

Smuggling of migrants in Kosovo

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Introduction

Smuggling of migrants, as a serious type of criminality, takes an important place in legal science and criminal legislation. This is due to the fact that actions creating the image of these criminal offences also cause numerous individual, family and societal consequences. Smuggling migrants, with all its consequences, attracts the attention not only of the state authorities, but also the wider public, and numerous researchers and scholars. Nevertheless, despite this fact, this phenomenon has not been studied thoroughly. There is a dire lack of such research in recent years, specifically because of the presence of such crimes in a relatively higher number. This circumstance, specifically the fact that in Kosovo, smuggling migrants is a frequent occurrence, made me engage in studying this type of criminality.

The aim of this paper is to research on criminal offences of migrant smuggling in Kosovo, and especially their causes. The causes of these criminal offences may be of numerous natures, but the main causes may be sought in social and economic circumstances, and other conditions related to the unstable political setting, weaknesses in operations of justice authorities, lack of implementation of criminal legislation, etc.

In researching the criminal offences of smuggling migrants, I have used the method of historical materialism, legal-dogmatic method, statistical method, complaint method and interviews, and the method of studying individual cases.

In the case of addressing criminal offences of smuggling migrants, I have concluded that these offences represent a serious type of crime, thereby resulting in dire individual, family and societal consequences. They are found in all modern societies, including Kosovo.

Key words: Kosovo, smuggling, migrants, perpetrators, victim.

I. Several criminal law aspects of the offence of smuggling migrants

1. The meaning of criminal offence of smuggling migrants

The Criminal Code of Kosovo¹ qualifies the offence of smuggling migrants as a serious offence. For this offence, the Code has provided on relatively onerous punishments, and has sorted it as a part of the chapter of criminal offences against international law.

Based on the solutions provided by the Criminal Code of Kosovo, the criminal offence of smuggling migrants, consists in undertaking illegal actions, by which the illegal entry of a foreign person to Kosovo is enabled², while this person is not a citizen of Kosovo, or in another country a citizen or resident of which this person is not. This criminal offence may be committed also by illegal action or failure to act, by which the alien citizen is enabled to stay in Kosovo, without fulfilling necessary conditions. The offence of migrant smuggling, according to provisions of the Criminal Code of Kosovo, may be committed by actions consisting of production,³ procurement,⁴ provision⁵ or possession⁶ of false travel or identification documents, with a view of enabling smuggling of migrants. In all these situations, to qualify such action or inaction as smuggling with migrants, there is a requirement of existence of intent of perpetrator to obtain direct or indirect material benefit.⁷

Apart from these, the offence of smuggling migrants can be qualified also if there are actions, or inaction by which a foreign citizen, or a person who is not a resident of Kosovo, enjoys stay in Kosovo without fulfilling legal conditions required. More accurately, this is about the stay of these persons in Kosovo by using forged travel or ID documents, or by the use of other similar unlawful means. Nevertheless, in this case as well, to qualify for the offence of smuggling migrants, it is required that the perpetrator engages in such activity by knowing that in the concrete case, this is related to a person in the capacity of a migrant, and the intent of obtaining material or financial benefit.⁸ From what is stated above, one may conclude that the offence of smuggling migrants means taking action or failing to act, by which a certain person is enabled to enter Kosovo, when such a person is not a resident of Kosovo, or into another country, a citizen or resident of which he/she is not, or enabling a person who is not a temporary or permanent citizen of Kosovo, to stay in Kosovo, without fulfilling necessary legal

¹See: Criminal Code of Kosovo (Article 138). This Code has entered into force on April 6th, 2004.

²These may be actions in transferring, accompanying or escorting migrants in passing a state border.

³The term production in this case means issuance of documents, which in the majority of cases, show a false identity of the person (migrant), and not his true identity, although it is still possible for such documents to reflect the person's true identity, but issued out of legal competency. Comparison: Albanian Dictionary (Fjalor i shqipes së sotme), Tirana, 2002, p. 1042.

⁴Term procurement seems to have the meaning of transferring fraudulent travel and identification documents from one country to the other, with the intent of smuggling migrants.

⁵Term provision means finding, or obtaining fraudulent documents, which enable smuggling of migrants.

⁶The term possession means holding, or appropriation of fraudulent travel and identification documents with the intent of smuggling migrants.

⁷Hajdari A. Criminal offences of smuggling migrants, with a view on provisions of the Criminal Code of Kosovo (Veprat penale të kontrabandës me emigrantë me vështrim të zgjidhjeve të përcaktuara në Kodin Penal të Kosovës), E drejta (Law Review), Revistë për çështje juridike dhe shoqërore, Nr. 1 - 2, Prishtina, 2008, fq. 140. For more aspects, see: Gashi R. Organized Crime (Krimi i organizuar), Prishtina (Ligjërata të autorizuara), 2010, pp. 78 - 79.

⁸Ibid, pp. 140 - 141.

conditions, and actions which consist in producing, procuring, providing or possessing fraudulent travel or identification documents, with the intent of enabling migrant smuggling. In all these situations, to qualify these actions or inaction as smuggling of migrants, there must be an intent for the perpetrator to realize direct or indirect material benefit.⁹

2. Constitutive elements of criminal offence of smuggling migrants

The criminal offence of smuggling migrants is made of several so-called constitutive elements. "These in fact, are special elements which create the physiognomy, or namely the image of a certain criminal offence."¹⁰ These elements, in the case of smuggling migrants, are the following:

1. The element of action or inaction – this element must be present in every case when the perpetrator, by taking action or abstaining from action, allows a person to enter (pass the border), without that person fulfilling necessary legal conditions, namely conditions which allow a foreign person to stay in Kosovo, namely enabling a foreign citizen to stay in Kosovo without respecting necessary legal conditions (staying with the use of fraudulent travel or identification documents).¹¹ This element also includes taking action in producing, procuring, providing or possessing fraudulent travel and identification documents, by which smuggling of migrants is enabled.¹²

2. The element of means – this element is considered to have been met in cases when the perpetrator produces, procures, provides or possesses fraudulent travel and identification documents to provide them to persons in the capacity of migrants.¹³

3. Mental Element. – This is a subjective element. It consists in the intent of the perpetrator, who by taking action or by failing to act, combined with the two foregoing elements, engages in smuggling migrants. Undoubtedly, an element of this nature is also related to the intent, which with the undertaking of actions of this criminal offence, results into realization of direct or indirect material benefit.¹⁴

Although in general, the intent of the perpetrator in exploiting the migrant is not considered a constitutive element of this offence, I would consider that as part of the mental element, there might still be situations in which this matter should be addressed as an integral part of this element.¹⁵ This may occur in cases in which the intent of the perpetrator in committing the offence of smuggling migrants, except others, results to be also the exploitation or inhumane treatment of the migrant.

⁹ Ibid, p. 141.

¹⁰ Salihu I. Criminal Law. General Part (E drejta penale, Pjesa e përgjithshme), Prishtina, 2003, pp. 184 - 185.

¹¹ By a fraudulent travel or identification document it is implied a document falsified or in any manner changed its content. Such activity can be undertaken by any person, even authorized persons according to the law, when such documents are issued or obtained in an improper manner, by misinterpretation, corruption, pressure or any illegal manner, or when the document is used by a person which is not its true possessor.

¹² Hajdari A. Criminal offences of smuggling migrants... (Veprat penale të kontrabandës me emigrantë,..) p. 142.

¹³ Ibid., p. 142.

¹⁴ Ibid., p. 142.

¹⁵ This implies the exploitation of a migrant for heavy labour, or material exploitation (taking money, personal items), etc.

3. Perpetrators of the criminal offence of smuggling migrants

Pursuant to the Criminal Code of Kosovo, a perpetrator of the criminal offence of smuggling migrants is any person¹⁶ who is at the age of criminal liability, and is liable. Consequently, a perpetrator of these criminal offences may be considered a person who directly engages in criminal conduct which is qualified as smuggling of migrants. Such a perpetrator is also a person who engages in illegal transfer of migrants from a third country to Kosovo, and vice versa, for material benefit. Apart from the person engaging directly in criminal conduct, perpetrators shall also be persons who take action or fail to act, thereby enabling such smuggling. These persons include persons who produce, procure, provide or possess fraudulent travel and identification documents with an intent of engaging in smuggling of migrants,¹⁷ or a person enabling the stay in Kosovo of a person in the capacity of a migrant, without fulfilling legal conditions, or namely a person who enables the passage of the borders of Kosovo of such persons, without fulfilling legal conditions for entry-exit from Kosovo. A perpetrator of the offence of migrant smuggling is also a person who organizes or orders other persons to undertake criminal activity which consists of a criminal offence.¹⁸

It is considered that in cases of ordering the commission of criminal offences of smuggling migrants, for a person to be liable in this offence, it is required that this person have official or any other position, which gives him/her the authority to order others to undertake or not take actions which the legislator qualifies as criminal offences. Such positions may be the superiors of the Kosovo Customs Service, or the Police, but also persons in higher ranking in criminal organizations.

Ultimately, according to the Criminal Code, a perpetrator of the criminal offence of smuggling migrants may also be a person taking preparatory actions or actions representing an attempt to commit such criminal offences.¹⁹

4. Criminal liability of smuggling migrants offenders

A person is considered to be criminally liable when at the time of commission of the offence he was conscious (meaning he had psychological skills or qualities which render possible the recognition of the weight of the act, and to control his actions) and liable (meaning that there was a view or a relation with the offence which makes it possible for the offence to be qualified, namely when such action is recognized as his).²⁰

Smuggling migrants, as a rule of thumb, may be committed by direct and special intent, which further results into obtaining material or other benefits. Nevertheless, I

¹⁶Salihu I. Criminal law, special part (E drejta penale pjesa e posaçme), Prishtinë, 2009, p. 89 and Shala A. Special part of criminal law, with court cases (Pjesa e posaçme e së drejtës penale me raste nga praktika gjyqësore), Gjilan, 2010, p. 68.

¹⁷ These cases talk about punishment of preparatory actions taken with an intent of committing a criminal offence of smuggling migrants. This provision was aimed by the legislator to intervene in the earliest stages of committing such crime. For more details see: Salihu I. Criminal Law. Special part (E drejta penale, Pjesa e posaçme),..., p. 95.

¹⁸ Hajdari A. Criminal offences of smuggling migrants (Veprat penale të kontrabandës me emigrantë),..., pp.150 - 151.

¹⁹According to paragraph 4 of Article 138 of the Criminal Code, "The attempt of committing a crime from paragraph 3 of this Article is punishable". In accordance with this provision, a perpetrator of the criminal offence of smuggling migrants is considered to be any person attempting to undertake actions by which a person who is not a resident of Kosovo is enabled to stay in Kosovo, or the person who is not a permanent resident is enabled stay in the country, without fulfilling necessary legal requirements for stay in Kosovo.

²⁰Salihu I. Criminal Law. General Part (E drejta penale, Pjesa e përgjithshme),..., p. 277.

consider that the criminal offence may be committed also by eventual intent. The Criminal Code of Kosovo categorizes a liable person a person who by intent, in any capacity, takes part in smuggling migrants, or produces, procures, provides or possesses fraudulent travel or identification documents, with a view of undertaking the act of smuggling offence. The intent of committing this criminal offence (be that direct or eventual) exists also in cases in which the perpetrator enables a person who is not a resident of Kosovo to stay in Kosovo, without fulfilling legal requirements for entry or exit from Kosovo, or another country. In these cases, as a rule, it is about the random criminal liability.²¹

Apart from the so-called random criminal liability, the Criminal Code of Kosovo, in qualifying criminal offences of smuggling migrants, talks also about the qualified criminal liability. This form of criminal liability, according to paragraphs 5 and 6 of the Article 138 of the Code, may be attributed to a person who undertakes the actions determined as criminal offence of smuggling migrants in being a member of a criminal group, or commits the offence in a way of endangering the life or safety of migrants, or which includes inhuman or degrading treatment, including exploitation of migrants.²² As mentioned above, the criminal offence of smuggling migrants is generally committed by action. Nevertheless, in accordance with legal solutions, it seems that this criminal offence may be committed by omission as well. A typical example of committing this crime by omission is when an official person, by not undertaking actions employed for, enables a person who is not a resident of Kosovo to stay in Kosovo, despite not meeting legal requirements to enter Kosovo (no passport).

Consequently, for a person to be subject to criminal liability for the offence of smuggling migrants, it is sufficient that he undertakes only one prohibited act, which is defined as such by the Criminal Code of Kosovo. Thus, only a single criminal act, in the sense of producing, procuring, or providing a fraudulent travel or identification document, taken to enable smuggling of migrants, and for direct or indirect material benefit, may be criminally prosecuted, and the person undertaking such action to be held liable for the offence of smuggling migrants.²³

Despite all solutions suggested, pursuant to paragraph 8 of the Article 138 of the Criminal Code of Kosovo, a person in the capacity of a migrant shall not be prosecuted, in any case when he is object of the criminal offence of smuggling migrants. Such may be the case when a migrant, being a victim of the offence of smuggling migrants, is exploited, maltreated, robbed, etc.

²¹Hajdari A. Criminal offences of smuggling migrants (Veprat penale të kontrabandës me emigrantë),..., pp. 151 - 152.

²² For more details, see: Salihu I. Criminal Law, Special Part (E drejta penale, Pjesa e posaçme),..., pp. 98 - 99 and Shala A. quoted works, pp. 68.

²³ Hajdari A. criminal offences of smuggling migrants (Veprat penale të kontrabandës me emigrantë),..., p. 153.

II. Extent and territorial coverage of criminal offences of smuggling migrants in Kosovo, in the period 2004 - 2010

The matter of smuggling migrants has been rather discussed during the period 2004-2010 in Kosovo.²⁴ The urgency of the matter was determined by the fact that these criminal offences, during the research period, have recorded relatively high numbers.

Therefore, according to data used during the period January 2004- December 2010, District Courts of Kosovo have processed 67 cases, or an annual average of 13.4 cases each year. 22 of the cases were resolved, while 45 criminal cases are pending decision. From the resolved cases, 19 have resulted in sentencing decisions, thereby convicting 36 persons. These persons have been convicted in average to 1 year and 2 months of imprisonment.²⁵ The addressing of criminal offences of smuggling migrants will cover only the final judgments.

I think that these records are to be taken with some reservation, since this type of criminal offences, for many reasons, involves a large number of perpetrators and victims who remain uncovered and not proceeded.²⁶

The data used show that criminal offences of smuggling migrants have involved all regions of Kosovo. Nevertheless, such data show that the perpetrators of these offences largely come from the Gjilan Region, leading with 13 perpetrators, pursued by the Prishtina Region with 11 cases, et cetera.

As one can see, the number of criminal offences of smuggling migrants during the period 2004-2010, is relatively high. This situation, according to my opinion, is a result of the fact that the research period was a period of numerous problems of political, social and economic nature, and the functioning of the justice system in the country. Naturally, another major factor of the frequency of this type of criminality in the country is found also in the fact that Kosovo is a country of young population without prosperity. As a result, high unemployment and extreme poverty have made many youngsters not select paths in escaping from the country. It seems that such an escape, and not rarely, has been connected to criminal actions qualified as smuggling of migrants.

III. Kosovo - a place of origin, transit and destination of victims of criminal offences of smuggling migrants

The research period, characterised by a dire economic crisis, a system of dysfunctional division of powers, which continues to operate under many problems (United Nations Interim Administration, local institutions, and most recently the EULEX Mission), improper functioning of the justice system, an extreme political influence in developing a "loyal" administration, blackmailing with certain political figures and senior heads of public administration, placement in high positions of many persons found to be unprepared professionally to cope with the challenges of institutional activities in all three branches of government, etc., are only some of the factors leaving

²⁴ 2004 was taken as the baseline year for beginning the research of this criminal occurrence, based on the fact that this type of criminal offence is first seen in the new Criminal Code of Kosovo (2004)

²⁵ See: Final judgments of District Courts of Kosovo sentencing perpetrators of criminal offences of smuggling migrants for the period 2004-2008.

²⁶ Reasons of this situation are referred initially to the complexity of the matter, but also other aspects which are associated with this criminal occurrence.

the adequate room for appearance of negative phenomena in Kosovo, including criminal behaviours of all types, therefore also the criminal offences of smuggling migrants.²⁷

These and other factors are viewed as very suitable for the phenomenon being discussed, for Kosovo to have a status of a territory very appropriate for smuggling of migrants, in being a place of origin, producing the largest number of perpetrators and so-called victims, but also in being a place of transit and destination of smuggling victims.

The conclusion that Kosovo may be taken as a place of origin for criminal offences of smuggling migrants is grounded upon the fact that in the research period, the largest number of perpetrators were originally from Kosovo.²⁸ Victims from Kosovo were at the second place (27), since a considerable number of Albanian victims came from Albania (19). In fact, according to this article, the first place is taken by the Turkish victims, 32. In stating the fact that Kosovo enjoys the attribution of being a place of origin, one might look at the record that during the last two decades, it has been estimated that hundreds of thousands of Kosovars have migrated to European countries, especially to Germany, Austria, Italy, France, UK, Slovenia, etc., the majority using illegal channels of getting there.

Also, it is estimated that during the years 2004-2010, Kosovo was a transit country for smuggled victims. This conclusion is grounded upon the fact that out of 98 victims, 69 were captured by border authorities in their efforts to abandon Kosovo for their destination country, and they were returned to their countries.²⁹ Kosovo, due to its geographical position, but also due to the poor consolidation of the judicial system, and the presence of evident problems in border checking points, throughout the period, has been a suitable terrain for unimpeded movement of those who wanted to migrate by passing these borders.

Ultimately, it is estimated that Kosovo, in a way or another, is a preferred country of destination for a certain number of victims.³⁰ This is proven by the statistical data used, according to which 13% of the victims entering Kosovo have continued to stay for several years until today. It is another matter that many of these people have only been waiting for the first opportunity to transfer to Western Europe or elsewhere. The fact that Kosovo is and continues to be a preferred country for some victims of smuggling sources in the international presence, which directly or indirectly has fostered this criminal phenomenon. This is explicated with the fact that amidst victims there is a belief of employment opportunities, and creation of bonds with internationals, who in turn they would use to migrate to Western Europe, or in enjoying employment opportunities with the international administration.

²⁷ Compare: Azem Hajdari, *Menschenhandel im Kosovo*, *Kriminalistik, Unahängige Zeitschrift für die kriminalistische Wissenschaft und Praxis*, No.3, Deutschland, 2008., fq.164, Azem Hajdar, *Organized crime (Kriminaliteti i organizuar)*, Prishtina, 2006, fq.228- 232.

²⁸ Statistical court data shows that out of 132 perpetrators, 126 were Kosovars. See: *Criminal records of district courts, 2004- 2008*.

²⁹ According to a KPS report, the majority of victims stopped at border passing points have been returned to their places of origin. The report dates March 3, 2007.

³⁰ Victims, as is to be seen below, came from different countries, such as Turkey, China, Albania, etc.

IV. Causes of criminal offences of smuggling migrants

Causes of these criminal offences are all those factors, conditions and circumstances affecting their presence in a society. These causes are numerous and different. Simultaneously, they are of a general character, but also of specific nature.³¹ The fact that many causes are related to the criminal offences of smuggling migrants is undisputable. Nevertheless, based on the outcomes of the research, as determining causes of the presence of such criminal offences are the following:

1. Economic crisis and depression;
2. Social – political circumstances;
3. Non-implementation of existing legislation;
4. Lack of a complete legal infrastructure;
5. activities of state authorities;
6. open borders, poor management of borders.

1. Crisis and economic depression

The economic crisis and depression are causes of an economic/social nature, exerting their influence in the occurrence of criminality in a society. In fact, “it is known and validated the fact that where there are economic crisis and other related problems, criminality is present in high rates”.³² As a consequence, such countries provide fertile ground for occurrence and expansion of numerous criminal offences.³³ In fact, it is a general conviction that economic crisis have a direct impact in increasing unemployment, prices, inflation and generally the poor welfare of the population, in any country they appear.

The conclusion that economic crisis have a large impact on the criminality rate in a society is best argued by the process of transformation the former Socialist countries have gone through. Almost in every country, in their difficult path of coping with the crisis, there was a tendency of increasing criminality.³⁴ This tendency is likely to have been pursued also in the case of criminal offences of smuggling migrants. This fact is also proven by the modest results of this work.

Thus, in researching the phenomenon of the presence of criminal offences of smuggling migrants in Kosovo, it has been concluded that the vast majority of both perpetrators and victims was in dire economic situations. Out of 36 perpetrators studied, 19 were in poor economic conditions. On the other hand, out of 98 victims for which the judgments rendered by courts showed social status of families they came from, 66 came from poor families. The sources used prove that perpetrators and victims of these criminal offences have come from places with such economic difficulties, or places in which the unemployment is very high. These countries are Kosovo, in which “it is estimated that more than the half of the population lives in poverty, of which 18% in extreme poverty”³⁵, and further Albania, Serbia, Turkey, China, etc. Therefore, the

³¹ For more, see: Halili R. *Criminology (Kriminologjia)*, Prishtina, 2000, p. 117 - 119.

³² Compare: Papandile J. *Criminological insight (Vështrim kriminologjik)* (1912 - 1999), Tirana, 2000, p. 76.

³³ Pavičević B. *Modern international criminality (Savremeni međunarodni kriminalitet)*, Priručnik, br. 3, Zagreb, 1991, p. 171.

³⁴ Hajdari A. *Organized criminality (Kriminaliteti i organizuar)*, Prishtina, 2006, p. 224.

³⁵ See: World Bank Report on poverty, 2008.

economic crisis, which generates difficult social situations in a country, is rightfully considered to be a factor affecting directly or indirectly in the occurrence of criminal offences of smuggling migrants.

2. Social/political circumstances

Social-political circumstances, especially when characterized by a high level of aggravation, are causes determining the presence of criminality in society. This fact is proven with the sad experience in wars involving the former Yugoslav areas, former Soviet Union, the events in 1997 in Albania, etc. Empirical data prove that almost in all these countries, there was a sharp increase of criminal offences, including criminal offences of smuggling migrants. In Kosovo as well, the social and political setting, throughout the research period 2004 - 2010, continued to be fragile (consider the situation in the north), the state administration continued to function with numerous problems (especially the criminal justice), having deficiencies in civil service, the law enforcement system had distinct deficiencies and problems, while economic development remained poor, together with massive unemployment.³⁶

To illustrate the impact of social and political circumstances in the rates of criminal offences of smuggling migrants it is sufficient to say that all perpetrators and victims identified in judgments studied come from countries with a fragile social-political situation, and even with evident problems, such as Turkey, China, Kosovo, Albania, Serbia, etc.

3. Non - implementation of existing legislation

Non-implementation of applicable legislation provokes the occurrence of numerous negative phenomena in society. Thus, the non-implementation of criminal legislation I consider to be one of the most important causes of increased criminality in general, and specifically criminal offences of smuggling migrants.

The functioning of the judiciary, as is known, is ensured with laws and other legal acts. In these terms, the role of judges, prosecutors and authorized police officers is considered to be rather large. They have direct responsibility in protecting individual and societal values as provided upon by applicable legislation. In these terms, as a favourable condition for criminal offences of smuggling migrants it appears the non-implementation of adequate legal measures by the justice authorities against all those proven to have committed such offences.³⁷

As it is notorious, the justice system in Kosovo has been for quite some years the target of criticism of main actors of international policy, and not only. In these terms, sharp criticism on inefficiency of judiciary was addressed by the 13 points of the Contact Group of 2006, and the OSCE Report analysing legally the cases of human trafficking in Kosovo. Before this criticism, and the large number of pending cases transferring from one year to the other, it is the mandate of Kosovo institutions to add up on their commitment to providing all opportunities for the justice authorities to be able to

³⁶ For more details, see: Hajdari A. The fenomenology and etiology of criminal acts involving migrant smuggling in Kosovo, *Archivos de Criminología, Criminalística y Seguridad Privada* > Núm. 2, Enero 2009,,..., pp. 7 - 8.

³⁷ Po aty, fq. 8.

exercise competently their functions.³⁸ Consequently, these authorities are responsible for taking all legal means in guaranteeing efficiency in processing criminal cases and extension of authority throughout the state³⁹, and enforcement of legislation in Kosovo, in responding to the citizens' needs for rule of law and justice.

I consider that this situation, in a way or another, has had its toll in the rates of these criminal offences of smuggling migrants. This may be argued by the fact that a considerable number of smuggled victims seems to be taken out of Kosovo's territory passing the northern borders of Kosovo, which for many years have been and continue to be beyond control of Kosovo and international institutions.

4. Incomplete legal infrastructure

A complete legal framework, especially the criminal law, is considered to be an important factor in preventing criminality.

Initially, it is important to underline the fact that in the post-war Kosovo, good results were recorded in terms of developing the legal framework necessary for combating criminality. In these terms, one must mention the adoption of the Criminal Code, the Criminal Procedure Code, the Law on Execution of Criminal Sanctions, the Juvenile Justice Code, Law against Corruption, Law on Courts, Law on State prosecution, etc. Nevertheless, despite this fact, for a successful fight against criminal offences of smuggling migrants, an immediate need is to review some provisions of the Criminal Code of Kosovo, which provides on these criminal offence, especially issuance of a law, which would fully and competently regulate the modalities of foreigners' stay in Kosovo, and especially the issue of their employment. All this, supported also by the fact that foreigners in Kosovo in principle do not have limitations which they would face in other countries, in terms of their stay and employment. This condition is estimated to have impeded, to a considerable extent, the matter of identifying smuggled victims, and obviously the perpetrators of these criminal offences.⁴⁰

It is already notorious the fact that in countries which have difficulties in adequate legislation coverage (when relevant laws are absent), criminality is present in higher rates. Setting from this, it is known that in any case, the lack of relevant legislation is a factor fostering the commission of criminal offences of smuggling migrants.

5. Activities of state authorities

One cause which is thought to have special influence on increasing or decreasing criminality rates in a country is the good or poor police work, prosecutors and courts in exercising the authority entrusted to them.

It is now a notorious fact that an influential factor favouring the commission of criminal offences of smuggling migrants is undoubtedly the weakness in police activities in prosecuting these criminal offences and their perpetrators. In fact, the Kosovo Police, despite its progress in the field, I would consider to be deficient in capacities to cope with the challenges ahead of it, at least for the time being. In such conditions, it is logical to conclude that it is hard to currently expect any desired results from this authority in

³⁸Po aty, fq. 8.

³⁹Është e ditur botërisht se një pjesë e ndjeshme e veriut të Kosovës nuk qeveriset nga institucionet dhe ligjet e Kosovës. Kjo çështje ndikon që në atë pjesë të mbretëroj anarkia dhe kriminaliteti.

⁴⁰ Compare: Hajdari A. Organized criminality (Kriminaliteti i organizuar),..., fq. 147 - 148.

matters related to discovering and combating criminality in general, and including there the criminal offences of smuggling migrants. As a result, it is more than needed that the international police force, part of the EULEX Mission in Kosovo, is engaged more in the matter.⁴¹

Also, other favouring conditions for committing criminal offences of smuggling migrants I consider to include weaknesses in the activities of public prosecution offices, especially deficiencies in delaying investigation, their action with suspicious and incomplete evidence, etc.⁴²

Favouring conditions in committing criminal offences of smuggling migrants are also deficiencies in the performance of the judiciary. These weaknesses come to surface especially in cases when the courts render unlawful decisions on criminal cases, under the justification that there are no sufficient grounds to certify the claims of the prosecution, or respectively convicting the perpetrators to lenient sentences, without any convincing reasons.⁴³

Naturally, favouring conditions for committing criminal offences of smuggling migrants are also problems which may appear in institutions in which convicts serve their sentences. Such weaknesses may be of different natures, but in the context of this study, the main ones seem to relate to resocialization of persons serving sentences for having committed criminal offences of this type.⁴⁴

Ultimately, I believe that a circumstance most favouring the commission of criminal offences of smuggling migrants, and which is related to judiciary performance, is the linkage, in any way (e.g. corruption) of employees of these bodies with problematic persons or organized criminal groups.⁴⁵

11. Opening of borders and inadequate management thereof

Generally, opening of borders is an important matter, which has a strong role in economic, social, cultural and scientific development in a modern society. This matter contributes to unimpeded and rapid movement of capital, immaterial values and people, as an open opportunity which renders all goods created by humanity available to any person, without consideration of the place one lives in.

Nevertheless, although the opening of borders is a vitally important matter for humanity, it is today a notorious fact that in terms of movement of values enabled by such opening of borders, a considerable number of problems arise, which in a way or another, favour the appearance of criminality in general, and criminal offences of smuggling migrants specifically. Problems related to this matter are numerous and diverse, but the main include: lack of appropriate solutions which would enable effective management of borders of a considerable number of countries, and the lack of professionalism in management of customs and corruption of their staff, etc.⁴⁶

⁴¹Hajdari A. *The Phenomenology*,..., fq. 9.

⁴² *Ibid.*, p. 9.

⁴³ Outcomes of this paper show that the average sentence for perpetrators of these criminal offences is 1 year and 2 months. In comparison to the consequences brought about by these offences, the punitive policy taken against these perpetrators is considered to be relatively lenient.

⁴⁴Hajdari A. *The Phenomenology*,..., fq. 9 - 10.

⁴⁵ *Ibid.*, p. 10.

⁴⁶ *Ibid.*, p. 10.

Such problems are also present in Kosovo. Pathways exist to allow suspicious persons to enter our country without any problem. In fact, according to Kosovo Police, around 25% of the victims of the criminal offences of smuggling migrants are thought to have entered Kosovo besides the checkpoint, which only speaks to the improper management of state borders.

I consider that such problems must not trigger any undertaking of any extent to narrow down the possibilities of free and unimpeded movement of values and persons, though they must bear a clear message, that in country, regional and international levels, measures should be taken to eliminate negative phenomena allowing the commission of these criminal offences, and even more today, when such crimes are expanding rapidly.⁴⁷

V. Measures aimed at combating criminal offences of smuggling migrants

Since criminality as negative phenomena endangers individual and community interests, and therefore even the legal order as set by the Constitution, the state must take measures to protect such values.⁴⁸ Measures and methods used in combating criminality are diverse, also conditioned by the economic and social development rates, and the manner of state regulation and legal organization of the society. All measures used by the society in combating crime may be divided into preventive and repressive measures. The following chapters talk about the two groups of measures, which according to my opinion, should contribute in the battle against criminal offences of smuggling migrants.

1. Preventive measures – introductory remarks

Criminality is a constant negative phenomenon, which has pursued human society since its primitive communities and until today.⁴⁹ This is a harmful phenomenon endangering and damaging values protected by criminal legislation. Therefore, this harmful phenomenon must be prevented and combated. To prevent and combat criminality in general, and criminal offences of smuggling migrants specifically, the society must use different means and methods.

Measures used in preventing criminal offences of smuggling migrants are numerous and diverse. In these terms, the following sections talk about the meaning and nature of preventive measures, while further some of the most important types of these measures, which are considered to be of benefit for the successful battle against criminal offences.

1.1. Meaning and nature of preventive measures

Preventive measures imply the set of means and methods used by various societal subjects with a view of preventing the occurrence of criminality as a socio-pathological phenomenon, by striking and eliminating causes and conditions determining its appearance. "Preventive measures taken to prevent the commission of

⁴⁷ Ibid, p. 10.

⁴⁸ Sahiti E. Proving process in criminal proceeding, opportunities and difficulties (Procesi i të provuarit në procedurë penale, mundësitë dhe vështirësitë), E drejta, no. 3, Prishtina, 1996, p. 37.

⁴⁹ Lazarević Lj. Punitive security measures in modern criminal law (Kaznene mere bezbednosti u savremenom krivičnom pravu), Beograd, 1969, fq. 37.

offences are numerous and diverse"⁵⁰, and they must be exercised by the society itself, by forms of emancipation and self-protection.⁵¹ The types of preventive measures to be taken by a society in preventing criminality predominantly depend on the recognition of the aetiology of crime.⁵²

Preventive measures, as a set of means and methods used by the state and society have a certain nature. The name, and the physiognomy of these measures show the nature of the measures. These components prove that the nature of these measures is preventive – elimination or reduction of criminogeneous factors,⁵³ especially those factors favouring the existence of crime.

1.2. Several preventive measures against criminal offences of smuggling migrants

Preventive measures taken against criminality are numerous and diverse. They are related, before all, with the elimination of conditional factors of criminality, especially those of economic, social, political, psychological natures, etc. Preventive measures influencing the prevention of criminal offences of smuggling migrants are also numerous and of different natures. As such, they may be classified into two groups:

1. General measures, and
2. Measures of a special nature.

By preventive measures in a general nature one implies the measures taken by state and societal authorities, at national or international levels, in enhancing social status and welfare of the population, enhancing education and cultural levels,⁵⁴ balancing and stabilizing social-political circumstances in places and regions in which these circumstances are graver, etc. These measures are about changing the social environment and its humanism, for which such conduct would be foreign, and eliminating general and special causes of incriminating behaviour.⁵⁵

Meanwhile, preventive measures in a narrow (specific) sense imply special measures to be taken by judicial authorities and our state and society entities of a certain community, namely bodies at international levels, in the sense of eliminating criminogeneous situations, aiming at preventing concrete crimes, including criminal actions representing criminal offences of smuggling migrants. "These measures are oriented towards the part of population which is likely to take the crime route, or towards persons already in such path, and are aimed at preventing the re-entry into such crime".⁵⁶

⁵⁰Krahaso: Jašović Z. The notion of preventing juvenile criminality and principal views (Pojam prevencije prestupništva mladih i njen osnovni vidovi,) <http://www.vpodom.org.yu/pojam%20prevencije%20prestupništva%20mladih>,...,dt. 06.01.2004, p. 1 - 5.

⁵¹Compare: Bavcon Lj. Punitive policies of the Socialist society of Yugoslavia (Kažnjerna politika socialističkog društva Jugoslavije), JRKKP, br. 2 - 3, Beograd, 1978, p. 17.

⁵²Hysi V. Prevetion of criminality – a main direction to take in practical guaranteeing of human rights (Parandalimi i kriminalitetit - drejtım kryerësor për garantimin në praktikë të të drejtave të njeriut), Drejtësia, no. 3 - 4, Tirana, 1996, p. 32.

⁵³Compare: Hajdari A. Juvenile criminality in Kosovo 2001-2003 (Kriminaliteti i të miturve në Kosovë 2001- 2003), Prishtina, 2004, p. 191.

⁵⁴ Compare: Salihu I. Murders in the SAP Kosovo (Vrasjet në KSA të Kosovës), Prishtina, 1985, p. 284.

⁵⁵ Milutinović M., Criminal policy (translation) (Politika kriminale (Përkthim), Prishtina, 1987, p. 381.

⁵⁶ Hysi V. Introduction to criminology and penology (Hyrye në kriminologji dhe penologji), Tirana. 2000, p. 118 - 119.

Preventive measures referring to prevention of criminal offences of smuggling migrants, as mentioned above, are numerous and diverse. The following sections talk about preventive measures which are thought to have a large influence in preventing these criminal offences.

1. When addressing the causes of criminal offences of smuggling migrants, it has been stated that economic crisis and depression, coupled with other circumstances, have major influences on the frequency of these offences. This fact suggests the conclusion that the criminal offences of smuggling migrants will vanish, or be largely reduced when economy is revitalized, production is expanded, unemployment decreases, welfare improves, educational and cultural levels are higher, and economic conditions are created to exclude the possibility of criminalization of state employees, etc.⁵⁷

2. This paper has concluded that as factor of distinct influence in the prominence of criminal offences of smuggling migrants are the difficult social and political circumstances. This fact takes to the conclusion that criminal offences of smuggling migrants can be eliminated, or at least alleviated, when the state coping with such a political situation approaches the resolution of problems determining political instability. In this case, action must be concentrated in strengthening and consolidating the democracy and rule of law, de-politicization of state administration, in cases when it is politicised, etc.⁵⁸

3. In preventing criminal offences of smuggling migrants, a large burden should be taken by media. "These means, as it is known, can mobilize the wider public to assist the justice bodies to discover such criminal offences, and in educating people with pure moral emotions against them."⁵⁹ In this aspect, the preventive role of public information media, in terms of smuggling migrants, is found in publishing accurate information on the existence of such criminal offences and their perpetrators, publication of articles reflecting positive experiences in uncovering these criminal offences and their perpetrators, publishing scientific articles in relation to criminal offences of smuggling migrants and especially those addressing the consequences of such criminal offences, etc.

4. A considerable impact in preventing criminal offences of smuggling migrants is considered to be made also by the revision of several provisions of the Criminal Code of Kosovo, which provides on these criminal offences, and especially the adoption of a law which would provide on details and modalities of foreigners' stay in Kosovo, and especially their employment. Apart from this, in preventing these criminal offences, a large burden is also left to the public awareness raising on the Criminal Code and other relevant legislation, through various seminars and symposia, with a view of raising awareness of all people on the need to observe the law.

5. An important preventive role in combating criminal offences of smuggling migrants is to be left also to the state police. Such a role can be exercised in different

⁵⁷ Compare: Hajdari A. Organized criminality (Kriminaliteti i organizuar),..., p. 258 - 259.

⁵⁸ Ibid., p. 259 - 260.

⁵⁹ For more details, see: Latifi V. Criminal policy (Politika kriminale), Prishtina, 1998, p. 217 - 219.

manners. Nevertheless, preventive measures serving this role specifically may include: evidencing people for whom there is information that they deal in smuggling migrants, development of monitoring activity and other activities against these persons, information sessions with such persons, filing criminal reports against them, etc.

6. In preventing criminal offences of smuggling migrants, a large role may be played by prosecution offices and courts. This role can be played in various manners. But, one of the main forms of playing such a role is the increased efficiency of their performance in proceeding and resolving criminal offences of this nature. This is due to the fact that the appearance of a certain number of criminal offences of smuggling migrants may be a consequence of inefficiency of these authorities.

7. An important preventive role in the combat against criminal offences of smuggling migrants may be played by penitentiary institutions. These institutions can play this role in several manners. The best way of providing such a contribution would be the manifestation of enhanced engagement and better organization of performance of these institutions in the process of resocialization and treatment of convicts, which would in turn impact the elimination of recidivist cases of perpetrators.

8. In preventing criminal offences of smuggling migrants, an important role is also left to international cooperation.⁶⁰ This cooperation, according to my opinion, may be established by direct and indirect contacts, between Balkan countries' police forces and wider, thereby sharing good practices, and further by signing bilateral and multilateral agreements between relevant authorities of various countries (ministries of interior or ministries of justice), or countries with Interpol and Europol, and ultimately, by an active participation of police officers, judges and prosecutors, in various activities organized by international organizations, addressing matters related to combating and preventing criminality in general, and criminal offences of smuggling migrants in specificity.

9. In preventing the criminal offences of smuggling migrants, a large role is left to control and efficient management of state borders. In this aspect, a necessary fact is found in strengthening security measures at the borders, enhancing the performance in enforcing the law at the Customs, and placement under control of illegal passages, which are largely used by perpetrators of criminal offences of smuggling migrants.

10. In preventing criminal offences of smuggling migrants, an important role can be played by enabling professional specialization courses for a number of state officials (police officers, customs officers, etc.) who are involved in activities of combating criminality, and equipment of competent authorities (e.g. customs) with modern technical means.

11. An important preventive part in fighting criminal offences of smuggling migrants I believe is to be taken by drafting special programs for victim and witness

⁶⁰ For more details, see: Hysi V. Introduction to criminology (Hyrje në kriminologji),..., p. 66.

protection. "Such a practice is now applied by many advanced countries, such as Germany, Belgium, etc., and some of the aimed outcomes are already visible. Establishing such programs is seen as necessary due to the fact that the most recent circumstances are that witnesses, in many cases and due to the risk for them, do not witness against criminal groups."⁶¹

From what was stated above, it seems that the role of preventive factors in fighting criminal offences of smuggling migrants is rather large. Apart from this, the literature used brought me to the conclusion that in Kosovo, due to many objective and subjective reasons, the majority of these preventive measures were not enforced by the authorities responsible for combating criminality. Based on this, I believe that responsible entities must take care of using these efficient measures in their fight against criminal offences of smuggling migrants.

2. Repressive measures – introductory remarks

Aspects related to combating criminality are matters which have attracted a large interest amongst many authors. A large number of authors (especially those earlier) consider that priority should be given to repressive measures. These measures are numerous and diverse. "As such, they are related to incrimination of criminal offences, with the uncovering of criminal offences and discovering their perpetrators, criminal prosecution, with application and imposing sentences and criminal sanctions in entirety and their execution"⁶² It is more than obvious that all these measures are applied in combating criminal offences of smuggling migrants. Based on that, the following sections of the paper shall talk about the meaning and nature of repressive measures, while further sections discuss some of the most important types of these measures, which are considered to contribute in a successful combating of these criminal offences.

2.1. Meaning and nature of repressive measures

Repressive measures are a set of means and methods used by the state, respectively the authorities and bodies combating the crime. "This work was entrusted mainly to specialized bodies and organizations, firstly the state authorities (police, public prosecutors, courts, criminal sanction enforcement authorities, etc.). These bodies are repressive bodies, while the measures taken by them are called repressive measures."⁶³

Repressive measures as a set of means and methods used by authorized bodies have a certain nature. The nature of these measures is already unveiled by their name, and specifically their content. Consequently, these components show that the nature of these measures is repressive – or violent in fighting and preventing criminality at large, and specifically the criminal offences of smuggling migrants.

Repressive measures are provided upon by the law, and as such they are intended to protect human and societal values from criminal action or inaction.

⁶¹ Hajdari A. Organized criminality (Kriminaliteti i organizuar),..., p. 205.

⁶² For more details, see: Milutinović M. Criminal policy (Politika kriminale),..., p. 178 - 180.

⁶³ Compare: Hajdari A. Juvenile criminality (Kriminaliteti i të miturve),..., p. 205 - 206.

2.2. Some repressive measures, and their role in combating criminal offences of smuggling migrants

Repressive measures influencing the eradication of the criminal offences of smuggling migrants are numerous and different. Nevertheless, this paper shall review and elaborate only on the following two types of measures, such as:

1. Policy of discovering and criminal prosecution of perpetrators of criminal offences of smuggling migrants, and
2. Policy of imposing sentences on perpetrators of criminal offences of smuggling migrants.

2.2.1. Policy of discovery and criminal prosecution of criminal offences of smuggling migrants

Discovery and prosecution of these criminal offences of migrant smuggling, and their perpetrators is of special importance in fighting these criminal offences. In this aspect, the discovery of criminal offences of smuggling migrants has a direct impact on reducing the number of such offences. In discovering criminal offences of smuggling migrants, similar to other criminal offences, in any society, the main role pertains to state authorities, concretely the police and public prosecution. In this sense, the role of the police is mostly concentrated in undertaking these actions: 1. Monitoring the trends of criminal offences of smuggling migrants and orientation, organization, and harmonization of activities in their discovery; 2. Undertaking and leading actions in discovering criminal offences of smuggling migrants, and unveiling and shedding light on their perpetrators; and 3. Obtaining and collecting data on perpetrators of criminal offences of smuggling migrants which commit criminal offences during serving the sentence in penitentiary institutions.⁶⁴

In the activities of unveiling criminal offences of smuggling migrants and their perpetrators, the role of the police consists also in generating special statistics on commission of these criminal offences by criminal groupings, undertaking steps to destroy such groups and undertaking tactical operational measures and other measures as set forth by the law,⁶⁵ including the arrest of persons captured in the act, undertaking respective criminalistic actions, etc.

In the struggle against criminal offences of smuggling migrants, the role of public prosecutors is vast. The outcomes of this paper prove that the performance of district prosecution offices in Kosovo in prosecuting criminal cases related to criminal offences of smuggling migrants has been satisfactory. Nevertheless, it may also be freely stated that so far, what was aimed has not been achieved yet. In this sense, it is an immediate request for these prosecution offices to tackle this type of criminal offences in a more urgent and more persistent manner.

⁶⁴ Compare: Hajdari A. Organized criminality (Kriminaliteti i organizuar),..., p. 274 - 275.

⁶⁵ For more details on meaning and types of operational tactical measures, see: Latifi V. Criminalistics (Kriminalistika), Prishtina, 2004, p. 70 - 74.

Ultimately, I consider that to enable a more efficient combat against these criminal offences, it is necessary to enhance the performance of all entities authorized to combat the crime, and then to de-politicise all performance of these entities, their equipment with modern technical means, cooperation and professional teamwork of all these entities at all levels, etc.⁶⁶

2.2.2 Policy of imposing and enforcing sanctions against perpetrators of criminal offences of smuggling migrants

The successful combat of criminal offences of smuggling migrants may be contributed largely by implementing an adequate punitive policy in terms of imposing and enforcing criminal sanctions.⁶⁷ In these terms, a dominant and irreplaceable role is placed by sentences, namely sentencing by imprisonment.⁶⁸ In relation to this issue, as stated above, the Criminal Code of Kosovo has provided rather harsh sentences. This approach is thought to be a result of high societal risk caused by these criminal offences. It is obvious that the combat against these criminal offences can be satisfactory only if sentences provided are imposed and enforced.⁶⁹ One must mention the fact that in terms of performance of the district courts of Kosovo, there is a tendency of imposing rather lenient sentences. This is further proven by the fact that these courts have imposed an average sentence of 1 year and 2 months of imprisonment.

It is an undisputable fact that the imposed sentence has no meaning if not enforced. One must stress that in this sense, Kosovo continues to face numerous problems. A future demand is to assign utmost care to matters related to enforcement of sentences in the policy of fighting criminality.

Nevertheless, it is a notorious fact that the provisions on harsh sentences alone cannot bring about the eradication of criminal offences of smuggling migrants. In these terms, it is considered that for a successful fight against these criminal offences, apart from providing on sentences for the offences, a wide front is open in terms of eliminating potential causes determining its appearance.

Conclusion

⁶⁶ Compare: Hajdari A. Organized criminality (Kriminaliteti i organizuar),..., p. 277.

⁶⁷ Compare. Milutinović M., Criminal policy (Politika kriminalne),..., p. 258.

⁶⁸ For the meaning, features and purpose of sentences, see: Ukaj B. Sentences in criminal law of Albania (Dënimet në të drejtën penale të Shqipërisë), Prishtina, 2006, p. 211 - 217.

⁶⁹ On enforcement of imprisonment sentences, see more: Gashi R. Enforcement of imprisonment sentences in Albania (Ekzekutimi i dënimit me burgim në Shqipëri, Prishtinë), 2001, p. 67 - 68.

In researching criminal offences of smuggling migrants, I have come to the following conclusions:

1. Criminal offences of smuggling migrants, although present in earlier human societies, are a phenomenon distinct for the modern society. This conclusion is argued by a relatively high presence of these criminal offences in the era we live in.

2. Criminal offences of smuggling migrants are serious criminal offences. The Criminal Code of Kosovo has structured these offences in the chapter of criminal offences against international law. This Code sentences perpetrators of these criminal offences by imprisonment from 2-20 years.

3. Criminal offences of smuggling migrants may be perpetrated in various manners. Therefore, these offences may be committed by: individual perpetrators and perpetrators in criminal organizations, in a random and qualified manner, by inhuman and degrading treatment of migrants, and even without such treatment, and by direct and indirect actions.

4. Criminal offences of smuggling migrants may be committed by using almost all transport modes and all potential pathways, be they controllable or not.

5. Criminal offences of smuggling migrants are committed by direct intent, and with a view of obtaining material or other benefits, as a rule. Nevertheless, due to their nature, these offences are considered to be eventually committed by eventual intent.

6. In Kosovo, criminal offences of smuggling migrants during the period of 2004 - 2010 have recorded a relatively high prevalence. The data processed show that during this period, the district courts of Kosovo have dealt with 67 criminal cases involving criminal offences of smuggling migrants. 22 cases have been resolved, in which 36 were convicted. The number of victims is very much larger. Their number, according to the data deriving from the final judgments, ranges to 98 persons. Nevertheless, I consider that such data should be taken with much reservation. This, amongst others, based on the fact that a number of perpetrators and victims, for many reasons, the authorities have not been able to discover or identify.

7. In the appearance of criminal offences of smuggling migrants, many causes have had their toll. Amidst these causes, I consider that a decisive impact has been borne by economic, social and political conditions, an incomplete legal framework, non-implementation of existing legislation, the opening of borders and problems with their management, activities of state authorities, et cetera. These criminal offences have brought about dire consequences for the victims, their families, and the society in full. Such consequences, in the majority of cases, were of social nature, but they also caused psychological consequences (for victims) and others.

8. The data processed show that perpetrators and victims predominantly come from low income families. These data also argue the influence of economic and

education factors (without excluding other impacts) in the prevalence of these offences during the research period.

9. Ultimately, I consider that for an efficient struggle against these criminal offences, there is a requirement for a permanent engagement of all authorities involved in combating crime, the provision of these authorities with modern technical means, cooperation and professional teamwork at all levels, etc. to accomplish this objective, high importance is given also to development and consolidation of democracy and rule of law, enhanced international cooperation between states and between states and international organizations (Interpol and Europol), continuous modernization of criminal legislation, enhanced economic development, educational and cultural development of the population, etc.

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