

Security for Human Beings and Borders

Combating Smuggling of Migrants
in the Western Balkan



Funded by
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Analysis in the field of migrant smuggling in Albania

Tirana, February 2024



BALKAN
REFUGEE AND
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1. Introduction

The phenomenon of migration has always been a part of human history, but, nowadays, it has not only garnered a wider scope, but it has also become very complex. Based on the National Strategy for Migration and its Action Plan 2019-2022, Albanian Helsinki Committee (AHC) previously has drafted a Report "On the rights and freedoms of migrants, asylum seekers and refugees in Albania for the period 2012-2017", which clearly indicates that mixed migratory flows have also affected Albania. This includes foreigners, refugees, asylum seekers, undocumented migrants, victims or potential victims of trafficking, unaccompanied and separated minors, and stateless persons. Some migrants fall into more than one of the above categories. Those categories, who enter the territory of Albania without an entry permit, belong to different nationalities, with the majority being Syrians and Afghans. Most of these migrants find themselves in difficult circumstances due to the economic or political situation in their countries of origin. Some of them seek asylum in Albania, while the majority only use it as a transit country to reach the countries of the European Union, towards "a better life" for themselves and their families.

The term "migrant smuggling" refers to the unauthorized movement of individuals across national borders for the financial or other benefits of the smuggler.¹ The smuggling of migrants poses a dual challenge, both security and humanitarian. It can be fully addressed only by including all the influential actors. The difficulty of coping with factual situations is even higher in countries that have more limited institutional opportunities. In this case, multifaceted cooperation is required which will guarantee their efficiency.

Despite the obstacles and difficulties encountered, cooperation with partner institutions of other countries, joint activity with domestic institutions for an integrated situation management, coordination with international factors and civil society organizations, are addresses that need to be implemented in practice.

¹ Anne T. Gallagher, "The International Law of Migrant Smuggling", Fiona David, Centre for International and Public Law, Australian National University, October 2014, pg. 1.

2. Methodology

2.1. Desk Research

This paper, in fulfillment of its purpose, has implemented some scientific methods, to guarantee the provision of data, legal basis, or even factual elements generated by official sources. For the provision of data which would then be subject to scientific analysis and processing, the main method used is that of research, access and securing them electronically, by checking the publications of official institutions on their websites. Afterwards, the below models constituted the methodology applied to develop the desk research, foundational to this paper.

Deductive method: This method of study and, at the same time, of reasoning begins with a general idea or data and then derives from them specific ideas and data.

Inductive method: The opposite of the deductive method, it represents a scientific analysis, wherein it passes from the specific facts which are known to the general conclusions which are the result of the application of this method.

Analytical method: This method focuses on the analysis of facts, circumstances and other elements that have been observed during the study.

Synthesis method: This method's primary characteristic is in its short, structured summary of elements provided in the study.

Descriptive method: This method focuses on the analytical description of various events or circumstances in detail based on the scientific standard to enable the acquisition of data that achieves the purpose of the paper, and the processing of useful conclusions.

Comparative method: This method focuses on comparing sets of data, in order to reach conclusions about the differences or similarities between them.

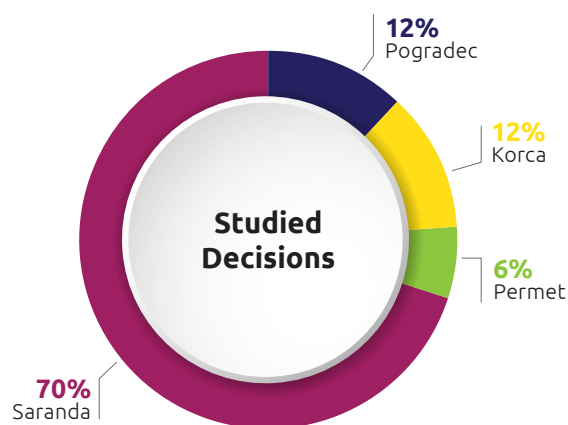
Statistical method: Through this method, a summarized version of the information is granted to obtain general conclusions.

2.2. Court decisions

Case studies are very important to consider because they provide important insights into law enforcement and implementation problems encountered. The decisions that were taken into consideration in this paper focus on two types of criminal offenses foreseen in the Article 297 of the Criminal Code "*Illegal crossing of the state border*" and the Article 298 of the Criminal Code "*Assistance in illegal border crossing*".

The identification of the route of illegal passage of migrants in our country is in the focus of the review of court decisions. The itinerary includes the border crossing points with the Republic of Greece and to a lesser extent with the Republic of Northern Macedonia, and then continuing towards the north of the country, to exit by land in the Republic of Montenegro. In this line of analysis, the selection of decisions was made based on the judicial practices addressed by 5 courts, namely, the Courts of First Instance Pogradec, Korça, Përmet, Elbasan, Shkodra.

In conclusion, 106 decisions of the aforementioned courts were taken into consideration: 12 decisions were obtained from the Court of First Instance of Pogradec, 12 decisions from the Court of First Instance of Korça, 6 decisions from the Court of First Instance of Përmet, 6 decisions from the Court of First Instance of Shkodra and 70 decisions from the Court of First Instance of Saranda.



3. Legal Framework

3.1. Policy Framework

The Republic of Albania does not have a single and comprehensive national strategy that would address all issues that illegal migration has brought, and more specifically the phenomenon of migrant smuggling. The focus of Albanian policies is currently on the fight against trafficking in human beings. The phenomenon of migrant smuggling seems to be acknowledged as a less dangerous phenomenon, and can often be addressed via the same methodologies and channels of addressing trafficking. But there are some policies², which partially or indirectly provide relevant measures on how to deal with it:

National Migration Strategy and its Action Plan (2019-2022).

The National Strategy for Migration and Action Plan 2019-2022 is an important strategic document approved by the Council of Ministers of the Republic of Albania with Decision no. 400, dated 19 June 2019 *"On the approval of the National Strategy for Migration and Action Plan 2019-2022"*. The document focuses mainly on regular and irregular migrants and takes into consideration, where possible, the position of asylum seekers and refugees.³

The National Strategy for Migration states some of the reasons why the territory of the Republic of Albania is accessible to refugees, asylum seekers, migrants, or persons who are victims of trafficking, unaccompanied and separated juveniles, as well as stateless persons, creating a passageway which is increasingly being confirmed as sustainable. The document states that: *"In this context, it remains essential to closely monitor not only the dynamics of migratory movements for various reasons, but also the early warning signs of increasing numbers. Asylum seekers coming from Greece and interviewed in Albania, confirm the prolonged asylum procedures in Greece, inadequate reception conditions inland and on the islands, as well as the desire to join their family members in EU member states. Therefore, if these factors do not improve, especially reception conditions and asylum procedures, refugees and migrants will increasingly seek alternatives. Options are either the irregular border crossing in Northern Macedonia and Albania, as has been the case since 2015, or the attempt by alternative sea routes that has not been an option so far. It is therefore necessary to ensure the effectiveness of border controls at authorized border crossing points, control along the green border, as well as periodically update the profile of refugees and immigrants coming to Albania, especially the reasons for which they intend to cross through Albania"*.

National Strategy for Migration and its Action Plan (2019-2022) and setting future priorities regarding the challenges and needs to be addressed in the "New Contingency Plan"

In 2015, Albania drafted the "Contingency Plan in Response to Mixed Migration Flows". According to the findings, which are transposed in the National Strategy for Migration and its Action Plan, it is evident that the Contingency Plan, due to the specifics and developments identified, raises the need to be replaced with a newly revised plan, which takes in account the increase in number of arrivals or detentions of migrants and especially the number of asylum applications in Albania.

The National Strategy on Migration and its Action Plan (2019-2022) states that the actors involved in providing assistance, services and protection will need to reassess existing needs, priorities and procedures. Such a change also has an impact on the budget forecasts of state structures, UN agencies and NGOs involved.⁴

2 To see the entirety of the various documents that define the policies for migrants in the Republic of Albania, see https://www.mb.gov.al/wp-content/uploads/2021/02/Strategjia-Komb%C3%ABtare-p%C3%ABr-Migration-and-Action-Plan_2019-2022.pdf Pg. 11

3 For more see page 8 of the National Strategy for Migration and Action Plan 2019-2022 <https://www.mb.gov.al/plane-dhe-strategji/> or https://www.mb.gov.al/wp-content/uploads/2021/02/Strategy-Nation%C3%ABtare-p%C3%ABr-Migration-and-Action-Plan_2019-2022.pdf

4 See page 19 of the National Strategy for Migration and Action Plan 2019-2022 <https://www.mb.gov.al/plane-dhe-strategji/> or https://www.mb.gov.al/wp-content/uploads/2021/02/Strategy-Nation%C3%ABtare-p%C3%ABr-Migration-and-Action-Plan_2019-2022.pdf which makes reference to the Joint Assessment on Asylum and Mixed Migration; The situation in Albania, 2018, conducted by the UN Team in Albania.

Challenges and needs that must be considered according to the National Strategy for Migration and its Action Plan (2019-2022) and that must have concrete treatment and space in the new Contingency Plan, should be:

1. *"The right to safe and dignified housing."*
2. *"Child protection".*
3. *"Women at risk."*
4. *"Other vulnerable categories".*
5. *"Health".*

The Border Police Risk Analysis System is important because these data provide analytical information and a situational picture for planning and decision-making, at strategic, operational and tactical level. The Department of Border Police and Migration has created a model of risk analysis in accordance with the methodology of FRONTEX, bringing a high standard in this regard. Permanent improvement, establishment of joint capacities of the risk analysis system and implementation of anti-corruption measures is necessary, as border controls are based on risk analysis and criminal intelligence. Border risk analysis includes internal security and analysis of threats that may affect the functioning of border security.⁵

6. *"Data management".*

Displacement tracking data management is used by state authorities to identify population movement. Proper tracking of mixed populations, such as migrants, asylum seekers, refugees, etc., requires that all relevant institutions (the Directorate for Asylum, the Border and Migration Police, the National Center for Asylum Seekers and the Closed Reception Center in Karreç), intensify the exchange of data for the purpose of effective action against the phenomenon⁶.

Cross-cutting Security Strategy in the Community 2021-2026 and Its Action Plan 2021-2023⁷

This cross-cutting strategy has the mission of creating a safer environment for the community, in order to protect life and property, providing service in close cooperation with all actors in the field of security, public security agencies, community, and other public and private entities. The function of the mission is to design and implement policies aimed at ensuring public order and enabling the creation of a community where everyone feels safe in the environment in which they live.⁸

Referring to the formulation and terminology, which does not mention the concepts for legal entities such as refugees, asylum seekers, migrants, victims of trafficking, unaccompanied and separated minors, as well as stateless persons, the impression is created that the persons identified above do not benefit from public safety. Where it uses the term *"citizen"* and does not make evidence referring to quality emphasizing that *"the Strategy aims to protect and serve the demands of citizens for a more peaceful, secure and democratic life for the whole community"*, this does not mean that it is applicable only to Albanian citizens.

Referring to such a general terminology, the focus on the term *"citizen"* is the appropriate legislative solution that the drafters of the legal act have chosen to use. On the contrary, the creation of a list that would explicitly mention all the vulnerable groups would not increase the guarantees for them. If other potential categories of citizens arrived in our country, through various forms of transit, they would risk being left without protection, provided within the public order, making it impossible envisioning a strategy for *"creating a community where everyone feels safe in the environment in which they live"*.

5 Decision no. 1117, date 16 December 2020 "On the approval of the inter-sectorial Strategy of the Integrated Management of the Borders 2021–2027 and the Action Plan 2021–2023" page 31.

6 For the above see page 12 of the National Strategy for Migration and Action Plan 2019-2022 https://www.mb.gov.al/plane-dhe-strategji/ or https://www.mb.gov.al/wp-content/uploads/2021/02/Strategy-Nation%C3%ABtare-p%C3%ABr-Migration-and-Action-Plan_2019-2022.pdf

7 This strategy was approved by Decision no. 1139, dated 24 December 2020 of the Council of Ministers. <https://mb.gov.al/ep-content/uploads/2021/01/STRATEGJIA-ND%C3%8BRSEKTORIALE-E-SIGURIS%C3%8B-N%C3%8B-KOMUNITET-2021%E2%80%932026-DHE-T%C3%8B-PAN-I-ACTION-2021%E2%80%932023.docx>

8 For more see Cross-cutting Community Safety Strategy 2021-2026 and Action Plan 2021 – 2023. Pg 14.

Also, the Cross-cutting Community Security Strategy stipulates that full control of the territory, in order to guarantee the implementation of legality⁹, is an important task of a number of actors who have a legal obligation in this regard. This control includes a set of processes, starting from the supervision of urban and rural areas, tourist areas affecting all other areas (mountain, plain, forest, etc.) throughout the country to prevent criminal offenses and illegality in the territory. Every person who is in the territory of the Republic of Albania, regardless of the way of arrival, is a beneficiary to the concept that this Strategy puts into action where it "aims to protect and serve the demands of citizens for a more peaceful, secure life and with democratic values for the whole community" and "creating a community where everyone feels safe in the environment in which they live".

■ National Strategy for Integrated Border Management¹⁰

The National Strategy for Integrated Border Management aims to develop policies to further improve border security standards. This goal will be achieved by investing in:

- Increasing efficiency for human and technical resource management;
- Increasing operational capacity to prevent and crack down on cross-border crime;
- Increasing cooperation with internal structures and neighboring and EU partners;
- Increasing investigative capacities and orienting these structures towards intelligence;
- Increasing the management and processing of criminal information;
- Increasing and improving capacities for the application of new technologies in the field of green and blue border management and the application of additional measures for territorial control in order to control the territory in relation to illegal migration.¹¹

Although the National Strategy for Integrated Border Management in defining its policies and strategic goals does not explicitly and directly mention migrant smuggling as a challenge, it lists the main objectives: *"Increasing operational capacity to prevent and strike cross-border crime"* and *"Increasing and improving capacities for the application of new technologies in the field of green and blue border management and the application of additional measures for territorial control in order to control the illegal migration"*. By the above definitions, it turns out that migrant smuggling is one of the issues targeted by the Strategy by default.

The main state agencies operating at the border are:

- Border and Migration Police (BMP) / State Police;
- Albanian Customs Service (ACS);
- National Food Authority (NFA);
- Anti-Epidemic Sanitary Service (AESS).

Regarding the purpose of border management in order to identify problems and design effective policies, the National Strategy for Integrated Border Management is not the only strategy which makes important determinations related to migrant smuggling.

Ensuring safe and orderly migration from, through and to Albania is an objective set out in the Action Plan of the National Migration Strategy. The document states that *"Integrated border and migration management has taken a central position in Albania's efforts to reduce irregular movement across its borders and within the territory."*

9 For more see Cross-cutting Community Safety Strategy 2021-2026 and Action Plan 2021-2023. Pg. 21

10 Approved by Decision no. 119, dated 5 March 2014 of the Council of Ministers. On the Approval of the National Strategy for Integrated Border Management and Action Plan, 2014 – 2020 http://www.mb.gov.al/wp-content/uploads/2018/01/Strategjia_e_Management_te_Integruar_te_Bijjive_2014-2020.pdf

11 For more see Chapter 2 Vision, Policies and Strategic Goals. National Strategy for Integrated Border Management.

3.2. National Legislation

Constitutional Definitions and the Position of Fundamental Freedoms and Human Rights in the Domestic Legal Framework

*"Fundamental human rights and freedoms are indivisible, inalienable and inviolable and stand at the foundation of the entire legal order."*¹² The determining character and fundamental importance that the Constitution of the Republic of Albania recognizes human rights and freedoms, their promoter in all institutional and social processes in the country, is the main guarantee for the principles on which relations will develop in society, not only in relation to Albanian citizens.

This initial definition of the legal relationship, of the extension of the fundamental rights and freedoms that foreign citizens or stateless persons, including migrants, will have, during their stay in the territory of the Republic of Albania, constitutes the main orientation on which they will outline the entire legal system in force. But the fundamental rights and freedoms, as well as the obligations provided in the Constitution for Albanian citizens apply equally to foreigners and stateless persons in the territory of the Republic of Albania, *"Except in cases when the Constitution specifically links with Albanian citizenship the exercise of certain rights and freedoms."*¹³

Analysis of the Criminal Code and Criminal Offenses related to the Concept of Migrants Smuggling

The Criminal Code of the Republic of Albania, in the legal terminology it uses, in order to construct its constituent provisions, converts the action of crossing without the approval of the relevant state border authorities into the term "Illegal crossing of the state border".

In 2021, Law no. 79/2021 *"On foreigners"* regulates the regime of entry, stay, employment and exit of foreigners in / from the Republic of Albania. The subject of this law are foreigners who enter or intend to enter the Republic of Albania, for the purpose of residence, transit, employment, study, as well as in cases when they leave the Republic of Albania.

The law determines how a foreigner can enter the Republic of Albania regularly as well as the cases when it happens illegally. Irregular entries will be considered cases if the foreigner: (a) *crosses the state border outside the points and the time set for crossing the border;* (b) *avoids border control;* (c) *enters the territory of the Republic of Albania during the period for which there is a ban on entering and staying in the Republic of Albania;* (d) *enters the territory of the Republic of Albania using a document of another person or a forged document or an unauthorized document to enter the territory of the Republic of Albania.*

Foreigners can leave the territory of the Republic of Albania freely. But the law also provides for cases when foreigners are prohibited from leaving the Republic of Albania if they act in violation of Albanian legislation by performing the following actions: (a) *when leaving the Republic of Albania he/she uses the travel document of another person or a forged document or invalid travel document;* (b) *is registered in the travel document of another person and on leaving the Republic of Albania is not accompanied by the person in whose document he/she is registered;* (c) *when intends to avoid prosecution for a criminal offense, detention, arrest or execution of a decision containing a sentence of imprisonment.*

The Minister responsible for public order and security, for important interests of the state, constitutional and legal order, national security and public order, with an argumentative order declares {non grata}. The foreigner declared an undesirable person is expelled from the territory of the Republic of Albania with an expulsion order, issued by the minister responsible for public order and security. But the law takes care to protect the rights of foreign nationals who are in special conditions.

12 Article 15 point 1 Constitution of the Republic of Albania.

13 A case when the Constitution of the Republic of Albania connects the enjoyment of freedoms and human rights in an inseparable way with the notion of statehood, is the case of political rights. For more see Article 45 of the Constitution of the Republic of Albania which defines "the right to vote and stand for election" only for Albanian citizens.

Referring to the Criminal Code of the Republic of Albania, its article 7, the foreign citizen, who commits a criminal offense in the territory of the Republic of Albania, is responsible according to the criminal law of the Republic of Albania. It is also provided that the criminal law of the Republic of Albania is applicable to a foreign citizen who outside the territory of the Republic of Albania commits to the detriment of the interests of the state or the Albanian citizen one of the crimes provided, including illegal trafficking in human beings, children and women. In this way the Criminal Code recognizes the serious consequences to the detriment of the interests of citizens and the state makes such a prediction, regarding the scope of application of sanctioning legislation for this particular illegal activity, aiming to prevent the phenomenon and punishing the perpetrators.

The origin of the word (*kontrabanda* in Albanian) smuggling comes from the Italian language, respectively "*contra*" – against and "*bando*" – government law.¹⁴ This terminology means illegal actions or omissions which are made to avoid tariff obligations arising from the import or export of goods to a particular country. The term "smuggling" in Albanian criminal legislation is used to describe a legal phenomenon which is mainly and only related to the illegal export and import of goods and not to the illegal passage, assistance, or support of human beings to cross the border. In this line, after the systematic study of the provisions of the Special Section of the Criminal Code, we bring to attention the concrete cases when the law mentions smuggling, which evidences its connection with goods. Regarding the manner of establishing these norms and the place that these provisions occupy in the Criminal Code, it is evident that they are all located in the "Section V – Crimes in the Field of Customs", and that are specifically: Smuggling of prohibited goods,¹⁵ goods for which excise is paid,¹⁶ licensed goods,¹⁷ other goods,¹⁸ by customs officials,¹⁹ of cultural values,²⁰ of intermediate goods²¹; Trade and transport of smuggled goods;²² Storage of smuggled goods²³

The phenomenon known as "smuggling of migrants", in international law or even that of some countries, in criminal legislation, and especially in the provisions of the Criminal Code is known as "*Illegal crossing of the state border*"²⁴ and "*Assistance for illegal border crossing*".²⁵ The provisions for these two types of the criminal offense are systematically set in the part of norms, for the protection and guarantee of the "State Secrets and Borders". This category of criminal offenses envisages the variety of actions but also criminal omissions against legal relations accepted by society and established by the state authority to protect state borders, which is their common goal, or as it may be called their common group object is the guarantee of state borders.

In the provision made by the Criminal Code it is classified as a criminal offense of the type "minor offense" and not "crime". This means that in the division that the Criminal Code makes for the type of its norms, this type of criminal offense is classified as a violation not as serious as other "crime" categories. In this line, the criminal law chooses to treat the "*Illegal crossing of the state border*", as an action with a not very high social risk, this by choice of the legislator which also affects the level of applicable sanction.

In the way of treatment and analysis that the Albanian criminal legal doctrine makes to the provisions of the Special part of the Criminal Code, it stops at four elements: the object of the criminal norm, the objective side of the criminal norm, the subject of the criminal norm and the subjective side of the criminal norm.²⁶ Specifically, we are briefly explaining the meaning of each of them, as stopping at the elements they represent in each norm will constitute the systematic way of analyzing the following norms.

14 <https://flamenco.ru/sq/kontrabanda---eto-chto-takoe-ponyatie-i-vidy-kontrabandy-kontrabandnym/>

15 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 171.

16 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 172.

17 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 173.

18 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 174.

19 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 175.

20 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 176.

21 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 177.

22 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 178.

23 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 179.

24 For more see article 297 of the Criminal Code of the Republic of Albania. (Added by law no. 8279, dated 15 January 1998; amended by law no. 9188, dated 12 February 2004).

25 For more see article 298 of the Criminal Code of the Republic of Albania. (Amended by Law No. 9188, dated 12 February 2004; amended the title and the first paragraph by Law No. 9686, dated 26 February 2007; amended by Law No. 23/2012, dated 1 March 2012; repealed the part that provides for punishment with a fine, as the main punishment, in addition to the imprisonment sentence, with law no. 144/2014, dated 2 May 2013)

26 In order to determine the methodology of the analysis of the figures of the criminal offense, we have referred to the doctrine, specifically to the initial definitions made in the publication "Criminal law special part" by Professor Ismet Elezi. Edition I 2016. Pp 10-11.

Object – of a criminal norm consists of legal relations accepted by society and protected by the state, to ensure “legal benefits”.

Objective side – of a criminal norm composed by elements such as action, inaction, consequence, causal link, manner, means, time or place of commission of the criminal offense.

The subject – of a criminal norm contains the clarification of certain circumstances, which determine which subject can consume a criminal offense, as not everyone can commit a criminal offense, in the criminal legal sense. In order to specify this moment, it is necessary to analyze the age and responsibility of the subject or even the special features, when the provision connects the quality of the active or passive subject of the criminal offense with special qualities, which the subject must have, of which must be evidenced.

The subjective side – of a criminal norm includes elements such as knowledge of the act or omission, intent or negligence as forms of guilt, motives and intent, qualities which are very important to determine whether a figure of the criminal offense, i.e. a norm of the Criminal Code is consumed or not.

This paper continues with the analysis of each norm of the Criminal Code, for which there is interest in the topics we are dealing with.

“Illegal crossing of the state border”

“Illegal crossing of state borders is a criminal offense and punishable by a fine or up to two years in prison.”

The **objective side** of this norm means that it can be consumed with either illegal entry or exit through the border of the Republic of Albania or any territory that according to the concept of International Law is part of the territory of the Republic of Albania. This is a figure of a **material** criminal offense, which means that in order to be considered consumed, the consequence of the illegal action must be ascertained, i.e. the illegal crossing of the border. Eventually when the citizens attempt to cross the state border illegally but will be stopped by the authorities, this criminal offense will be considered as *attempted*. The **subject** of the criminal offense of “*Illegal crossing of the state border*” can be any person. At this point, the Criminal Code of the Republic of Albania does not connect the active subject of the criminal offense, i.e. the perpetrator with its special quality, but any person who illegally crosses the state border can be the perpetrator of this offense. The **subjective side** of this criminal offense after the analysis of the provision, which at this point is not clear, will be concluded that it is consumed only intentionally, in terms of the form of guilt. At this point, if in an eventual case, a boat sailing, due to the negligence of the management personnel will access the territorial waters of the Republic of Albania, without permission, the persons will not have criminal responsibility. This is because the form of guilt that is required to be ascertained in order to be before the consumption of the figure of the criminal offense of “*Illegal crossing of the state border*” is that of intent. On the other hand, if the crew consciously makes the decision to help the people on board cross the sea border, they will not only face the criminal norm of “*Illegal crossing of the state border*”, according to which the members of the board will be criminally liable, but also the provision “*Assistance for illegal border crossing*”²⁷, for which crew members will be held accountable.

“Assistance for illegal border crossing”

“Accommodation, escort, making available or using means of navigation, flight or other means of transport or any other assistance, for the purpose of illegal crossing of the border of the Republic of Albania or for the illegal entry of a person into another state, without being its citizen or having no residence permit in that state, is punishable by imprisonment from one to four years. When the aid is given for profit, it is punishable by imprisonment from three to seven years. When the 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 has resulted in death of the injured party, it shall be punished by imprisonment of not less than fifteen years or by life imprisonment. When the criminal offense is committed through the use of a state function or public service, the sentence of imprisonment is increased by ¼ of the given sentence”

27 Provision made in article 298 of the Criminal Code of the Republic of Albania.

The main **object** of this criminal norm are the legal relations which have been accepted by the society and have been established by the state to guarantee the integrity and inviolability of the state borders of the Republic of Albania. From the interpretation of the qualifying circumstances of this provision we conclude that in addition to the main object, i.e. public goods which this norm protects, it also has other secondary objects, such as the life or health of citizens. "Life and health" despite the fact that in the criminal legal sense according to the Criminal Code, are more important objects than the "integrity and inviolability" of state borders, they still remain secondary because this norm, due to its purpose, the part where it is located and the main goal that the legislator intends to achieve through it, has the main focus on the integrity of the state border. The **objective side** of this figure of the criminal offense is achieved with illegal actions which can appear in several forms, such as: housing, accompaniment, making available or using means of navigation, flight or other means of transport, or any other help. Confirmation of one of these moments, listed above, regardless of the ascertainment or not of the arrival of the illegal consequence, i.e. illegal crossing of the border, would lead to the criminal offense to be considered fully consumed and the perpetrators to keep responsibility for it, fully.

Any person can be the **subject** of the criminal offense of "*Assistance in illegal border crossing*". But when referring to the qualified circumstances of this norm, specifically, its paragraph number 5, which states that "*When the offense is committed through the use of state function or public service*", it is concluded that this is a situation where the subject must have a special quality, namely public service or state function. As far as the subjective side is concerned, this criminal offense is committed intentionally, as the main form of guilt, necessary for this norm.

"Trafficking in adult persons"²⁸

In practice, it turns out that criminal groups which operate in the field of smuggling migrants, often partake in trafficking, as well. This is not the only legal-criminal moment of the illegal activity of criminal groups which operate in this field. It should be noted that the activity of migrant smuggling often serves as a supplier of the activity of trafficking, where criminal groups exploit the vulnerability of this category of citizens and recruit their victims against various forms of force.

Human trafficking is defined by the Albanian Criminal Code as "*The recruitment, transport, transfer, hiding or reception of persons through threat or the use of force or other forms of compulsion, kidnapping, fraud, abuse of office or taking advantage of social, physical or psychological condition or the giving or receipt of payments or benefits in order to get the consent of a person who controls another person, with the purpose of exploitation of prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or forms similar to slavery, putting in use or transplanting organs, as well as other forms of exploitation, both within and beyond the territory of the Republic of Albania*"

The Criminal Code,²⁹ considering the specifics of trafficking in human beings, provides for a special regime for victims of trafficking who have been forced to commit a criminal offense during the period when they have been trafficked and against perpetrators of this category of criminal offenses who cooperate with justice to whitewash them.

Specifically, it is provided that the person injured by the criminal offenses, related to the trafficking of the person, may benefit from the exemption from punishment. Also, the person who assists the prosecuting authorities in the fight against the sort of crime the person has committed, or as the case may be, in the detection of other persons who commit such crimes, no more than half of the sentence provided for the offense committed by him may be punished. In special cases, when mitigating circumstances compete in his favor, this person may be exempted from punishment. Additionally, refugees may fall victim not only to administrative abuse by official institutions, due to their negligence in providing services, but as victims of criminal groups too, which in addition to the offense of the smuggling of migrants may also indulge in the trafficking of persons.

28 Provision of Article 110 / a of the Criminal Code of the Republic of Albania. This provision has been amended several times, specifically, added by law 8733, dated 24 January 2001; amended by law no. 9188, dated 12 February 2004; changed the title, the words in the first paragraph and the third paragraph and added the second paragraph by law no. 144, dated 2 May 2013; repealed the part that provides for a fine, as the main punishment, in addition to imprisonment, by law no. 144/2013, dated 2 May 2013.

29 Article 52 / a of the Criminal Code.

The main **object** of this provision is the legal relations accepted by the society and established by the state, in order to ensure the rights and freedoms of the person from any criminal act or omission. The legal relationship that this provision establishes in defense is closely related to the freedom of the person in both a broad and concrete sense. .

The **objective** side of this criminal provision is consumed by active illegal actions, which materialize in four forms:

- Recruitment (finding persons, implementing various forms or techniques of changing the will, by having as its ultimate goal their trafficking);
- Transportation (the movement of a trafficked person, from one place to another, inside or outside the territory of the Republic of Albania)
- Transfer (relocation of the person in order to transfer takes place abroad);
- Concealment and Waiting (hiding the person who will be trafficked, restriction or complete prohibition of contacts with other persons, or free access to public premises).

It must be noted any of the abovementioned forms are enough to consider this criminal offense to be fully committed. In the event that the criminal offense has been consumed in two or more of the forms discussed above, criminal responsibility by the perpetrator will not be borne as many times as in what form he committed the crime. In such an eventual case, the perpetrator will be held liable only once, i.e. the criminal norm will be applied only once.

It is important to ascertain that the entire illegal cycle of trafficking occurred outside the free will of the victim, and with the final and verified purpose of trafficking them. When the trafficking takes place abroad, it does not matter whether the victim was transferred legally or illegally.

The third group of elements that this provision provides in its enacting clause, and that at least one of them must be ascertained before the consumption of the criminal offense, is related to its **subjective** side, and specifically to the special purpose provided in the criminal norm, namely:

- Purpose for the use of forced labor or services, slavery or similar forms of slavery;
- Purpose to use or transplant organs;
- Intent to exploit in prostitution;
- and other forms of sexual exploitation outside the territory of the Republic of Albania.

In order to consider the subjective element of the figure of the criminal offense as complete, it is sufficient to prove the intention of the active subject of the criminal offense to illegally exploit the victim. The **subject** of this criminal offense is general and from the subjective point of view this criminal offense is consumed in any case with direct intent and special purpose.

Referring to the concept of "Trafficking", the Criminal Code mentions it in some key moments: Human trafficking; Trafficking in women for prostitution;³⁰ Maintaining premises for prostitution³¹; Trafficking of works of art and culture;³² Trafficking in motor vehicles;³³ Arms trafficking;³⁴ Trafficking in explosives and poisons;³⁵ and Narcotics trafficking.³⁶

In the analysis of the legislative technique, "trafficking" is mainly used to identify two types of illegal activities. First to regulate an illegal phenomenon which is directed against people and fundamental values related to their human integrity and against the freedom of the person. Secondly, this term is used to criminalize illegal phenomena related to the economic sphere. Regardless of the fact that, in principle, a formal, centralized process has not been developed to officially align the criminal legislation with EU directives, this legislation, in a natural way, from the moment of approval and after the changes it has made, has integrated step-by-step the main values for the protection of human rights, according to the European standard.

30 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 110 / a.

31 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 114 / b.

32 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 115.

33 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 138 / a.

34 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 141 / a.

35 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 278 / a.

36 To see the full wording of the norm refer to the Criminal Code of the Republic of Albania article 282 / a.

The Government of Albania does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts. Albania remained on Tier 2.³⁷ **The government did not meet the minimum standards in several key areas. The government did not convict any traffickers, identified fewer victims, and decreased resources to NGO-run shelters. The government lacked screening efforts for vulnerable populations—particularly migrants, asylum-seekers, individuals in commercial sex, and children—and mobile victim identification units (MIU) remained underfunded and staffed despite identifying most of the victims every year.**³⁸

Criminal Code, Definition of the Notion of State Border and Typology of Criminal Offenses related to Migrants Smuggling

The concept of state territory is a very important material element, as it is the main determinant for the consumption of elements of the figure of criminal offenses related to the smuggling of migrants. The territory of the Republic of Albania, in the sense of criminal law, is based on the concept of International Law on this issue.

*"The territory of the Republic of Albania, in the sense of criminal law, is called land space, the width of territorial and inland maritime waters, the airspace that extends over land and territorial and inland maritime waters, as well as any other country where the sovereignty of the Albanian state extends, such as the headquarters of the Albanian diplomatic and consular missions, the ships that carry the flag of the Republic of Albania, the ships of the navy, military or civil aviation."*³⁹

From the above it is clearly identified that the territory of the Republic of Albania, in the sense of criminal law, consists of several legal concepts, which are essential for the implementation of criminal norms, and which are listed as follows:

- Ground space;
- Width of territorial and inland marine waters;
- Airspace extending over land and territorial and inland marine waters;
- Any other country where the sovereignty of the Albanian state extends, such as the headquarters of the Albanian diplomatic and consular missions, the ships that carry the flag of the Republic of Albania, the ships of the navy, military or civil aviation.

The above notions, in addition to the defining value in terms of criminal law, also configure concrete civil elements which are related to the necessity to regulate border crossing technicalities. It is known that in order to access the territory of a state other than that of citizenship, it is necessary to submit to a specific regime of rules, which is related to obtaining a special permit or visa. The visa regime for foreigners is determined based on Law, 108/13, "For foreigners", and DCM no. 569, dated 03 October 2018 for some additions and changes to the Decision no. 513, dated 13.06.2013 of the Council of Ministers on "On Determining the Criteria of Procedures and Documentation for the Entry, Stay and Treatment of Foreigners in the Republic of Albania", as amended.

Difference of Criminal Offenses in Migrants Smuggling with that of Trafficking

Having fully analyzed the main moments related to the criminal offenses that include the sphere of "*Smuggling of migrants*", and the connection that they show in the theoretical and practical plane with "*Trafficking in human beings*", it would be necessary to identify the **differences** that these two typologies of criminal offenses have among them.

Regarding the difference between trafficking and "providing assistance for illegal border crossing" or smuggling of migrants, as defined in foreign legislation, we are dealing with the element of the person's will and connection with the perpetrator, in order to commit the crime on the street for criminal of material benefits. The difference lies in the fact that in the case of illegal crossing or providing assistance for illegal

³⁷ Tier 2 countries whose governments do not fully comply with all of TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards.

³⁸ <https://www.state.gov/reports/2021-trafficking-in-persons-report/albania/>

³⁹ Article 5 of the Constitution of the Republic of Albania.

crossing, the migrants or persons cross voluntarily and the connection with the perpetrators ends with the crossing of the Albanian territory to another border country. Whereas in the case of trafficking, the migrant (in this case) is used as a *corpus delicti* to extract profits, transferred outside the territory against their will or by exercising that will and the connection with the trafficker does not end with the passage of the territory.⁴⁰

This is also the essential difference between the two typologies of criminal offenses. The figures of the criminal offenses of "*Illegal crossing of the state border*" and "*Assistance for illegal border crossing*" have the legal relations which have been established by the state to guarantee the integrity and inviolability of the state borders of the Republic of Albania as their object. While the figure of the criminal offense of "*Trafficking in adults*" has as its main object the legal relations accepted by society and established by the state, to ensure the rights and freedoms of the person.

Another difference is related to the fact that throughout the time of the commission of the criminal offense, any profit derived by the injured party as a result of its use is obtained by the subject of the criminal offense. The injured party, during the time of committing this criminal offense by the subject, has been completely deprived of liberty, as one of the fundamental human rights and freedoms and becomes an obedient tool of the subject of the criminal offense, it did not matter at all that he committed acts according to his will, and this is one of the basic differences between the criminal offense of "*Trafficking in persons*" and the offenses of "*Assisting illegal border crossing*"⁴¹ or smuggling as it is called in international law.⁴²

40 For more see the Commentary on the Criminal Offenses of Trafficking in Human Beings. <https://www.osce.org/files/f/documents/8/c/373348.pdf>

41 In the Palermo Protocol this offense is known as illegal immigration or smuggling of immigrants.

42 For more see the Commentary on the Criminal Offenses of Trafficking in Human Beings. <https://www.osce.org/files/f/documents/8/c/373348.pdf>

4. Institutional Capacity

4.1. Institutional Framework

The Ministry of Interior is the main structure responsible for dealing with irregular migration, asylum and refugees. As shown in other parts of this paper, the institution and others under its auspices, charged with functional duties, to guarantee public order, public goods, and the life and health of citizens are the core structures engaged in the fight against the smuggling of migrants.

■ Governmental Institutions

The General Directorate for Border and Migration in the Ministry of Interior, through its central and local structures, is responsible for preventing and combating irregular migration, through:⁴³ Integrated border management; Controlling the legality of the stay of foreigners in the territory and taking measures of voluntary departure, deportation, detention of irregular foreigners in the territory and their return; Implementation of Readmission Agreements with other countries; Reception, interviewing and selection of returned citizens at the border; Regional and wider cooperation in the field of exchange of statistical data on illegal migration and early warning; Identification and treatment of victims, potential victims of trafficking in persons under the National Referral Mechanism and Standard Operating Procedures for the identification, referral and assistance of victims of trafficking.

The Directorate of Asylum and Foreigners and Citizenship in the Ministry of Interior, is a structure which has competence in asylum and refugee issues. It is the responsibility of this structure to handle, process and review applications, as well as gather the information needed to complete the documentation for each asylum application. The Republic of Albania guarantees the right to asylum for foreign citizens or stateless persons, who are outside the country of citizenship or outside the habitual residence and have no possibility or desire to seek its protection.⁴⁴ Considering that these citizens arrive in our country through illegal routes related to the phenomenon of migrant smuggling, those who enter the territory of the Republic of Albania illegally, are not prosecuted for illegal border crossing, if they appear before the authorities within 10 days from the day of entry into the territory of the Republic of Albania.⁴⁵ A foreign citizen or a stateless person may express the intention to seek international protection, verbally or in writing, at the moment of entering the territory of the Republic of Albania, at a border crossing point, at a State Police⁴⁶ station.

The Directorate of Asylum and Foreigners and Citizenship is the body that examines whether the applicant meets the conditions for refugee status or supplementary protection in the first instance.⁴⁷ At the end of the application review procedure, the Asylum Directorate makes a decision through which: (a) recognizes the refugee status; (b) rejects refugee status and recognizes supplementary protection status; (c) rejects the request for international protection; (d) terminates the procedure for determining the status of international protection; (f) terminates the review of the request for international protection.⁴⁸ The applicant may lose his/her status or may be revoked even after the authority has previously given a granting decision to him/her.⁴⁹ The applicant, who declares the intention to apply for international protection, is transferred to the *Asylum Reception Center*, where he has the right to stay until the final decision is made or in another country of his choice.⁵⁰

43 For more see https://www.mb.gov.al/wp-content/uploads/2018/02/Profili_i_Migracionit_-_2015.pdf Pg 14.

44 Article 5 of Law no. 10/2021 On Asylum in the Republic of Albania. <https://www.parlament.al/Files/Akte/20210203145606ligj%20nr%20%2010%20dt%20%201%20%202021.pdf>

45 Article 45 Law no. 10/2021 for Asylum in the Republic of Albania.

46 Article 26 Law no. 10/2021 for Asylum in the Republic of Albania.

47 Article 31 Law no. 10/2021 for Asylum in the Republic of Albania.

48 Article 33 Law no. 10/2021 for Asylum in the Republic of Albania.

49 Article 39 Law no. 10/2021 for Asylum in the Republic of Albania.

50 Article 43 Law no. 10/2021 for Asylum in the Republic of Albania.

The National Commission for Asylum and Refugees is the superior administrative body that reviews the appeals made against administrative decisions of the Directorate of Asylum and Foreigners as well as Citizenship. The Commission consists of the chairman and 4 (four) members, who are appointed to office for a term of 4 (four) years with the right of reappointment. The members of the Commission are appointed and dismissed from office by a decision of the Council of Ministers, which also determines the criteria for appointment, the reasons for dismissal, as well as the remuneration of the members. The Commission is independent in the exercise of the duty and competencies provided in this law. In its first meeting, the Commission approves the internal regulation of its organization and functioning.⁵¹

The Directorate of Anti-Trafficking and Migration in the Ministry of Internal Affairs has the essential task of monitoring, coordinating, promoting and orienting the activity of central or local structures in matters of prevention and fight against trafficking in persons, within the implementation of the National Strategy of Fight against Trafficking in Persons. Trafficking in persons in Albania is considered a worrying phenomenon, despite the existence of legal and institutional mechanisms in place to combat its spread. The driving factors that lead women, men and children to trafficking, becoming victims of this crime are many, among which: poverty, inability to work, education, and lack of solid alternatives. Commitment to combating trafficking includes: Improving the legal framework and its compliance with international law; Increasing the capacity of anti-trafficking structures; Improving the way victims are identified through a proactive approach and the process of their reintegration into society; Prevention of trafficking in persons, through raising public awareness; Intensification of international cooperation in the fight against trafficking.⁵²

The Albanian response against trafficking in human beings is comprehensive, it investigates and prosecutes traffickers, protects the victim and promotes policies and initiatives to prevent trafficking, keeping all these efforts coordinated.⁵³ Based on the Decision of the Council of Ministers no. 770, dated 26 December 2018, "On the approval of the National Action Plan for the Fight against Trafficking in Persons 2018-2020, there are several ministries and institutions, defined with special tasks for the implementation of this decision, setting up a joint group action, against trafficking:⁵⁴ Ministry of Internal Affairs; Ministry of Europe and Foreign Affairs; Ministry of Finance and Economy; Ministry of Education, Sports and Youth; Ministry of Justice; Ministry of Health and Social Protection. From the 143 measures contained in the Action Plan 2018-2020, for the period January 2019-March 2020, according to the pillars, a total of 102 measures have been implemented, 25 measures are in process, 16 measures have not been implemented. Data in percentage: 71.3% – realized measures; 17.5% – measures in process; and 11.2% – unrealized.⁵⁵

The fight against trafficking is a great challenge for the Albanian state. Its engagement is serious and multifaceted, but mainly focused on the legal-criminal direction. The Republic of Albania applies a very severe punishment system for this phenomenon, and the quality of law enforcement in this regard has reached very good quality terms. The application of a criminal sanction alone, however severe and however rightly enforced, may not suffice to address a complex problem. It will take the conformity of many energies and philosophies that need to be put together.

The above philosophy, how the state approaches and then fights trafficking, during the development of this study has been concretely observed. The legal-criminal sphere of the fight against trafficking is characterized by a correct systematization of legal acts, where the Criminal Code and the Code of Criminal Procedure are very well adapted to international acts and conventions, are published, and accessible. Quite the opposite happens with the administrative sphere of the fight against trafficking, where the adopted strategies are not often up-to-date, there is no information on the extent of their monitoring, they are not published and it is not known whether they have been replaced or not.

The study of the content of the acts confirms their external, formal systematics and the fact that Albania treats the phenomenon of trafficking and smuggling of migrants closely, mainly with criminal means. This philosophy needs change and reflection of qualitative elements. It is concluded that the institutional line that refers, addresses and has in competence the issues of "*Trafficking in human beings*", is the same as that which

51 Article 78 Law no. 10/2021 for Asylum in the Republic of Albania.

52 For more see <https://www.wvi.org/sites/default/files/Raporti%20antitrafikim%20shqip%20-%202015.pdf>

53 For more see the National Action Plan for Combating Trafficking in Persons 2018-2020. Fq 1 <https://mb.gov.al/wp-content/uploads/2019/12/VKM-nr-770-date-26-December-2018-Plani-Kombetar-i-Veporit-2018-2020-1-1.pdf>

54 For more see https://www.mb.gov.al/wp-content/uploads/2021/01/Antitrafiku_Plani-Kombetar-i-Vepimit_Raport-monitorimi-2018-2020.docx fq 3.

55 For more see the Monitoring Report on the Implementation of the National Action Plan for the Fight against Trafficking in Persons https://www.mb.gov.al/wp-content/uploads/2021/01/Antitrafiku_Plani-Kombetar-i-Action_Report-monitoring-2018-2020.docx Fq 5.

addresses the phenomenon of *"Migrant Smuggling"*. This attitude is understandable, but the strategic line of treatment of this phenomenon should always be more characterized by special elements that will affect the individualization of treatment.

■ Court jurisdiction for the Smuggling of Migrants

According to the provisions of the Code of Criminal Procedure, district courts are competent to judge the criminal offenses, except those that fall within the jurisdiction of the Court against Corruption and Organized Crime (SPAK). Based on this definition and recognizing the subject matter competence of the Court against Corruption and Organized Crime, criminal offenses in the field of migrant smuggling, mainly criminal offenses provided by Article 297 of the Criminal Code "Illegal crossing of the state border", and Article 298 of the Criminal Code "Assistance in illegal border crossing" are in the subject matter jurisdiction of the courts of first instance. But not in every case, criminal offenses in the field of migrant smuggling will be within the jurisdiction of the courts of first instance. The circumstances of the committing of the criminal offense and the identification of other important elements, such as the cooperation of the perpetrators of the criminal offense may determine for them to be tried by the Court against Corruption and Organized Crime, seeing that according to point B of article 75/a, any criminal offense committed by a structured criminal group, criminal organization, terrorist organization and armed gang, according to the provisions of the Criminal Code, is part of the substantive jurisdiction of this court.

■ Governmental institutions, international organizations, national CSOs that protect the rights of migrants

The Albanian state has continued to strengthen its operational cooperation with the EU member states regarding the control of mixed migratory flows along the migration route of the Western Balkans, including the exchange of information for entry bans in the Schengen area. Albanian authorities have worked closely with most EU member states to address irregular migration of unaccompanied minors, facilitate regular migration, operational cooperation to address irregular migration and information exchange, document falsification and information campaigns on travel rights and obligations. This trend of cooperation should be extended to international and national organizations in the field of guaranteeing human rights and especially for migrants:

- **The organization "Albanian Services for Refugees and Migrants" (RMSA)** started to operate in September 2001 as an implementing partner of UNHCR. RMSA works to promote and protect the rights of refugees, asylum seekers, migrants (IDPs) and minorities in Albania. RMSA promotes the implementation of the Geneva Convention Relating to the Status of Refugees and other national and international human rights standards. RMSA promotes the fact that refugees and migrants are individuals with inalienable rights, obligatory to be respected by all. The organization is a member of councils and groups working in the field of asylum inside and outside Albania. It aims to support refugees, migrants, asylum seekers by providing basic needs (housing, food, clothing and medical assistance).⁵⁶
- **The "Albanian Helsinki Committee" (AHC)**, established on 16 December 1990, in the context of the first wave of movements for the democratic transformation of Albania, a group of public intellectuals founded the Albanian Forum for the Protection of Fundamental Human Rights and Freedoms, which was later renamed into the "Albanian Helsinki Committee" (AHC). The organization initially focused on the rights of persons persecuted by the totalitarian regime, which ruled Albania in the second half of the twentieth century, and played a leading role in educating Albanian society about the international human rights framework. On 22 March 1992, the AHC became a member of the International Helsinki Federation for Human Rights, based in Vienna. In this quarter of a century, AHC has been and remains the most prominent organization for the protection and promotion of human rights in Albania, as well as a key partner for other non-governmental organizations, Albanian public institutions, agencies and international programs working for the advancement of respect for human rights in Albania.⁵⁷

⁵⁶ <http://rmsa.al/>

⁵⁷ <https://ahc.org.al/about-us/historia/>

In addition to its commitment in the framework of guaranteeing freedoms and human rights, in many ways, AHC's mission includes monitoring, advocating and protecting fundamental human rights and freedoms in Albania and beyond, in cooperation with other actors in civil society, national and international organizations⁵⁸. AHC was also a part of the National Commission for Asylum and Refugees, which is the only competent decision-making authority for appeals against decisions of state authorities on asylum and refugees.

- The **International Organization for Migration** has been operationally present in Albania since 1992, while Albania became an IOM member state in 1993. Since then, IOM has become one of the main international partners of the Government of Albania (GoA), supporting its continuous progress and efforts in migration governance in line with Albania's priorities of European Union integration. IOM is a member of the UN Country Team (UNCT) in Albania since 2007. IOM actively contributes to the implementation of the GoA-UN Programme of Cooperation for Sustainable Development 2017-2021, a framework that guides the work of the GoA and the UNCT and their partnerships and aligns the support, funds and programmes of 17 UN agencies including IOM, to Albania's development priorities. On 19 September 2016 IOM joined the UN during the summit for Refugees and Migrants, as the "UN migration agency".⁵⁹ IOM Albania works in the four broad areas.⁶⁰
- **UNHCR** worked closely with the authorities and partners to protect the refugees. A pressing concern was to have refugees move from the northern prefectures to safer locations away from the border. Equally important was to ensure the safety of camps and collective centers, especially for women. The Government conducted a registration of the refugees and the results were verified at the field level by UNHCR teams.⁶¹

58 <https://ahc.org.al/about-us/our-mission/>

59

60 <https://albania.iom.int/about-us>

61 <https://www.unhcr.org/3e2d4d50d.pdf>

5. Court Practice

To properly conclude this study of the legal and political aspects that characterize the typology of migrants smuggling in our country, an analysis of the criminal offenses targeted by Article 297 of the Criminal Code "Illegal crossing of the state border", and Article 298 of the Criminal Code "Assistance in illegal border crossing" will be conducted.

Taking into consideration the route of illegal passage of migrants in our country, which extends from the border areas with the Republic of Greece and to a lesser extent with the Republic of Northern Macedonia, they follow it towards the north of the country, to get on the road land in Montenegro to proceed to the European Union, it was considered appropriate to analyze the decisions of 5 courts, the Court of First Instance Pogradec, Korca, Përmet, Elbasan, Shkodra.

This selection was made by taking into account the routes of passage of migrants, which cross the territory under the jurisdiction of these courts. In this regard, the impact of migrant traffic is studied not only through statistics as above but by concretely analyzing court decisions to identify some components of their decision-making.

The Court of First Instance Pogradec is the procedural body which, in the cases taken into consideration, has given the decision to resolve the case as soon as possible, calculating this deadline from the moment of identification when the criminal offense occurred. In a particularly sensitive case, with several victims from the offense, the decision of another court was given about 7 years after the event occurred. It turns out that the cases of conviction for foreign citizens are very few compared to those for Albanian citizens.

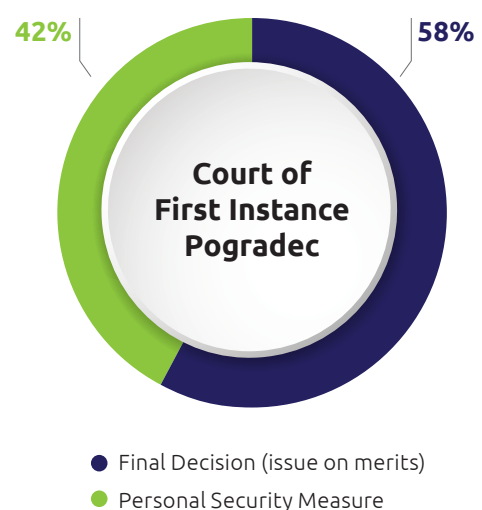
All five courts have considered mitigating circumstances, in some of its decisions, such as: the fact that the perpetrator has not been a repeat offender, low risk of the criminal offense, family and economic situation, assistance provided to victims, cooperation with the prosecuting authority, the correct attitude during the investigation and trial of the perpetrator and pleading guilty. The same courts have identified aggravating circumstances in some cases: the ascertainment of facts which are related to the conduction of the offense with weak motives, commission of the offense for property gain and disobedience to the order of the police officer and the repetition of the criminal offense.

After the study of the judicial decisions taken in the analysis, we highlight the fact that the courts have qualified the criminal offenses. This conclusion is reached keeping in mind the factual circumstances described in the decision and in the given sentence. Considering that the phenomenon of trafficking of migrants has taken a wide spread, also driven by factors that do not depend on the local situation of our country, it is necessary to take other measures, in addition to the criminal ones to punish the smugglers.

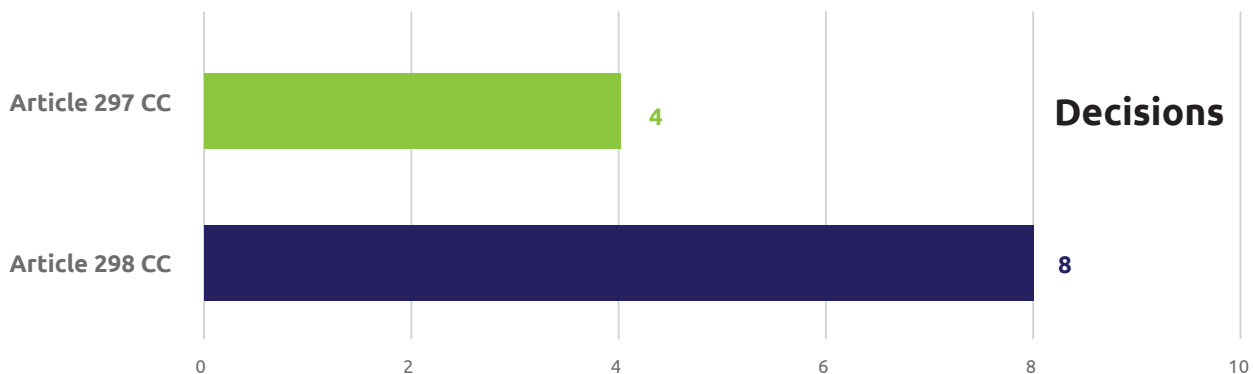
5.1. Court of First Instance Pogradec

This paper includes a full legal analysis of decisions obtained from a series of 5 courts, one of which is the Court of First Instance Pogradec, from where a total of 12 decisions of which 7 decisions are final and resolve the issue on merits, while 5 decisions are for imposing a personal security measure were targeted. The time it took the prosecuting authorities to resolve the case, since when the event occurred and until when the decision of the Court of First Instance Pogradec was taken varies from a minimum of one month to 22 months.

Regarding the frequency of ascertaining criminal offenses in the field of migrant smuggling, from 12 decisions analyzed, the Court of First Instance Pogradec, 4 decisions were taken for violation of Article 297 of the Criminal Code "Passage of illegal border crossing" and 8 decisions were issued for violation of Article 298 of the Criminal Code "Assistance for illegal border crossing". All the analyzed court decisions are sentencing and in no case were there any dispositions that acquitted the accused person.



The route followed by migrants while passing through the country, starts by crossing the state border in the South or South East of the country, avoiding the control of authorities with the intention to go to the North of the country or to the Port of Durrës, from where the transit to EU countries will be possible. The persons accused as perpetrators of criminal offenses and convicted by the Court of First Instance Pogradec in 11 out of 12 cases are Albanian citizens and the remaining is a foreign citizen.



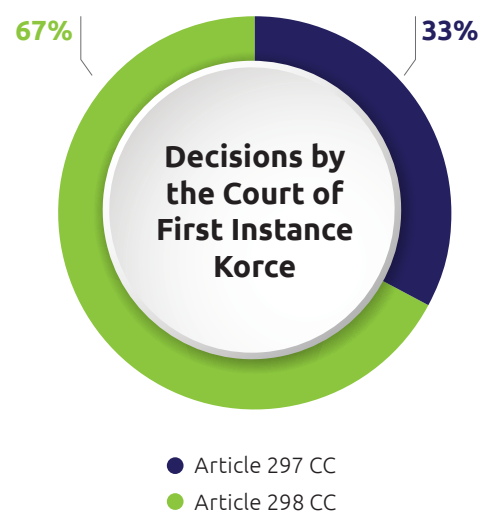
In sentencing the citizen, the court argues that:

“The Palestinian citizen declared that he met a Syrian citizen in the Greek checkpoint of Ipsala. He told the Syrian that his goal was to go to Europe and, upon request, gave him a sum of x euros to fulfill the journey. After entering the territory, he traveled for three days. When the truck stopped for a moment, the door of the trailer opened and he saw the police who asked him to get out of the truck. He stated that he did not know in which country he was located or in which territory he had entered. He further stated that the driver of the truck was not aware of his presence in the truck, as the Syrian citizen had slit open the tent of the trailer where he was riding to get him in”.

This citizen was eventually sentenced to 2 months. This decision represents a special case, where a Palestinian citizen, leaving the conditions of the war in his country of origin, illegally enters our country, with the EU countries as final destination. The illegal crossing of the state border has caused this citizen to receive respective punishment from the court. In our opinion, the Albanian authorities should carefully investigate such cases. If it is proven that foreign citizens are escaping from the war and entering Albania illegally, the criminal sanction for illegal border crossing should not be applied to them.

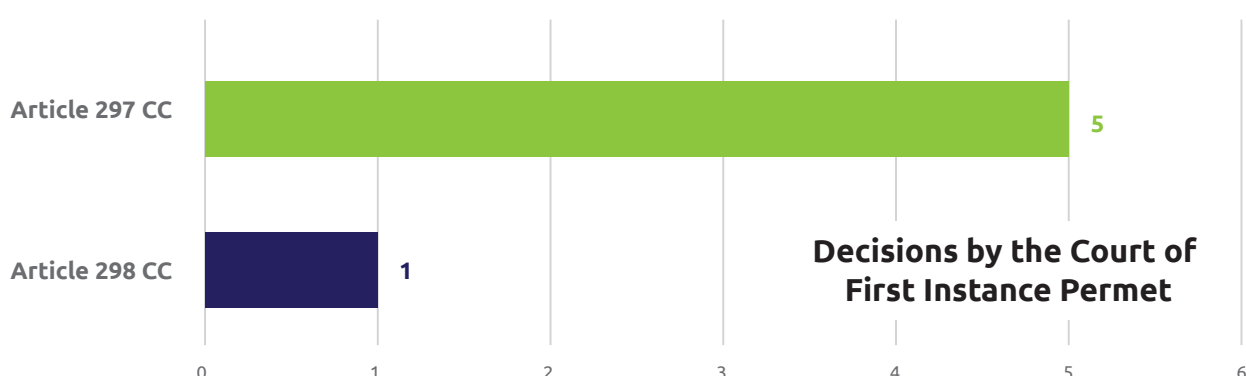
5.2. Court of First Instance Korçë

Due to the specifics of the phenomenon of migrant smuggling, the analysis also took 12 decisions of the Court of First Instance Korça, as an important territory in terms of the phenomenon of migrant smuggling, of which there were 4 decisions taken for violation of Article 297 of the Criminal Code “Illegal crossing of the state border”, and 8 decisions given for violation of Article 298 of Criminal Code “Assistance for illegal border crossing”. The time, from the moment when the event occurred and until the moment when the decision of the Court of First Instance Korça was taken, numbers from 4 months to a maximum of 17 months. The path followed by the smuggled migrants is the same as the itinerary ascertained above. This route starts with the crossing of the state border in the South East and aims to go to the North of the country or the Port of Durrës, with the aim of crossing over to EU countries by accessing illegal migrant trafficking lines. In all of the 12 decisions the accused persons are Albanian citizens, for both criminal offenses.



5.3. Court of First Instance Përmet

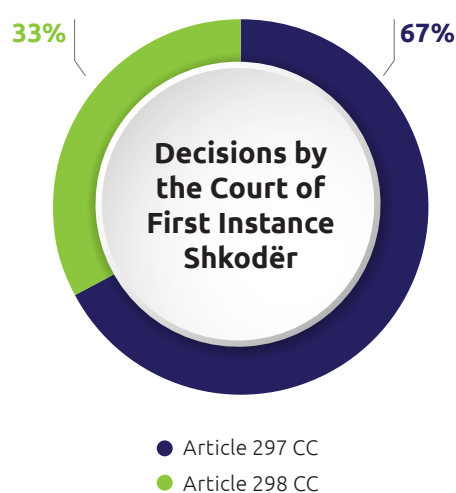
Decisions of the Court of First Instance Përmet, for committing criminal offenses in the field of migrant smuggling, specifically for violation of Article 297 of the Criminal Code "Illegal crossing of the state border", and for violation of Article 298 of the Criminal Code "Assistance for illegal border crossing" constitute the next stage of the analysis. A total of 6 decisions issued by this court were analyzed, wherein 1 decision for imposing a personal security measure and 2 other final decisions which resolved the issue on the merits, 3 decisions for approving the criminal order. This court has assigned 1 prison sentence and 4 fine sentences. The time used by the authorities to resolve the above issues ranges from 2 months to a minimum of 9 months to a maximum. Five of the decisions were for violating Article 297 of the Criminal Code "Illegal crossing of the state border", and 1 decision was given for the violation of Article 298 of the Criminal Code "Assistance for illegal border crossing". Përmeti is a border town located near the Albanian-Greek green border. This makes it a potential territory which can be used as an important transit route to be accessed in order to enter the Albanian territory and then follow the transit routes to EU countries. The decisions analyzed show that illegal crossings of perpetrators across the green border are a possibility. The persons who have committed the above violations are all Albanian citizens.



5.4. Court of First Instance Shkodër

The decisions taken by the Court of First Instance Shkodra, for committing criminal offenses for violation of Article 297 of the Criminal Code "Illegal crossing of the state border" and Article 298 of the Criminal Code "Assistance for illegal border crossing" are important to analyze the phenomenon of migrant smuggling due to the geographical position of the city pursuant to the route of smuggling. A total of 6 decisions issued by this court were analyzed, where 1 decision was taken for imposing a personal security measure and 5 other decisions were final which resolved the issue on the merits. In 3 cases, this Court has imposed fines and in 1 case it has declared the defendant's innocence. The time it took for the authorities to resolve the issue ranges from a minimum of 6 months to a maximum of 27 months. Four of the decisions were taken for violation of Article 297 of the Criminal Code "Illegal crossing of the state border", and 2 decisions were given for violation of Article 298 of the Criminal Code "Assistance for illegal border crossing".

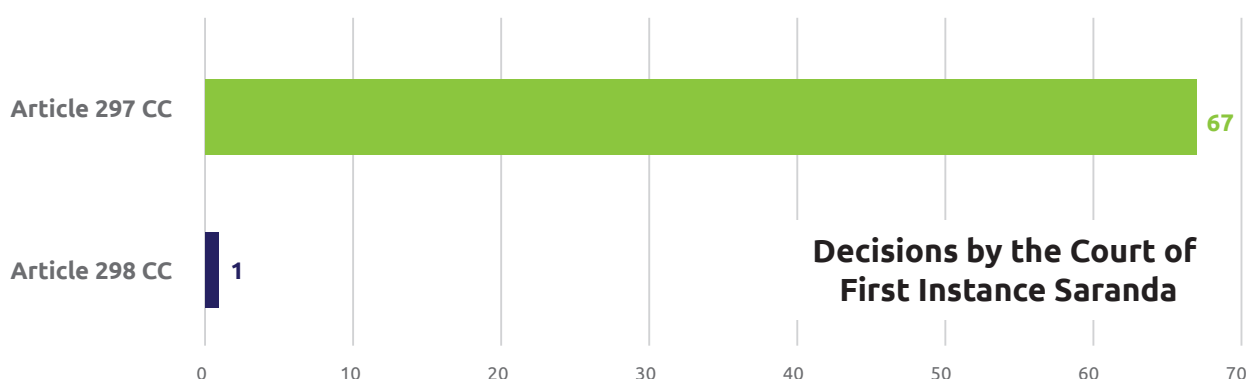
Regarding the persons who have been convicted as perpetrators of these criminal offenses, it is worth mentioning that they mostly are Albanian citizens. In one case, the court found that an Albanian citizen and a foreign citizen from Iraq violated in collaboration Article 298 of the Criminal Code "Assistance in illegal border crossing". The court decision argues: "The white Ford van was stopped, driven by citizen x born and based in Tirana, which was transporting 14 foreign nationals, from third countries towards the border with Montenegro. The Iraqi foreign citizen, who is suspected as the organizer, was found sitting in the passenger seat. He, in cooperation with the driver of the vehicle, was transporting them to Montenegro for a payment of 120 euros/person. These citizens had as their final destination the places of the EU... As reasoned above, the Court creates the internal conviction beyond any doubt that the defendants



in cooperation with each other and other unidentified persons have fully consumed the elements of the objective and subjective side of the criminal offense provided by Article 298 of the Criminal Code for illegal border crossing”.

5.5. Court of First Instance Saranda

Due to its geographical position, the city of Saranda, in addition to the border area with the Republic of Greece, also offers a harbor, which cumulatively constitute favorable conditions that can be used for migrant trafficking. Based on this fact, a full legal analysis of 70 decisions obtained from the Court of First Instance Saranda was conducted. 68 decisions are final and resolve the issue on merits, while 2 other decisions were taken to impose a personal security measure on persons suspected of committing a criminal offense. The time it took for the competent bodies to address the case, from the moment it was recorded and until the moment the decision of the Court of First Instance was given, varies from 2 months minimum to 7 years.



Out of 70 analyzed decisions, taken by the Court of First Instance Saranda, 67 of them were on violation of Article 297 of the Criminal Code “Illegal border crossing state”, and 1 decision was given for the violation of article 298 of the Criminal Code “Assistance for illegal border crossing”, while 2 decisions with multiple perpetrators violated both Articles.

The route followed by migrants in this area starts from the checkpoint in Greece to then target EU countries through Northern checkpoints or blue borders. The persons accused as perpetrators of criminal offenses in these 70 decisions of the Court of First Instance Saranda, are Albanian in 67 of the cases and foreign in the remaining 3.

In one decision, the Court argues:

“The defendants were put in contact with persons who wanted to cross the border by themselves or through their relatives. The crossing of borders of these citizens would not be conducted at the official checkpoint, but illegally, through a payment of 600-1500 euros per person... All the persons who would cross the border illegally, were told to gather by the defendants in the place called Lion Gate, located inside Butrint. They would cross from one side of the lake to the other using a fishing boat... Due to the commotions happening inside the vehicle, the back of the boat was lowered below the water level and immediately sunk in the lake due to being filled with water. The people travelling with it were left in the water without the opportunity to go ashore, because the boat sunk in deep and in a considerable distance from both sides of the canal. In these conditions, the citizens who knew how to swim could not survive, while the five citizens who did not know how to swim drowned.”

The court initially sentenced the two persons found guilty of committing the criminal offense to 15 years and 9 months in prison and 15 years in prison, whereas after the application of the shortened trial procedure, the respective sentences applied to 10 years and 6 months of imprisonment and 10 years of imprisonment. This is a typical case, which shows how serious the consequences of the criminal phenomenon of migrant smuggling can be. In the specific case, the court acted, assigning high penalties. However, treating this phenomenon only with criminal means does not ensure its prevention.

In another decision, one of the perpetrators of the criminal offense provided by Article 298 of the Criminal Code "Assistance in illegal border crossing" is a citizen from Turkey:

"The judicial police of the Saranda Commissariat have kept under surveillance a vessel considered to be of high risk on the basis of administered information anchored in the yacht port of the city of Saranda, and which had a Delaware USA flag. The judicial police services have searched the vessel and found a Turkish citizen hidden inside a closet, covered in a pile of blankets, in a room at the bottom of the yacht... The captain of the ship stated his owner told him to take him on board, the person did not have documents with him... The police services were informed by Interpol Ankara that this citizen is a nationally wanted person for the criminal offense of economic crimes".

The captain of the ship was sentenced to 1 year in prison in violation of Article 298 of the Criminal Code "Assistance for illegal border crossing", while the Turkish citizen was sentenced to 1 year in prison for the offense of Article 297 of the Criminal Code "Illegal crossing of the state border", and 2 years and 6 months in prison for the criminal offense provided by Article 189/1 "Forgery of identity cards, passports or visas". In this case, it is worth noting that the court qualified in the correct way the criminal offenses for each author. In the case of the Turkish citizen, the institution of the competition of the criminal offense was also applied in the correct manner, treating them as two offenses. This provides a direct approach in the direction of determining violence and its individualization.

6. Conclusions and Recommendations

6.1. Improvement of Legal Framework

The Republic of Albania does not have a single national strategy, which would address all issues related to the phenomenon of illegal migration. Criminal policies in the Republic of Albania are focused on the fight against trafficking in human beings, thus prioritizing this issue. The phenomenon of migrant smuggling is seen as a less dangerous phenomenon, and can often be addressed through the same tools and ways of addressing trafficking. Therefore, some policy documents partially or indirectly generate the way of dealing with the phenomenon of migrant smuggling.

Recommendation: The legal-criminal response to the phenomenon of illegal migration and smuggling of migrants should not constitute the only reactive dimension of the state. It should be accompanied by integrated inter-institutional programs which address the phenomenon in the humanitarian field, with priority given to guaranteeing the freedoms and rights of migrants. Informing migrants on the corpus of freedoms and rights, institutions/organizations that offer assistance or provide services in this area, can be part of this field.

The National Migration Strategy and its Action Plan (2019-2022), in the way it sets its priorities and actions, identifies and focuses mainly on regular and irregular migrants, however, at certain moments, it takes into account, where possible, asylum seekers and refugees.

Recommendation: It would be more appropriate if this strategy was to focus a part of it specifically on asylum seekers and refugees. This would bring about an appropriate and more complete addressing of the phenomenon of migrant smuggling. Also, it would not remain simply a legal-criminal phenomenon but would be fully addressed in this regard. The engagement of responsible institutions would be a consequence of such a measure, enabling the inclusion of more capacities and the treatment of the phenomenon in a complete and effective way.

The legal-criminal sphere of the fight against trafficking is characterized by a correct systematization of legal acts, where the Criminal Code and the Code of Criminal Procedure are very well adapted to international acts and conventions; they are published and accessible. Quite the opposite happens with the administrative sphere of the fight against migrant smuggling, where the adopted strategies are often not updated in time, there is no information on the extent of their monitoring, they are not published and it is not known whether they have been replaced or not.

Recommendation: The focus should be on undertaking measures to address the problems identified above related to the approved strategies, for timely renewal, concrete steps to monitor their implementation, periodic publication and announcements and publications of finalized documents. This reaction would also consist of other interventions that will affect the solution of the problem, such as the approximation of legal acts with international standards and the definition of institutional competencies, with a humanitarian focus and not only sanctions.

PRIORITIZED RECOMMENDATIONS

1. Vigorously investigate, prosecute, and convict traffickers – including complicit officials – under Articles 110(a) and 128(b) of the criminal code.
2. Increase efforts to screen vulnerable populations and train police, labor inspectors, and other front-line officials on proactive identification of victims.
3. Institutionalize and provide training for law enforcement, prosecutors, and judicial officials, particularly district prosecutors, on investigating and prosecuting trafficking cases, including guidance on issues of consent and coercion in the context of labor and sex trafficking.
4. Increase funding and create funding mechanisms that allocate adequate funding and resources on a consistent and regular basis to the NGO-run shelters for trafficking victims. Improve the sustainability of, and law enforcement participation in, mobile trafficking victim identification units.

5. Expand the jurisdiction of labor inspectors to inspect businesses that are not legally registered.
6. Increase reintegration services, including access to mental health services for victims and education for child victims. Implement victim-centered approaches and victim-witness protection measures during investigation, prosecution, and court proceedings.

Legislation has been amended **to strengthen the rights and position of victims**. GRETA is concerned that there has been **only one criminal court decision on compensation** of a victim of trafficking, and there is still **no functioning state compensation scheme available to victims of trafficking**, it is necessary to improve the protection of victims and witnesses of human trafficking and their family members from potential retaliation and intimidation by traffickers. Albania **remains primarily a country of origin for victims of human trafficking**, with women and girls trafficked abroad for the purpose of sexual exploitation being the vast majority of identified victims.⁶²

6.2. Improvement of Institutional Capacity

The territory of the Republic of Albania is a transit country of illegal passage of migrants, where year by year the weight of this influx has increased. The possibility for criminal groups to extend their activity in the field of migrant smuggling is very high. This phenomenon is characterized by the vulnerability of migrants, their submission to the organizers and executors of this activity.

Recommendation: The Albanian authorities should increase institutional capacity to cope with the proportional increase in migrant flows. In addition to improving the institutional capacity to address this phenomenon, the continuous training of human resources should be a priority. This also means increasing the cooperation between institutions as an opportunity for an integrated approach to challenges, as a chance to coordinate capacities in conditions of limited resources.

6.3. Improvement of Current Court Practice

As results from the study of the content of the acts, Albania treats the phenomenon of trafficking and smuggling of migrants mainly with criminal means and similarly. This philosophy needs to change and reflect qualitative elements. It has been noticed that the institutions that refer, address and have in their competence to deal with issues of trafficking of human beings, are the same with the ones that address the smuggling of migrants. While the choice of grouping similar offenses to be dealt with by the same institution is recognized as feasible, the strategic line of treatment of the phenomena should always be characterized by special elements that will affect the individualization of treatment.

Recommendation: To factor in civil society organizations, with a focus on promoting and guaranteeing human rights in the targeting and fighting of the phenomenon. Creating facilities for civil society organizations to exercise their activity, promoting sustainable models of cooperation with institutions, increasing their presence in providing services to migrants, creating opportunities for ongoing monitoring of institutions, improving their partnership with institutions, in the design and promotion of individual policies, which constitute the premise for making a difference in the followed approaches to the targeting of smuggling and trafficking of human beings.

62 GRETA the Group of Experts on Action against Trafficking in Human Beings.

