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Repeal of criminal liability of refugees who cross state borders¹

Pursuant to Art. 31 (1) of the [Geneva Convention Relating to the Status of Refugees](#), a person who has crossed a border illegally should not be liable to punishment if:

- is a refugee within the meaning of the Convention;
- arrives directly from a territory where his or her life or freedom is threatened;
- reports promptly to the authorities and provides credible reasons for his or her unlawful entry or stay.

Pursuant to Art. 17 § 1 item 4 of [the Code of Criminal Procedure](#) (hereinafter: the Code of Criminal Procedure), a negative procedural prerequisite for instituting criminal proceedings (or for discontinuing proceedings that have already been instituted) is the fact that the law provides that the perpetrator shall not be subject to punishment. Theoretically, this regulation explicitly refers to the provisions of the Act and, since it is an exception, it should not be interpreted broadly. Nevertheless, it seems that it should be applied in the current case for two reasons. First, Art. 31 § 1 of the Geneva Convention is sufficiently precise to lend itself to direct application. Secondly, Art. 10 § 2 of the Code of Criminal Procedure sets out an exception to the rule of liability for a crime in cases stipulated by a statute or international law. Thus, the initiation and conduct of criminal proceedings against aliens is [inadmissible](#) if the conditions laid down in the Geneva Convention are met. Furthermore, the recommendations issued by the Office of the United Nations High Commissioner for Refugees on the interpretation of this provision say that [the principle of non-prosecution](#) should be extended to all crimes that were committed by a refugee as a means of fleeing from his or her country of origin or in connection with this principle, thus in the context of fleeing motivated by a well-founded fear of persecution in the country of origin.

Consequently, there is a contradiction between the provisions of the Geneva Convention and the provisions of the Misdemeanours Code and the Penal Code in the normative approach to the issue of criminal responsibility for illegally crossing the border. It is therefore necessary to determine which of these provisions should be applied, and the inconsistency should be resolved based on the provisions of the [Polish Constitution](#). The Constitution stipulates, firstly, that Poland shall observe international law binding on it; secondly that an international agreement ratified with the consent expressed in a statute shall override the statute, if the statute cannot be reconciled with the agreement (Art. 91 of the Constitution); and thirdly that international agreements ratified by the Republic of Poland on the basis of constitutional provisions in force during their ratification and published in the Journal of Laws shall be regarded as agreements ratified with the consent expressed in the statute and the provisions of Art. 91 of the Constitution of the Republic of Poland shall apply to them if it results from the international agreement that they concern the category of issues listed in Art. 89 (1) of the Constitution of the Republic of Poland.² The Geneva Convention is such an international agreement. In the event of a clash with Polish laws, the Geneva Convention takes precedence and its provisions are binding in the domestic legal order *ex proprio vigore*. Thus, under Polish law, a refugee as described in Art. 31 (1) of the Geneva Convention who has crossed our borders in violation of the law is not subject to punishment.

¹ The text is based on the article entitled ‘On the “crossing” of the borders of the state and refugee law’, which will be published in W. Cieślak, M. Romańczuk-Grącka (eds.) (2022). In dubio pro humanitate. Olsztyn: UWM Publishing House.

² Cf. M. Grzybowski (eds.) (2008). *Prawo Konstytucyjne* [Constitutional law]. Białystok: Temida2, p. 120.

Even a reasonable suspicion that the circumstances mentioned in Art. 31 (1) of the Geneva Convention have occurred will mean that it is inadmissible to hold a foreigner criminally responsible for committing a crime or an offence of illegal border crossing. Even if the circumstances and arguments presented by the detainee do not seem credible, law enforcement agencies should not assess them subjectively, and should adopt a *pro favorem libertatum* approach in doubtful cases. From that moment on, law enforcement authorities should apply only the provisions of the [Act on granting protection to foreigners within the territory of the Republic of Poland](#), and thus initiate relevant administrative proceedings.³

The Supreme Court made a similar statement in the judgment of 16 June 2015 in the case of Sri Lankan nationals participating in the support programme for victims of trafficking. They were charged and convicted for illegally crossing the border of the Republic of Poland under Art. 264 § 2 of the [Criminal Code](#). In the opinion of the Supreme Court, there was a gross violation of the law in that case. Since there were reasonable suspicions that the women were victims of human trafficking, there also had to be doubts about the degree of social harm of the offence they had committed. It was therefore unacceptable to use the institution of voluntary punishment. The fact that the foreigners pleaded guilty and acceded to the prosecutor's motion was of no significance. We can find analogies here with cases in which [foreigners who applied for refugee status immediately after crossing the border are accused of illegal border crossing](#). In these cases, there are also considerable doubts as to the degree of social harm of the committed act. It should be unacceptable to apply voluntary punishment, which significantly shortens the criminal trial and precludes the possibility to conduct an evidentiary hearing. The current practice of courts in Poland shows that they do not verify at all whether a foreigner fulfils the prerequisites of Art. 31 (1) of the Geneva Convention. Thus, there is a regular violation of international law.

With reference to Art. 31 (1) of the Geneva Convention, meeting two conditions is problematic in the current situation on the Polish-Belarusian border: an alien arriving directly from the territory where his or her life or freedom is in danger and presenting credible reasons for his or her illegal entry or stay to the authorities. According to [the Border Guard](#), today mainly citizens of Iraq, Afghanistan, Syria, Somalia and Tajikistan are 'pushed back' from the Polish border. The requirement of direct arrival required by the Geneva Convention is interpreted by the Polish authorities literally and is considered a necessary condition for applying for international protection. In fact, foreigners are arriving from the territory of Belarus. However, this country cannot be regarded as a safe country (see more in "[Marcin Górski](#)" chapter).

We must remember that Art. 31 (1) of the Geneva Convention must be interpreted with regard to the purpose for which it was adopted and not literally. It should not, therefore, be understood as a journey in which the crossing of the border between the country of origin and the host country takes place in immediate succession. Under that legislation, a refugee must have the right to transit through other countries and not to stay in those countries if he or she considers them unsafe for him or her or his/her family or if they do not offer international protection.

This was confirmed by e.g. the European Court of Human Rights (ECHR) in the judgment in [D.A. and others v. Poland](#). The ECtHR recalled the importance of the principle of non-refoulement, the violation of which may lead to a violation of Art. 3 of the [European Convention on Human Rights](#) (hereinafter ECHR), namely the prohibition of torture, and inhuman or degrading treatment. This also applies in the

3 I. Rzeplińska (2007). 'Karnoprawne problemy polityk towarzyszących swobodnemu przepływowi osób – aspekty praktyczne' [Criminal law issues in policies related to free movement of persons: Practical aspects]. In: W. Czapliński, A. Wróbel (eds.). *Współpraca sądowa w sprawach cywilnych i karnych* [Judicial cooperation in civil and criminal matters]. Warsaw: C.H. Beck, p. 415; M. Perkowska (2015). 'Problem nielegalnego przekroczenia granicy przez osoby ubiegające się o nadanie statusu uchodźcy' [The problem of illegal border crossings by asylum seekers]. In: W. Pływaczewski, M. Ilnicki (eds.). *Uchodźcy- nowe wyzwania dla bezpieczeństwa europejskiego na tle standardów praw człowieka* [Refugees: New challenges for European security in the context of human rights], Olsztyn: UWM Publishing House, pp. 52-62.

case of expulsion of a foreigner to a third country, insofar as it results in the direct or indirect exposure of the foreigner to treatment contrary to this provision.

At this point, it should be recalled that the principle of non-refoulement is the cornerstone of the international refugee protection regime and is the most important of the fundamental rights of refugees. As noted in the literature, it means not only protection against expulsion or refoulement to the borders of the state, but also applies to such measures as refusal of entry at the border. This protection covers both persons who have been granted protection status and those who have not yet been officially identified as refugees.⁴ Hence the Polish authorities, after the procedure has been meticulously conducted, are obliged to make sure that there is no risk of expelling a foreigner to a country where he or she is under the threat of torture or inhuman or degrading treatment, or of refusing him or her entry if he or she has arrived from such a country.

In the ruling of *D.A. and others*, the ECtHR found that in Belarus the migrants are at risk of being transferred to Russia and from there to Syria, which is a situation of [chain refoulement](#). Thus, Belarus is not a safe country for them. The ECHR issued a similar ruling in the case of Russian citizens of Chechen nationality (*M.K. and others v. Poland*). Thus, the basis for state responsibility may be expulsion of a foreigner to a country that will not provide him or her with proper access to the asylum procedure and transfer him or her to the country of origin.

Accordingly, the use of the push-back procedure in the zone of the state of emergency and earlier [at the Terespol border](#) crossing constitutes [a violation of the refoulement ban](#). A good-faith application of Art. 33 of the Geneva Convention must involve a thorough examination of the state of affairs in the country to which the refoulement is to take place. This includes a careful analysis of whether the country in question guarantees that no further transfer will be permitted to the country of origin which contravenes the Convention.

⁴ B. Wierzbicki (1993). *Sytuacja prawna uchodźcy w systemie międzynarodowej ochrony praw człowieka* [The legal status of the refugee in the system of international protection of human rights]. Białystok: Reklamowo-Wydawnicza Agencja Dziennikarzy AG-Red, pp. 131–132; B. Wierzbicki (1993). *Uchodźcy w prawie międzynarodowym* [Refugees in international law]. Warsaw: PWN, p. 91; B. Mikołajczyk (2004). *Osoby ubiegające się o status uchodźcy: ich prawa i standardy traktowania* [Asylum-seekers: their rights and standards of treatment]. Katowice: Publishing House of Silesian University, pp. 111–112.