by the police after 15 minutes of driving.

The criminal charge was rejected due to the fact that no objects or money were found in the suspect's possession that would indicate him as the perpetrator of the criminal offense for which he is charged and that in this case there is no personal and material evidence to challenge the suspect's defense since it is not possible to question the foreigners since they were returned to the territory of BiH.<sup>24</sup> It was certainly a wrong qualification of the act, that is, it was necessary to go with the qualification of the misdemeanor from Article 43 of the LF, and not with the criminal offense under Article 326 of the CC as was the case, and greed has not been proven.

### 4.3 *Illegal entry, movement and stay – Article 326 (2) of the CC*

The following case study was chosen because it is a criminal offense under Article 326 (2) of the CC committed jointly by the first defendant D. S. I. and the second defendant B. P. A.<sup>25</sup> (citizens of the Republic of Bulgaria) on October 15, 2019, in order to *gain material benefit* in an unspecified amount of money, by taking over a Ford Transit van with Italian registration plates from the Slunj area. The first defendant was driving the vehicle, while the second defendant was in the front passenger seat, and a total of 26 illegal migrants were transported by being placed in the trunk of a van registered as a truck without ventilation and windows, measuring 353x179x202 cm. They were moving in the direction of the Republic of Slovenia, in order to cross the state border, as a result of which they were found by police officers in Soboli at the Kikovica toll station. Therefore, out of *greed*, they enabled other persons to move and reside in the Republic of Croatia illegally, and when committing a criminal offense, they were treated in an inhuman and degrading manner, thus committing the criminal offense under Article 326 (1 and 2) of the CC and were sentenced to 2 years in prison each.<sup>26</sup>

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24 ODO No: K-DO-469/19 of 26 July, 2019

25 Defendants pleaded guilty, the first defendant alleges that he confessed to the crime in full as described in the indictment and that he is sorry that he committed it and that he did not know it was illegal. In Serbia, he agreed by phone with one person to transport migrants, which they then took to Slunj in order to transfer them across the Slovenian border. After picking up 26 migrants in Slunj, who were placed in the back of a Ford Transit van, they headed for Rijeka, where they were caught by police officers at toll booths. For transportation costs that they received 150 euros. The second defendant stated that he confessed to the criminal offense he was charged with, and that everything that was stated in the indictment was true. Municipal Court in Rijeka, number: K-171 / 2019-17 dated 11 April 2019.

26 Municipal Court in Rijeka, number: K-171 / 2019-17 dated 11 April 2019.

The case study shows that the perpetrators are willing to seriously endanger human lives in order to obtain undue property gain. For the said criminal offense, at least the prescribed minimum set of three years' imprisonment should certainly have been imposed.

#### 4.4. *Illegal entry, movement and stay within a criminal association*

The case study in question was chosen because it is a criminal offense under Article 326 of the CC, which was committed as part of a criminal organization under Article 329 of the CC. From a brief description of the events, it can be seen that the defendants S.P. and B.S. from July 29 to November 20, 2018, in order to gain material benefits, transported foreign citizens from BiH and Serbia to Croatia, and further to Slovenia and then to Italy for amounts of 200, 400 and 1000 euros per person.<sup>27</sup>

With the help of an unknown driver, they picked up foreign nationals at an agreed place and transported them to Zagreb or drove them as *a vehicle precursor in order to spot and avoid police patrols*, where V. Ž. (along with several other people) organized temporary *accommodation* for foreign nationals, from where they were picked up again by drivers and transported to the immediate vicinity of the border. In the described manner, from July 29 to November 20, 2018, 153 foreign nationals were "transferred" across the state border of BiH and Serbia to the Republic of Croatia and from the Republic of Croatia to Slovenia and further to Italy on 17 occasions. So, the first defendant<sup>28</sup> and the second defendant<sup>29</sup>, being aware of the goal of the criminal organization, and as part of such an organization,

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27 Zagreb County Court, 5 Kov-Us-41/19 dated 17 July 2019.

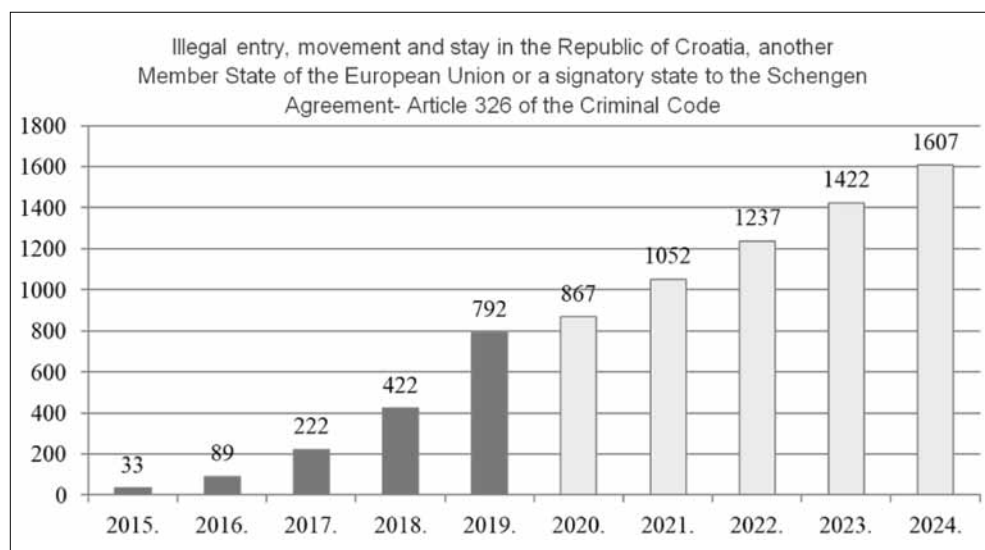
28 The first defendant S. P. was sentenced to imprisonment for a term of 2 (two) years and 11 (eleven) months, and pursuant to Article 57 (1), a partial suspended sentence shall be imposed on him, provided that he is sentenced to 1 (one) year and 3 (three) months of imprisonment, and he will not serve the part of the imprisonment for a term of 1 (one) year and 6 (six) months if he does not commit a new criminal offense within a period of 3 (three) years, provided that the probation period begins to run from the imprisonment sentence served. Zagreb County Court, 5 Kov-Us-41/19 dated 17 July 2019.

29 The second defendant B. S. was sentenced to imprisonment for a term of 2 (two) years and 8 (eight) months, and on the basis of Article 57 (1), a partial suspended sentence shall be imposed on him, provided that he is sentenced to 1 (one) year and 5 (five) of imprisonment for which he was sentenced, and he will not serve the part of the prison sentence for a term of 1 (one) year and 5 (five) months if he does not commit a new criminal offense within a period of 3 (three) years, provided that the probation period begins to run from the imprisonment sentence served. Zagreb County Court, 5 Kov-Us-41/19 dated 17 July 2019.

enabled and helped another person to illegally enter, leave, move and stay in the Republic of Croatia, another EU member state or a signatory state to the Schengen Agreement out of greed.<sup>30</sup>

## 5. Statistical analysis of the number of committed criminal offenses under Article 326 of the CC

Graph 1 shows the data from Article 326 of the CC for a period of five years in the Republic of Croatia. Comparing the above data, it can be seen that in the first observed year there were 33 criminal offenses, whereas at the end of the observed period in 2019, there were 608 criminal offenses, which is an increase of 1742.42% compared to the first period and indicates that the problem is very serious, which is emphasized by almost every international source on migration of the Council of Europe and the European Union. The trend of the criminal offense from Article 326 of the CC, when calculated using a linear trend, is certainly not completely reliable, but according to the calculation, it indicates a trend according to which in 2024, 1313 criminal offenses under Article 326 of the CC shall be recorded if there is no serious change in that regard.



**Graph 1.**  
 $y = 185,1x - 58,6$   
 $R^2 = 0,906$

30 Zagreb County Court, 5 Kov-Us-41/19 dated 17 July 2019.

## 6. The principle of *ne bis in idem* as regards the criminal offense under Article 326 of the CC and Article 43 of the LF

The descriptive analysis, as well as the analysis of the case study, shows that there are points of contact between the offenses under Article 43 of the LF and Article 326 of the CC. Prof. Martinović states that in some criminal offences and violations, even the most skillful formulation of legal descriptions cannot avoid "overlap", i.e. the apparent confluence between violations and criminal offenses (Martinović, 2019: 618).

Prof. Elizabeta Ivičević states that a few years after the verdict of the European Court of Human Rights in the case of *Maresti vs. Croatia*, it is possible to see to some extent its influence on the Croatian criminal or misdemeanor legal order. First of all, it should be concluded that certainly the most difficult task set by the above verdict before the Croatian legislator has not yet been fulfilled: a clear delineation of misdemeanors and criminal offenses at the legislative level. There are still many criminal offenses and misdemeanors overlapping, which overlap in their description, impeded punishment and protected legal good (Ivičević-Karas, Kos, 2012: 582).

The analysis of numerous cases shows that no charges are filed for both misdemeanors and criminal offenses, because otherwise the principle of *ne bis in idem* would be violated. According to this principle, the same person cannot be tried twice in the same case that has already been *adjudicated*, it has its roots in Roman law, although older written legal sources also contained indications of the rules on this prohibition (Ivičević-Karas, 2014: 271). Influenced by the jurisprudence of the European Court of Human Rights, the application of the *ne bis in idem* principle in the context of the (im)possibility of consecutive misdemeanor and criminal proceedings has been in the center of attention of the domestic professional public in recent years, especially after the *Maresti vs. Croatia verdict*<sup>31</sup> (Ivičević-Karas, 2014: 271). Professor Ivičević Karas further mentions a new institute that is not sufficiently known to the professional public, and it is a transnational principle of *ne bis in idem* proclaimed by the Convention implementing the Schengen Agreement – CISA.<sup>32</sup> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party, (Article 54 of the CISA). The provisions of the Convention Implementing

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31 ECHR, *Maresti vs. Croatia*, 55759/07, dated June 25, 2009

32 Convention implementing the Schengen Agreement, Official Journal L 239 of 22 September 2000



the Schengen Agreement have largely shaped the provisions on *ne bis in idem* in a number of instruments of European Union law, however, it should be noted that *ne bis in idem* from the Convention Implementing the Schengen Agreement, unlike the one from the Charter, applies in relations between Member States, but not within national jurisdictions (Ivičević-Karas, 2014: 283). In addition, Article 55 of the Convention Implementing the Schengen Agreement explicitly provides for the possibility of derogating from the *ne bis in idem* principle, regarding the application of the principle of territoriality and the safeguard principle that Contracting States may apply subject to prior explicit declaration (Ivičević-Karas, 2014: 283).

However, given that the idea of a complete demarcation of misdemeanors and criminal offenses is unfeasible, the solution *de lege ferenda* should be sought elsewhere (Martinović, 2019: 618). First of all, it would be desirable to legitimize in an appropriate way the fundamental ingredient of "close connection in nature and time", which is to include the sentence imposed in misdemeanor proceedings in the sentence imposed in criminal proceedings (Martinović, 2019: 618).

## 7. Conclusion

The specificity of these criminal offences and misdemeanors is that the victims are very interested in crossing the state border and arriving at the destination they planned and have no interest in revealing the perpetrator or the entire network through which they came from distant states. The criminal offense and the misdemeanor are similar and for the same offense a criminal charge cannot be filed with the competent State Attorney's Office and an indictment with the competent misdemeanor court, because otherwise the principle of *ne bis in idem* would be violated.

It is evident from the paper as a whole that the acts from Article 326 of the CC and Article 43 of the LF overlap in their description, except for the most important factor of greed, which is a crucial difference between a misdemeanor and a criminal offense of illegal entry, movement and residence in the Republic of Croatia, another EU Member State or a signatory state to the Schengen Agreement.

Case studies have pointed out a problem in proving greed for the crime under Article 326 of the CC, but it is evident that the penalties for the misdemeanor or of the prohibition of helping a third-country national under Article 43 of the LF are quite high and certainly have an effect on both special and general prevention, and it is evident that the courts are quite consistent in imposing fines of HRK 23,000.00 for each assisted third-country national. The proposal is that in Article 225 (3) of the LF first states a fine, and only then imprisonment in accordance with the principle of proportionality; and not that there is any doubt about the type of sanction.

Case studies have shown that the perpetrators of criminal offenses under Article 326 of the CC are well organized in groups and use sophisticated mobile devices, then "vehicle precursors" to avoid the police, and in case of detection do not shy away from attacking police officers in achieving their goals.

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