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Criminalisation of solidarity. Whether activists who help forced migrants in the borderland can be penalised for their actions?

Since early August 2021, when the humanitarian crisis began to unfold on the Polish-Belarusian border, the key actors who [provide real help to migrants in borderland forests are activists and local residents](#). The role of the latter cannot be overestimated, especially when they live and act in a state of emergency zone to which no one else has access. This assistance has been met with both great appreciation from one – large – part of society and with condemnation from another. Some of those who condemn it include public officials (both members of the Border Guard and other law enforcement agencies) who threaten activists rescuing people in border area with criminal prosecution. The two legal provisions that they most often refer to are: assistance in facilitating illegal stay in Poland (Art. 264a § 1 of the [Polish Criminal Code](#) – hereafter PCC) and assistance in organising illegal border crossings (Art. 264a § 2 PCC). In this analysis, I would like to discuss these regulations from the point of view of whether they permit punishment for granting humanitarian aid.

It is worth remembering that both of the above-mentioned regulations are included in the Polish legislation because criminalisation of these behaviours is required by international law. In fact, Art. 264a PCC was introduced in 2004 in order to implement [Directive 2002/90/EC](#) requiring adequate punishment for persons who support the illegal entry, transit and stay of migrants on the territory of the EU. The enactment of these provisions also amended Art. 264 § 3 PCC, which significantly increased the penalty for committing this crime: the lower limit was raised from three to six months, and the upper limit from five to eight years (Art. 1 § 3 of the [Framework Decision 2002/946/JHA](#)). Furthermore, criminalisation of people smuggling is mandated by United Nations regulations, more specifically by [a special protocol on this crime adopted in 2000 to the Convention against Transnational Organized Crime](#).

Facilitation of illegal stay

In Poland, facilitation of illegal stay means [different types of activities](#) that aim at:

- helping to legalise the stay of an undocumented person, e.g. by entering into a marriage of convenience with them, false declaration of parenthood in order to try to legalise the stay, or fraud of documents necessary for granting the legal stay;
- improving the undocumented person's situation and enabling them to function despite being undocumented, e.g., employing the undocumented person or providing them with a place to stay, hiding them, but also offering a car ride or providing with food or shelter.¹

Importantly, for these actions to be deemed criminal, the perpetrator must be acting for personal or financial profit. While the concept of a financial profit is quite obvious (someone must reap a specific, material benefit from their actions), the term 'personal profit' is not necessarily so. Moreover, this term does not originate from Directive 2002/90/EC, but was added by the Polish legislature. In Polish case law it is understood rather broadly and ambiguously. The [courts have recognised](#) such benefits to be e.g. unpaid help in the household, care for the offender's parent and running their household, the possibility to drink alcohol free of charge, or assistance in legalising their child's stay in Poland. As can be seen, the spectrum of these activities is very wide, and the courts are struggling to interpret the term. It should be borne in mind,

¹ See commentary to Art. 264a PCC: Z. Cwiągalski In: W. Wróbel, A. Zoll (eds.) (2017). *Kodeks karny. Część szczególna*. Vol. II. Part II. *Komentarz* [Criminal Code: Special Part. Volume II. Part II. Commentary]. Warsaw: Wolters Kluwer, LEX.

however, that these verdicts were issued in different real-life circumstances, none of which was even remotely similar to the situation on the Polish-Belarusian border.

The crime of facilitating illegal stay can only be committed intentionally and only with a direct intent, i.e. the goal of the perpetrators must be to facilitate the illegal stay of a specific person in Poland.

How, then, can the current interpretation of these provisions be applied to humanitarian actions, which entail, on the one hand, providing assistance in the forest (delivering food, clothes and medicines) and, on the other hand, delivering other types of relief, such as hosting forced migrants in a warm house or giving them a lift to a hospital? First, the Polish legislation does not recognise any exceptions to the provision of humanitarian assistance. On the other hand, Art. 264a § 2 PCC mentions the possibility of extraordinary mitigation of punishment by the court or even waiving the punishment when the perpetrator was not acting to achieve financial gain. However, this person has still committed a crime. In these cases, however, the key requirement for the crime is, as I mentioned above, an intentional act (i.e. intention and goal of facilitating the stay in Poland) and achieving a specific benefit (personal or financial). Meanwhile, people who offer aid in the forest act in order to prevent deaths or serious illnesses of forced migrants on the border. Therefore, it is not possible to speak about the commission of a crime. Still, even if the activists act in order to help forced migrants in their stay in Poland, it is not an illegal stay, but it aims at the legalisation of this stay; e.g. while waiting for the European Court of Human Rights to issue an interim measure, which will oblige the Polish authorities to accept the asylum application. Therefore, the intention is to assist the asylum seekers in obtaining a legal stay and these actions are undertaken only because the Polish authorities have failed to fulfil their obligations and to follow the procedures required by law. Between August and early December 2021, the [Court received](#) 47 such applications, concerning 198 persons, 44 of which were filed in Poland, mostly in connection with the prohibition of refoulement to Belarus.

Furthermore, none of the activists receive any financial gain from their actions. They are volunteers who help out of the kindness of their hearts and in order to prevent people from dying at the border. However, even if they are full-time employees of civil society organisations, their remuneration is not linked to assistance in illegal stay; on the contrary, their work is to support people in need and to offer relief (including legal or humanitarian assistance) to people fleeing danger and seeking (or wishing to seek) asylum in the European Union. It is also hardly plausible that these activists achieve any personal gain as a result of their actions. Quite the reverse, they suffer from cold, sleepless nights, trauma, threats or even violence from the enforcement agencies, and sometimes resentment from neighbours who support the government's actions. All this leads to the conclusion that humanitarian assistance in the borderland carried out by activist or local residents who help forced migrants do not meet the requirements of Art. 264a § 1 PCC, and therefore cannot be considered illegal under criminal law.

Organising illegal border crossings

The second provision that the Polish authorities refer to paint a picture of illegality of humanitarian action is Art. 264 § 3 PCC which criminalise illegal smuggling of people across the border, in other words, helping to organise illegal border crossings. The Polish [Supreme Court ruled](#) that organising 'does not have to be reduced solely to efforts to facilitate the mere physical crossing of that border which is in violation of the law. For it may also consist of efforts to provide shelter for persons illegally crossing the border of the Republic of Poland or means of transporting these persons to specific locations'. It should be remembered, however, that these actions must be connected with organising further border crossing: from Poland to another EU country. Therefore, in no way do they apply to the humanitarian assistance carried out in the Polish-Belarusian border area, as the activists did not take part in helping migrants to cross this border. In other words,

their assistance was delivered after forced migrants had been crossed the border. Moreover, the activists do not cooperate with smugglers who organise further travel of migrants in Europe.

Again, in order to punish for organising illegal border crossing, such an act must be committed intentionally and with direct intent, i.e. the perpetrator must want to organise or help someone organise the border crossing illegally.² Such a situation does not occur in cases of humanitarian aid because the purpose of the assistance is certainly not to organise illegal crossing of the Polish–Belarusian border for forced migrants. One can even say that by protecting these migrants from Polish enforcement and preventing their deportations, the activists actually stop migrants from illegally crossing the Polish border (towards Belarus). Incidentally, it may be noted that in order for the crime of organising border crossing to occur, persons who cross the border must do so illegally (against the law). Meanwhile, persons seeking international protection, who come directly from a territory where their life or freedom is threatened (in this case from Belarus) do not commit a crime of illegal border crossing in accordance with Art. 31 (1) of the 1951 [Geneva Convention Relating to the Status of Refugees](#). Consequently, also the actions of the individuals who are involved in helping asylum seekers cannot constitute a crime. The activists also do not participate in organising the crossing of the Polish–German border as this is not the purpose of their assistance.

In addition, the provision of Art. 264 § 3 PCC criminalises organising border crossings for ‘other persons’. This means that for the offence to be committed, the offender must assist at least two persons in their border crossing. If they helps just one person, e.g. by giving that person a lift somewhere, or by hosting forced migrants at home, they does not commit a crime.³

International standard

As I have mentioned, both types of crimes were instituted as a result of the implementation of international laws. Both the [European Commission](#) and the [UN](#) have drawn up guidelines to these regulations. In both cases, they clearly state that criminalisation of behaviours associated with crossing the borders and organising this practice can in no way mean criminalisation of humanitarian aid or any other humanitarian efforts, as conducting such efforts is actually required by law. The UN guidelines also call for non-punishment of family members who help their loved ones cross borders. They also explicitly say that especially assistance given to those seeking international protection must not be penalised.

Conclusions

In conclusion, it should be noted that rendering humanitarian assistance to forced migrants in Poland does not constitute a crime under the Polish law. We cannot talk about assistance in undocumented stay or in organising illegal border crossing either. Activities such as providing food, clothing, medicines or other resources to help people survive in the forest on the Polish–Belarusian border are entirely legal. Hosting migrants at home should also be considered as such (especially when staying outdoors in bad weather, particularly at night, could put them at risk of significant deterioration of their health or even loss of life). Likewise, a free ride, whether to the nearest hospital, place of assistance, or to a larger city, where they can find help is perfectly legal. This position is also [shared by human rights organisations](#).

² See commentary to Art. 264 PCC: Z. Cwiakalski In: Ibid.

³ See commentary to Art. 264 PCC: A. Lach In: V. Konarska-Wrzesek (ed.) (2020). *Kodeks karny. Komentarz* [Criminal Code: Commentary]. Warsaw: Wolters Kluwer.