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Boundaries of humanitarian aid to irregular migrants from a comparative law perspective*

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1. Introduction

International law referring to irregular migrants is based on the enforcement of return obligations, enhanced external border controls and the imposition of criminal and administrative sanctions on those who interact with irregular migrants as carriers, employers or smugglers.¹ Irregular migration has another important aspect, namely the humanitarian assistance provided to people on the move whose life and health are at risk. Those who, in a more or less formalised way, try to help in emergency situations often face accusations of organising illegal border crossings

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¹ N. Delvino, *European Union and National Responses to Migrants with Irregular Status: Is the Fortress Slowly Crumbling?*, in: *Migrants with Irregular Status in Europe Evolving Conceptual and Policy Challenges*, eds. S. Spencer, A. Triandafyllidou, Springer 2020, p. 77; M. Stepka, *The New Pact on Migration and Asylum: Another Step in the EU Migration-Security Continuum or Preservation of the Status Quo?*, “Białostockie Studia Prawnicze” 2023, No. 1, p. 28.

or illegal stay.² The aim of this article is to try to establish, from the point of view of international and national law, the boundary between the criminalised smuggling of migrants and activities that aim at providing assistance.

The migration situation in Italy and Poland is diametrically opposed, but in both countries humanitarian aid workers face various actions from law enforcement agencies, including such as being charged with organising illegal migration, or collaborating with migrant smugglers.³ Since the start of the crisis on the Polish-Belarusian border in 2021, which according to government is a “hybrid war” caused by Belarusian regime,⁴ volunteers have been providing assistance to migrants who have crossed the border and often need medical help because they are exhausted by the journey, injured or ill, or other types of support, such as hosting migrant women or migrants at home in the warmth or giving them a lift to hospital. In the case of Poland, we are not dealing with migrants on sinking ships in the Mediterranean. We are

² B. Figaj, M. Chomiuk, “Wielka afera przemytnicza PO”. Wiceministrowie SWiA i MS o zatrzymaniu aktywistki, Polska Agencja Prasowa, <https://www.pap.pl/aktualnosci/wielka-afere-przemytnicza-po-wiceministrowie-swia-i-ms-o-zatrzymaniu-aktywistki> (access: 26.07.2024); J. Klimowicz, #Murem za Ewą. Aktywiści i aktywistki w obronie aresztowanej kobiety, pomagającej migrantom i uchodźcom, “Gazeta Wyborcza Białystok”, https://bialystok.wyborcza.pl/bialystok/7,35241,30202485,murem-za-ewa-aktywisci-i-aktywistki-w-obronie-aresztowanej.html#S.embed_article-K.C-B.1-L.1.zw (access: 26.07.2024); A. Jucewicz, Policjanci przejrzyli moje prywatne rozmowy na Signalu i Messengerze. Teraz grozi mi osiem lat za pomoc uchodźcom, “Gazeta Wyborcza”, <https://wyborcza.pl/magazyn/7,124059,28336460,policjanci-przejrzyli-moje-prywatne-rozmowy-na-signalu-i-messengerze.html> (access: 26.07.2024).

³ In Italy, this is, for example, the case of the ship *Iuventa*, whose crew was prosecuted for complicity in the smuggling of migrants from Libya, but discontinued in 2024, A. Spena, *Part 1. Migrant Smuggling: a Normative and Phenomenological View from Italy*, in: *Between Criminalization and Protection. The Italian Way of Dealing with Migrant Smuggling and Trafficking within the European and International Context*, eds. A. Militello, V. Spena, Springer 2019, p. 40; *Sono stati prosciolti tutti gli imputati nel processo sulla nave Iuventa*, <https://www.ilpost.it/2024/04/19/iuventa-prosciolti/?homepagePosition=1> (access: 25.07.2024).

⁴ Proposal by the President of the Council of Ministers on the introduction of a state of emergency on the territory of a part of the Podlaskie Voivodeship and a part of the Lubelskie Voivodeship, RM-060-218-21, p. 4.

dealing with foreigners who are already on Polish territory and their health and lives are at risk.

2. Scope of criminalisation of migrant smuggling in international law

The most important act of international law in the area of interest is Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000.⁵ The Protocol, in its Article 2, indicates that its purpose is to prevent and combat the smuggling of migrants, as well as to promote cooperation between States in achieving this objective, while protecting the rights of smuggled migrants. The *ratio legis* of this legislation is primarily to combat the activities of organised criminal groups which, by organising the smuggling of migrants, commit the criminal exploitation of migration and the generation of illicit profits from the procurement of illegal entry or illegal residence, which constitutes a serious form of transnational organised crime.⁶ The aim of the Protocol is not to criminalise the behaviour of migrants themselves in the form of illegal entry or illegal residence.⁷

The scope of criminalisation primarily includes smuggling of migrants, which the Protocol itself defines in Article 3(a) as organising, directly or indirectly, the illegal entry of a person into the territory of a State Party of which that person is not a national or in which he or she does not have a permanent residence. Article 6(1)(a)(c), indicating the scope of criminalisation, emphasises that States shall criminalise acts undertaken knowingly and with the

⁵ Journal of Laws 2005. No. 18, item 162, hereinafter: Protocol.

⁶ United Nation's Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto. Part Three, Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, United Nations 2005, p. 340.

⁷ Ibidem.

intent to obtain, directly or indirectly, a financial or other material advantage, such as the smuggling of migrants, as well as allowing a person who is not a national or a resident of a State to remain in that State without fulfilling the requirements for legal residence there. An essential element of these definitions is that the perpetrator acts in order to “obtain, directly or indirectly, a financial or other material benefit”. As indicated in the Legislative Guides, the purpose of the legislation is to establish provisions that can apply to those who smuggle others for gain, but not those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain. An element of benefit was included to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties.⁸ The document makes it clear that it is not the intention of the Protocol to criminalise the activities of family members or support groups such as non-governmental organisations.⁹ Financial or other material benefit “should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or costsharing among ring members. It follows from the Interpretative notes for travaux préparatoires for Article 12 of the Protocol that ‘other benefits’” are intended to encompass material benefits, as well as legal rights and interests of an enforceable nature, that are subject to confiscation. The Palermo Convention clearly implies

⁸ A. Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, “Human Rights Quarterly” 2001, No. 23, pp. 996; A. Gallagher, F. Davis, *The international law of migrant smuggling*, Cambridge University Press 2014, p. 43.

⁹ United Nations, General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions Addendum Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, United Nations, General Assembly A/55/383/Add.1, p. 17, https://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf (access: 26.07.2024); United Nations Office on Drugs and Crime, op.cit., p. 341.

in Article 2(a) that an organised criminal group is a structured group which acts for the purpose of obtaining, directly or indirectly, a financial or other material benefit. The financial purpose of the group is the main objective of its activities.¹⁰

Referring to the taint of guilt, offences must have been committed intentionally. Applied to the smuggling offence, this entails two requirements: there must have been some primary intention to procure illegal entry and there must have been a second intention, that of obtaining a financial or other material benefit.¹¹

The Legislative Guides clearly indicate that in recognition that illegal or irregular migration and, in some cases, the criminal smuggling of migrants may involve the movement of legitimate refugees or asylum-seekers, precautions were taken to ensure that the implementation of the Protocol would not detract from the existing protections afforded by international law to migrants who also fell into one of these categories. Here the language is intended to ensure that the offences and sanctions established in accordance with the Protocol will apply to those who smuggle migrants, even if they are also asylum-seekers, but only if the smuggling involves an organised criminal group. The precautions were taken to ensure that altruistic or charitable groups who smuggle asylum-seekers for purposes other than financial or other material gain were not criminalised.¹²

As it results from the analysis made above the humanitarian assistance to migrants during illegalised border crossings is not subject to criminalisation in the Protocol. To help people in danger or to transport family members and friends without any financial benefit is not considered a crime. Furthermore, the Protocol underlines the importance of protecting migrants' rights and their status as victims of smuggling operations.¹³

¹⁰ United Nation's Office on Drugs and Crime, op.cit., p. 343.

¹¹ Ibidem, p. 342.

¹² Ibidem, p. 364.

¹³ S. Bellezza, T. Calandrino, *Criminalization of Flight and Escape Aid*, Hamburg 2027, p. 34; V. Mitsilegas, *The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and*

While in the Protocol, the aspect of financial gain is required for an action to be classified as the crime of smuggling, it also explicitly excludes humanitarian aid that enables the entry and transit of migrants in cases of emergency from being a crime. Moreover, it specifies that help provided by non-governmental groups or family members to persons crossing borders without appropriate documents is not considered a crime.¹⁴ On the contrary, the Facilitation Directive¹⁵ does not give the definitions concerning humanitarian aid and leaves it to the discretion of the EU Member States. States have the possibility to exempt cases of smuggling from criminalisation.

Facilitation Directive requires States to criminalise the intentional facilitation of unauthorised entry into or transit through a Member State and the intentional facilitation of unauthorised residence for financial gain. The Directive does not explicitly exclude the provision of humanitarian assistance from criminalisation.¹⁶ This may lead to situations where the provision of humanitarian aid constitutes a criminal offence, which in turn is contrary to the international obligation to rescue persons in distress at sea,¹⁷ stemming, for example, from the United Nations Convention on the Law of the Sea.¹⁸ In contrast to international

international laws, "New Journal of European Criminal Law" 2019, Vol. 10(1), p. 70.

¹⁴ S. Bellezza, T. Calandrino, *op.cit.*, p. 34.

¹⁵ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328 (further as Facilitation Directive).

¹⁶ J. Allsopp, M.G. Manieri, *The EU anti-smuggling framework: direct and indirect effects on the provision of humanitarian assistance to irregular migrants*, in: *Irregular migration, trafficking and smuggling of human beings policy dilemmas in the EU*, eds. S. Carrera, E. Guild, Brussels 2016, p. 84; J. Allsopp, *The European facilitation directive and the criminalisation of humanitarian assistance to irregular migrants: measuring the impact on the whole community*, in: *Irregular migration, trafficking and smuggling of human beings policy dilemmas in the EU*, eds. S. Carrera, E. Guild, Brussels 2016, p. 49; L. Fekete, *Europe: crimes of solidarity*, "Race and Class" 2009, No. 4, p. 84.

¹⁷ F. Webber, *The legal framework: when law and morality collide*, in: *Humanitarianism: the unacceptable face of solidarity*, Institute of Race Relations, eds. L. Fekete, F. Webber, A. Edmond-Pettitt, London 2017, p. 8.

¹⁸ Journal of Laws of 2002, No. 59, item 543 as amended.

law, EU law offers the possibility to hold family members criminally responsible for assisting illegal stay or crossing a border.¹⁹

The regulations included in the Facilitation Directive, relating to the criminalisation of facilitating an illegal border crossing, do not contain a requirement to act for financial gain. The offences included, notified at the initiative of France, did not contain a reference to financial gain, but assumed the possibility of waiving responsibility for assisting family members. The rationale for the absence of a benefit was the evidentiary difficulty in attributing *mens rea* to the perpetrators, which was expected to have the effect of reducing the effectiveness of prosecuting criminal networks organising the smuggling.²⁰ As the proposal was criticised by Member States, the European Parliament and the UNHCR, a condition of acting for financial gain was introduced, but only for the offence of facilitating illegal residence.²¹ By contrast, in the case of facilitation of unauthorised border crossing, the condition of financial gain appeared in Framework Decision 2002/946/JHA only for the criminalisation of the qualified type of facilitation of unauthorised border crossing, i.e. acting within the framework of a criminal organisation or committing an act endangering the lives of the persons subject to the offence²².

In 2023, only Belgium, Greece, Spain, Finland, France, Croatia, Ireland, Italy and Malta exempted humanitarian assistance from criminal sanctions.²³ The European Commission perceives

¹⁹ J. Allsopp, M.G. Manieri, op.cit., p. 86.

²⁰ Explanatory Memorandum to JAI(2000)22 – Initiative of France with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence, https://www.eumonitor.eu/9353000/1/j4nvhdhfdk3hydzq_j9vvik7m1lc3gyxp/vi8rm2ypr4yp (access: 18.07.2024).

²¹ C.M. Ricci, *Criminalising Solidarity? Smugglers, Migrants and Rescuers in the Reform of the 'Facilitators' Package*, in: *Securitising Asylum Flows. Deflection, Criminalisation and Challenges for Human Rights*, eds. V. Mitsilegas, V. Moreno-Lax, N. Vavoula, Leiden –Boston 2020, p. 45.

²² M. Perkowska, *Kryminalizacja organizowania nielegalnego przekroczenia granicy – analiza wdrożenia prawa Unii Europejskiej przez Polskę*, "Europejski Przegląd Sądowy" 2023, No. 8, p. 33.

²³ European Commission, Directorate-General for Migration and Home Affairs Study supporting the implementation of the Facilitators Package. Final report, European Union 2024, p. 32.

a lack of legal certainty in the Member States in the area of criminalisation of the behaviours included in the Package, particularly with regard to the criminalisation of humanitarian assistance, and issued interpretative recommendations in 2020, but which were not legally binding.²⁴ Therefore the European Commission has submitted a draft new directive to Parliament,²⁵ which is intended to replace the Facilitation Directive. The explanatory memorandum clarifies that previous regulation has not been effective in creating clarity and legal certainty²⁶ about the distinction between facilitation of irregular migration and humanitarian assistance. The proposal clarifies that the purpose of the Directive is not to criminalise third-country nationals for the fact of being smuggled, assistance provided to family members, or humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.²⁷ Article 3 of the proposal contains the scope of criminalisation; this provision defines that intentionally assisting a third-country national to enter, transit across or stay within the territory of any Member State constitutes a criminal offence when there is an actual or promised financial or material benefit, or where the offence is highly likely to cause serious harm to a person. The proposal also highlights in recitals that the purpose of the Directive

²⁴ Communication from the Commission – Commission Guidelines on the implementation of EU rules on the definition and prevention of the facilitation of unauthorised entry, transit and residence (OJ EU C 323, 2020, p. 1); K. Arrouche, A. Fallone, L. Vosyliute, *Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling*, “CEPS Policy Briefs” 2021, No. 1, p. 5.

²⁵ Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the European Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA COM(2023) 755 final 2023/0439(COD).

²⁶ J. Allsopp, op.cit., p. 49; I. van Liempt, *Humanitarian smuggling in a time of restricting and criminalizing mobility*, in: *Routledge Handbook of smuggling*, eds. M. Galien, F. Weigant, Routledge 2022, p. 306; V. Mitsilegas, op.cit., p. 70; J.A. Brandariz, *Anti-smuggling Penal Policies: A Cross-National Exploration*, in: *The Challenges of Illegal Trafficking in the Mediterranean Area*, eds. V. Militello, A. Spena, Springer 2023, pp. 93–94.

²⁷ Proposal for a Directive, op.cit., p. 3.

is not to criminalise third-country nationals for the fact of being smuggled. Such a regulation clarifies which offences should be criminalised. These include facilitation conducted for financial or material benefit or the promise thereof. The exemption from material gain is in case of conduct that is likely to cause serious harm to the third-country nationals who were subject to the criminal offence or to any other person, even though there is no financial or material benefit or no promise of such benefit.²⁸

It is evident from the provisions of international law outlined above that they do not aim to criminalise the provision of aid to people on the move, taking the view that the provision of humanitarian aid does not fulfil the prerequisites of migrant smuggling. Therefore, the aim of the following part of the article will be to discuss Italian and Polish regulations regarding the possibility of criminalising humanitarian aid.

3. Italian and Polish regulations on (in)punishment for the provision of humanitarian aid

Italian law in the casuistic Article 12 of the Italian Consolidated Act concerning immigration²⁹ criminalises both facilitation of illegal border crossing and facilitation of stay. Facilitation of illegal border crossing is an act that does not include acting for the purpose of gaining a pecuniary or other advantage, whereas facilitation of stay is a directional offence, and the offender's acts are undertaken for the purpose of gaining an advantage.³⁰ Article 12 TUIMM is also considered "the pivotal instrument by which the

²⁸ Ibidem, p. 16.

²⁹ Legislative Decree 25.7.1998, No. 286 on Consolidated Act of Provisions concerning immigration and the condition of third country nationals (*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*) (abbreviated TUIMM).

³⁰ R. Ercole Omodei, *I traffici illeciti nel Mediterraneo. Persone, stupefacenti, tabacco. Report Italia*, Palermo 2019, p. 12.

incrimination of supportive conducts in favour of migrants is expressed".³¹

As mentioned above, Italy is one of the EU countries that exempt humanitarian assistance from criminal sanctions in their law. According to Article 12(2) TUIMM, "without prejudice to art. 54³² of the Italian penal code, rescue and humanitarian assistance do not amount to crimes insofar as they are provided in Italy to foreigners in need who find themselves, even if irregularly, within the territory of the state". Article 12(2) TUIMM can be used in cases in which rescuers do not act out of strict necessity and absolute emergency: cases in which foreigners are not properly saved from a serious and imminent danger for their life or personal integrity, but either find themselves in a more generic state of need (or are escaping from "man-made disasters, including armed conflict, or natural disasters").³³

This regulation contains several exclusionary elements. The first is the premise of the place of the acts undertaken. Article 12(2) TUIMM applies only to acts undertaken on Italian territory.³⁴ This limitation is clearly aimed at circumscribing as much as possible the number of cases in which helping foreigners to unconventionally enter the state territory can be deemed to be lawful.³⁵ Thus, it only refers to assisting persons who have in any way entered Italian territory and are in need. In fact, therefore, the regulation of Article 12(2) TUIMM only refers to the situation of facilitation of illegal stay (inland smuggling) and not to facilitation of border crossing,³⁶ as the legislator's aim is, *inter alia*, to limit the situations in which

³¹ G. Mentasti, *The criminalisation of migration in Italy: Current tendencies in the light of EU law*, "New Journal of European Criminal Law" 2022, Vol. 13(4), p. 508.

³² Article 54 of the Italian Penal Code regulates the state of necessity. Italian Penal Code 19.10.1930, no. 1398, Journal of Laws no. 251, 26.10.1930 (hereinafter IPC).

³³ A. Spena, *op.cit.*, p. 36.

³⁴ G. Mentasti, *op.cit.*, p. 510.

³⁵ A. Spena, *op.cit.*, p. 37.

³⁶ In the case of actions outside Italian territory, in order to abolish criminal liability for facilitating an illegal border crossing, the provisions on acting in a state of necessity of Article 54 of the Italian Penal Code and the provisions of international law obliging assistance at sea. R. Ercole Omodei *op.cit.*, p. 14.

facilitation of irregular border crossing by foreigners can be considered lawful. The exemption from article 12 TUIMM only applies if the foreigner is “in need”. State in need may be understood as difficult health conditions requiring significant but not life-saving intervention, food deprivation not amounting to starvation, etc.³⁷ The scope of application of Article 12(2) TUIMM is broader than Article 54 IPC defining the grounds of state of necessity, as it does not presuppose that there is a present danger of serious bodily harm, but only requires that the foreigner is in a state of need. Furthermore, Article 12(2) of the TUIMM does not require the premise of subsidiarity,³⁸ nor proportionality.³⁹

Therefore, since Article 12(2) TUIMM only refers to inland smuggling, let us look at the scope of criminalisation of this act as set out in Article 12(5) TUIMM. The rationale for the criminalisation of conduct defined as inland smuggling makes it clear that the aim of the offender who facilitates the stay of the foreigner in the territory of the State in violation of the norms of this Consolidated Act is “to gain an unfair profit from the illegal condition of the foreigner”. The statutory elements of the offence of facilitating illegal residence will only be fulfilled if the offender acts with the aim of gaining a pecuniary advantage, and, moreover, this pecuniary advantage must be unfair. The scope of the criminalisation is therefore narrowed down to cases where the facilitation is committed for selfish purposes or in any case in an unlawful context, while on the other hand leaving out of the scope of the provision cases of facilitation motivated by solidarity or disinterestedness and falling within the normal sphere of personal contacts determined by interpersonal relationships. It is therefore necessary that the benefit is *contra ius* and results from the exploitation by the perpetrator of the foreigner’s state of illegality.⁴⁰

Thus, if the purpose of the offender’s action is to provide assistance, he does not fulfil the statutory elements of the offence

³⁷ A. Spena, op.cit., p. 36.

³⁸ V. Militello, *Traffico di migranti e tratta di esseri umani: studio comparato sull’implementazione degli strumenti dell’Unione Europea*, Palermo 2018, p. 23.

³⁹ R. Ercole Omodei op.cit., p. 13.

⁴⁰ V. Militello, op.cit., p. 20.

under Article 12(5) TUIMM. In such a situation, regulation a of Article 12(2) TUIMM seems to be unnecessary.⁴¹ On the other hand, its existence, in the already very casuistic regulation of Article 12 TUIMM, may be intended to emphasise that Italian law draws attention to the fact that the provision of humanitarian aid should not be criminalised, although these provisions *de facto* only concern the facilitation of residence.

As regards the exclusion of liability for facilitation of illegal border crossing, which is mainly criminalised in Article 12(1) TUIMM and its qualified types are set out in Article 12(3)–(3ter) TUIMM, in this case, Article 12(2) TUIMM will not apply. Persons who, by their conduct, fulfil the elements set out in Article 12(1) TUIMM and who have done so for humanitarian reasons (e.g. taking on board migrants from a sinking ship on the high seas) will only be able to rely on acting in a state of necessity or on the fulfilment of their obligations under the law of the sea under the International Convention for the Safety of Life at Sea from 1974, the International Convention on Maritime Search and Rescue from 1979 or the UN Convention on the Law of the Sea from 1982. In a situation where the transport of irregular aliens or assistance to remain in Italian territory are the consequences of rescuing them from a situation of serious and imminent danger to their health or life (behaviour of the perpetrator which constitutes the fulfilment of his obligations under the rules of maritime rescue), there will be no smuggling of migrants.⁴² If the perpetrator, by providing assistance, fulfils the prerequisites of acting in a state of necessity as set out in Article 54 IPC, he will not face criminal liability. On the other hand, since the entry of the aliens is a consequence of the rescue operations and the intervention is lawful, it cannot be considered that the entry was “illegal”, whereas Article 12 of the TUIMM defines smuggling precisely as the commission of acts aimed at “illegally bringing [aliens] into the national territory”.⁴³

⁴¹ A. Spina, *op.cit.*, p. 37.

⁴² *Ibidem*, p. 36.

⁴³ *Ibidem*, p. 30.

Polish criminal law, like Italian law, criminalises both the facilitation of illegal entry (Article 264 § 3 PPC⁴⁴) and illegal residence (Article 264a PPC). Similarly, in the case of organising illegal entry, the condition of acting for financial gain is not required. On the other hand, in the case of facilitation of illegal residence, the statutory elements of the offence include acting for the purpose of financial or personal gain. The Polish legislator has not decided to implement the clause resulting from the Directive that waives criminal liability of persons providing humanitarian assistance to migrants. Therefore, is it possible to abrogate criminal liability for organising illegal border crossings or facilitating illegal residence for persons providing humanitarian assistance? Or rather, is it at all possible, on the basis of current legislation, to attribute such responsibility to them?

Pursuant to Article 264 § 3 PPC, criminal liability shall be imposed on anyone who organises the crossing of the border of the Republic of Poland for others in violation of the law. And although international law requires criminalisation of facilitation of illegal border crossing, the legislator has retained the word “organises”, which is interpreted as “making efforts to obtain information on the manner of protecting the border, organising means of transport, collecting a fee from candidates for illegal border crossing, drawing up a route plan, keeping persons who are to cross the border illegally, arranging for them to have the relevant documents, acquiring objects to facilitate border crossing”.⁴⁵ Mainly following the judgment of the Supreme Court of 25.01.2005, WK 23/04,⁴⁶ it is pointed out that this behaviour does not have to consist of efforts to ensure the physical crossing of the border itself, but may also consist in efforts to provide places of safekeeping for persons illegally crossing the border. On the other hand, whoever provides a means of transport for transporting persons after they have crossed the border illegally to a place of safekeeping may be liable

⁴⁴ Act of 6 June 1997 Penal code (consolidated text: Journal of Laws of 2024, item 17, as amended, hereinafter Polish Penal Code PPC).

⁴⁵ Z. Cwiakalski Z., in: *Kodeks karny. Część szczególna*, t. 2, cz. 2: *Komentarz do art. 212–277d*, eds. W. Wróbel, A. Zoll, Warszawa 2017, p. 597.

⁴⁶ “Orzecznictwo Sądu Najwyższego Izba Karna” 2005, No. 2, item 21.

for aiding and abetting the commission of this offence (Article 18 § 3 in connection with Article 264 § 3 PPC), if this is the result of a promise made before or during the commission of the offence.⁴⁷ Aneta Michalska-Warias emphasises that the perpetrator's activity which amounts only to providing places of safekeeping or means of transport for persons illegally crossing the border may constitute either aiding and abetting of offences under Article 264 § 2 or 3 PPC or an offence under Article 49a of the Misdemeanours Code,⁴⁸ or the perpetration of an offence under Article 264a § 1 PPC. In order to speak of perpetration of an act under Article 264 § 3 PPC, it is necessary to establish that the perpetrator organised the illegal border crossing itself, and not only certain elements indirectly related to it.⁴⁹ Thus, facilitation is an element of organising, and organising itself consists of acts facilitating the illegal border crossing.

Therefore, providing assistance to a foreigner who is already on the Polish territory does not fulfil the elements of organising an illegal border crossing, nor does it constitute aiding and abetting this act, especially due to the fact that the communication between the volunteers and the foreigner takes place already after the border has been crossed. Moreover, assisting persons do not cooperate with smugglers who are involved in organising the onward journey of migrants across Europe.⁵⁰ The basic prerequisite for criminal liability is guilt. And the act under Article 264 § 3 PPC can be committed intentionally, and only with direct

⁴⁷ A. Herzog, in: *Kodeks karny. Komentarz*, ed. R. Stefański, Warszawa 2023, Legalis

⁴⁸ Act of 20 May 1971 – Code of Misdemeanours (Journal of Laws of 20.05.1971, item 2151, as amended).

⁴⁹ A. Michalska-Warias, in: *Kodeks karny. Część szczególna*, t. 2: *Komentarz. Art. 222–316*, eds. M. Królikowski, R. Zawłocki, Warszawa 2024, Legalis; eadem, *Przestępstwo ułatwiania nielegalnego pobytu na terytorium Rzeczypospolitej Polskiej (art. 264a k.k.) – wybrane problemy*, "Teka Komisji Prawniczej" 2018, No. 1, pp. 241–242.

⁵⁰ W. Klaus, *Karanie za pomoc, czyli czy można pociągnąć do odpowiedzialności karnej osoby pomagające przymusowym migrantom i migrantkom na pograniczu*, in: *Poza prawem. Prawna ocena działań państwa polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej*, ed. W. Klaus, Warszawa 2022, p. 30, DOI: 10.5281/zenodo.5838485.

intent,⁵¹ which means that the perpetrator must want to arrange for other persons to cross the border illegally.

As regards the facilitation of illegal stay criminalised in Article 264a PPC, this behaviour consists in “enabling” or “facilitating” another person’s unlawful stay on the territory of the Republic of Poland. Enabling means any activity that makes a person’s illegal stay on the territory of the Republic of Poland possible, while facilitating means any behaviour that makes an illegal stay on the Polish territory easier.⁵² The doctrine enumerates that facilitating activities may consist in providing accommodation, hiding a person, arranging for his or her illegal registration or providing appropriate documents, giving a lift to a person, providing clothing or means of subsistence. It may also consist in helping to change one’s image, enabling work, misleading the competent authorities dealing with foreigners, or presenting the said person as one’s close relative.⁵³

In any case, the perpetrator’s action requires that his or her aim is to “obtain a pecuniary or personal benefit”. Such a benefit should be interpreted in the sense given to this concept by Article 115 § 4 PPC, i.e. as a benefit both for oneself and for someone else.⁵⁴ Causal conduct “for the purpose of gaining a pecuniary or personal benefit” is a constitutive characteristic of the offence in question,⁵⁵ and without establishing this purpose of the offender’s action, liability under Article 264a PPC cannot be attributed. The offence can only be committed intentionally, and only with *dolus directus*, due to the intentional nature of the action.⁵⁶ As for the illegal nature of the foreigner’s stay, the perpetrator does not have

⁵¹ Z. Cwiakalski, op.cit., p. 599; A. Michalska-Warias, in: *Kodeks*; A. Herzog, op.cit.

⁵² A. Michalska-Warias, in: *Kodeks*.

⁵³ Z. Cwiakalski, op.cit., p. 602; A. Herzog, op.cit.; E.W. Pływaczewski, A. Sakowicz, in: *Kodeks karny. Część szczególna. Komentarz do artykułów 222–316*, t. 2, eds. A. Wąsek, R. Zawłocki, Warszawa 2010, Legalis.

⁵⁴ Z. Cwiakalski, op.cit., p. 603.

⁵⁵ E.W. Pływaczewski, A. Sakowicz, op.cit.

⁵⁶ Z. Cwiakalski, op.cit., p. 604.

to be certain in this respect, it is sufficient that he or she foresees such a possibility and agrees to it.⁵⁷

Those who provide assistance in the forest are acting to prevent the death or serious illness of migrants at the border, so in this case, therefore, no crime will be committed. But even if the volunteers are acting to help migrants in their stay in Poland, it is not in an illegal stay, but in legalising it, e.g. while waiting for the European Court of Human Rights to issue an interim measure ordering the Polish authorities to accept an asylum application. The aim, therefore, is to assist in obtaining legal residence and these actions are taken solely and exclusively because the Polish authorities do not fulfil their obligations and do not follow the procedures prescribed by law.⁵⁸

In addition, none of the people helping migrants and forced migrants in the border area receive financial gain from their actions. They are volunteers helping out of the need of their hearts and in disagreement with the deaths of people at the border. However, even if they were full-time employees of social organisations, their remuneration is not linked to helping illegal stay. On the contrary, their job is to support people in need or to provide assistance (including legal or humanitarian assistance) to people fleeing danger and seeking (or wishing to seek) protection in the European Union. It is also difficult to say that these activists achieve any personal gain as a result of their actions. For it is quite the opposite – they expose themselves to cold, sleepless nights, trauma, harassment by services or even violence on their part.⁵⁹ All this leads to the conclusion that humanitarian activi-

⁵⁷ A. Michalska-Warias, in: *Kodeks*.

⁵⁸ W. Klaus, op.cit., p. 30.

⁵⁹ K. Czarnota, M. Górczyńska, *Gdzie prawo nie sięga. Raport Helsińskiej Fundacji Praw Człowieka z monitoringu sytuacji na polsko-białoruskiej granicy*, Helsińska Fundacja Praw Człowieka 2022, pp. 48–49, <https://hfhr.pl/publikacje/raport-gdzie-prawo-nie-siega-11-miesiecy-kryzysu-humanitarnego-na-polsko-bialoruskim> (access: 29.07.2024); *The report on the Granica Group's anti-repression work carried out by the Szpila Collective and the Helsinki Foundation for Human Rights from the beginning of the humanitarian crisis (autumn of 2021) until the end of December 2022*, p. 3, <https://hfhr.pl/upload/2023/02/report-eng.pdf> (access: 29.07.2024).

ties in the border area carried out by activists and activists or residents assisting migrant women and forced migrants do not fulfil the disposition of Article 264a § 1 PCC and, therefore, cannot be considered illegal under criminal law.⁶⁰

4. Conclusions

The scopes of criminalisation of the smuggling of migrants under international law are similar, although with the advantage of international law for not criminalising humanitarian aid. Both international and European law regulations send a clear message to national legislators that humanitarian aid should be outside the scope of criminalisation. This is particularly evident in the European Commission's recent proposal for a new directive to prevent and counter the facilitation of unauthorised entry, transit and stay in the European Union, which introduces a mandatory condition that migrant smugglers act for financial gain.

Italian and Polish law have a similar scope of criminalisation of behaviour consisting in facilitating illegal border crossing and facilitating illegal stay. At the same time, Italian law contains an explicit exclusion of criminal liability for facilitating the illegal stay of foreigners, which is not present in Polish law. In addition, due to the different nature of the migration routes through the Mediterranean Sea to Italy, persons transporting migrants whose lives and health are at risk may invoke their obligations under the law of the sea and rescue persons in need at sea. Polish legislation, due to the nature of the perpetrator's action, which is the desire to obtain a pecuniary or personal benefit, also provides the possibility for those who act from humanitarian motives to go unpunished. In all of this, it is important for the judiciary to be aware of the *ratio legis* of the applicable provisions and their rationale. In such cases, consideration should also be given to the possibility of applying the institution of state of necessity when, in saving the

⁶⁰ W. Klaus, op.cit., p. 31.

life and health of a human being, the actor would have violated the rules on the legality of the border crossing.

SUMMARY

Boundaries of humanitarian aid to irregular migrants from a comparative law perspective

The criminalisation of migrant smuggling is part of migration management. It is intended to combat the activities of organised criminal groups in this area. However, it is possible that criminal provisions criminalising the smuggling of migrants are used against persons providing humanitarian assistance to migrants in life or health-threatening situations. The aim of the article is therefore to analyse international and European law regulations to the extent that they impose on states an obligation or the possibility to exclude criminal liability of the latter. The article analyses the provisions of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air and the Council Directive defining the facilitation of illegal entry, transit and residence. It also analyses Polish and Italian criminal law regulations in this area.

Keywords: migrant smuggling; humanitarian aid; criminalisation

STRESZCZENIE

Wokół granic pomocy humanitarnej wobec migrantów o nieuregulowanym statusie z perspektywy prawa porównawczego

Kryminalizacja przetrzutu migrantów jest elementem zarządzania migracjami. Z założenia ma na celu zwalczanie działalności zorganizowanych grup przestępczych w tym obszarze. Bywa jednak tak, że przepisy karne penalizujące przetrzut migrantów wykorzystywane są przeciwko osobom niosącym pomoc humanitarną migrantom znajdującym się w sytuacji zagrożenia życia lub zdrowia. Celem artykułu jest zatem analiza regulacji prawa międzynarodowego i europejskiego w zakresie, w jakim nakłada na państwa obowiązek lub możliwość wyłączenia odpowiedzialności karnej tych ostatnich. W artykule przeanalizowano zapisy Protokołu ONZ przeciwko przemytowi migrantów drogą lądową, morską i powietrzną oraz Dyrektywy Rady definiującej ułatwianie nielegalnego

wjazdu, tranzytu i pobytu. Analizie poddano także regulacje prawa karnego polskiego oraz włoskiego w tym zakresie.

Słowa kluczowe: przerzut migrantów; pomoc humanitarna; kryminalizacja

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