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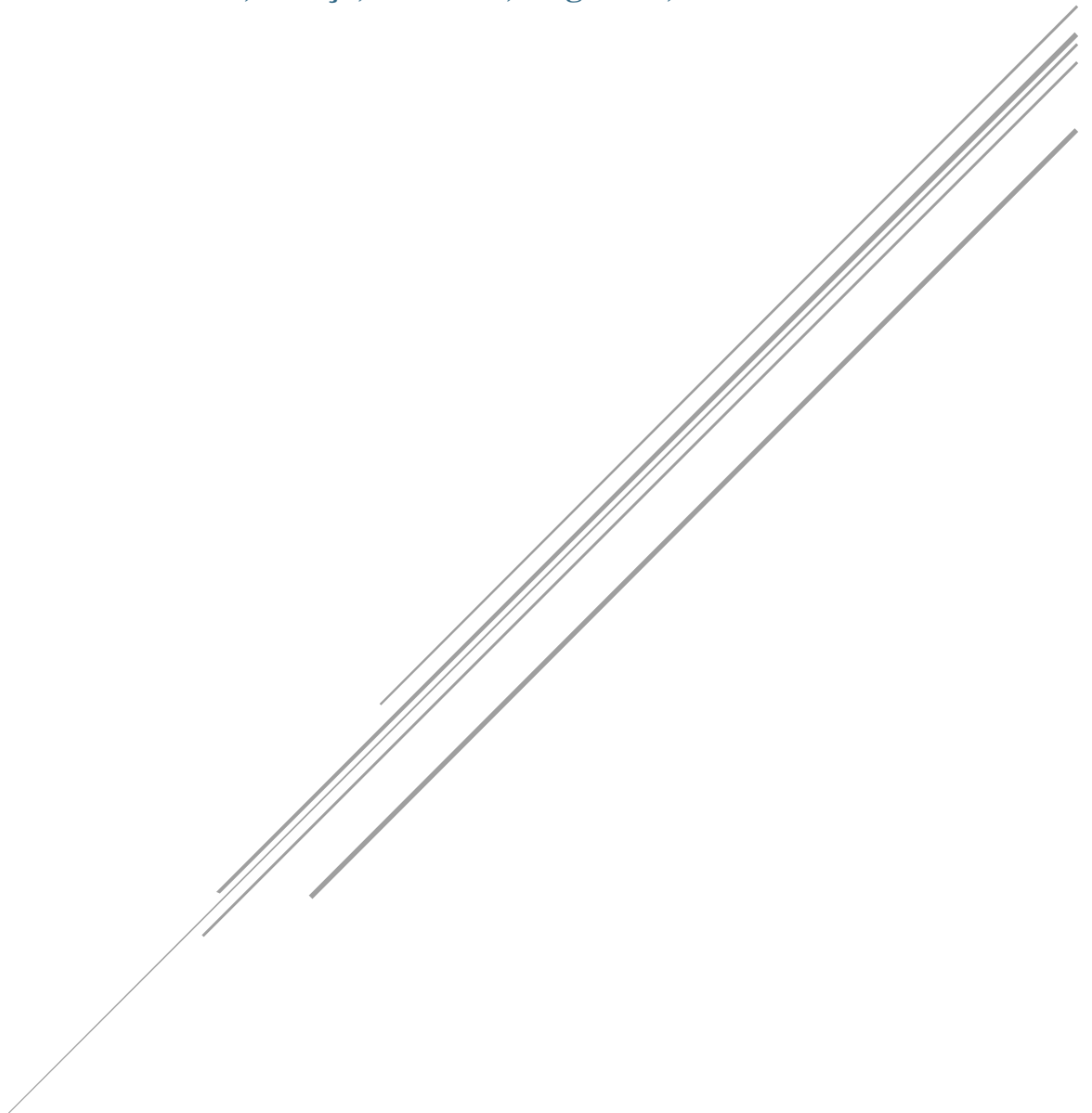


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STUDY REPORT

The phenomenon of illegal border crossing and assistance thereto, in the lens of the courts of Saranda, Korça, Shkodra, Pogradec, and Përmet Judicial Districts



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Albanian Helsinki Committee

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1. Introduction

The Albanian Helsinki Committee (AHC), in pursuit of its mission to promote the respect for freedoms and human rights while enhancing the rule of law, directs its efforts towards periodic monitoring of measures implemented by responsible state institutions in Albania with the aim to prevent and effectively combat the phenomenon of migrant smuggling, also referred to in Albanian legislation as providing assistance for illegal border crossing.

The AHC has previously released two comprehensive study reports that meticulously analyzed the situation regarding the respect for the rights and freedoms of immigrants, asylum seekers, and refugees in Albania during the period spanning 2012 to 2017¹; September 2018 – June 2019². Furthermore, the AHC has made contributions to Albania's participation in the regional migration analysis titled "Common Migration Policies in the Western Balkans," which was published in October 2022.³

The phenomenon of migrant smuggling poses a significant threat to the security of the borders of the Republic of Albania and presents a concrete danger to the respect of freedoms and human rights. Illegally crossing territorial, land, or air borders of a state is a relatively common occurrence faced by all regional countries, European states, and beyond, despite the efforts of governments to implement preventive and punitive criminal policies. A substantial number of individuals attempt to enter the territory of a country, disregarding the legal criteria set forth for entry⁴, thus violating the essence of legal relations defined as guardians of state territorial inviolability.

The dynamics of the spread of this phenomenon are not constant. Based on the Intersectoral Strategy of Integrated Border Management, it is evident that during the period 2014-2020, the Border and Migration Police recorded 231 cases of assistance for illegal crossing of the border and 3985 cases of illegal border crossing.⁵

In the first Screening report of the European Commission for Albania (July 24, 2023), known as the process of analytical control of the acquis or legislation of the European Union (EU)⁶, it is noted that Albania has approved the National Strategy for Integrated Border Management (2021-2027) and its action plan for 2021-2023. However, the Ministry of the Interior has updated its contingency plan for a significant number of possible arrivals of migrants and asylum seekers, though the plan has not yet been approved. The general staff of the Border and Migration Department in the Albanian State Police remains limited, despite recent augmentation. Permanent training structures should be established in accordance with the basic training standards for EU border guards. Crimes that generate large sums of money include drug trafficking, tax evasion, smuggling, and human trafficking. As of 2018, the Border and Migration Police have no

¹ Published in July 2018: <https://ahc.org.al/wp-content/uploads/2018/09/Migrantet-Shqip.pdf>

² Published in March 2020: https://ahc.org.al/wp-content/uploads/2020/03/Raport-monitorimi_Mbi-te-drejtat-dhe-lirite-e-emigranteve-azilkerkuesve-dhe-refugjateve-ne-Shqiperi_compressed.pdf

³ <https://ahc.org.al/wp-content/uploads/2020/11/Politikat-e-Perbashketa-te-Migracionit-ne-Ballkanin-Perendimor-Tetor-2020.pdf>

⁴ According to Law No. 71/2016 "For border control" (amended), the term "border control" encompasses activities conducted in accordance with and for the purpose of this law at the state border of the Republic of Albania. It specifically addresses the response to an intention to cross or the act of crossing the border, regardless of the circumstances, and involves border verification and border surveillance.

⁵ Cross-sectoral Integrated Border Management Strategy and Action Plan 2021–2027

⁶ [Microsoft Word - AL Cluster_1 Draft screening report_external version \(europa.eu\)](#)

investigative powers; therefore, no specific structure from the border police is engaged in the investigation of criminal offenses related to border crimes. This particularly hinders the detection of cases of smuggling and human trafficking.

According to the European Border and Coast Guard Agency (FRONTEX) report, there was a decline in the number of irregular immigrants during the period 2015-2017. However, from 2018 to 2020, there was a notable upward trend, positioning Albania as one of the primary transit routes for illegal immigration between countries like Greece and Turkey en route to European Union countries. The multitude of border crossings, challenging terrain, significant human traffic, and insufficiently trained border control personnel are among the factors contributing to Albania's vulnerability to illegal border crossings.⁷

Building upon the aforementioned data, the AHC has undertaken the initiative to closely monitor the judicial practices of the relevant bodies within the criminal justice system. This monitoring effort focuses specifically on the investigation and adjudication processes related to criminal offenses associated with illegal border crossings,⁸ and providing assistance for border crossing⁹, for a defined period of time between 2015-2021.

The objective of this Study Report is to analyze the rationale behind the requests made by the Prosecutor's Office for the trial of criminal offenses related to migrant smuggling. Additionally, it aims to scrutinize the decision-making processes of the Courts of Judicial Districts (with general jurisdiction) to identify the specific criteria and factors utilized. Moreover, the report seeks to highlight the challenges and obstacles encountered by stakeholders within the criminal justice system in effectively addressing this issue. In conclusion, the AHC provides concrete recommendations aimed at urging the relevant actors within the criminal justice system to adhere to and promote the implementation of the international legal framework. These recommendations draw upon the best practices and standards observed at both regional and European levels.

The object of this study report encompasses 106 rulings issued by the Courts of First Instance (with general jurisdiction) in Saranda, Korça, Shkodra, Pogradec, and Përmet. These rulings pertain to the adjudication of offenses outlined in Articles 297 and 298 of the Criminal Code.

The examination of these decisions operates on two levels. Firstly, it employs a statistical approach aimed at gathering measurable data concerning various elements influencing specific rulings. Secondly, it involves the collection and analysis of qualitative data and information. This includes recording and processing pertinent data on how the phenomenon of migrant smuggling was identified, addressed, and handled by the judicial bodies within the justice system.

In addition to presenting the current situation regarding the comprehension and accurate implementation of legislation concerning migrant smuggling, the study aims to address identified deficiencies by proposing efficient solutions based on the best international standards. These solutions are intended to improve judicial practices and ensure proper institutional handling of the migrant smuggling phenomenon.

⁷ https://ec.europa.eu/neighbourhood-enlargement/albania-report-2021_en

⁸ Article 297 Criminal Code of RoA

⁹ Article 297 Criminal Code of RoA

2. Work Methodology

This Study Report delves into the theoretical and practical dimensions of criminal offenses related to "Illegal crossing of the border" and "Assistance for illegal crossing of the border." It explores these concepts from a doctrinal perspective, considering both internal substantive and procedural criminal legislation. The document is crafted based on a methodology that incorporates insights from the judicial practices observed in Albania, which forms an integral part of the study. Furthermore, the report includes an analysis of key findings derived from this comprehensive approach. These findings are synthesized into conclusions, which subsequently inform concrete recommendations aimed at enhancing the current situation regarding these criminal offenses.

During June 2021, the AHC engaged in formal institutional correspondence with the Courts of First Instance in Pogradec, Përmet, Shkodra, Korça, and Saranda to facilitate the collection and analysis of data. The selection of judicial decisions scrutinized in this paper was meticulously conducted to ensure an accurate sampling, considering the territorial jurisdiction of these courts. The report's constituent sections offer an in-depth analysis of court decisions within their territorial boundaries, encompassing cities situated near border points such as Qafë-Thana, Tri Urat, Muriqani, Kapshtica, and Konispoli. In terms of temporal scope, this study examines rulings rendered by these courts over a 7-year period, spanning from 2015 to 2021.

A total of 106 decisions were scrutinized, comprising both first-instance rulings and decisions pertaining to the assessment of requests from the Prosecutor's Office regarding security measures, including 'prison arrest' and alternative security measures, for suspected perpetrators accused of offenses outlined in Articles 297 and 298 of the Criminal Code of the Republic of Albania..

The study is structured into three main sections. **The first section** delves into the legal provisions within our legislation concerning the commission of criminal offenses associated with illegal border crossing, thoroughly analyzing all pertinent elements and potential connections with other criminal offenses. **The second section** centers on examining the approaches adopted by the Prosecutor's Offices and Courts, whose decisions are under scrutiny, concerning these specific cases. Finally, **the third section** encapsulates the most significant findings of this study report alongside recommendations directed towards the courts within the judicial districts falling under ordinary jurisdiction.

Recognizing the paramount importance of ensuring unrestricted and objective access to the data sourced from the five Courts of Judicial Districts, we take this opportunity to express our sincere gratitude to the Presidents and staff of the judicial administration of these courts. Their invaluable cooperation in providing access to the decision-making processes that constitute the focal point of this AHC study report is deeply appreciated.

Executive Overview

or the implementation of this study, an official analysis was conducted by the AHC¹⁰ on 106 court decisions issued by the first instance courts of Pogradec, Përmet, Shkodra, Korça, and Saranda. These courts were selected based on their territorial jurisdiction, aiming to encompass the migration transit routes within Albania. Additionally, the AHC considered the distribution of border crossing points and the dynamics of migrant routes, particularly focusing on the illegal use of the green border, en route to European destinations, in the selection of the aforementioned decisions.

The analyzed decisions span a seven-year period from 2015 to 2021 and pertain to two categories of criminal offenses: "Illegal border crossing" as defined by Article 297 of the Criminal Code and "Assistance for illegal border crossing" as outlined in Article 298 of the Criminal Code.

In the majority of the decisions, the involved experts did not establish the concurrence of these criminal offenses. However, in five cases, the defendants were additionally charged with other criminal offenses such as "Forgery of documents" under Article 186 of the Criminal Code, "Driving vehicles in an irregular manner" under Article 291 of the Criminal Code, "Disobedience to the order of the public order police officer" under Article 242 of the Criminal Code, or "Forgery of identity cards, passports, or visas" under Article 189 of the Criminal Code.

Based on the rulings scrutinized, foreign migrants interrogated during the investigative process predominantly claimed to originate from Syria, with Moroccan, Afghan, Palestinian, and Iraqi citizens following suit. The migrants cited the ongoing war situation in their home countries as the primary reason for their departure. They typically travel in organized groups comprising two or more families or in groups of individuals familiar to them. Commonly, these groups traverse the travel route together, driven by a shared goal of leaving their home countries.

Regarding the route taken until their arrival in Albanian territory, a pattern emerges in the crossing routes utilized by migrants. Initially, they travel to Turkey and then cross the border into Greece before heading southeast towards Albania as the subsequent crossing point. These nations primarily serve as transit countries, as migrants typically express no intention to remain in these transit countries but instead aim to reach European ones. However, there have been instances where migrants' stays in various countries have been prolonged, deviating from a simple and temporary transit route.

Their interaction with smugglers facilitating their crossing into Albanian territory takes on three forms: 1. Meeting with Smugglers at Border Crossing Points: Migrants often encounter smugglers near border crossing points. These smugglers help integrate the refugees into larger groups with a shared goal of reaching the same destination. 2. Identification of human smugglers by migrants themselves, or them being assistance from individuals in neighboring countries who have previously used the same illegal routes to cross into other states. 3. Communication through Social Networks and Apps. These smugglers assist them by connecting them with certain individuals or providing assistance, such as arranging taxi transportation.

¹⁰ Letter No. 442, dated 25.06.2021 "Request for information" - Letter No. 463, dated 14.07.2021 "Reply"
Letter No. 441, dated 25.06.2021 "Request for information" - Letter No. 461, dated 13.07.2021 "Reply"
Letter No. 438, dated 25.06.2021 "Request for information" - Letter No. 464, dated 14.07.2021 "Reply"

From the analysis of court rulings, it is evident that payments to smugglers range from 100 to 500 euros, contingent upon the level of assistance and the complexity of the route they facilitate within the territory. Concurrently, foreign nationals transiting through Albania, encounter significant obstacles in accessing intercity public transportation services. This hindrance stems from transport service providers' reluctance to accommodate them, citing apprehensions arising from past encounters with law enforcement agencies. Indeed, some providers have faced criminal charges under suspicion of aiding illegal border crossings". When agreements between migrants and transport facilitators are forged to ensure the migrants' safe passage to their final destination, they are often escorted and supported throughout their journey by individuals with whom they maintain continuous communication until they reach their destination. While these endeavors often involve well-organized criminal networks, they have not been thoroughly investigated by law enforcement bodies such as the Prosecution of Serious Crimes or SPAK (following its establishment), nor have they been adjudicated by the Special Court of First Instance for Corruption and Organized Crime. In these instances, the process of migrant smuggling exhibits a marked level of coordination, with reports indicating payments of up to 9,000 euros per person to facilitate passage to their intended final destination.¹¹

From a statistical perspective, an analysis of the examined judicial decisions reveals a predominant focus on the prosecution and adjudication of the criminal offense of "Illegal Crossing of the Border" as outlined in Article 297 of the Criminal Code. This offense was the subject of 86 decisions in total, with approximately 88% of these rulings originating from the Court of First Instance, primarily from the Saranda jurisdiction. Despite the Court of the Saranda Judicial District accounting for the highest number of rulings (approximately 72% of the total examined court decisions), it exhibits the lowest rate of decisions concerning cases related to the criminal offense of assisting illegal border crossings, commonly known as migrant smuggling, in comparison to other courts. The statistical analysis conducted by the AHC, prompts reasonable doubts regarding the effectiveness of the prosecution body's efforts in investigating cases falling under Article 298 of the Criminal Code.

Regarding the objective aspect of the criminal offense "Aiding Illegal Crossing of Borders" stipulated in Article 298 of the Criminal Code, the most prevalent form of its commission involves the transportation of individuals. Analysis of court rulings reveals that in only one instance did perpetrators initially provide shelter to refugees before transporting them, indicating a more intricate and sophisticated modus operandi compared to other cases scrutinized in these decisions.

In the overwhelming majority of scrutinized cases, the commission of the criminal offense did not result in grave consequences such as injuries, loss of life, or other serious outcomes. Only one ruling documented the occurrence of severe consequences, notably the loss of life involving five victims, including one woman and an infant.

Among the examined rulings, the Courts of First Instance rendered a total of 95 decisions concerning the culpability and sentencing of defendants. Notably, only one decision resulted in the court declaring the defendant's innocence. Additionally, in 10 cases, the Court entertained the Prosecutor's motion for the determination of security measures against the defendants.

¹¹ Korça Judicial District Court. Decision no. 41-2021-430,1284 dated 08.04.2021

Of the total cases, penalties were imposed in 77 instances in the form of fines, while imprisonment constituted the primary punishment in 18 cases. However, in three of these instances, the Court opted to suspend the prison sentences and place the convicts on probation, taking into consideration the specific factual circumstances.

95% of cases involve male suspects as alleged perpetrators of criminal offenses. However, there are also instances where girls and women are implicated in the criminal activity under consideration.

In approximately 63% of cases (12 out of 19 analyzed decisions) involving the criminal offense of "Aiding for illegal border crossing," accomplices are alleged to have been involved. However, investigations have failed to uncover structured criminal activity related to the smuggling of migrants, which would typically fall under the jurisdiction of specialized justice bodies such as the prosecutor's offices and courts specialized in serious crimes (e.g., SPAK and the Special Court against Corruption and Organized Crime), the latter establishment within the period under study. Data from the region, the EU, and incidents of Albanian migrant smuggling into the United Kingdom reveal that collusion for this offense extends beyond national borders, forming a complex network facilitating illegal immigration across multiple states. Despite, the analysis of cases suggests that such collusion is not thoroughly investigated as a sophisticated criminal activity by specialized justice bodies. Instead, it is often treated as a simplistic form of crime by courts with general jurisdiction. This approach merely scratches the surface of the issue, resulting in softened convictions for defendants found guilty.

The courts, in addressing the analyzed cases, have employed both conventional trials and accelerated proceedings. Approximately 24.5% of cases (or 26 cases) were resolved through accelerated judgment. The predominant form of punishment is fines, accounting for about 73% of cases, followed by prison sentences in around 17% of cases. Alternative prison sentences are considered in only 3% of cases. Notably, in 3 out of 18 cases where prison sentences were imposed, alternative forms of imprisonment were applied, such as:

- obligation to work in the public interest¹²
- conditional probation¹³

Through statistical and qualitative analysis of the sample judicial decisions in this study, it's revealed that among the total number of individuals tried, 75 are categorized as "not previously convicted," while 31 are classified as "previously convicted." These findings indicate that approximately 29% of the total number of individuals committing these criminal offenses for the first time have a prior record as repeat offenders or recidivists.

In the analysis of 106 decisions conducted within the framework of this study, it is found that the fine penalty was imposed in 77 cases. Among these, 18 individuals were defendants during the judicial review process, while 59 were convicted. Notably, the fine penalty was exclusively applied to defendants accused of the criminal offense "Illegal crossing of the state border," as stipulated in Article 297 of the Criminal Code.

¹² Decision of the Court of Përmet, No. 22-2018-62, dated 22.02.2018

¹³ Decisions of the Court of Pogradec, No. (449)----- 67, dated 29.04.2021 and No. (650)---121, dated 09.06.2021

The court's fines ranged from a minimum of 40,000 ALL to a maximum of 150,000 ALL. A fine close to the minimum limit, specifically 60,000 ALL, was applied in 37 cases, making it the most frequently imposed fine by the court.

Foreign nationals who illegally cross the border, constituting 95% of cases, predominantly come from countries such as Syria, Afghanistan, and Palestine. These individuals often flee their home countries due to ongoing wars and civil conflicts, which have disrupted and destabilized democratic structures. Analysis of court rulings indicates that these third-country nationals frequently participate in the criminal court process as witnesses. In the majority of cases, criminal proceedings are conducted against defendants holding Albanian citizenship, accused of facilitating illegal border crossings. Only one instance has seen the court impose a prison sentence against a foreign citizen under this legal framework. In another scenario involving a foreign citizen seeking asylum, the court has invoked the security measure of imprisonment pending trial, on charges of "Aiding the illegal crossing of borders" in collusion, in accordance with Article 298/3 of the Criminal Code.

Through individual and comparative analysis of the reasoning provided in the court decisions examined in this study, a recurring issue emerges: a lack of complete, clear, and logical reasoning. Most decisions are marked by formal and standardized justifications that fail to address the specific issues at hand. Instead, the obvious change is just the generalities of the litigants and time of sentence, resulting in a uniform and generic language across decisions. In its jurisprudence, the Constitutional Court has underscored the importance of justifying judicial, criminal, or civil decisions as a fundamental aspect of the legal process. Reasoning within decisions is crucial for ensuring fairness. These judicial rulings, issued by courts of all tiers upon conclusion of a trial, represent the primary procedural act of the entire judicial process. They serve to summarize and conclusively define the court's stance on the case at hand.¹⁴ In any judicial decision, adherence to principles of logic, formal regularity, and clarity of content is imperative. The decision should be viewed as a cohesive whole, with its component parts intricately interconnected and serving each other's purpose. The arguments presented in the reasoning section must be well-founded and logically coherent, adhering to principles of fair reasoning. Conclusions drawn in the reasoning section should not only be rooted in legal statutes but also reflect principles and rules characteristic of sound and logical thinking.¹⁵

In cases involving the criminal offense of "Illegal crossing of the border" as outlined in Article 297 of the Criminal Code, analysis of 106 decisions reveals that 27 individuals were tried as defendants. Among them, approximately 66% (or 18 defendants) of those convicted, the court predominantly imposed fines, while alternative sentences of imprisonment assigned in 2 cases. In 4 other instances, the court opted for prison sentences. Additionally, one case involved a request for the court to appoint a security measure without a specific sentencing decision.

¹⁴ See decisions no. 8, dated 16.03.2011; no. 23, dated 04.11.2008; no. 11, dated 02.04.2008; no. 7, dated 09.03.2009 of the Constitutional Court

¹⁵ See decisions no. 3, dated 19.02.2013; no. 20, dated 13.04.2012; No. 38, dated 30.12.2010 of the Constitutional Court

Though occurring infrequently, the maximum prison sentence handed down was 2 years (following summary judgment), while the minimum was 10 days of imprisonment.

In cases involving the criminal offense stipulated in Article 298 of the Criminal Code, "Assistance for illegal border crossing," it is observed that out of 30 defendants, the Court found 57% of them guilty, resulting in prison sentences for 17 defendants. The maximum term of imprisonment imposed under paragraph 4 of this provision is 10 years and 6 months. Remarkably, none of the defendants had the imposition of a fine requested by the Prosecutor's Office, leading the Court to abstain from making a decision regarding fines in these cases.

SECTION I

“THE DYNAMICS OF TWO DIFFERENT CRIMINAL PHENOMENA” 'Illegal Crossing of the State Border' and 'Aiding the Illegal Border crossing'

1.1 Elements of criminal offenses committed by the defendants

The decisions analyzed and discussed in this paper were drawn from five courts of first instance, namely the courts of Pogradec, Përmet, Shkodra, Korça, and Saranda. These courts have handled cases where defendants clandestinely crossed the state border, bypassing border control points, and failing to present required documentation such as passports or residence permits. Additionally, they have dealt with cases where individuals were apprehended in the act of aiding others to cross the border illegally. Upon examination of the circumstances surrounding these cases, the courts concluded that the individuals involved had fulfilled all the criteria necessary to be classified under the criminal offenses of "Illegal Crossing of the Border" and "Assistance for Illegal Border Crossing," as outlined in Articles 297 and 298 of the Criminal Code of the Republic of Albania.

The quantitative analysis of 106 decisions from five courts reveals that these judgments were rendered over a seven-year period spanning from 2015 to 2021. These decisions were categorized according to the specific criminal offenses committed as follows::

- The Judicial District Court of Pogradec issued a total of 11 decisions, with 4 categorized under Article 297 of the Criminal Code and 7 under Article 298.
- The Judicial District Court of Përmet issued a total of 6 decisions, with 5 categorized under Article 297 of the Criminal Code and 1 under Article 298.
- The Judicial District Court of Shkodër issued a total of 6 decisions, with 3 falling under Article 297 of the Criminal Code and 2 under Article 298. In 1 case, the commission of the criminal offense was not proven, resulting in the court finding the defendant not guilty.
- The Judicial District Court of Korça issued a total of 12 decisions, with 4 classified under Article 297 of the Criminal Code and 8 under Article 298.
- The Judicial District Court of Saranda issued a total of 71 decisions, with 70 classified under Article 297 of the Criminal Code and 1 under Article 298.

Article (Criminal Code)	Pogradec	Përmet	Shkodra	Korça	Saranda
297	4	5	3	4	70
298	7	1	2	8	1
Not proven			1 (Acquittal)		

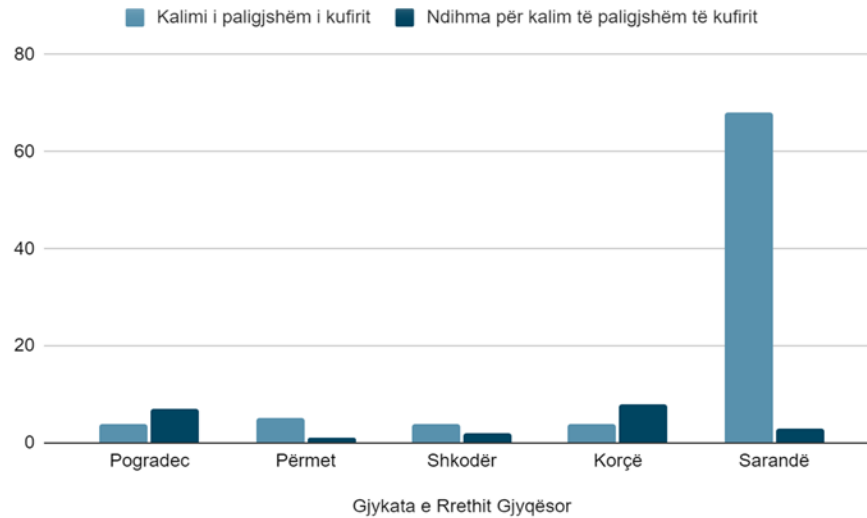


Chart 1.

Based on the statistical analysis of the studied decision-making, it turns out that the largest number of them corresponds to the criminal offense "Illegal crossing of the border" provided by article 297 of the Criminal Code, with 86 decisions in total. Out of their total, it is the Court of the Judicial District of Saranda, which accounts for the vast majority of the ruling on this criminal offense, specifically 70 rulings.

Most cases of illegal border crossing refer to the situation of Albanian citizens who immigrate to the Greece due to economic reasons.

As for the decisions given for the criminal offense "Aiding for illegal crossing of the border", provided by article 298 of the Criminal Code, the Courts have disposed through 19 decisions, from which it follows that the largest number of them were given by the Court of Korçë Judicial District in 8 cases, followed by that of Pogradec with 7 decisions. The increased dynamics of committing this criminal offense only in these two counties mainly refers to the situation created by the migratory flows of refugees coming from countries involved in armed conflicts, such as Syria, Afghanistan and Palestine. These citizens arrive in the southeast of our country, after crossing the Turkish and Greek borders. Although with the highest number of decisions (70% of the total studied decisions), the Saranda Judicial District Court reflects the lowest margin of decisions for the criminal offense of assisting the illegal crossing of the border, known as migrant smuggling, in relation to other courts that have a number of decisions several times lower than that. This statistical data raises reasonable doubts about the activity of the prosecution in the effective investigation of Article 298 of the Criminal Code.

1.1.1 Common elements and differences between these two types of criminal offenses

The Criminal Code of the Republic of Albania incriminates within its chapter VIII, entitled "Crimes Against the State Authority", section IV "Criminal Offenses Against State Secrets and Borders", the criminal offense "Illegal Crossing of the Border".

According to Article 297 of the Criminal Code: *"Illegal crossing of state borders constitutes a criminal misdemeanor and is punishable by a fine or imprisonment of up to two years."*

The subsequent provision delineates another offense akin to it in certain substantive elements, termed "assistance for illegal border crossing." While this offense is not explicitly labeled as smuggling of migrants, a phenomenon recognized worldwide under this term, the provision within the Albanian Criminal Code encompasses elements that align it with such activity. Specifically, Article 298 of the Criminal Code stipulates:

“Housing, accompanying, making available or using means of navigation, flight or other means of transport or any other assistance, with the purpose of illegally crossing the border of the Republic of Albania or for the illegal entry of a person into a country while not being its citizen or while not possessing a residence permit in that state, shall be punished by imprisonment from one to four years.”

“When the aid is given for the purpose of profit, it is punishable by imprisonment from three to seven years.”

“When this offense is committed in collaboration or more than once, or has brought serious consequences, it is punishable by imprisonment from five to ten years.”

“When the offense resulted in the death of the victim, it is punishable by imprisonment of not less than fifteen years or life imprisonment.”

“When the criminal offense is committed through the use of state function or public service, the prison sentence is increased by ¼ of the sentence given.”

Referring to the aforementioned provisions, both criminal offenses exhibit distinct characteristics beyond their classification as misdemeanors and crimes. Thus, it is prudent to outline the specifics of these two offenses in a synthesized manner.

The fact that both elements of these criminal offenses are categorized within a single section of material criminal legislation indicates that the violated object remains consistent. This object pertains to the adherence to rules ensuring the territorial inviolability of the state. Additionally, a shared characteristic involves the perpetrator, whose designation is not contingent upon any specific function, duty, or nationality. Potential perpetrators of these offenses can include Albanian citizens, foreigners, and stateless individuals, provided they meet the criteria for criminal liability. An exception to this rule is found in the criminal offense of "assistance for illegal border crossing," where the last paragraph designates its consummation by a special subject, defined as one who "abuses the state function or public service."

The essential distinction regarding the perpetrator of these offenses lies in their roles: In the case of illegal border crossing, the perpetrator is the individual who unlawfully crosses the border. Conversely, in the case of assisting illegal border crossing, the perpetrator is the individual who aids another person in crossing the border illegally.

In terms of culpability, subjectively speaking, both instances involve a direct and deliberate act, without necessitating the establishment of any particular motive on the part of the perpetrator at the time of committing the offense. Specifically, concerning the perpetration of the criminal offense of "assistance for illegal crossing of borders" as outlined in Article 298 of the Criminal Code, the perpetrator's specific intent also emerges as a distinct qualifying element, particularly in circumstances delineated in the second paragraph of the provision, where it pertains to deriving material benefit.

An essential distinguishing factor between these two figures of criminal offenses lies in their objective aspects – that is, the manner in which the actions are carried out or the sequence of acts undertaken by the perpetrator, which are crucial for qualification under each respective offense. In the context of Article 297 of the Criminal Code, which pertains to "Illegal crossing of the border," the offense involves entering or exiting a country's territory not through designated customs checkpoints, but rather through unauthorized means. On the other hand, Article 298 of the Criminal Code addresses "Assistance for illegal border crossing," which encompasses a range of actions such as providing accommodation, escorting, transporting, and offering other forms of aid to individuals crossing the border into another country without the requisite residence permit. Upon analyzing the objective elements of these two elements of offenses, it becomes apparent that in the case of Article 298, "Assistance for illegal crossing of the border," the collective elements of the offense's objective side entail a higher degree of preparedness, necessitate greater involvement from the perpetrators, and tend to involve more sophisticated activities compared to the *modus operandi* employed in illegal border crossing.

Another significant distinction between these two figures of criminal offenses lies in determining when the offense is considered to have been committed. For the offense of border crossing to be deemed committed, it is necessary for the act to be fully executed, meaning the individual has effectively entered or exited Albanian territory. If the act remains merely attempted, it will be classified under Article 297 in conjunction with Article 22 of the Criminal Code¹⁶. In the context of the offense of assisting illegal border crossing, the crime will be deemed to have been committed when providing shelter, accompanying, facilitating access, or utilizing transportation means to aid in illegal crossing, irrespective of any additional consequences, that is, regardless of whether the individual succeeds in entering/crossing the territory of the other destination country.

Article 298 of the Criminal Code, "Assistance for illegal border crossing," includes qualified circumstances such as "collaboration occurring repeatedly or resulting in serious consequences". Additionally, it encompasses instances "when the offense leads to the death of the victim". These specific circumstances are not applicable to the criminal offense outlined in Article 297 of the Criminal Code, as the perpetrator in that case is the individual illegally crossing the border themselves.

1.1.2 Correlation to other criminal offences

Crossing the border illegally to facilitate migrant smuggling often necessitates a conducive environment, which includes establishing an appropriate criminal infrastructure through the provision of tools or the implementation of mechanisms that make the operation feasible. In this regard, sporadic instances, perpetrators have engaged in additional criminal offenses alongside those outlined in Articles 297 and 298 of the Criminal Code, as a means to facilitate the achievement of their primary goal—migrant smuggling.

The illegal crossing of borders can also transpire when individuals gain irregular entry into Albanian territory through the use of forged visas, passports, or residence permits. Article 189 of the Criminal Code stipulates that: "*Forgery or the utilization of counterfeit identity cards, passports, or visas is subject to imprisonment ranging from six months to four years.*" In this scenario, we encounter competing offenses outlined in Articles 189 and 297 of the Criminal Code.

¹⁶ "Criminal Law - Special Part" authored by Prof. Dr. Ismet Elezi.

The individual is held accountable for two criminal offenses: illegal crossing and document falsification.

This circumstance was further affirmed in a ruling by the Court of First Instance of Saranda, wherein the merits details of the case revealed that the defendant, a Turkish citizen, had unlawfully crossed the border by hiding himself in a closet concealed with blankets, located in the lower room of a yacht named "Rest" docked at the port of Saranda. Upon discovery by the Albanian police during an inspection, the defendant presented a form of identification along with a forged driver's license.¹⁷ In its verdict, the court found the Turkish citizen guilty of committing two criminal offenses under Articles 297 and 189/1 of the Criminal Code.

In a separate case, the Court of First Instance of Pogradec convicted the defendant, not only for the crime of "Aiding illegal border crossing" but also for the offenses of "Forgery of documents" and "Irregular driving," as outlined in Articles 186/1¹⁸ and 291¹⁹ of the Criminal Code. From the verified factual circumstances presented by the Court of Pogradec, it is evident that the defendant assisted six foreign Syrian citizens in illegally crossing the border. This assistance involved collaborating with unidentified individuals and transporting them in a private vehicle. Moreover, it was discovered that the defendant lacked a valid driver's license, and the license seized was entirely falsified. During interrogation, the defendant claimed to have no knowledge (of the falsification).²⁰

The third case, wherein the Court of First Instance Korça identified elements of multiple criminal offenses, pertains an incident wherein, based on the reasoning section of the verdict, the perpetrator, upon being signaled by a police patrol to stop, as he was transporting four Palestinians in his vehicle in exchange for payment, failed to comply and swiftly fled in another direction (toward Lozhan).²¹ Based on his actions, the court convicted him under Article 298 of the Criminal Code and Article 242 of the Criminal Code.²²

1.1.3 The Objective Aspect

The objective aspect, as an essential component of the crime, encompasses all illicit actions or omissions undertaken by the perpetrator to accomplish the criminal objective. This includes all circumstances surrounding the commission of the offense, such as the location or the tools utilized.

Illegal border crossing

In analyzing the court decisions pertaining to the commission of the criminal offense "Illegal crossing of the border," it becomes apparent that the methods and means employed by the perpetrators are largely consistent. The prevalent cases involve individuals departing from their cities or villages of residence toward border crossing points, often in random vehicles, and traverse

¹⁷ Decision 23-2019-1762, dated 09.10.2019 Saranda Judicial District Court.

¹⁸ Article 186/1 *Forgery of Documents: Forgery or the use of forged documents is punishable by imprisonment for up to three years.*

¹⁹ Article 291 *Driving vehicles or other motorized vehicles while intoxicated, under the influence of narcotic substances, or without the relevant attestation of ability is punishable by imprisonment ranging from ten days to three years. The court reserves the right to commute the prison sentence to the payment of a fine to the state..*

²⁰ Decision 43-2021-499, dated 07.15.2021 Court of the Pogradec Judicial District.

²¹ Decision 41-2021-945, dated 12.03.2021 Court of the Korça Judicial District

²² Disobeying the lawful orders of a public order police officer constitutes a criminal misdemeanor and is punishable by a fine or imprisonment of up to three months.

into the neighboring country on foot, bypassing formal border checkpoints via what is commonly referred to as the "green border." "They typically cross alone, primarily because it often transpires that they have made the journey on previous occasions. However, there are instances when they travel in groups. They endure hours of travel until they reach the nearest village or town in the neighboring country, where they begin their search for work or board buses to other cities. The most common scenarios involve being apprehended by the neighboring state's police without proper documentation while traveling or working. There are also occurrences of being caught upon return"²³ in Albania, they have also been unable to secure stable employment.

It is worth noting that the ultimate destination isn't always a neighboring country. In certain instances, upon reaching Greece (an EU member state), individuals depart using various means such as ferries, planes, or trucks to reach other countries like Belgium, England, Spain, and Italy. They may cross borders of other nations using forged documents, which they obtain by paying people they do not know.²⁴ As previously mentioned, typically, the primary crossing route is via land borders, through which individuals enter the neighboring country. In only one instance, individuals used the maritime border to reach Greece, employing inflatable rafts, and were intercepted by the police as the sea currents hindered their progress.²⁵

From a general examination of the circumstances surrounding the commission of this crime, it can be deduced that:

- **Firstly**, In all instances, the defendants were found to be lacking documents or residence permits. Many claimed to have lost them, while others' were not accepted at customs checkpoints.)
- **Secondly**, In the majority of cases, the last documented legal exit from Albanian territory by the defendant occurred at significantly distant periods, stretching up to 2 years ago. Moreover, discrepancies arise in cases where individuals had exits from a country, yet subsequent entries do not align. For instance, in one case, an individual was found to have legally left Albania only once, while subsequently returned twice from the Greek authorities²⁶. Such inconsistencies between entries and exits highlight the illicit border crossings of these individuals between Albania and Greece.
- **Thirdly**, It appears that in the majority of cases, the explanations provided to the court by citizens who illegally cross the border are predominantly linked to economic motives, particularly the necessity for employment opportunities in the neighboring country.
- **Fourthly**, In the vast majority of cases, individuals who illegally cross the border are repeat offenders, having previously subjected to administrative measures by Albanian authorities or expulsion or deportation orders from other countries²⁷.

✚ “Assistance for illegal border crossing”

Regarding the criminal offense "Aiding the illegal crossing of the border" as stipulated by Article 298 of the Criminal Code, analysis of relevant judicial decisions indicates that it is predominantly manifested through two forms: "transportation" and "housing". The provision of transportation by

²³ Note, these cases are recorded only in the decisions of the Court of Saranda.

²⁴ Korça Judicial District Court, Decision 41-2021-1294, dated 09.04.2021

²⁵ Saranda Judicial District Court, Decision 23-2016-1094, dated 31.05.2016

²⁶ Saranda Judicial District Court, Decision 23-2016-1332, dated 01.07.2016

²⁷ Saranda Judicial District Court, Decision 23-2020-878, dated 17.05.2020.

perpetrators of this offense to migrants reveals certain specificities. Mainly, assistance was provided through the provision of transportation means, particularly vehicles. It appears that these vehicles are typically rented on a daily or weekly basis, while in other instances, they are owned by the perpetrators or their relatives. Examining the circumstances surrounding how perpetrators organize the provision of assistance for illegal border crossing reveals two primary reasons for renting vehicles. Firstly, it relates to the economic constraints of the perpetrators, as they may lack the financial means to purchase a vehicle outright, to finance with large sums of money their criminal activity. Secondly, renting vehicles aligns with their criminal strategy, allowing them to evade detection by police patrols. For instance, in one case, an individual had rented three cars in his own name, and with the assistance of two other individuals, intended to transport certain individuals expected to arrive at the southeastern Albanian border.²⁸

The contact between perpetrators of the criminal offense and refugees appears to occur through three primary methods.:

- Communication through social networks such as Facebook and WhatsApp.
- They encounter them randomly on specific road segments.
- In cases of collusion, they receive information from other group members regarding the movement of refugees and migrants.
- Find other persons contacts from refugees/migrants who have previously helped them cross the border illegally.

The analysis of court decisions shows that the perpetrators first housed and then transported the irregular migrants to Tirana.

In addition to the analyzed rulings sample, particular attention is drawn to the merits of the case and the rationale provided by the Court of Korça in decision 41-2020-732(56) dated 24.02.2020. According to the factual details outlined in this decision, the three defendants, who were members of the same family, aided foreign refugees by providing them with shelter and transportation in exchange for payment. They operated a hotel where they accommodated foreign nationals for a nightly fee of 10 euros. The defendants' wife took care of the refugees and registered contacts of other refugees who were intending to cross the border. Meanwhile, the husband and son took charge of transportation, with the son using his car to facilitate transportation from the hotel to the bus station. As local residents, they opted for secondary roads to evade detection by the police. For a fee of 100 euros, refugees were transported to the capital. The family head, employed as a driver by a private entity, incorporated transporting irregular refugees into his schedule of transporting the staff of another Albanian company commuting between Kamza and Korça daily. The judicial investigation uncovered that the defendants had engaged in this illicit activity for an extended period, aiding foreign nationals in irregularly crossing the Albanian border en route to EU countries.

From the aggregate of decisions rendered for the crime of aiding illegal border crossing, it's evident that only in one instance did Albanian citizens provide assistance to other Albanian citizens. This indicates that the primary focus of individuals committing this criminal offense, with the intent of aiding illegal border crossing, is predominantly foreign citizens.

²⁸ Korça Judicial District Court, Decision 41-2021-1284 (163), dated 08.04.2021

1.1.4 The Subjective Aspect

In the commission of the criminal offense, the perpetrator's mindset towards its execution is of significant importance. Regarding culpability, it is observed that in all cases, the perpetrators acted with direct intent. However, if the crossing of state borders occurs due to negligence, such as confusion on the road, the individual is not criminally liable.²⁹ Indeed, this category of criminal offenses requires the element of intent to be present in order to be classified as such. In the case outlined in the case study of the court decision provided by the Court of the Judicial District of Saranda, it was established that the offense was committed with direct intent. Perpetrators aimed at speculative profit, exploiting the needs of citizens who sought to cross the border, charging them fees ranging from 600 to 1500 EUR. Tragically, this resulted in the loss of several lives.

Certainly, there are cases where serious consequences arise from the criminal offense, constituting a distinct element of the offense under qualifying circumstances. In such instances, the subjective aspect can involve negligence or excessive self-confidence, such as when irregular migrants are transported under challenging conditions to avoid detection by the police. In **doctrinal** level, factors such as difficult economic situations, human rights considerations, and the level of public security are recognized as motivating individuals to leave their countries. Migration in search of employment has become a means of survival due to the lack of job opportunities in many developing countries, including Albania.

Illegal border crossing

Even in the decisions examined in this study, it is evident that the socio-economic circumstances drive Albanian citizens to resort to illegal border crossings. Faced with dire situations, such individuals feel compelled to seek employment opportunities abroad, given the lack of job prospects or insufficient earnings in their cities or villages. This motive becomes apparent in their actions, as upon crossing the border, they immediately seek various job opportunities in construction or agriculture.

There are instances where citizens resort to this method not only due to economic reasons but also because they face administrative measures imposed by Albanian authorities, which they have yet to settle. Additionally, they may have received expulsion orders from neighboring countries for a certain period, imposing prohibitive obstacles to legal passage. In such cases, the individual becomes a repeat offender. Furthermore, certain social phenomena exacerbate the need to leave the homeland for these individuals, such as being the sole breadwinner in the family or fulfilling court-ordered parental custody obligations, in cases of having custody right on the child³⁰.

Assistance for illegal border crossing

Referring to the judicial practice observed in this study, even in cases where the offense of "Assistance for illegal crossing of the border" is consummated, the perpetrators have acted with direct intent. Most of these offenders are not residents of border towns wherein illegal migrants enter; rather, they arrive from other cities in Albania, such as Tirana, Durrës, or Elbasan. They come from long away to transport and shelter migrants. This suggests a deliberate attempt to obscure their trail and evade detection by law enforcement agencies. The primary motive behind

²⁹ Criminal Law-Special Part. Prof. Dr. Ismet Elezi

³⁰ Saranda Judicial District Court, Decision no. 23-2020-790/159, dated 02.07.2020

committing this criminal offense is financial gain, driven by the substantial amounts paid by illegal migrants to facilitate their journey to the destination. Perpetrators often rationalize their unlawful actions by citing the humanitarian plight of refugees or irregular migrants on the territory, while ultimately prioritizing their own economic interests.

1.1.5 Consequences resulting from the commission of criminal offenses

With reference to Article 298 of the Criminal Code, "Assistance for illegal crossing of the border", the law provides for certain qualified circumstances, including situations where the offense has resulted in serious consequences.

In this section of the paper, we intend to delve into the consequences stemming from the commission of this offence, as it constitutes a crucial aspect of analyzing the entire phenomenon of migrant smuggling, one that should not be disregarded. The possibility of detection by law enforcement authorities or police patrols, as well as the potential pressure or fear experienced by those involved, along with unforeseen circumstances beyond perpetrator's control, may prevent the successful execution of the illicit activity. Consequently, there can be dire consequences, including fatal outcomes such as health deterioration or loss of life for smuggled migrants.

Out of the 106 decisions analyzed, only one case, for which the court has rendered a decision, is identified as involving very serious consequences. In the remaining decisions, there is no data provided regarding the consequences for the victim(s) of the criminal offense. This particular case was reviewed by the Saranda Judicial District Court³¹ depicts the involvement of three defendants, all Albanian citizens, who were accomplices in assisting 27 individuals from various cities in Albania in illegally crossing the border into the Greece. Investigations reveal that they planned to depart from Butrint Castle and then, using the canal in Butrint Lake, they intended to cross the border into the neighboring country undetected by the police that has a checkpoint just 100 meters away, in a location known as Lundra. It appears that initially, a fishing boat-style vehicle with dimensions of 2 meters in width and 4.5 meters in length was provided for the individual to cross to the other side of the canal. Initially, 12 people crossed to the other side, and after 10 minutes, the boat returned to pick up the remaining 17, including the 3 accomplices. However, upon departing from the coast, a young child began crying once again. In an effort to avoid detection by the police, one of the perpetrators requested that the child's parents quiet their daughter, subtly indicating that it was turning into an issue. Due to intermittent movements, the boat experienced a rear tilting below the water level, causing it to immediately sink into the lake. The location of the incident was noted to have significant depth, and not all citizens were proficient swimmers. Tragically, some individuals drowned, while others managed to escape and reach shore by promptly disembarking. Regrettably, in this incident, 5 citizens lost their lives, including the aforementioned infant and her parents.

1.2 Subjects suspected as perpetrators of criminal offences

✚ Recidivism of the defendants

In the legal-criminal context, recidivism refers to the relapse of an individual who has been convicted of a criminal offense to similar or different criminal behavior after being found guilty by a final court decision. According to the Criminal Code, recidivism is considered an aggravating

³¹ Decision no. 23-2015-40 dated 08.01.2016 of the Saranda Judicial District Court

and determining factor in court ruling when the defendant's guilt is established. Specifically, the commission of a crime after being sentenced for a prior offense is cited as an aggravating circumstance under Article 50, letter "ç" of the Criminal Code, which the court takes into consideration during sentencing. Repeat offending is also a criterion for determining personal security measures, as outlined in Article 229, point 2 of the Code of Criminal Procedure.³²

From the statistical and qualitative processing of court decisions, it appears that there are 75 defendants with a judicial status of "not previously convicted" and 25 defendants with a documented judicial status of "previously convicted". While the rulings does not provide information regarding the 11 defendants, however, 3 are found to have fled to Turkey earlier, but no identifying data on their recidivism is referred to. These statistics show that the total number of previously convicted persons who appear as repeat offenders constitutes about 22% of the total number of defendants. It would be in the interest of the caselaw, from the study and doctrinal aspects, that during the judicial process and consequently in these decisions, the causes that have influenced recidivism among the defendants would be identified.

✚ The right to appeal against court decisions

From the analysis of the decisions, it is evident that the right to appeal was exercised by the prosecutor in 2 cases, while in 8 cases, the defendants themselves exercised this right. Additionally, concerning 14 defendants, the court decided to accept only the prosecutor's request for the determination of the security measure³³, While the phase of preliminary investigations has continued, the aim is to determine the proportionate punishment corresponding to the role of each suspected perpetrator.

1.2.1 Defendants with the status of public official

From the analysis of the 106 decisions, it was determined that none of the defendants represented a special entity. Therefore, at the time of being charged with criminal responsibility, none of them were found to have held a public office or to have been an employee of the administration.

1.2.2 Women and minors as perpetrators and victims of criminal offences

All the defendants and individuals convicted for offenses related to migrant smuggling are adult citizens with full criminal responsibility. Regarding female perpetrators, a small number of 6 girls and women were identified. In many cases, there appears to be a more lenient and favorable approach towards female defendants, consistent with the principle of humanity, both from the prosecuting body and the court when determining sentencing.

It appears that this lenient attitude is not observed in the case of the decision of the Court of Saranda no. 23-2017-1021(159), dated 31.05.2017, where the female defendant was sentenced to a fine of

³² Article 229/2 of the Criminal Procedure Code stipulates that "Each measure must be proportionate to the gravity of the offense and the sanction prescribed for the specific criminal offense. Furthermore, factors such as continuity, repetition, as well as mitigating and aggravating circumstances outlined in the Criminal Code are also considered (in determining the appropriate measure)."

³³ 2 types of security measures are applied:

- Security measure "Compulsion to appear before the judicial police"
- Security measures "Prison arrest"

100,000 ALL. This represents one of the highest fines, applied in only three other cases.³⁴ The court's rationale regarding the individualization of the sentence and determination of its magnitude is absent. This lack of explanation renders the judicial practice inconsistent, particularly evident in the fine of 60,000 Lek imposed by the Saranda court. Notably, the circumstances surrounding the cases leading to this conclusion are nearly identical.

An essential focus of data processing in this study pertains to identifying cases or circumstances that yield insights into victims of criminal offenses, specifically women or minors. The concept of victimhood is integral to interpreting the objective elements of the criminal offense "Aiding the illegal border crossing." In theory, any smuggled individual, irrespective of whether they have suffered consequences under the qualifying circumstances outlined in this offense, is considered a victim of this criminal act. The phenomenon of migrant smuggling poses heightened risks, extending beyond mere concerns for border security or territorial integrity. It encompasses the vulnerability of individuals involved in these movements. Such citizens face elevated dangers to their lives and health. In contrast, for smugglers and criminal entities, the sole pursuit is material gain.

Decision no. 23-2015-40 (9) ruled by the Saranda Judicial District Court is the only decision where the consummation of the criminal offense "assistance for illegal border crossing" resulted in the death of 5 people, three males, one female and a minor infant.

1.2.3 Types of personal security measures are requested for and applied to defendants

Out of a total of 106 analyzed decisions, it is observed that the prosecution has requested the imposition of personal security measures against defendants in 14 instances. Among these requests, 12 pertained to the measure of "Arrest in prison," while 2 involved "Compulsion to be presented to the judicial police." Notably, all requests made by the Prosecution for the imposition of the "arrest in prison" measure against defendants were granted by the Court. However, there was a single case where the Court of the Pogradec Judicial District, Decision No. xxx dated 16.01.2021, opted to replace the imposed security measure of detention in prison. Instead, based on Article 236 of the Criminal Procedure Code, the Court ordered the release of the individual, bail as an alternative measure.

The Court of Pogradec imposed the security measure of "Compulsion to appear before the judicial police" on a Polish citizen suspected of the criminal offense of providing assistance for illegal border crossing under Article 298 of the Criminal Code. In its rationale, the court considered the individual's marital status and the presence of a minor child attending school in Durrës. Similarly, the Korça Court also applied this security measure in a separate case involving a defendant accused of the same criminal offense. In determining the security measure, the court took into consideration the defendant's personal characteristics, including lack of prior convictions, as well as his role as the family's primary provider.

It is observed that the measure of arrest in prison is the most frequently requested and applied by the prosecution for 22 individuals, constituting approximately 20% of the decisions. This trend

³⁴ Court of Saranda decision no. 23-2017-860(135), dated 04.05.2017
Court of Saranda decision no. 23-2019-2342(309), dated 27.12.2019
Court of Saranda decision no. 23-2016-1763/266, dated 27.09.2016

appears to deviate from the requirements outlined in Article 230 of the Code of Criminal Procedure, which stipulates that the measure of "prison arrest" should only be imposed when other measures are deemed inappropriate due to the specific dangerousness of the offense and of the defendant. Furthermore, the analysis of the study reveals that the Courts of Judicial Districts have predominantly accepted ex officio the prosecutor's requests, often referring to the risk of the defendant's escape and the exceptional dangerousness of the committed crime as justifications.

It is noteworthy that personal security measures were solely requested and imposed for the criminal offense of "Assistance for illegal crossing of borders," as stipulated by Article 298 of the Criminal Code. In contrast, for the offense of "Illegal crossing of the state border," outlined in Article 297 of the Criminal Code, which is considered less severe, there were no instances where the Prosecution requested the imposition of a security measure.

1.2.4 Modes of collusion in the commission of criminal offenses and the involvement of the defendants.

Based on the data derived from court decisions processed, there has been no evidence of the commission of criminal offenses within any of the special forms of collusion. Identifying various modes of collusion among organizers of criminal offenses holds paramount significance for accurately classifying the offense. Moreover, it determines the jurisdiction of the prosecution and the appropriate court. In cases involving organized collusion in specialized forms competence lies with SPAK and the Special Court Against Corruption and Organized Crime. With reference to Article 75/a of the Code of Criminal Procedure, the Special Prosecution (SPAK) and the Special Court Against Corruption and Organized Crime, inter alia are authorized to investigate and prosecute any criminal offense perpetrated by a structured criminal group, criminal organization, terrorist organization, and armed gang, in accordance with the stipulations of the Criminal Code. Definitions pertaining to these specific forms of collusion are outlined in Article 28 of the Criminal Code (general section). Data regarding migrant smuggling in the Western Balkans region and in EU countries, including also the United Kingdom, point to organized criminal networks engaging in this illicit activity. However, in Albania, such cases are predominantly treated as mere collaboration, resulting in less specialized investigations and defendants receiving lighter sentences compared to those for involvement in organized criminal networks committing this particular criminal offense.

Simple collusion, as defined in Article 25 of the Criminal Code, falls under the jurisdiction of prosecutors' offices and general courts for these criminal offenses. It refers to the established form of collusion among perpetrators of a criminal offense, characterized by an agreement between two or more individuals for the commission of said offense, as delineated by legal interpretation.

Moreover, as outlined in Article 26 of the Criminal Code, individuals engaged in collusion (including even the simpler forms not handled by SPAK and GJKKP) for the commission of a criminal offense are categorized as organizers, perpetrators, instigators, and accomplices.³⁵ The

³⁵ Under Article 26 of the Criminal Code, collaborators are defined as follows: Organizers: Individuals who orchestrate and oversee the activities aimed at carrying out the criminal offense. Executors: Persons who directly carry out actions to accomplish the criminal offense. Instigators: Individuals who incite other accomplices to commit the criminal offense. Accomplices: Persons who aid in the commission of the offense by offering advice, instructions, providing tools, removing obstacles, promising to conceal accomplices, traces, or items derived from the criminal offense."

examination brought attention to a consistent lack of determination regarding the division of roles among those involved in the criminal offense, noted in nearly all cases by the prosecution in its plea for the sentencing of the defendants. In cases where judicial decisions reveal a clear division of roles among the defendants, it is often observed that the defendants assumed the roles of accomplices or organizers. A notable instance concerning the simple form of collusion is exemplified in the decision issued by the Korça Judicial District Court under no. 41-2021-2209(196). During the trial for the imposition of the security measure "Arrest in prison," the court independently raises claims based on the merits of the case regarding collusion with unidentified individuals, without any indication from the Prosecution.

The Court determined that collusion for this criminal offense extends beyond national borders and encompasses international networks, facilitating passage through multiple countries.

Therefore, in AHC's understanding, this element affirmed the initial finding that the subject matter jurisdiction for investigation belongs to SPAK. International collusion is uncovered through specialized investigative techniques such as wiretapping, surveillance, and others. However, identifying foreign individuals proves challenging without the defendant's cooperation, which is often lacking. Hence, there is a pressing need to enhance regional cooperation among legislative and judicial entities. Despite the prosecuting body seeking the maximum penalty of 8 years under Article 298/3 of the Criminal Code on collusion, the highest sentence imposed by the court did not ever exceed 5 years following the application of summary judgment.

1.2.5 Motions for summary judgment and its effects

The summary trial falls under the category of special trials, as outlined in articles 403-406 of the Code of Criminal Procedure. Its essence lies in progressing with the trial based on the contents of the investigative file, thereby bypassing the stage of judicial investigation. The request for summary judgment is initiated by the defendant, and the court determines whether to accept or reject it.

Referring to the 106 judicial decisions researched in this paper, a total of 26 written requests related to this type of judgment were made by the defendants or their legal representatives and all were accepted. The courts of the judicial districts, in the vast majority of cases where such a request has been received, have accepted the summary trial with intermediate decision-making, arguing that the subject matter of the trial could be examined in the state that the acts currently are.

It is understood that through this request, defendants opting for summary judgment (granted upon request) voluntarily waive certain rights pertaining to due legal process, such as the right to equality of arms during trial or the collection of evidence under the principle of adversarial proceedings during judicial investigation. Despite not implying culpability, one of the advantages of a summary trial is the potential reduction of the sentence by one-third if the defendant is found guilty by the court³⁶.

³⁶ Article 406 of the Code of Criminal Procedure stipulates that upon judgment, the court reduces the sentence of imprisonment or fine by one third. Moreover, a sentence of life imprisonment is substituted with thirty-five years of imprisonment.

Concerning the effects resulting from the acceptance of the request for a summary trial, the AHC notes that the application of this trial type has led to various procedural conveniences:

- *Firstly*, the procedures have been expedited, leading to increased speed and efficiency of the trial.
- *Secondly*, this has resulted in lower costs for the parties involved compared to ordinary trials, thus positively impacting judicial economy.
- *Thirdly*, defendants and convicts have benefited from a 1/3 reduction in punishment for the offense committed. Consequently, 37 accused individuals have received reduced sentences due to the application of summary judgment by the courts in five judicial districts.

SESSION 2

“CRIMINAL POLICY FOLLOWED BY THE PROSECUTOR'S INSTITUTION AND THE COURT”

1.3 Types and measures of punishment determined by the Courts of Judicial Districts

Regarding the punitiveness, regarding the offense of illegal border crossing (Article 297 of the Criminal Code), punishment may include a fine or imprisonment for up to 2 years. However, for the offense of assisting illegal border crossing (Article 298 of the Criminal Code), only imprisonment or life imprisonment is provided as the main sentence.

It is noteworthy that the Constitutional Court, through its jurisprudence, has evaluated that each of the main punishments outlined in the Criminal Code serves distinct purposes. Imprisonment, which entails a deprivation of liberty, is conceptualized within criminal law, also in the understing of the principle of *favor libertatis* (*in favor of freedom*), as an *extrema ratio* (*extreme measure*). Therefore, since a prison sentence represents the maximum sacrifice of an individual's personal freedom, a right protected by the Constitution, the legislator has deemed it the ultimate coercive measure and the most severe punishment among primary penalties. Conversely, the fine penalty was introduced as a means to circumvent imprisonment, under the notion that it's fairer for individuals to pay a monetary sum for offenses with low social risk, thereby avoiding the deprivation of liberty³⁷.

To thoroughly analyze the types and measures of punishment determined by the court, it's essential to categorize them based on the legal provisions referenced in their charge.

• Categorization of the type and measure of punishment

In the examined cases involving 95 accused citizens who received a guilty verdict, whether final or pending appeal, potential penalties included fines or imprisonment. Analyzing the type of punishment imposed by the courts, it's evident that fines were predominantly applied in 77 cases, while imprisonment was imposed in 18 cases. Specifically, out of 86 cases adjudicated under Article 297 of the Criminal Code: Approximately 89.5% (77 cases) resulted in the imposition of an administrative measure (fine) by the Court. In 3 instances, alternative punishments of

³⁷ See decision no. 19, dated 01.06.2011 of the Constitutional Court.

imprisonment were assigned in accordance with Article 59. 18 cases resulted in sentences of imprisonment.³⁸

The highest fine amount requested by the Prosecution body, which was accepted and imposed by the Court, amounts to 150,000 ALL. The lowest fine amount requested by the prosecution amounts to 50,000 ALL, while the Court has set the lowest fine amount at 40,000 ALL.³⁹

Although to a lesser extent, a prison sentence of up to 1 year was imposed on a Turkish citizen, while in one of the cases, the minimum prison sentence was set at 10 days of imprisonment⁴⁰. Given that Article 297 of the Criminal Code categorizes it as a criminal misdemeanor, the imposition of a prison sentence, as observed in judicial practice, is not commonplace. Consequently, it fails to serve the purpose of re-educating and rehabilitating the perpetrator.

Referring to Article 298 of the Criminal Code, titled "Assistance for illegal border crossing," the legislator has stipulated a range of penalties from one year to life imprisonment, contingent upon the varying aggravating circumstances delineated in the distinct paragraphs of this provision.

1.3.1 The trend of determining alternatives to imprisonment

As an expression of the humanistic approach within criminal legislation and serving as a mechanism for the rehabilitation and reintegration of individuals involved in criminal activities, Chapter 7 of the Criminal Code delineates alternatives to imprisonment, as outlined in Articles 58-65. These alternatives encompass:

1. *Half-freedom*⁴¹
2. *Suspension of the execution of the decision with imprisonment and placement under probation*⁴²
3. *House arrest*⁴³
4. *Suspension of the execution of the decision with imprisonment and the obligation to perform a work in the public interest*⁴⁴
5. *Parole*⁴⁵

In the entirety of the scrutinized decisions, it is noted that in 18 cases under investigation, the Courts of Judicial Districts imposed prison sentences. However, it was observed that only in three cases did the courts opt for alternative measures to imprisonment. Specifically, these alternatives included the "suspension of the execution of the decision with imprisonment and probation," as

³⁸Përmet Judicial District Court, Decision No. 22-2018-62 dated 22.02.2018

Pogradec Judicial District Court, Decision No. 43-2021-75 dated 25.01.2021

Pogradec Judicial District Court, Decision No. 43-2021-430 dated 26.04.2021

Saranda Judicial District Court, Decision No.23-2016-1930-/289 dated 14.10.2016

Saranda Judicial District Court, Decision No.23-2017-905 dated 11.05.2017

³⁹ Saranda Judicial District Court, Decision No.23-2016-1332 dated 01.07.2016

Saranda Judicial District Court, Decision No.23-2016-1925(287) dated 13.10.2016

Saranda Judicial District Court, Decision No.23-2016-1094(155) dated 31.05.2016

Saranda Judicial District Court, Decision No. No.23-2016-1024/144 dated 20.05.2016

⁴⁰ Pogradec Judicial District Court, Decision no, Decision No. 43-2021-75 dated 25.01.2021

⁴¹ Article 58 of the Criminal Code

⁴² Article 59 of the Criminal Code

⁴³ Article 59/a of the Criminal Code

⁴⁴ Article 63 of the Criminal Code

⁴⁵ Article 64 of the Criminal Code

provided by Article 59 of the Criminal Code, and in another instance, the alternative of imprisonment entailed the "suspension of the execution of the decision with imprisonment and the obligation to perform community service," outlined in Article 63 of the Criminal Code. Among these cases, two instances of alternative punishment were assigned for the criminal offense of "Illegal crossing of the state border," as stipulated in Article 297 of the Criminal Code, while in one case, it was applied to the criminal offense of "aiding illegal border crossing."

In one of the cases mentioned above, specifically detailed in decision No. 650-121 dated 09.06.2021 by the Court of First Instance Pogradec, a sentence of 2 months in prison was imposed upon a citizen who pleaded guilty to the criminal offense of "Illegal crossing of the state border," as outlined in Article 297 of the Criminal Code. Utilizing the provisions of Article 59 of the Criminal Code, the Court opted to apply a suspension of the sentence coupled with a probation period lasting 4 months. This alternative sentence was contingent upon the condition that the defendant refrains from committing any further criminal offenses during the probationary period. From the factual circumstances of the case at hand, it was revealed that the defendant, an Albanian citizen, unlawfully crossed the border with the intention of reaching Spain. Initially, he crossed the green border in North Macedonia, where he stayed for a month before continuing his journey towards France. Subsequently, he clandestinely boarded a truck bound for Spain, where he was apprehended by French authorities and subsequently returned to Albania.

In analyzing the court decision, it becomes evident that the court, in its reasoning, assessed that the defendant fulfilled all the conditions necessary for the application of the alternative punishment, for the following reasons:

1. The sentence imposed on him was relatively lenient, falling within the defined range of 2 months' imprisonment, as outlined in the relevant provision.
2. Upon scrutinizing the circumstances surrounding the commission of the offense and the defendant's attitude towards it, particularly considering the defendant's expression of remorse, the court concluded that the defendant poses minimal societal risk.
3. The court factored in the defendant's criminal background when opting for an alternative to imprisonment, noting that the individual had no prior convictions.
4. Upholding the principle of humanity, the court determined that a prison sentence would not contribute to the defendant's rehabilitation, thereby hindering their successful reintegration into society.

For these reasons, the Court, in a fair and harmonious assessment of the elements identified above, verified during the judicial examination of the case, in accordance with point 3 of article 59⁴⁶ decided to put the defendant on probation for a period of 4 months, provided that the convict keep in contact with the probation service and that during the probation period he does not commit another criminal offense.

In the second case, wherein an alternative sentence was issued, it was the Court of First Instance that presided. Through Decision No. 22-2018-62, dated 22nd February 2018, this court imposed a 2-month prison sentence upon the defendant charged with the criminal offense of "Illegal crossing of the state border," as stipulated in Article 297 of the Criminal Code. Utilizing the authority vested in Article 63 of the Criminal Code, the court opted to suspend the execution of the prison term and

⁴⁶ "For sentences of up to two years of imprisonment, which the court suspends, the probationary period is typically twice the duration of the prison sentence decreed by the court."

instead imposed an obligation to carry out 50 hours of public interest work within a span of 6 months. In this case, the court's analysis reveals that the defendant illegally crossed the border on foot, traversing the green border. Throughout the judicial examination, it was established that the motive behind this criminal act, acknowledged by the individual suspected of perpetrating the offense, was driven by economic aspirations, specifically seeking employment in the neighboring country. The defendant, accompanied by an associate, undertook the journey across the state border on foot, spanning a day and a night. Subsequently, they were apprehended in flagrante delicto by the Greek police within the territory of Greece. There is no indication that the defendant possessed valid travel documents. Furthermore, scrutiny of the TIMS system indicates that the defendant had previously committed similar administrative offenses and incurred an administrative fine on two occasions.

Even in this instance, the Court of the Judicial District of Përmet, in its deliberation, concluded that the defendant fulfilled all prerequisites for the implementation of an alternative sentence, deemed the most conducive to his rehabilitation and societal reintegration. This determination stemmed from several factors, which upon analysis of the decision, elucidate the following reasons:

1. During the judicial examination, it was assessed by the court that the defendant presents little social danger.
2. It has been established by the Court that the defendant has been criminally convicted before, but not for the same offense, as he was previously punished for committing the criminal offense provided for by article 134/1 of the Criminal Code.⁴⁷
3. The circumstances surrounding the commission of the criminal offense are not deemed severe.
4. Both the court's confirmation and the defendant's statements corroborate that the defendant crossed the state border with the intent of seeking employment.

In light of these considerations, pursuant to Article 297 of the Criminal Code, the court imposed a 2-month prison sentence. Additionally, invoking the provisions of Article 63 of the Criminal Code, the court opted to suspend the execution of the imprisonment verdict and instead assigned the defendant an obligation to fulfill 50 hours of public interest work within a span of 6 months.⁴⁸

1.3.2 Implementation of the criminal penalty with a fine

As it has been evidenced in the jurisprudence of the Constitutional Court, the aim of the primary punishment with a fine (as a less restrictive measure compared to imprisonment), within the spirit of the Constitution, should be interpreted in a manner that the rehabilitative function, for certain specific criminal acts, can also be fulfilled through the payment of a specified amount, without the necessity of depriving the individual of their liberty⁴⁹. Furthermore, although the fine penalty is regarded as a less coercive measure, prescribed under the provisions of Article 297 of the Criminal Code, for individuals crossing the border for economic motives (such as employment), it can exacerbate their financial circumstances, potentially fostering recidivism. Hence, in such

⁴⁷ Article 134 Theft "Theft of property is subject to a fine or imprisonment for a maximum term of three years."

⁴⁸ Public interest work entails the convicted individual undertaking a task, with their consent and without compensation, in service of the public interest or the organization designated in the court's ruling, for a duration ranging from forty to two hundred and forty hours.

⁴⁹ For further reference, consult Decision No. 19, dated 01.06.2011, issued by the Constitutional Court.

scenarios, the implementation of alternative sentences involving imprisonment may offer a more ameliorative approach to their economic predicament.

In the analysis of 106 decisions conducted within the scope of this study, it is observed that fines were imposed in 77 cases, constituting approximately 72.6% of the cases examined through these decisions. It is evident that the imposition of a fine as the primary criminal penalty, as outlined in Article 29, first paragraph, point 3 of the Criminal Code, is the most prevalent sanction employed by the Courts of Judicial Districts for the offense of illegal border crossing. Within these decisions, the courts have taken into consideration the minimal societal risk associated with this criminal offense. Furthermore, in determining the fine amount, certain cases have factored in the circumstances surrounding the incident and the defendants' prior criminal records. An important element gleaned from the qualitative analysis of court decisions is that the highest fine amount imposed by the courts is 150,000 ALL⁵⁰ and the lowest 40,000 lekë⁵¹. The fine penalty amounting to ALL 60,000 has been employed in 37 cases and is consistently the typical magnitude of this penalty most frequently imposed by the Court.

During our analysis, we have noted instances where the courts have aligned their decisions closely with the prosecution's recommended sentencing. In approximately 20 cases, the courts opted for a lower fine imposed vs. prosecution's stance, with only one exception in a case within the Sarandë Judicial District, where the imposed criminal fine surpassed the prosecution's request. Specifically, in the case referenced as Saranda First Instance no. 23-2020-878(170), dated 15.07.2020, the prosecution sought a criminal liability of 60,000 ALL, whereas the court exercised its discretion to impose a fine of 80,000 ALL.

Considering the factual circumstances of the case at hand, it is evident that the defendant unlawfully crossed the state border into Greece through the green border, resulting in their apprehension by the neighboring country's police. According to the TIMS system data, it reveals that the defendant had been deported three times by Greek authorities for the same offense. The court, in justifying its decision, deemed the defendant's repeated violation of the criminal offense of "Illegal crossing of the state border" under Article 297 of the Criminal Code as an aggravating circumstance, particularly given his prior conviction. Moreover, the court took into account the defendant's challenging economic circumstances as a significant factor contributing to the commission of the criminal offense. However, despite acknowledging the defendant's economic hardship as a motivating factor, the court imposed a relatively high fine compared to the minimum or average standards applied in similar cases. This raises concerns regarding the effectiveness of the re-educational aspect of the criminal punishment on the defendant. The burden of such a substantial fine may incentivize the defendant to resort to illegal border crossing again in order to meet the imposed financial obligation, thus increasing the likelihood of recidivism.

1.3.3 The quality of reasoning employed by the judicial bodies within the Judicial District Courts.

In accordance with the standards outlined in Articles 42 point 2 and 142/1 of the Constitution, as well as Article 6(1) of the European Convention on Human Rights, judicial decisions must adhere to the principles of being reasoned, clear, and comprehensive in reflecting the circumstances. This entails ensuring that the decision is logically connected through the analysis of the circumstances,

⁵⁰ Saranda Judicial District Court, Decision No. 23-2017-1057(168) dated 05.06.2017

⁵¹ Saranda Judicial District Court, Decision No. 23-2016-1094(155) dated 31.05.2016

facts, and legal basis. The right to receive a reasoned judicial decision is a fundamental entitlement guaranteed to defendants or individuals subject to legal proceedings within the framework of their right to a fair trial, as clearly established by the jurisprudence of both the Constitutional Court and the European Court of Human Rights.

Upon individual and comparative analysis of the reasoning within the decisions under study, it becomes apparent that in numerous instances, there is a lack of complete, coherent, and logical justification. Most decisions predominantly feature formal and conventional justifications, neglecting to address the specific issues at hand. Furthermore, there is a tendency for litigants' date information to be changed, yet the overarching language remains consistently generic and uniform. Particularly noteworthy is the observation that the Court of the Judicial District Court of Saranda often issues rulings in a standardized format, failing to identify and subsequently justify crucial individualization factors of the defendant, such as judicial status, age, and civil status.

As per Article 47, paragraph 2 of the Criminal Code, the court considers several factors in determining an appropriate punishment for an individual, including the severity of the criminal offense, the perpetrator's identity, the level of culpability, and any mitigating or aggravating circumstances. However, it is notable that the Courts of Judicial Districts have generally overlooked the significance of the motive behind the commission of the crime. Incorporating the motive into the assessment process would facilitate a more tailored approach to determining the type and extent of punishment.

In the instances under consideration, the primary motive driving these individuals to commit legal violations appears to stem from challenging socio-economic circumstances. It is noteworthy that some individuals find themselves unable to bear the expenses associated with essential identification means, such as a passport⁵²). The fulfillment of the re-educational and rehabilitative objectives of punishment stands as a crucial consideration for the court during sentencing. Therefore, upon reviewing court decisions, it is apparent that the imposition of fines does not effectively serve this purpose, as previously highlighted. Conversely, such fines may exacerbate recidivism tendencies among citizens, fostering a cycle of repeated law-breaking. This observation gains further credence when we consider that individuals suspected of the criminal offense of "illegal crossing of the state border" were primarily motivated by economic factors, seeking employment opportunities in neighboring countries. It is evident from the studied decisions that all defendants accused of this offense have presented themselves as unemployed and lacking alternative financial means, compelling them to resort to illegal border crossings in pursuit of stable employment prospects abroad.

Among the cases scrutinized, particular attention was drawn to the instance involving a citizen previously convicted with a fine⁵³, however, while the defendant is being tried for the second time consecutively, it emerges that she has yet to fulfill her initial legal obligation, rendering the first sentence unenforceable. We assess that such ruling has contributed to the recidivism of this citizen, exacerbated by her socio-economic circumstances impacting her procedural status. In this particular case, along with similar instances, we believe that the Courts could have explored the option of implementing alternative to imprisonment measures.

⁵² Saranda Judicial District Court No. 23-2017-686(110), dated 11.04.2017

⁵³ Saranda Judicial District Court, Decision No. 23-2017-1021(159) dated 31.05.2017

1.3.4 Cases of acquittal

Among the 106 court decisions analyzed, a verdict of innocence was rendered in only one case, accounting for less than 1% of the total decisions. This exoneration was pronounced by the Court of First Instance in Shkodra⁵⁴. Based on the merits of the case, the defendant is charged with the criminal offense of "Illegal Crossing of the State Border," as outlined in Article 297 of the Criminal Code. The prosecuting body has sought a fine of 500,000 ALL in response.

Based on the judicial examination of the circumstances of the offense, we acknowledge and value the findings of the court as articulated in the specific decision:

- On February 10, 2018, the defendant was returned as a "Deported" individual.⁵⁵
- The verification in the TIMS system⁵⁶ reveals that this citizen has not departed from the territory of R.oA. since his entry on March 28, 2018.
- The citizen crossed the border at the Muriqan point and proceeded to enter Montenegro. Subsequently, he traversed the borders of Croatia, Bosnia, and Slovenia on foot, with the United Kingdom as his ultimate destination.
- The defendant asserts that he passed through border control without evasion, utilizing his biometric passport for identification purposes, and is at a loss as to why there was no registration of his crossing of the border.
- Upon inspecting the passport pages, it is evident that the individual has obtained regular entry stamps from the other countries mentioned, confirming his lawful passage through those territories.

Considering these data, the court has concluded that the principle of presumption of innocence necessitates a declaration of innocence for the defendant⁵⁷ based on Article 4 of the Criminal Code, and with the primary argument being the prosecuting body's inability to establish guilt beyond a reasonable doubt.

In the argued decision, the Court asserts that *"in the current case, there is a lack of conclusive evidence proving beyond a reasonable doubt that the defendant illegally crossed the Albanian border. This uncertainty arises from the presence of state stamps in the defendant's passport from other neighboring countries, dated September 12, 2018, which coincides with the defendant's claim of departing date from off the territory of the Republic of Albania for the last time. The Court emphasizes that it is not the responsibility of the defendant to prove innocence. Instead, during*

⁵⁴ Shkodra Judicial District Court, Decision No. 51-2021-175 dated 03.05.2021

⁵⁵Deportation refers to the legal expulsion of an individual from a country, typically due to illegal immigration status or involvement in criminal activities.

⁵⁶The TIMS system is an electronic database for border control management, overseen by the State Police Directorate in its role as the controller.

⁵⁷Regarding the meaning of the constitutional principle of the presumption of innocence, as outlined in decision No. 57, dated 21.12.2012, by the Constitutional Court, it states that the presumption of innocence encompasses various aspects, including the principle of "in dubio pro reo," which means that the benefit of the doubt should favor the defendant. The burden of proof primarily lies with the prosecution. The court has interpreted the presumption of innocence to mean that ordinary courts should not commence proceedings with the assumption of the defendant's guilt. Instead, the burden of proof rests with the accusing party, and any doubt should weigh in favor of the defendant. The court must base its decision on both direct and indirect evidence, which must be proven by the prosecution."

*preliminary investigations, it was established that the defendant presented his travel document at the border crossing point, where he was allowed to pass as normal.”*⁵⁸

The court, in accordance with Articles 378 - 390 of the Criminal Procedure Code, has acquitted the defendant of the charge of "Illegal Crossing of the State Border" as outlined in Article 297 of the Criminal Code. This decision was reached because, according to Article 388, subsection "d" of the Criminal Code, the prosecution failed to substantiate the defendant's commission of the alleged criminal offense.⁵⁹

AHC acknowledges that confronting a citizen with a criminal charge carries substantial consequences, not only in terms of financial impact but also psychologically and emotionally, affecting both the individual and his/her family members. The gravity of the situation escalates when the charges brought forth by the prosecution lack adequate and dependable evidence to establish guilt.

1.4 The criminal policy concerning individuals from third countries who are tried before the Courts of the Albanian Judicial Districts

Foreigners who enter the territory of Albania contrary to the criteria defined by law are classified as individuals with irregular stay and are subject to measures for their removal from Albanian territory. As per this criterion, it is observed that the five Judicial District Courts, whose decisions were reviewed, did not impose criminal penalties on aliens who were assisted in illegally crossing the border. Instead, they are mentioned solely within the analysis of the merits of the case, and the entire legal process has been pursued against the individual (defendant) accused of facilitating their illegal border crossing, under the charge of "Aiding Illegal Crossing of Borders" as stipulated by Article 298 of the Criminal Code.

In general, the policy adopted by the Courts under review appears to be fair in principle. Irregular immigrants should be addressed through administrative procedures outlined in specific legislation for foreigners, rather than being subject to criminal prosecution for illegal border crossing as per Article 297 of the substantive criminal legislation. This approach aligns with the interest of states in effectively removing or returning irregular immigrants, rather than focusing solely on their criminal punishment.⁶⁰ Additionally, this criminal policy demonstrates a humanitarian approach, particularly towards citizens originating from countries experiencing conflict or where the democratic system is compromised, where individuals may face persecution due to their political beliefs or other circumstances.

In one instance, the Pogradec Judicial District Court deviated from the prevailing practice in the country and imposed criminal penalties on a Palestinian citizen for illegally crossing the border. According to decision no. 43-2021-430 dated 26.04.2021, the defendant had departed from Palestine with the intention of reaching European countries. His route involved crossing Turkish and then Greek territory. At the Turkish-Greek border, the defendant encountered a Syrian citizen whom he did not know. The Syrian individual assisted the defendant in entering the trailer of a

⁵⁸ Decision of the Court of Shkodra no. 51-2021-175.

⁵⁹ Article 388/1, letter d of the Criminal Code stipulates that: The court renders a verdict of not guilty when: d) it is not proven that the defendant has committed the criminal offense for which he is accused."

⁶⁰STUDY REPORT "On the rights and freedoms of immigrants, asylum seekers and refugees in Albania for the period 2012 - 2017" Albanian Helsinki Committee <https://ahc.org.al/ep-content/uploads/2018/09/Migrantet-Shqip.pdf>

truck in exchange for payment. The defendant traveled for three days until he was discovered by the police during a border check in Albania. Furthermore, the investigation revealed that the Turkish driver of the truck, bound for Shkodra, was unaware of the presence of the Palestinian citizen in his trailer.

In its ruling, the court affirmed the Prosecution's requested sentence of 2 months in prison. This penalty stands out as the most severe punishment meted out to an individual for the criminal offense of "Illegal crossing of the border," based on an analysis of court decisions.

Furthermore, the Shkodra Judicial District Court, alongside the Pogradec Judicial District Court, rendered a decision of imposition of a security measure against an Iraqi citizen with asylum seeker status. In decision no. 1477 of May 2021, the Court imposed the security measure of "Arrest in prison" upon the Iraqi citizen, who was accused of the criminal offense of "Aiding illegal border crossing" as per Article 298/3 of the Criminal Code. Through an analysis of the court's ruling, it becomes evident that this individual assumed the role of organizer, holding a pivotal position among the other collaborators. The Court's rationale for accepting the prosecution's request for this security measure stemmed from the seriousness of the offense and the presumed risk of the individual's absconding the investigation.

Out of all the decisions scrutinized, only in the cases mentioned above were refugees implicated in criminal offenses related to "Illegal crossing of the border" as per Article 297 of the Criminal Code, and "Aid for illegal border crossing" under Article 298 of the Criminal Code, while maintaining their status as asylum seekers.⁶¹

1.4.1 Albania a transit or destination country?

Based on the analyzed decisions, foreign migrants, during the interrogation process and criminal prosecution, provided details about the routes they took to reach Albania. The information reveals that the majority claim to originate from Syria, followed by citizens from Morocco, Afghanistan, Palestine, and Iraq. These migrants are compelled to flee their home countries due to ongoing warfare. They often depart in organized groups comprising two or more families, or alongside individuals they are acquainted with, or those who share the common objective of leaving, thereby traversing the journey collectively. Notably, from the examination of court decisions, it emerges that only in one instance did an individual leave their country of origin alone.⁶²

Regarding the route taken until their arrival in Albanian territory, there's a notable pattern in the migration routes utilized by the immigrants. Typically, they first travel to Turkey, then cross the border into Greece, before heading southeast towards Albania as the subsequent crossing point. These countries primarily serve as transit points, with immigrants expressing no intention to settle permanently in these transit nations; their ultimate destination remains European countries. However, there have been instances where immigrants stayed longer in various countries, rather than just using them as quick transit routes. In one case, immigrants temporarily stayed in Thessaloniki (Greece) for approximately a month, paying 400 euros for their accommodation. In two other cases, immigrants resided in Turkey for extended periods—five years in one instance

⁶¹ Court of the Judicial District of Shkodra, Decision no. 1477, dated 10.05.2021

⁶² Pogradec Judicial District Court Decision no. 43-2021-430, dated 26.04.2021

and seven years in another. Only one case involved refugees spending time in a camp in Greece, totaling 20 days, before proceeding to Albanian territory.⁶³

In analyzing these data and the circumstances verified by the courts in their judicial decisions, it becomes evident that foreign citizens, intending to transit to their destination country, seek assistance from individuals capable of facilitating border crossings. From the comprehensive review of the analyzed decisions, three distinct forms of interaction with smugglers emerge from the described factual circumstances:

- Refugees encounter these individuals, suspected of being smugglers, in proximity to border crossing points. With the aid of these individuals, refugees are able to integrate into larger groups sharing the same destination and common goal;
- Refugees either independently identify the means of communication and the whereabouts of smugglers or receive assistance from individuals situated in neighboring countries. These helpers, who have previously utilized the same illegal crossing routes, facilitate refugees in locating smugglers either directly or through their network of contacts in that country,
- Refugees utilize social networks such as Facebook and WhatsApp to communicate with smugglers. This method of communication is extensively employed, as evidenced in numerous analyzed cases of preliminary investigations where refugees solicited assistance via social media platforms. They either seek assistance through acquaintances or respond to offers for taxi transportation. Once the individual is identified, communication transitions to the WhatsApp application, facilitating easier exchange of location details.

Immigrants typically pay varying sums of money for assistance in reaching their destination country, with the amount depending on the destination and the distance of the journey. Analysis of court decisions reveals that in instances where assistance is arranged until the immigrants cross the Albanian border, they are escorted to the border and then continue their journey using navigation applications on their mobile devices. In such cases, individuals have been known to pay up to 500 euros per person. Upon arrival in Albania, they seek out private cars to continue their journey. For transportation to Tirana or other border points, they typically pay between 100 and 220 euros.⁶⁴ Meanwhile, foreign citizens transiting through our country encounter the impossibility of accessing intercity public transport services. This is due to road transport service providers refusing to transport them, citing concerns stemming from past incidents where similar cases have been targeted by law enforcement authorities. In some instances, these service providers have faced criminal prosecution as suspected perpetrators of the offense of "assistance for illegal border crossing," as outlined in Article 298 of the Criminal Code.

When agreements are made between migrants and individuals transporting them to their final destination—where they intend to settle permanently—the migrants are accompanied and received at the borders of each country by individuals with whom they maintain continuous communication until they reach their destination. In such cases, assistance is provided by well-organized criminal groups with international reach, operating across multiple countries, or by groups cooperating and coordinating actions to facilitate transportation within their controlled territories. Regarding payment methods, migrants typically provide the entire sum at the time of the agreement. Only in

⁶³ Korça Judicial District Court, Decision no. 41-2021-945, dated 12.03.2021

⁶⁴ Court of the Judicial District of Përmet, Decision no. 07/22-2015-78, dated 05.03.2015

two cases was payment made partially after crossing each country, paid to the person accompanying them to the border. This entire process of migrant smuggling is characterized by a high degree of coordination. For delivery to the final destination, it has been reported that up to 9000 euros were paid per person.⁶⁵

The goal and final destination of refugees is to arrive in a European Union country for a better life, or to join family members who have left for these countries before, due to the war. Thus, Germany is often mentioned as their target country. Albania is seen as a place of transit for these people and only in 1 case they have stated that they would stay for a temporary period of time in Tirana and this had to do with securing income to continue the journey to other countries⁶⁶.

Recommendations and Suggestions:

1. The AHC recommends to the Prosecution Offices of the judicial districts under the jurisdiction of the Courts, whose decisions have been researched, to meticulously evaluate the aspects that underscore the distinctive forms of collaboration in the perpetration of the criminal offense outlined in Article 298 of the Criminal Code. This evaluation aims to promptly transfer the investigation of the criminal case to the Special Prosecutor's Office against Corruption and Organized Crime.
2. The Albanian Helsinki Committee recommends to the Courts of first instance that priority should be given to the application of specific laws in cases involving foreign citizens, as outlined in Law No. 79/2021 "On Foreigners." In accordance with Albanian legislation, foreign nationals should be regarded as subject to removal from Albanian territory rather than of criminal prosecution.
3. The AHC recommends that the Courts pay closer attention to the rationale behind judicial decisions, avoiding the use of standard formats and formal language that hinder clear, comprehensive, and logical reasoning, as well as the fair individualization of sentence. We recommend that the Courts take into account the legal arguments presented by both parties and provide convincing legal justifications for their acceptance or rejection, tailored to the specific factual circumstances of each case. It is imperative that judicial decisions offer a clear analysis of both the objective and subjective aspects of the criminal offense for which the defendants are accused, aligning with the specifics of their actions or omissions.
4. The AHC recommends that incumbent institutions, such as the Ministry of Finance and Economy, the Ministry of Health and Social Protection, the National Employment Service, and the State Labor Inspectorate, coordinate efforts to develop concrete action plans for implementing approved policies and strategies for the employment of returnees and individuals convicted of illegal border crossing for employment purposes. These measures aim to enhance the well-being and facilitate the smooth and short-term reintegration of these individuals into society.

⁶⁵ Korça Judicial District Court. Decision 41-2021-430,1284 dated 08.04.2021

⁶⁶ Korça Judicial District Court. Decision 41-2020-806 (58) dated 02.03.2020

5. The AHC recommends to the incumbent institutions of the criminal justice system the enhancement of the implementation of criminal policy, adopting a humane, reintegrative, and rehabilitative approach toward the phenomenon of illegal migration. This approach should consider both the factors that incite and compel individuals to engage in illegal migration, as well as the socio-economic challenges faced by those under investigation. These influencing factors contribute to the phenomenon of recidivism.
6. The AHC recommends to the General Directorate of Borders and Migration the enhancement of border surveillance quality, along with bolstering cooperation and interaction with international agencies like FRONTEX, in accordance with national legislation and international directives such as the European Union Strategy on voluntary return and reintegration.⁶⁷

Annex 1- List of analyzed decisions

Pogradec Judicial District Court

1. Decision no. 449 – 67 dated 29.04.2021
2. Decision no. 650 – 121 dated 09.06.2021
3. Decision no. 5 dated 11.01.2021
4. Decision no. 32 dated 06.02.2021
5. Decision no. xxx⁶⁸ dated 16.01.2021
6. Decision no. 43-2021-499 dated 07.05.2021
7. Decision no. 43-2021-84 dated 26.01.2021
8. Decision no. 43-2021-430 dated 26.04.2021
9. Decision no. 146 dated 01.07.2021
10. Decision no. 43-2021-75 dated 25.01.2021
11. Decision no. 43-2021-518 dated 11.05.2021

Përmet Judicial District Court

1. Decision no. 22-2018-62 dated 22.02.2018
2. Decision no. 22-2018-74 dated 05.03.2018
3. Decision no. 07/22-2015-78 dated 05.03.2015
4. Decision no. 22-2019-294 dated 29.07.2019
5. Decision no. 22-2019-184 dated 22.05.2019
6. Decision no. 22-2019-183 dated 22.05.2019

⁶⁷ https://home-affairs.ec.europa.eu/system/files/2021-04/27042021-eu-strategy-voluntary-return-reintegration-com-2021-120_en.pdf

⁶⁸Due to the principle of protecting confidential data, this decision did not include certain details, such as the individuals' personal information, specific locations, length of sentence, or the number of court decisions.

Shkodra Judicial District Court

1. Decision no. 51-2021-1875 dated 26.04.2021
2. Decision no. 51-2021-175 dated 03.05.2021
3. Decision no. 51-2021-71 dated 18.01.2021
4. Decision no. 1179 dated 20.05.2021
5. Decision no. 55 dated 05.02.2021
6. Decision no. 1477 dated 10.05.2021

Korça Judicial District Court

1. Decision no. 41-2020-3744 (499) dated 24.12.2020
2. Decision no. 41-2020-3708(495) dated 22.12.2020
3. Decision no. 41-2021-1294(165) dated 09.04.2021
4. Decision no. 41-2021-1375(174) dated 15.04.2021
5. Decision no. 41-2021-945(128) dated 12.03.2021
6. Decision no. 41-2021-1284(163) dated 08.04.2021
7. Decision no. 41-2021-938(130) dated 12.03.2021
8. Decision no. 41-2021-2209(196) dated 26.06.2021
9. Decision no. 41-2021-1561(194) dated 27.04.2021
10. Decision no. 41-2020-806 (58) dated 02.03.2020
11. Decision no. 41-2020-1110(154) dated 14.05.2020
12. Decision no. 41-2020-732(56) dated 24.02.2020

Saranda Judicial District Court

1. Decision no. 23-2016-1616 (237) dated 06.09.2016
2. Decision no. 23-2016-1632/243 dated 08.09.2016
3. Decision no. 23-2016-1646/246 dated 13.09.2016
4. Decision no. 23-2016-1763/266 dated 27.09.2016
5. Decision no. 23-2016-1765(267) dated 27.09.2016
6. Decision no. 23-2016-1845/281 dated 05.10.2016
7. Decision no. 23-2016-1094(155) dated 31.05.2016
8. Decision no. 23-2016-1925(287) dated 13.10.2016
9. Decision no. 23-2016-1024/144 dated 20.05.2016
10. Decision no. 23-2016-900/126 dated 03.05.2016
11. Decision no. 23-2016-1930/289 dated 14.10.2016
12. Decision no. 23-2016-1332(196) dated 01.07.2016
13. Decision no. 23-2019-1762 dated 09.10.2019
14. Decision no. ⁶⁹ dated 15.01.2021
15. Decision no. 70 (11) dated 15.01.2021
16. Decision no. 23-2015-40 (9) dated 08.01.2016
17. Decision no. 2 (1) dated 06.01.2021
18. Decision no. 23-2020-744/151 dated 25.06.2020
19. Decision no. 23-2019-751/153 dated 26.06.2020

⁶⁹ This decision did not have a number.

20. Decision no. 23-2020-790/159 dated 02.07.2020
21. Decision no. 23-2020-845(166) dated 10.07.2020
22. Decision no. 23-2020-878(170) dated 15.07.2020
23. Decision no. 23-2020-897/173 dated 16.07.2020
24. Decision no. 23-2020-908(175) dated 17.07.2020
25. Decision no. 23-2020-910(176) dated 17.07.2020
26. Decision no. 23-2020-911(177) dated 17.07.2020
27. Decision no. 23-2020-959 dated 23.07.2020
28. Decision no. 23-2020-960(183) dated 23.07.2020
29. Decision no. 23-2020-961(184) dated 23.07.2020
30. Decision no. 23-2020-1018(189) dated 30.07.2020
31. Decision no. 23-2020-1069(196) dated 09.09.2020
32. Decision no. 23-2020-1228(220) dated 02.10.2020
33. Decision no. 23-2019-1287/225 dated 15.10.2020
34. Decision no. 23-2020-1479/242 dated 04.12.2020
35. Decision no. 23-2019-1639(240) dated 24.09.2019
36. Decision no. 23-2019-1640(241) dated 24.09.2019
37. Decision no. 23-2019-1641(242) dated 24.09.2019
38. Decision no. 1669/250 dated 27.09.2019
39. Decision no. 23-2019-1434(206) dated 31.07.2019
40. Decision no. ⁷⁰ dated 17.07.2018
41. Decision no. 23-2019-1941/276 dated 30.10.2019
42. Decision no. 23-2019-1964/278 dated 04.11.2019
43. Decision no. 23-2019-1969/279 dated 04.11.2019
44. Decision no. 23-2019-2329/308 dated 26.12.2019
45. Decision no. 23-2019-2342(309) dated 27.12.2019
46. Decision no. 23-2019-2343(310) dated 27.12.2019
47. Decision no. 23-2019-2344(311) dated 30.12.2019
48. Decision no. 23-2018-1901 dated 23.10.2018
49. Decision no. 23-2018-1902/232 dated 23.10.2018
50. Decision no. 23-2018-1903/233 dated 23.10.2018
51. Decision no. 23-2018-2032(244) dated 08.11.2018
52. Decision no. 23-2018-2027/243 dated 08.11.2018
53. Decision no. 23-2018-2039/246 dated 09.11.2018
54. Decision no. 23-2018-2068/249 dated 12.11.2018
55. Decision no. 23-2018-2089(252) dated 13.11.2018
56. Decision no. 23-2018-2123(257) dated 15.11.2018
57. Decision no. 23-2018-2206(269) dated 27.11.2018
58. Decision no. 23-2018-2409(301) dated 26.12.2018
59. Decision no. 23-2017-637/102 dated 04.04.2017
60. Decision no. 23-2017-654/104 dated 06.04.2017
61. Decision no. ⁷¹ dated 06.04.2017
62. Decision no. 23-2017-674(109) dated 07.04.2017
63. Decision no. 23-2017-686(110) dated 11.04.2017

⁷⁰ This decision did not have a number

⁷¹ This decision did not have a number

64. Decision no. 23-2017-842/129 dated 03.05.2017
65. Decision no. 23-2017-857(133) dated 04.05.2017
66. Decision no. 23-2017-860(135) dated 04.05.2017
67. Decision no. 23-2017-905 dated 11.05.2017
68. Decision no. 23-2017-1021(159) dated 31.05.2017
69. Decision no. 23-2017-1057(168) dated 05.06.2017
70. Decision no. 23-2016-1436(214) dated 15.07.2016
71. Decision no. 23-2016-1484(220) dated 20.07.2016