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LEGAL AND INSTITUTIONAL CONDITIONS FOR PROSECUTING SMUGGLING OF IMMIGRANTS ACROSS THE EASTERN BORDER OF THE REPUBLIC OF POLAND AS AN EXTERNAL BORDER OF THE EUROPEAN UNION

Introduction

The phenomenon of migration is an inherent component of the processes of population movement and exchange, both domestically and internationally: regionally and globally. It is also an integral part of the historical process. In common understanding, as recoded by lexical publications, migration is defined as ‘a movement of population aimed at changing the place of residence permanently or temporarily, both within the country and from one country to another’, while a migrant is a person who migrates, resettles, changes the place of permanent residence.²

Depending on the direction of movement, migration is divided into immigration, *i.e.* the influx of people to a given territory, usually a country, for the purpose of permanent or long-term residence, while emigration is the opposite phenomenon — leaving the territory (country) of permanent residence in order to settle permanently in another territory.³ It can be assessed positively if it is a source of development impulses or negatively if it is uncontrolled⁴, conflict-generating⁵ or criminal.⁶

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² Szymczak M (Ed.), *Słownik języka polskiego*, Vol. II (L–P). Warszawa, 1988, entry: migration, migrant, pp. 161–170.

³ Kaczmarczyk T, *Migracja — charakterystyka zjawiska. Zeszyty Naukowe PWSZ w Legnicy*, 2015, Vol. 3, p. 9. *See also:* Nickel A, Nowak M, *Trendy migracyjne w XXI wieku. Roczniki Studenckie Akademii Wojsk Lądowych*, 2017, Vol. 1, pp. 109–120.

⁴ Due to its uncontrolled nature, illegal migration is considered to be the most dangerous manifestation of cross-border flows. *Cf.:* Kicinger A, *International migration as a non-traditional security threat and the EU responses to this phenomenon. CEFMR Working Paper*, 2004, Vol. 2, p. 4.

⁵ *Cf.:* Raczyński R, *Wpływ migracji międzynarodowych na bezpieczeństwo wewnętrzne państwa. Bezpieczeństwo. Teoria i Praktyka*, 2015, Vol. 2, pp. 13–30.

At present, negative evaluations predominate in this respect, which is related to the ongoing (practically since 2011) migration crisis (which worsened in 2015), which is a source of controversy and divisions among EU Member States. Although the EU is trying to develop a uniform, generally accepted strategy of dealing with the increased influx of emigrants from the south and east, the differences in interests and cost burdens of the crisis are too great for consensus to be possible in this matter.⁷

Migration, as a phenomenon in the above-mentioned sense, can be perceived in science from the perspective of various fields and disciplines, including sociology, political science, economics or law. In the latter case, migration can also have a penal aspect. This is the case when it becomes a field of activity for individual criminals and/or international criminal groups. It then becomes an issue of cross-border security, a component of the national security policy, understood as a state free from internal and external threats.⁸ The crime of illegal border crossing is described primarily in Article 264(2 and 3) of the Act of June 6, 1997 — the Penal Code.⁹ Pursuant to the first of the aforementioned provisions, an illegal border crossing occurs when it is accompanied by the use of violence, threats or deception. In the case described and pursuant to Article 264(3), the crime of illegal border crossing, having the

⁶ According to empirical research, almost half of illegal migrants are smuggled by organised crime groups specialising in trafficking in human beings, which generate approx. 10 billion USD in profit each year. Adamson F.B, Crossing Borders. International Migration and National Security. *International Security*, 2006, No. 1, p. 174. These profits are then put into circulation through the money laundering mechanism. Combating illegal migration also means combating money laundering from human trafficking and the cross-border smuggling of illegal migrants. Aronowitz A, Theuermann C, Tyurykanova I, Analysing the Business Model of Trafficking in Human Beings to Better Prevent the Crime. Vienna, 2010 p. 53. According to: Wódka M, Międzynarodowa przestępczość zorganizowana — typologia, charakterystyka i zwalczanie, 'De Securitate et Defensione'. *O Bezpieczeństwie i Obronności*, 2015, No. 2, p. 156, 'the main cause of illegal border crossing is ethnic, religious and national conflicts, or difficult political or economic situation of individual countries. Criminal groups take advantage of the difficult situation of the people living there by creating channels for smuggling illegal migrants. Along with them, other material goods are illegally smuggled, such as weapons, ammunition, drugs or alcohol. Sometimes, criminal organisations attempt to bribe border officers. They agree to commit these crimes, because people can sacrifice a lot for safe living and economic reasons'. Organised crime of cross-border smuggling of illegal migrants is therefore one of the components of cross-border organised crime, a part of its complex picture.

⁷ Cf.: Szymańska J, Strategia Unii Europejskiej wobec kryzysu migracyjnego: priorytety, bariery, efekty. *Studia BAS*, 2017, Vol. 3, pp. 159–186.

⁸ Trybus M, Nielegalne przekroczenie granicy — aspekty prawnokarne. *Studia Prawno-ustrojowe*, 2019, Vol. 46, p. 442.

⁹ Dz.U., 1997, No. 88, item 553 as amended (hereinafter: the PC), Article 49a of the Act of May 20, 1971, Code of Petty Offenses (hereinafter: the CPO)(Dz.U., 1971, No. 12, item 114 as amended) defines as a petty offence the so-called simple border crossing, i.e. without the use of violence, threats or deception, pp. 439–452. For more information, see: Trybus M, pp. 439–452; Klaus W, Woźniakowska-Fajst D, Przestępstwo nielegalnego przekroczenia granicy w ujęciu historycznym, teoretycznym i praktycznym. *Archiwum Kryminologii*, 2015, Vol. XXXVII, pp. 195–222; Laskowska K, Perkowska M, Przestępstwo nielegalnego przekroczenia polskiej granicy w ujęciu empirycznym. *Prawo w Działaniu. Sprawy Karne*, 2020, Vol. 43, pp. 9–36.

same modal features as those specified in § 2 of the Article in question, involves organising illegal border crossing for others. Both of these crimes, as accepted in doctrine, are of a basic nature, although they have identical modal features. In the former case, the perpetrator is the person crossing the border in the manner specified in Article 264(2) of the Penal Code, while in the latter — without any connection to the first one — it is the person (persons) organising the conditions for illegal border crossing for others.¹⁰

The service responsible for combating crimes of illegal border crossing is the Border Guard, the functioning of which is regulated by the Act of October 12, 1990 on the Border Guard.¹¹ In the relevant literature, it is pointed out that organised immigration crime is a crucial element of the illegal border crossing in Poland, which brings 'a significant income for the organised underworld. In addition, criminal groups are highly adaptable to all circumstances, characterised by unconventional methods and an innovative approach'.¹² This requires the services responsible for combating the described type of crime to maintain constant vigilance, improve methods of operation and increase their effectiveness. The driving force behind organised crime is not only the increasing population movement, conditioned by a variety of political, social and economic factors both on a regional and global levels, but also the benefits that organised crime groups derive from trafficking in human beings, which is sometimes difficult to separate from organised crime of illegal border crossing.¹³ This factor, to a large extent, also affects the Polish crime of organised illegal border crossing.

In the Polish context, combating the crime of organised illegal border crossing is closely related to the issue of protecting the external borders of the European Union. The Polish border with Russia, Belarus and Ukraine has this status, which imposes additional tasks and obligations on the Polish authorities. Therefore, in addition to Polish legal and institutional conditions, the description of the crime of illegally crossing

¹⁰ Banasik K, Penalizacja nielegalnego przekroczenia granicy, *Studia Prawnicze. Rozprawy i Materiały*, 2017, Vol. 1, pp. 8–9.

¹¹ Dz.U., 1990, No. 78, item 462 as amended; hereinafter : Act on Border Guard.

¹² Maciejewska M, Piffer A, Rola straży granicznej w zakresie zwalczania międzynarodowego terroryzmu i przestępczości zorganizowanej. *Zeszyty Naukowe Ruchu Studentckiego*, 2016, Vol. 2, p. 24. See also: Bąk T, Bezpieczeństwo transgraniczne Polski. *Zeszyty Naukowe WSOWL*, 2011, Vol. 3, p. 89.

¹³ This may result, as stated by M. Kluczyński in 'Przeciwdziałanie procederom handlu ludźmi i przemytu migrantów w Polsce' (*Przegląd Bezpieczeństwa Wewnętrznego*, 2014, Vol. 11) 'from different perceptions of these practices by law enforcement agencies of the country in which they are detected. In the country of transit, the smuggling of migrants may be defined just as the smuggling of migrants, and in the countries of origin or destination, as trafficking in human beings. Also, subtleties such as the simultaneous occurrence of features characteristic of both practices do not make it easier to define them. For example, when the cost of migrant smuggling is covered by the smuggler, there is a high probability that debt repayment will be made through various forms of exploitation'. However, it should be noted that in legal terms, the problem of separating trafficking in human beings from organised crime and illegal border crossing does not raise any doubts, due to the different penal classification of these two practices. This distinction is also accepted for the purposes of this study.

this border must take into account the EU's transborder security policy and EU regulations relating to the protection of its external borders. The present study will describe the role of the Border Guard (hereinafter: THE BORDER GUARD) in combating organised crime and illegal border crossing, taking into account the determinants of this issue resulting from Poland's membership in the EU.

Illegal immigration as an issue of cross-border security

After Poland's accession to the European Union in 2004, the perception of border security, whose tasks and goals are defined in terms of cross-border security, underwent a fundamental reevaluation. In this concept, due to the prefix 'trans', the main burden of the problem of border security was placed on issues related to the observance of the rules agreed between states for crossing the border in the context of peaceful population, economic, cultural and other exchanges. Basically, cross-border security is defined as 'a state (process) that is the result of all measures aimed at ensuring the security of border crossing by persons, all goods and vehicles (including air, water and land means of transport), between at least two state-owned entities'¹⁴. The main task of the services responsible for security is, first of all, combating all kinds of threats arising in this area of inter-state relations, especially cross-border crime, including those related to illegal smuggling of migrants by organised crime groups, which are particularly interesting in this study.¹⁵ Therefore, cross-border security can be defined, taking into account the above remarks and the general meaning of the term 'security', as the absence of threats to the proper course of the processes related to the crossing of state borders by persons and goods.

As a result of accession to the EU, on December 21, 2007, Poland found itself in the Schengen Information System, which defines a new, previously unknown model of cross-border security.¹⁶ In the current legal state, the functioning of the Schengen Information System is regulated by the Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)¹⁷. The

¹⁴ Serdakowski J, *Perspektywy rozwoju bezpieczeństwa transgranicznego RP. Rozprawy Społeczne*, 2015, Vol. 2, p. 29.

¹⁵ *Ibid.*, pp. 29–30.

¹⁶ *For more information, see: Banasik K, Penalizacja...*, *op. cit.*; Mickiewicz P, *Bezpieczeństwo wewnętrzne Unii Europejskiej. Repetytorium*, Wrocław b.d.w., pp. 37–40; The evolution of the Schengen Information System discussed, [in:] Zaiotti R, *Performing Schengen: Myths, rituals and the making of European territoriality beyond Europe. Review of International Studies*, 2011, Vol. 2, pp. 537–556; Piechowicz M, *Evolution of Schengen: an Example of Enhanced Cooperation and Differentiated Integration Model within the Area of Freedom Security and Justice. Polish Political Science Yearbook*, 2017, No. 1, pp. 121–137.

¹⁷ Official Journal of the EU of 23/03/2016, L77, p. 1; hereinafter: Schengen Borders Code.

most important national act regulating the protection of state borders and cross-border security is the Act of October 12, 1990 on the Protection of the State Border.¹⁸

In the light of the provisions of Article 2 of the Schengen Borders Code, the status of borders between EU Member States is essentially different from its external borders, which define the course of the boundaries of EU Member States with non-Community countries. The former are referred to as 'internal' borders and delimit the territories of the EU Member States. External borders are all other borders of these countries that are not internal borders. Under Article 22 of the Schengen Borders Code, movement across internal borders can take place at any point, other than border crossings, without border clearance and regardless of citizenship, in accordance with Article 25, provided that border control may be reinstated on these borders in the event of a situation requiring it. Pursuant to Article 14 (1) of the Act on the Protection of the State Border, crossing the borders of the Republic of Poland is generally based on documents authorising its crossing, however, in the case of internal borders, it takes place according to principles specified in the Schengen Borders Code. If the said temporary restoration of border control occurs pursuant to Article 25 the Schengen Borders Code, the provisions on external border control as defined in the Code shall apply.

All border crossing restrictions are, as a rule, maintained at external borders. Pursuant to Article 15 (1) of the Act on the Protection of the State Border, persons crossing the state border, which is an external border within the meaning of the provisions of the Schengen Borders Code, are obliged to undergo border control, within the scope specified by the Schengen Borders Code and other separate provisions, performed by Border Guard officers. Therefore, only external borders within the meaning of the Schengen Borders Code can be affected by transborder crime, including in particular the organisation of the smuggling of illegal immigrants, which is of particular interest to this study.¹⁹ It may also occur during the period of temporary restoration of border control on certain sections of the internal border, when the provisions applicable to the external border are used.

The north-eastern border of the Republic of Poland with Russia (including the Kaliningrad Oblast), Belarus and Ukraine has the status of the 'external' border, as previously noted. As observed by Magdalena Perkowska, 'the eastern border of the Republic of Poland is [...] a kind of border between the East and the West of Europe. Therefore, it plays an important role in the field of broadly understood security in the region'.²⁰

¹⁸ Dz.U., of 1990, No. 78, item 461 as amended; hereinafter: the Act on the protection of state border.

¹⁹ Perkowska M, *Nielegalna migracja w Europie — aspekty prawne i kryminologiczne. Teka Komisji Politologii i Stosunków Międzynarodowych*, 2017, No. 3, p. 61.

²⁰ Perkowska M, *Zagrożenie przestępczością na wschodniej granicy Polski — struktura i dynamika zjawiska. Politeja*, 2016, Vol. 2, p. 116.

The crime of illegal border crossing can therefore in practice only concern these sections as the EU's external border. Poland's cross-border security in its current geopolitical position does not so much involve protecting these sections as its national borders, but rather the cooperation in their protection as the external border of the EU, with the relevant EU authorities and EU Member States interested in such cooperation due to their own cross-border security. Currently, the protection of the EU's external borders involves, first of all, placing barriers permitted by international law to the uncontrolled inflow of migrants from outside the EU, the scope of which is determined by the Schengen Information System. However, the increasing mobility, both interregional and global, combined with the attractiveness of the EU as a target area for economic migrants and refugees from regions affected by armed conflicts, creates a demand for support by specialised criminal organisations in entering the Schengen Information System area. This significantly increases the possibilities of reaching the chosen migration destination. Poland does not necessarily have to be — and generally is not — the target of illegal migrants using the 'services' of organised crime groups, but it can be a transit point due to having a section of the EU's external border. This is the basic reason why Poland belongs to the group of EU Member States most exposed to the organised crime of illegal migrant smuggling. Therefore, the main area of responsibility of the Polish authorities in the area of cross-border security policy is effective control of the mobility of migrants coming to Poland, and consequently — to the territory of the EU, through its eastern border as the external border of the EU, by eliminating various related threats, especially those associated with organised smuggling of illegal immigrants.

Organised crime of illegal border crossing under the Polish legal system and EU law regulations

As mentioned earlier, illegal border crossing cannot be equated with the very fact of being illegal. Such an act, in the light of the previously mentioned provisions of the Penal Code, must be performed using violence, threats, deception [Article 264(2) of the Code] or/and be of an organized nature [Article 264(3) of the Code]. Acts of illegal migration that do not meet these criteria are treated as a minor offence under Polish law (Article 49a of the CPO). In this study, the focus is on the organised crime of smuggling migrants across the border, which is particularly dangerous as it has the potential to disrupt the functioning of the state and society. For this reason, organised groups of cross-border crime are referred to in the literature as 'new political actors on the international arena'²¹.

This kind of threat is posed not so much by illegal immigrants themselves, who are in many cases victims of groups organising their

²¹ Aleksandrowicz T.R, *Bezpieczeństwo w Unii Europejskiej*. Warszawa, 2011, p. 27.

cross-border transfers, but rather by these groups themselves. Their actions are referred to as *clandestine entry* or *smuggling of persons* and involve smuggling illegal immigrants across the border in a manner similar to smuggling goods, *i.e.* using the loading parts and hiding places of vehicles participating in cross-border traffic. Smuggled migrants themselves, if their illegal crossing of the border meets the characteristics contained in Article 264(2) of the PC, will be responsible for the crime of illegally crossing the border; if not, the act will be classified as a minor offence defined in Article 49a of the CPO. The organiser, most often acting in agreement with others or with the knowledge of a criminal group, is subject to liability under Article 264(3) of the PC, which provides for the penalisation of organising other persons to cross the border of the Republic of Poland contrary to the provisions of the law.²² The *ratio legis* for introducing this provision to the Penal Code in 1997 'was an effective fightt against the constantly growing number of groups engaged in organising other people to cross the border contrary to the provisions of the law.'²³ The need to penalise acts of organising the smuggling of illegal migrants was motivated by Poland's accession to the EU. As Monika Kotowska and Wiesław Pływaczewski point out, Poland as an EU member 'has become, to a large extent, a destination and transit country for foreigners trying to enter the European Union illegally.' In addition, it should be noted that 'there are more and more cases of border crossing using force.'²⁴

For the crime of organising the illegal smuggling of immigrants to occur, it is not sufficient to act in agreement with other persons, as these persons may cooperate in order to achieve the common goal of crossing the border.²⁵ It is necessary for the person cooperating to undertake specific organisational activities aimed at achieving this goal for others and deriving certain benefits, *e.g.* financial ones, from it. At the same time, it is not necessarily required for the crime of illegal smuggling of immigrants across the border to be organised by several people, despite the fact that the legislator used the plural form, it is enough for the crime to be organised by one person.²⁶ These activities may include providing illegal immigrants with means of transport, bringing them to the border area, providing maps or equipment for orientation in the field, etc.²⁷

²² Perkowska M, *Nielegalna ...*, *op. cit.*, p. 64.

²³ Jachimowicz M, *Nowe zasady odpowiedzialności za nielegalne przekroczenie granicy RP. Prokuratura i Prawo*, 2006, Vol. 5, p. 59. *Similarly*: Kotowska M, Pływaczewski W, *Przemysł imigrantów jako obszar zainteresowania członków zorganizowanych grup przestępczych. Studium przypadku*, [in:] Pływaczewski W, Ilnicki M (Eds), *Uchodźcy — nowe wyzwania dla bezpieczeństwa europejskiego na tle standardów praw człowieka*. Olsztyn, 2015, p. 81.

²⁴ Kotowska M, Pływaczewski W, p. 81.

²⁵ Cwiakalski Z, [in:] Wróbel W, Zoll A (Eds), *Kodeks karny. Część szczególna. T. II. Komentarz do art. 117–277d*. Warszawa, 2008, p. 1238.

²⁶ Jachimowicz M, p. 59.

²⁷ Banasik K, p.11; Kotowska M, Pływaczewski W, p. 81.

It should also be emphasised that — as the Supreme Court ruled in the judgment of June 6, 2003 — organising other persons to illegally cross the border of the Republic of Poland does not have to involve the crossing of the border by the perpetrator of the crime discussed.²⁸ This makes it possible to prosecute perpetrators abroad in cooperation with the authorities of the state in which the illegal transfer was organized.²⁹

Penalisation of illegal border crossing, including the act of its organisation for other persons, is a decision of the national legislator. EU law does not oblige member states to include such obligations in their national law systems.³⁰ Article 5(3) of the Schengen Borders Code cannot be considered tantamount to the requirement to criminalise the acts in question, according to which ‘without prejudice to the provisions of paragraph 2 of this article, Member States shall introduce sanctions, in accordance with their national law, for unauthorised crossings of the external borders at places other than border crossing points or outside the hours of opening. These sanctions must be effective, proportionate and dissuasive’. The type of sanctions for illegal crossing of the EU’s external borders is determined by each Member State that has such a border, on their own. It must only meet the criteria of effectiveness, proportionality, *i.e.* adequacy to the protected good, which is the security of the EU’s external borders, and deterrence. In the opinion of Katarzyna Banasik, Polish law fulfils the requirement of sanctioning illegal border crossing because it treats it either as a minor offence (Article 49a of the CPO) or as a crime [Article 264(2) of the PC]. In her opinion, those sanctions also meet the requirements of the State, as set out in Article 5 (3) *in fine* of the Schengen Borders Code³¹. Polish law meets the requirement of Article 5 (3) of the Schengen Borders Code also by penalising organising other people to cross the border illegally, even if organisers themselves do not participate in the act. The Court of Appeal in Szczecin derived the admissibility of such a sanction, in a judgment of 29 October 2010, from the fact that Poland is bound by the Schengen Borders Code, which does not create ‘a legal status allowing everyone to cross internal borders, and in a way that does not depend on the fulfillment of any conditions. This code, in Article 1, only provides for the lack of internal border controls. This means that the regulations contained therein did not deprive the Member States of the European Community, including Poland, of the right to protect their borders, which are currently

²⁸ Wyrok Sądu Najwyższego (Judgment of the Supreme Court) z 6 czerwca, 2003, file ref. No. III KKN 349/01, LEX, No. 78837.

²⁹ Poland closely cooperates with the countries of the Visegrad Group in combating the phenomenon of illegal migration and the crime of cross-border organised transit of illegal migrants. Cf.: Klepner T, Współpraca transgraniczna państw Grupy Wyszehradzkiej na rzecz zapewnienia bezpieczeństwa granic. *Poliarchia*, 2014, Vol. 2, pp. 99–122. Such cooperation is also a permanent element of cooperation between Poland as an EU member and Eastern partners. Cf.: Kalicka-Mikołajczyk A, Ramy prawne i zasady unijnej Europejskiej Polityki Sąsiedztwa wobec partnerów wschodnich. *Prace Naukowe Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego*, 2013, No. 30.

³⁰ Perkowska M, Nielegalna ..., *op. cit.*, pp. 63–64.

³¹ Banasik K, pp. 6–7.

internal borders. Before Poland's accession to the Schengen area, *i.e.* on December 21, 2007, and after that date, the Polish national visa did not entitle third-country nationals to cross the Polish-German border. Organising such people to cross the national border is a crime stipulated in Article 264(3) of the PC.³² In other words, each case of allowing a person who is not authorised to do so to cross the internal border is a prerequisite for the crime of organising an illegal border crossing within the meaning of Article 264(3) of the PC. It is *de facto*, despite applying to the external border, a violation of the security of internal borders. This is because it creates a potential risk that an illegal immigrant, once in the area covered by the Schengen Borders Code, will use the privileges of free movement within the internal borders reserved only for citizens of EU Member States, or that their behavior will pose a threat to their broadly understood security.

Position of the Border Guard in the system of combating organised smuggling of illegal immigrants

In the current legal and institutional states, the Border Guard is a leading service responsible for preventing and combating the broadly understood cross-border crime.³³ It belongs to the group of state institutions responsible for internal security policy, which includes: the Police, Internal Security Agency and the Border Guard. The special role of the force in this system results from its basic task, which is the effective protection of the state borders and ensuring cross-border security.³⁴ It performs these tasks on the basis of constitutional and statutory premises and the Schengen Borders Code. The Border Guard is a unified, uniformed and armed force responsible for the security of the north-eastern border of the Republic of Poland, on the Russian, Belarusian and Ukrainian section, as the external border of the EU. This also explains its special role in the prosecution of the crime stipulated in Article 264(3) of the PC.

The Act on the Border Guard, in Article 1(2)(4) contains an extensive list of tasks in the field of identification, prevention and detection of crimes and offences as well as prosecution of perpetrators of these crimes. The use of the adverbial phrase 'in particular' by the legislator in the quoted provision means that the list is open, so theoretically the Border Guard is entitled to prosecute all kinds of crimes. However, in the light of the wording of Article 1, the scope of its statutory jurisdiction is limited to the

³² Wyrok Sądu Apelacyjnego (Judgment of the Court of Appeal) w Szczecinie z 29.10.2010, file ref. no. II AKa 156/10. *Prokuratura i Prawo*, 2011, Vol. 5, suplement: Orzecznictwo, p. 15. *Electronic source*: <<https://pk.gov.pl/wpcontent/uploads/2013/12/86a7d3c05b1d31bc43bd515bd1c8c2bd.doc>>, *accessed*: 28.11.2022.

³³ Laskowska K, Perkowska M, p. 10 ff.

³⁴ Jurczak D, Wybrane zagadnienia zapewnienia bezpieczeństwa na morskim odcinku ochrony granicy państwowej. *Edukacja Humanistyczna*, 2013, Vol. 2, p. 198.

protection of the state border, border traffic control, as well as preventing and counteracting illegal migration.³⁵ The list of these tasks also includes the most interesting for us in this study, the crime stipulated in Article 264(3) of the PC. Pursuant to Article 9a(1)(1) of the Act on the Border Guard, it is authorized to perform intelligence-gathering and investigative in the prosecution of this crime.

The Border Guard has been relatively recently granted the above powers and the powers to prosecute other forms of border crime. This happened as a result of the adoption of the new Aliens Act³⁶ on December 12, 2013, which included, *inter alia*, changes in the Act on the Border Guard, expanding the jurisdiction of the force in the field of identification, detection and prosecution of perpetrators of border crimes, including illegal immigration.³⁷

Preventing illegal immigration has become one of the priorities of the EU, with special attention paid to the integrated management of external borders. The accession of ten new countries to the Schengen Agreement on 21 December 2007 required a completely new approach to the issue of border protection management in Europe. In accordance with the Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the borders in Europe were divided into internal borders and external borders³⁸. The basic aim of the Community policy, in the field of the EU's external border protection, is the integrated management ensuring a uniform and high level of control and protection, which is a necessary element of the free movement of persons within the European Union. In order to fulfil this task, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States — FRONTEX³⁹ has been established.

FRONTEX combines a function of the services responsible for protecting and safeguarding the borders of the EU countries, such as: border guard, border police, army and intelligence services, as well as being a promoter of improvements in the field of immigration surveillance.

Since its establishment, the agency has conducted a number of operations connected with sealing borders, improving technical inspections, and primarily, preventing illegal immigration. Despite the efforts of FRONTEX, the number of immigrants that illegally cross the external borders of the EU is increasing. As it follows from the information presented to the Members of the Committee on EU Affairs by the Director of FRONTEX, Gil Arias Fernández, since the beginning of 2014, more than

³⁵ Perkowska M, Analiza systemu zapobiegania i zwalczania przestępczości granicznej. *Archiwum Kryminologii*, 2016, Vol. XXXVIII, p. 95.

³⁶ Dz.U., 2013, No. 2013, item 1650 as amended.

³⁷ Kluczyński M, p. 242.

³⁸ Official Journal of the European Union, L 105 of 13 April 2006, p. 1.

³⁹ The name comes from a combination of the following French words: *frontiers extérieures* — external borders.

200,000 people have crossed the EU borders illegally. For comparison, in the entire year 2013, this number was over 100,000.⁴⁰

In Poland, the institution responsible for performing various tasks in cooperation with FRONTEX to counter illegal immigration, and manage and monitor migration flows across the section of the EU's external border that is also Poland's state border is the Border Guard.

As a service competent for the protection of the external border of the EU, the Border Guard uses the Schengen Information System (SIS), which is one of the inherent components of the functioning of the Schengen area. Its main purpose is the verification of persons during border control, when crossing the internal border, by all services responsible for state security during activities conducted within the territory of the country (police checks, checks conducted by the Customs Service) and the examination of visa applications by national authorities and consular bodies examining the residence applications of foreigners. These data, collected by the Border Guard in the course of external border crossing activities, make it possible to detain wanted, missing or secretly monitored individuals, and to take procedural action against them, *e.g.* in connection with suspected border crimes. The force uses the data collected within the SIS in its own investigative and intelligence-gathering activities, aimed at obtaining and recording evidence of crimes, detecting and identifying their perpetrators⁴¹.

In the light of the latest empirical research conducted by Katarzyna Laskowska and Magdalena Perkowska, covering the period between 2014 and 2018, *i.e.* when border crime was included in the Border Guard's area of jurisdiction, crime rates for smuggling illegal migrants across the north-eastern border of the Republic of Poland as the external border of the EU were relatively low, *i.e.* compared to other sections of the EU's external borders. The research in question also showed that there are many limitations and difficulties in identifying prohibited acts which clearly meet the criteria for the crime defined in Article 264(3) of the PC, mainly due to the fact that the organizers of the illegal smuggling of immigrants do not operate in the territory of the Republic of Poland. It is also difficult to establish whether an organised criminal group is involved in each case of an organised smuggling of migrants across the Polish north-eastern border. In these cases, other crimes are also committed, including crimes against the credibility of documents.⁴² Therefore, in practice, the crime stipulated in Article 264(3) of the PC often occurs in conjunction with other border crimes. Between 2014 and 2018 the Border Guard detected 352 crimes in which the basis for classification was Article 264(3) of the PC, (most of them in 2015 — 91), and those which occurred in conjunction

⁴⁰ Kancelaria Sejmu. Biuro Komisji Sejmowych, Pełny zapis przebiegu posiedzenia Komisji ds. Unii Europejskiej, Vol. 295, 22.10.2014. *Electronic source:* <[http://orka.sejm.gov.pl/zapisy7.nsf/0/ODFEEC3D1601A15FC1257D7E004E97BF/\\$File/0385707.pdf](http://orka.sejm.gov.pl/zapisy7.nsf/0/ODFEEC3D1601A15FC1257D7E004E97BF/$File/0385707.pdf)>, *accessed:* 10.09.2022.

⁴¹ Jurczak D, pp. 199–200.

⁴² Laskowska K, Perkowska M, p. 16.

with other border crimes — 338 (most of them in 2014 — 76).⁴³ Although from a purely statistical perspective, the scale of the crime of organised smuggling of migrants across the Polish eastern border as the external border of the EU is not very great, it should be noted that each of these cases is associated with a threat to the cross-border security of the state and the internal security of citizens.

However, the situation on the eastern border of the Republic of Poland is dynamic and depends on the processes taking place in the world and in the region. Admittedly, the period of the pandemic and the resulting lockdown did not encourage illegal immigration, but it also did not stop it. According to data published by the Border Guard, 2021, which was the peak of limitations and restrictions due to COVID-19, was marked by a decrease in the number of people detained for illegal stay and border crossing compared to the previous year. The total number of illegal immigrants dropped in 2021 by 31% compared to 2020. In numbers this looked as follows: there were 62 illegal immigrants from Russia detected, while in 2021 only 18, from Belarus in 2020 – 898 immigrants, in 2021 — 236 people. When it comes to Ukraine, in 2020 — 4617 people, in 2021— 2505 people.⁴⁴ The data show a significant correlation between the number of illegal immigrants and the general social situation, including the epidemiological one.

In late autumn of 2021, the situation on the eastern border began to change quickly. The policy of Belarusian authorities led to a serious migration crisis at the Poland—Belarus border, which caused a huge increase in the illegal immigration. In November 2021, near the border, there were about 3–4 thousand immigrants gathering on the Belarusian side. They attempted to forcibly cross the border. The result of the actions taken by the Belarusian side aimed at provoking a conflict and social unrest was an increase in the number of illegal immigrants. While analysing the data from the first nine months of 2022, compared to the corresponding period in 2021, the increase in the number of detected cases of illegal immigration by 220% is observed. From January to September 2021, there were 185 cases, while in the same period in 2021, as many as 592 cases.⁴⁵ The situation on the Polish-Belarusian border, despite the use of many state-of-the-art measures and techniques, including the construction of the border wall, is still very difficult and full of incident and attempts of illegal border crossing.

The year 2022 brought the eastern border of Poland to the world's attention due to Russia's bloody aggression against Ukraine. The eastern border of the Republic of Poland became a forefront of a powerful armed conflict. In the context of the discussed subject matter, *i.e.* the illegal immigration, it should be noted that the number of cases of immigrants detained in the first nine months of 2022 dropped by 34% compared

⁴³ *Ibid.*, pp. 13–16.

⁴⁴ The Border Guard's statistics. *Electronic source:* <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html>, accessed: 22.05.2022.

⁴⁵ *Ibid.*

to the same period in 2021. In 2021, there were 1697 cases, while in 2022 — 1121 cases in the same period, that is from January to September inclusive.⁴⁶ It can be assumed that a certain group of immigrants who would not have obtained permission to legally cross the Polish-Ukrainian border, took advantage of the opportunity to enter the Republic of Poland as war refugees. Since 24 February 2022, the date of the Russia's aggression against Ukraine, the Polish-Ukrainian border has been crossed by more than 8 million people. Detailed control of such a large number of people crossing the border is a huge challenge for the Border Guard.

Therefore, it is not the scale but the Border Guard's fulfilment of its tasks in the prevention and detection of the board crime in an effective manner, proportionate to the threats and in a way that has a deterrent effect that is most important here.

Summary

Preventing and combating border crime is one of the important factors in the cross-border security process in the Republic of Poland. It is also an important area of responsibility for Poland as an EU Member State for the security of its external borders. According to the Schengen Borders Code, the north-eastern border of the Republic of Poland on the Russian, Belarusian and Ukrainian sections has this status. The Schengen Borders Code requires that external borders be crossed in designated places, at a specified time and in compliance with the border control regime. Violation of these rules is a violation of the law and is subject to prosecution, either as a minor offence or a crime.

The list of crimes against cross-border security includes, *inter alia*, the crime of organising a transfer across the eastern border of Poland as the external border of the EU, as defined in Article 264(3) of the PC. It consists in providing immigrants with organisational and material conditions to illegally cross the border of the Republic of Poland, treated as the external border of the EU, *i.e.* in violation of the provisions of the Act on the Protection of the State Border and the Schengen Borders Code. The Border Guard is the competent authority for the prosecution of border crimes, including the abovementioned one. It is part of the system of institutions responsible for national security. A special area of the Border Guard's jurisdiction is the cross-border security of the country and the EU. In this regard, it implements the provisions of the Act on the Protection of the State Border and the Schengen Borders Code.

The scale of crime of organising immigrant smuggling across the north-eastern border of the Republic of Poland as an external border of the EU is not very big. This is due not only to the fact that this border is not one of the most frequently used routes for smuggling immigrants from outside Europe, but also because those crimes are difficult to detect, they

⁴⁶ *Ibid.*

require a lot of time and work, including intelligence-gathering, and often occur in conjunction with other border crimes. This requires the Border Guard to improve the quality and effectiveness of its activities. This is because not only Poland's but also the EU's cross-border security depends — to some extent — on it.

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Keywords: immigration, cross-border security, border crime, EU internal border, EU external border, Schengen Borders Code

Summary: The aim of this study is to present the current legal and institutional determinants of prosecuting the crime of immigrant smuggling [Article 264(3) of the Penal Code] across the north-eastern border of the Republic of Poland, on the Russian, Belarusian and Ukrainian sections, as an external border of the EU, in accordance with the provisions of the Schengen Information System. The thesis of the study is that the state authorities and institutions, while combating border crime, including the crime specified in Article 264(3) of the Penal Code, fulfill the obligations imposed on them by national and EU regulations on cross-border security. In Poland, the lead-

ing service in this regard is the Border Guard (THE BORDER GUARD). The study first discusses terminology and then characterises the crime of illegal immigration as a determinant of cross-border security. A separate attention is paid to the crime specified in the above-mentioned Article, which became the main area of interest of the author of the study. In its final part, based on the legal grounds, the objectives and tasks of the Border Guard as a specialised force responsible for preventing and combating illegal immigration are discussed. Final conclusions are formulated in the summary. The bibliography lists the legal acts, case law and literature used in the study.