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Illegal Border Crossing and Associated Offences in the Light of the Criminal Code of the Republic of Belarus

Abstract: This paper addresses the important current problem of illegal crossing of a national border, which since autumn 2021 has been particularly intense on the Belarusian–Polish section of the border. It has been serious enough to pose a security threat not only to Poland, but also to the rest of Europe. This article contains a discussion of the solutions provided for in the 1999 Criminal Code of the Republic of Belarus that concern illegal border crossing and associated crimes, i.e. organization of illegal migration and violation of the period of prohibition of entry into the territory of the country. For the purposes of the article, it was assumed that the scope of the regulations in question is casuistic and restrictive, and provides little guarantee of protection of the national border of Belarus. The legal analyses that were conducted generally confirmed the assumed evaluation of these solutions.

Keywords: Criminal Code of the Republic of Belarus, illegal border crossing, illegal migration

Introduction

In September 2021, a major migration crisis took place at the border between Belarus and Poland. The cause of the crisis was the deliberate facilitation by the government of Belarus for migrants from Iraq, Afghanistan, and other countries to illegally cross the border into Poland. These actions were a retaliation for the sanctions imposed on Belarus by the European Union for human rights violations during the

public protests that took place in response to the results of the 2020 presidential election.¹

This situation was cynically exploited by the Belarusian government to escalate the problem of illegal border crossing into Poland, and triggered a humanitarian and political crisis. The situation made it clear that Belarus, a neighbour of Poland geographically located in the east of Europe with 'transparent' borders with the countries of the Commonwealth of Independent States, plays an important role on the route used for circulation and smuggling of people from the former USSR and other countries. These activities violated the security of the Polish border with Belarus.

As a number of publications have been written on the provisions of Polish law on the criminalization of illegal crossing of Poland's national border, it would be interesting to learn about the legal solutions that protect the national borders of Belarus. Therefore, the purpose of this paper is to discuss the legal provisions concerning the crime of illegal crossing of the national border and the crimes directly associated with it in light of the 1999 Criminal Code of the Republic of Belarus (CCRB).² The paper describes legal provisions that concern the illegal crossing of the country's national border, the organization of illegal migration, and the violation of the period of prohibition of entry into its territory. The basis for the analyses will be the 1999 Criminal Code of Belarus and the legal literature on the crimes referred to therein.

For the purposes of this paper, two hypotheses were adopted:

- 1) The regulation of the crime of illegal crossing of the national border and the crimes directly associated with it under the 1999 Criminal Code of the Republic of Belarus is of a casuistic and restrictive nature.
- 2) Due to legal facilitations of migration within the Commonwealth of Independent States, the provisions of the 1999 Criminal Code hardly guarantee the protection of the country's national border.

1. Illegal crossing of the national border of the Republic of Belarus

Illegal crossing of the national border of the Republic of Belarus is regulated in Article 371 of the CCRB, in its Chapter XIII titled 'Crimes against the state and the

1 С.Г. Абсальямова, К.С. Саушева, *Современные парадоксы международной миграции* (в:) З.О. Адаманова (ред.), *Национальные экономические системы в контексте формирования глобального экономического пространства. Сборник научных трудов, Симферополь 2022*, с. 42 [S.G. Absalyamova, K.S. Sausheva, *Sovremennyye paradoksy mezhdunarodnoy migratsii* (in:) Z.O. Adamanova (ed.), *Natsional'nyye ekonomicheskiye sistemy v kontekste formirovaniya global'nogo ekonomicheskogo prostranstva. Sbornik nauchnykh trudov, Simferopol 2022*, p. 42].

2 Уголовный Кодекс Республики Беларусь 275-3 от 09.07.1999 г., https://kodeksy-by.com/ugolovnyj_kodeks_rb.htm (03.10.2022) [Ugolovnyy Kodeks Respubliki Belarus' 275-Z ot 09.07.1999 g., https://kodeksy-by.com/ugolovnyj_kodeks_rb.htm (03.10.2022)].

order of the exercise of power and governance' in the section titled 'Crimes against the order of governance'. Pursuant to Article 371 par. 1 of the CCRB, 'intentional illegal crossing of the national border of the Republic of Belarus with the use of a motor vehicle, an inland navigation vessel (self-propelled), a mixed (river-sea) navigation vessel (self-propelled), a small motor vessel, a watercraft with an outboard motor, a water scooter, or an aircraft with a motor, as well as intentional illegal crossing of the national border of the Republic of Belarus by other means, committed within one year of the imposition of an administrative penalty for the same violation' shall be subject to a penalty. The perpetrator is subject to a fine, detention, or imprisonment for up to two years. This is the basic type of this crime.

The object of the legal protection is 'the order of crossing of the national border'.³ According to Article 1 of the 2008 Act on the National Border of the Republic of Belarus, the national border is 'a line, and a vertical plane passing along this line, which defines the borders of the territory of the Republic of Belarus (land, water, subsoil, and airspace)'.⁴ It constitutes 'a feature of the state that testifies to the extent of its territory and its sovereignty'. The inviolability of national borders guarantees the territorial integrity, unity, and internal security of the country.⁵

In broad terms, crossing of a national border includes crossing by individuals, by water, air, or other means of transportation, and the movement of cargo, goods, and animals across a national border. The object of the crime includes crossing the border both with the use of a means of transportation indicated in the provision and by other means, such as on foot, by swimming, on a boat, bicycle, or skis, and on horseback.⁶ It seems that the meaning of the phrase 'by other means' was somewhat downplayed by the Belarusian legislator by it not being indicated literally in the legislation.⁷ It

3 В.А. Круглов, Уголовное право. Особенная часть, Минск 2011, с. 234 [V.A. Kruglov, *Ugolovnoye pravo. Osobennaya chast'*, Minsk 2011, p. 234].

4 Закон Республики Беларусь 'О Государственной границе Республики Беларусь' от 21 июля 2008 г. № 419-З, https://kodeksy-by.com/zakon_rb_o_gosudarstvennoj_granitse_respubliki_bielarus.htm (03.10.2022) [Zakon Respubliki Belarus' 'O Gosudarstvennoy granitse Respubliki Belarus' ot 21 iyulya 2008 g. № 419-Z, https://kodeksy-by.com/zakon_rb_o_gosudarstvennoj_granitse_respubliki_bielarus.htm (03.10.2022)].

5 Е.Н. Смоляр, Ответственность за посягательства на порядок пересечения государственной границы Республики Беларусь (в:) Правовая культура как условие формирования правового государства. Материалы международной научно-практической конференции, Витебск 2010, с. 244 [Y.N. Smolyar, *Otvetstvennost' za posyagatel'stva na poryadok peresecheniya gosudarstvennoy granitsy Respubliki Belarus'*, (in:) *Pravovaya kul'tura kak usloviye formirovaniya pravovo gosudarstva. Materialy mezhdunarodnoy nauchno-prakticheskoy konferentsii*, Vitebsk 2010, p. 244].

6 В.А. Круглов, Е.И. Климова, Комментарий к уголовному кодексу Республики Беларусь, Минск 2015, с. 803–804 [V.A. Kruglov, Y.I. Klimova, *Kommentariy k ugolovnomu kodeksu Respubliki Belarus'*, Minsk 2015, pp. 803–804].

7 И.С. Яцута, Об ответственности за незаконное пересечение государственной границы Республики Беларусь (в:) А.Е. Виноградов (ред.), *Актуальные проблемы обеспечения*

should be noted that the legislator's emphasis was on the method of crossing the border (which is not a frequently found in legislation).⁸ The legislator also assumed that it is relevant for criminal liability whether this crime is committed within one year of the imposition of an administrative penalty for the same offence. Thus the provision criminalizes illegal border crossing, i.e. 'the actual movement across a national border in any way, in any direction without the legal grounds for doing so'.⁹ A border crossing is illegal when it occurs in a place that has not been designated for this purpose, without proper documents, and without the required permission or authorization.¹⁰

The nature of the crime is formal. Therefore, the perpetrator's liability does not require the occurrence of any consequences. They are considered to be completed at the time of completion of the behaviours indicated in the legislation,¹¹ and in practice, at the time of the actual crossing of the line of the Belarusian national border. Crossing the control line of a checkpoint that does not coincide with the line of the national border, without the required documents or without the appropriate permission, may be classified as an attempt to illegally cross the Belarusian national border.¹²

Criminal liability under Article 371 of the CCRB does not take place when the border crossing regulations are violated in connection with an occurrence of extraordinary circumstances, such as an accident or a natural disaster, or in the case of for-

пограничной безопасности: материалы Международной заочной научно-практической конференции ГУО 'Институт пограничной службы Республики Беларусь', Минск 2017, с. 550 [I.S. Yatsuta, *Ob otvetstvennosti za nezakonnoye peresecheniye gosudarstvennoy granitsy Respubliki Belarus'*, (in:) A.Y. Vinogradov (ed.), *Aktual'nyye problemy obespecheniya pogranichnoy bezopasnosti: materialy Mezhdunarodnoy zaочноy nauchno-prakticheskoy konferentsii GUO 'Institut pogranichnoy sluzhby Respubliki Belarus'*, Minsk 2017, p. 550].

- 8 Ю.А. Минакова, Уголовная ответственность за незаконное пересечение государственной границы по законодательству России и других стран СНГ (сравнительный аспект), <https://cyberleninka.ru/article/n/ugolovnaya-otvetstvennost-za-nezakonnoe-peresechenie-gosudarstvennoy-granitsy-po-zakonodatelstvu-rossii-i-drugih-stran-sng/viewer> (04.10.2022) [Y.A. Minakova, *Ugolovnaya otvetstvenost' za nezakonnoye peresecheniye gosudarstvennoy granitsy po zakonodatel'stvu Rossii i drugikh stran SNG (sravnitel'nyy aspekt)*, [https://cyberleninka.ru/article/n/ugolovnaya-otvetstvennost-za-nezakonnoe-peresechenie-gosudarstvennoy-granitsy-po-zakonodatel'stvu-rossii-i-drugih-stran-sng/viewer](https://cyberleninka.ru/article/n/ugolovnaya-otvetstvennost-za-nezakonnoe-peresechenie-gosudarstvennoy-granitsy-po-zakonodatelstvu-rossii-i-drugih-stran-sng/viewer) (04.10.2022)].
- 9 В.А. Круллов, Е.И. Климова, Комментарий..., *op. cit.*, с. 803 [V.A. Kruglov, Y.I. Klimova, *Комментарий...*, *op. cit.*, p. 803].
- 10 С.В. Ананич, Глава 18 (в:) Э.А. Мичулис (ред.), Уголовное право. Особенная часть, Минск 2012, с. 565 [S.V. Ananich, *Glava 18*, (in:) E.A. Michulis (ed.), *Ugolovnoye pravo. Osobennaya chast'*, Minsk 2012, p. 565].
- 11 В.А. Круллов, Е.И. Климова, Комментарий..., *op. cit.*, с. 804 [V.A. Kruglov, Y.I. Klimova, *Комментарий...*, *op. cit.*, p. 804].
- 12 В.М. Хомич, Глава 32 (в:) А.В. Барков, В.М. Хомич (ред.), Научно-практический комментарий к Уголовному кодексу Республики Беларусь, Минск 2007, с. 802 [V.M. Khomich, *Glava 32*, (in:) A.V. Barkov, V.M. Khomich (eds.), *Nauchno-prakticheskiy kommentariy k Ugolovnomu kodeksu Respubliki Belarus'*, Minsk 2007, p. 802].

eigners or stateless persons applying for the status of a refugee.¹³ The circumstances in question are extraordinary and irreversible circumstances and situations that have caused a violation of the regulations concerning border crossing.¹⁴ In addition, the perpetrator can be considered innocent in the absence of Border Guard signs (posts, patrols) and clearly visible border signs.¹⁵

Under Article 371 par. 2 of the CCRB, ‘intentional illegal crossing of the national border of the Republic of Belarus by a person previously convicted for the crime provided for in this article, or by a foreigner, a stateless person, deported or expelled from the Republic of Belarus before the expiration of the period of prohibition of entry into the Republic of Belarus, or by an official using his official powers’ is subject to a penalty. The perpetrator is punishable by detention or restriction of liberty for up to five years or imprisonment for up to five years. This is an aggravated type of this crime.

On the basis of this provision, the following are criminally liable: a foreigner, i.e. a person who is not a citizen of Belarus and who has proof that he or she is a citizen of another state, and a stateless person, i.e. a person who is not a citizen of Belarus and has no proof that he or she is a citizen of another state. These people are deported, i.e. forcibly expelled beyond the borders of the republic, or expelled, i.e. sent out of the republic. Also criminally liable is a public official who uses his or her official powers for unlawful behaviour¹⁶ involving the improper performance of control functions at the national border of Belarus, as well as other abuses of official powers, to allow others to illegally cross the border.¹⁷

Under Article 371 par. 3 of the CCRB, ‘intentional illegal crossing of the national border of the Republic of Belarus, carried out by an organized group’ is subject to a penalty. The perpetrator is subject to imprisonment for three to seven years and to an optional fine. This is a particularly aggravated type of this crime. It should be

13 А.В. Шидловский, Глава 33 (в:) А.В. Барков, В.М. Хомич (ред.), Научно-практический комментарий к Уголовному кодексу Республики Беларусь, Минск 2010, p. 859 [A.V. Shidlovskiy, Glava 33, (in:) A.V. Barkov, V.M. Khomich (eds.), Nauchno-prakticheskiy kommentariy k Ugolovnomu kodeksu Respubliki Belarus', Minsk 2010, p. 859].

14 С.Н. Ховратова, О.А. Коледич, Понятие незаконного пересечения государственной границы Республики Беларусь в уголовно-правовом аспекте (в:) Государство и право: актуальные проблемы формирования правового сознания. Сборник статей IV Международной научно-практической конференции, Могилев 2021, с. 116 [S.N. Khovratova, O.A. Koledich, Ponyatiye nezakonnogo peresecheniya gosudarstvennoy granitsy Respubliki Belarus' v ugolovno-pravovom aspekte, (in:) Gosudarstvo i pravo: aktual'nyye problemy formirovaniya pravovogo soznaniya. Sbornik statey IV Mezhdunarodnoy nauchno-prakticheskoy konferentsii, Mogilev 2021, p. 116].

15 В.М. Хомич, Глава 32..., *op. cit.*, с. 802 [В.М. Хомич, Глава 32..., *op. cit.*, p. 802].

16 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 804 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 804].

17 А.В. Шидловский, Глава 33..., *op. cit.*, с. 859 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 859].

pointed out that in the light of Article 17 of the CCRB, a crime is considered to have been committed by a group of persons after prior agreement if they have agreed in advance to jointly commit the crime in question. Therefore, under Article 371 par. 3 of the CCRB, it is the leaders and members of such a structure who are liable.

Article 371 of the CCRB contains a so-called footnote to its content. It shows that the above provision does not apply to foreign citizens and stateless persons who arrive in Belarus in violation of the rules for crossing its national border and who apply for the status of a refugee, subsidiary protection, or asylum in the republic. The condition is that such persons submit the applications in question without delay.

The perpetrator of the crime under Article 371 of the CCRB is a sane individual who has reached the age of 16 and, according to paragraph 2, is a foreigner, a stateless person, or a person deported or expelled from Belarus. Intentional fault is a necessary criterion for a person to be considered a perpetrator of this crime.

It should be noted that the regulation in question is described with a fairly high level of detail. It takes into account both the ways of crossing the border and the different categories of perpetrators (including those operating in organized structures).

2. Organization of illegal migration

Organization of illegal migration is regulated in Article 371¹ of the CCRB, in its Chapter XIII titled 'Crimes against the state and the order of the exercise of power and governance' in the section titled 'Crimes against the order of governance'. It was added to the Criminal Code in 2003.

On the basis of Article 371¹ par. 1 of the Criminal Code of the Republic of Belarus, 'organization, directing, and support for activities involving illegal entry into the territory of the Republic of Belarus, stays in the territory of the Republic of Belarus, transit through the territory of the Republic of Belarus, or departure from the Republic of Belarus of foreigners or stateless persons (organization of illegal migration)' are subject to a penalty. The perpetrator is punishable by detention or restriction of liberty for up to five years or imprisonment for up to five years. This is the basic type of this crime.

It should be noted that the wording in parentheses of the quoted provision contains the legal name of this crime, i.e. 'organization of illegal migration'. Illegal migration is defined as 'entry into the country, stays in its territory, transit through the territory of the state, or exit outside the borders of the republic carried out in violation of the legislation of the Republic of Belarus'. This phenomenon includes such behaviour as 'entry of a foreigner into Belarus on the basis of falsified documents, without a visa, without an immigration card, a passport, or another document au-

thorizing the crossing of the border; failure to comply with the order of registration and choice of place of stay; and failure to leave Belarus after a certain period of stay.¹⁸

It should be noted that the largest number of illegal migrants come to Belarus from Afghanistan, Pakistan, Iraq, India, Sri Lanka, and China, taking advantage of the transparency of the Russian–Belarusian border. About 95% of them come from Russia. They mostly arrive in Russia and other countries of the Commonwealth of Independent States legally thanks to lenient conditions for obtaining visas and for entry. Due to a lack of customs and border control, they easily enter Belarus.¹⁹ At a critical time in the migration crisis, a migration business has sprung up in some countries. Tourism companies, including those from Iraq, have organized ‘excursions’ from Baghdad to Minsk, costing between USD 560 and 950. The price included airline tickets, visas, insurance, a COVID-19 test, and accommodation in a hotel. The ‘tourists’ were encouraged by President Lukashenko himself. After entering Belarus, the migrants first rested, then were taken by bus for USD 20–25 to Lida, a town close to the border with Lithuania. Further on, with the help of a smuggler, they crossed the border in the Belarusian forests and went to Vilnius at the cost of USD 1,000–1,500. Then, after paying another fee, they were transported to Suwałki, a city located in the European Union.²⁰ Migrants also illegally crossed the so-called ‘green border’ in terrible conditions, going through forests and swamps. In addition, there have been attempts to push for a legal border crossing at the crossing point in Kuźnica Białostocka.

The object of the crime is ‘the established procedure/order for managing the entry to (exit from) and transit through the Republic of Belarus by foreigners and stateless persons.’²¹ Another object of the crime is ‘the social relations in the sphere of management that regulate the migration processes at the borders of the Republic of Belarus.’²² The object of the crime includes behaviour in the form of organization. Organization is a planned activity aimed at enabling illegal entry, exit, or transit of foreigners and stateless persons,²³ which consists in searching for persons willing to cross the bor-

18 *Ibidem*, p. 860.

19 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 806 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 806].

20 А.Г. Злотников, Транзитная миграция в Беларуси: в поисках фокальной точки, Россия: тенденции и перспективы развития 2022, no. 17–1, с. 890 [A.G. Zlotnikov, Tranzitnaya migratsiya v Belarusi: v poiskakh fokal'noy tochki, Rossiya: tendentsii i perspektivy razvitiya 2022, no. 17–1, p. 890].

21 В.А. Круглов, Уголовное право..., *op. cit.*, с. 236 [V.A. Kruglov, Ugolovnoye pravo..., *op. cit.*, p. 236].

22 С.В. Ананич, Глава 18..., *op. cit.*, с. 566 [S.V. Ananich, Glava 18..., *op. cit.*, p. 566].

23 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 806 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 806].

der and recruiting the participants in the crime,²⁴ developing a plan to penetrate the border in the territory of Belarus, preparing and equipping migrants with illegal documents, providing a means of transport for their transportation,²⁵ dividing responsibilities and specific activities among the participants, providing financial resources and communications, renting premises to hide the migrants, determining places for crossing the border,²⁶ and establishing contacts with foreign citizens.²⁷ The aforementioned behaviours constitute 'a complex of undertakings involving planning, preparation, and multilateral provision for the performance of the crime'.²⁸ Organization can involve the actions of one person or a group of people; in practice, the perpetration is divided among many people.²⁹ It includes two forms of behaviours: those related to crossing the border and those related to organizing an illegal stay in Belarus. The behaviour included in the first consists in conducting a campaign to recruit possible illegal migrants, dividing them into different groups, organizing and equipping vehicles with the appropriate documents, and transporting, delivering, and transferring the illegal migrants with properly prepared means of transport across the border. This is done on the basis or with the use of falsified or other persons' documents.³⁰ The most common are falsified or stolen authentic passports, and falsified invitations used to obtain a visa, documents for legal residence, or documents needed to obtain

- 24 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 806; С.В. Ананич, Глава 18, *op. cit.*, с. 568 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 806; S.V. Ananich, Glava 18, *op. cit.*, p. 568].
- 25 С.В. Ананич, Глава 18, *op. cit.*, с. 568 [S.V. Ananich, Glava 18..., *op. cit.*, p. 568].
- 26 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 806 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 806].
- 27 А.В. Шидловский, Глава 33..., *op. cit.*, с. 861 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 861].
- 28 А.В. Казхаков, Отдельные проблемы правового обеспечения борьбы с незаконной миграцией на внутренней границе союзного государства, 'Вестник полоцкого университета' 2017, no. 14, с. 157 [A.B. Kazhakov, Otdel'nyye problemy pravovogo obespecheniya bor'by s nezakonnoy migratsiyey na vnutrenney granitse soyuznogo gosudarstva, 'Vestnik polotskogo universiteta' 2017, no. 14, p. 157].
- 29 А.В. Казхаков, Оперативно-розыскная характеристика незаконной миграции на государственной границе Республики Беларусь: уголовно-правовой аспект и механизм преступления, https://elib.amia.by/bitstream/docs/2455/1/358_2018_Minsk-krim_2.pdf (04.10.2022) [A.B. Kazhakov, Operativno-rozysknaya kharakteristika nezakonnoy migratsii na gosudarstvennoy granitse Respubliki Belarus': ugolovno-pravovoy aspekt i mekhanizm prestupleniya, https://elib.amia.by/bitstream/docs/2455/1/358_2018_Minsk-krim_2.pdf (accessed 04.10.2022)].
- 30 О.И. Бахур, Организованные формы незаконной миграции в Республике Беларусь: проблемы уголовно-правового противодействия, 'Вестник Академии МВД Республики Беларусь' 2008, no. 2, с. 67 [O.I. Bakhur, Normy ugolovnogo Kodeksa Respubliki Belarus', predsmatrivayushchiye otvetstvennost' za nezakonnyu migratsiyu: stanovleniye razvitiye i dal'neysheye sovershenstvovanie, 'Zhurnal Belorusskogo gosudarstvennogo universiteta. Pravo' 2019, no. 3, p. 67].

a Schengen area invitation or visa.³¹ Confirmation of their authenticity at the national border sometimes requires the use of specialized equipment.³² The second behaviour consists in ‘ensuring the illegal presence of illegal immigrants in the territory of the country’, which includes, for example, meeting them at their points of arrival in the country, clandestine forward transportation, providing vehicles, housing, and food, providing security, and assistance in finding work.³³

The object of the crime also includes behaviour in the form of directing. Directing involves the preparation by an individual or a group of persons of actions aimed at illegal entry, exit, or transit of foreigners or stateless persons, preparation of action plans, management of a group, maintaining discipline, attracting new members to the group, establishing contacts with customs and border officials,³⁴ carrying out instruction briefings on the various stages of illegal migration,³⁵ maintaining constant contacts between participants in the crime, and coordination of their actions.³⁶

The object of the crime also includes behaviour in the form of support for the activity consisting in illegal entry into the territory of Belarus. It involves assistance by providing information about the crossing of the national border and the route to reach it,³⁷ providing advice and information to the organizers of the crime and

31 А. Федорако, Причины и тенденции незаконной миграции. Противодействие незаконной миграции, ‘Журнал международного права и международных отношений’ 2009, no. 4, с. 17 [A. Fedorako, Prichiny i tendentsii nezakonnoy migratsii. Protivodeystviye nezakonnoy migratsii, ‘Zhurnal mezhdunarodnogo prava i mezhdunarodnykh otnosheniy’ 2009, no. 4, p. 17].

32 О.С. Бочарова, Т.Ю. Ритеинская, Особенности криминалистического исследования документов на право пересечения границы осуществляемого спецалистами и экспертами пограничной службы Республики Беларусь, ‘Вопросы криминологии, криминалистики и судебной экспертизы’ 2013, no. 1, с. 50–51 [O.S. Bocharova, T.Y. Riteinskaya, Osobennosti kriminalisticheskogo issledovaniya dokumentov na pravo peresecheniya granitsy osushchestvlyayemogo spetsialistami i ekspertami pogranichnoy sluzhby Respubliki Belarus’, ‘Voprosy kriminologii, kriminalistiki i sudebnoy ekspertizy’ 2013, no. 1, pp. 50–51].

33 О.И. Бахур, Организованные..., *op. cit.*, с. 67 [O.I. Bakhur, Organizovannyye..., *op. cit.*, p. 67].

34 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 806 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 806].

35 А.В. Шидловский, Глава 33..., *op. cit.*, с. 861 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 861].

36 С.В. Ананич, Глава 18..., *op. cit.*, с. 568 [S.V. Ananich, Glava 18..., *op. cit.*, p. 568].

37 Н.Н. Бореико, Пособничество в незаконном пересечении государственной границы Республики Беларусь либо содействие незаконной миграции? Вопросы квалификации и разграничения ответственности (в:) А.Е. Виноградов (ред.), Актуальные проблемы обеспечения пограничной безопасности: материалы Международной заочной научно-практической конференции ГУО ‘Институт пограничной службы Республики Беларусь’, Минск 2017, с. 65 [N.N. Boreyko, Posobnichestvo v nezakonnom peresechenii gosudarstvennoy granitsy Respubliki Belarus’ libo sodeystviye nezakonnoy migratsii? Voprosy kvalifikatsii i razgranicheniya otvetstvennosti (in:) A.Y. Vinogradov (ed.), Aktual’nyye problemy obespecheniya pogranichnoy bezopasnosti: materialy Mezhdunarodnoy zaочноy nauchno-prakticheskoy konferentsii GUO ‘Institut pogranichnoy sluzhby Respubliki Belarus’, Minsk 2017, p. 65].

its participants,³⁸ preparing the smuggling route,³⁹ purchasing tickets to the border zone,⁴⁰ hiding the organizers and participants of the crime⁴¹ by providing premises,⁴² receiving and accommodating them,⁴³ providing means of transportation,⁴⁴ mobile communications, and other property, arranging personal escort of illegal migrants through the territory of Belarus and to the state border, providing them with assistance in the crossing of the border,⁴⁵ transporting migrants to the territory of Belarus, directing the transit,⁴⁶ preparing shelters for illegal migrants in the border zone (belt), hiding or destroying objects (documents) left by illegal migrants, obliterating other traces of the crime, and carrying out instructions from the person directing illegal migration that are aimed at committing the crime.⁴⁷

The object of the crime also includes behaviour in the form of residence in or transit through the territory of the Republic of Belarus (entry of a foreigner into the Republic of Belarus from one country, transit through it, and exit from the republic to another country),⁴⁸ or departure from the Republic of Belarus.

In general, the organization of illegal migration as the entire crime manifests itself 'in ordering activities aimed at creating conditions for the movement of foreigners, organizing their illegal stay in violation of the migration or transit procedure established in the Republic of Belarus, or directly organising the commission of the acts provided for in Article 371 par. 1¹ of the Criminal Code of the Republic of Belarus'.⁴⁹ In this regard, it should be noted that this crime is associated with the commission of separate crimes of bribery and falsification of documents.⁵⁰ As the nature of the crime is formal, the perpetrator's liability does not require the occurrence of any

38 A.V. Шидловский, Глава 33..., *op. cit.*, с. 861 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 861].

39 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 807 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 807].

40 Н.Н. Борейко, Пособничество..., *op. cit.*, с. 65 [N.N. Boreyko, Posobnichestvo..., *op. cit.*, p. 65].

41 А.В. Шидловский, Глава 33..., *op. cit.*, с. 861 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 861].

42 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 806–807 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, pp. 806–807].

43 Н.Н. Борейко, Пособничество..., *op. cit.*, с. 65 [N.N. Boreyko, Posobnichestvo..., *op. cit.*, p. 65].

44 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 806–807 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, pp. 806–807].

45 Н.Н. Борейко, Пособничество..., *op. cit.*, с. 65 [N.N. Boreyko, Posobnichestvo..., *op. cit.*, p. 65].

46 С.В. Ананич, Глава 18..., *op. cit.*, с. 568 [S.V. Ananich, Glava 18..., *op. cit.*, p. 568].

47 Н.Н. Борейко, Пособничество..., *op. cit.*, с. 65 [N.N. Boreyko, Posobnichestvo..., *op. cit.*, p. 65].

48 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 807 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 807].

49 Л. Васильева, О. Бахур, Незаконная миграция в современной Беларуси: проблемы уголовной ответственности, 'Журнал международного права и международных отношений' 2005, no. 1, с. 15 [L. Vasil'yeva, O. Bakhur, Nezakonnaya migratsiya v sovremennoy Belarusi: problemy ugolovnoy otvetstvennosti, 'Zhurnal mezhdunarodnogo prava i mezhdunarodnykh otnosheniy' 2005, no. 1, p. 15].

50 С.В. Ананич, Глава 18..., *op. cit.*, с. 569 [S.V. Ananich, Glava 18..., *op. cit.*, p. 569].

consequences. It is considered as completed at the time of completion of the behaviours indicated in the legislation.⁵¹

In light of Article 371¹ par. 2 of the CCRB, ‘organization of illegal migration, carried out in a manner that endangers the life or health of foreigners or stateless persons, or involving treatment that is cruel or degrading to their dignity, or is carried out repeatedly, or by a group of persons with prior agreement, or by a public official using his official powers’ is subject to a penalty. The perpetrator is subject to imprisonment for three to seven years and to an optional fine. This is an aggravated type of this crime.

The object of the analysed crime comprises:

- its perpetration in a manner that endangers the life or health of foreigners or stateless persons – creating a real danger to human life and health by transporting people in truck containers, car trunks, hiding places that impede their movement and nutrition,⁵² in tanker trucks, or in unsanitary conditions;⁵³
- its perpetration in a manner that involves treatment that is cruel or degrading to their dignity – with the violation of applicable norms of law, morality, and social relations⁵⁴ by deprivation of access to food, drink, and heat, or with beating, violence, ridicule, or insult;⁵⁵
- its perpetration more than once – the repeated perpetration of two or more such crimes,⁵⁶
- its perpetration by a group of persons after prior agreement, if they have previously agreed to jointly commit the crime in question (Article 17 of the CCRB);
- its perpetration by a public official using his or her official powers – the unlawful behaviour of a public official that was carried out taking advantage of his or her official status and position.⁵⁷

The perpetrator of the crime identified in Article 371¹ of the CCRB is a sane individual who has reached the age of 16, and the perpetrator of the crime identified in Article 371¹ par. 2 of the CCRB is a public official. Intentional fault is a necessary cri-

51 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 807 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 807].

52 *Ibidem*, p. 807.

53 А.В. Шидловский, Глава 33..., *op. cit.*, с. 861 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 861].

54 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 807 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 807].

55 А.В. Шидловский, Глава 33..., *op. cit.*, с. 861 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 861].

56 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 807 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 807].

57 *Ibidem*, p. 807.

terion for a person to be considered a perpetrator of this crime. Motives (such as personal benefit or financial gain) do not affect the qualification of the act.⁵⁸

Stressing the importance of the crime described, Belarusian lawyers point out that the criminalization of behaviour associated with illegal migration is ‘an important step on the way to securing social relations in the sphere of migration and the constitutional rights of citizens.’⁵⁹

3. Violation of the period of prohibition of entry into the territory of the Republic of Belarus

Violation of the period of prohibition of entry into the territory of the Republic of Belarus is regulated in Article 371² of the CCRB, in its Chapter XIII titled ‘Crimes against the state and the order of the exercise of power and governance’ in the section titled ‘Crimes against the order of governance’. It was added to the Criminal Code in 2003.

Under Article 371² of the CCRB, a ‘stay in the Republic of Belarus of a foreigner or a stateless person who has been deported or expelled from the Republic of Belarus before the expiration of the period of prohibition of entry into the Republic of Belarus, in the absence of the elements of a crime, as provided for in Article 371 par. 2 of the Criminal Code’ is subject to a penalty. The perpetrator is subject to a fine, detention, or imprisonment for up to one year.

The object of the crime is ‘the established procedure/order of the entry into the Republic of Belarus by foreigners and stateless persons.’⁶⁰ The object of the crime includes behaviour involving the stay in Belarus of a foreigner or a stateless person who has been deported or expelled from the country before the end of a period of prohibition of entry.⁶¹ Deportation means the forcible removal of a person to outside the borders of Belarus, and expulsion (sending out) means the removal of a foreigner to outside its borders.⁶²

58 A.V. Шидловский, Глава 33..., *op. cit.*, с. 861 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 861].

59 О.И. Бахур, Нормы уголовного кодекса Республики Беларусь, предусматривающие ответственность за незаконную миграцию: становление развитие и дальнейшее совершенствование, ‘Журнал Белорусского государственного университета. Право’ 2019, no. 3, с. 71 [O.I. Bakhur, Normy ugolovnogo Kodeksa Respubliki Belarus’, *predusmatrivayushchiye otvetstvennost’ za nezakonnyuyu migratsiyu: stanovleniye razvitiye i dal’neysheye sovershenstvovanie*, ‘Zhurnal Belorusskogo gosudarstvennogo universiteta. Pravo’ 2019, no. 3, p. 71].

60 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 808 [V.A. Kruglov, Y.I. Klimova, *Kommentariy...*, *op. cit.*, p. 808].

61 А.В. Шидловский, Глава 33..., *op. cit.*, с. 862 [A.V. Shidlovskiy, Glava 33..., *op. cit.*, p. 862].

62 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 808 [V.A. Kruglov, Y.I. Klimova, *Kommentariy...*, *op. cit.*, p. 808].

At this point of the analysis, it should be noted that in administrative deportation proceedings, deportation can be imposed by a body of the Belarusian border service, the country's internal affairs bodies, national security bodies, and judges. The period of the ban on entry into Belarus is determined on the basis of the circumstances, the information on the foreigner, and the reasons for his or her stay in the republic. The authority enforcing the deportation order informs the foreigner of their criminal liability for illegal crossing of the border and violation of the period of prohibition of entry, and an entry to this effect is made in the deportation order. The deported person is subject to mandatory fingerprint registration.⁶³

Deportation issues are regulated by the 2010 Act on the Legal Situation of Foreigners and Stateless Persons in the Republic of Belarus.⁶⁴ In light of Article 70, on the basis of an executed decision on deportation to a foreign country, a foreigner is included in the list of persons whose entry into the territory of the Republic of Belarus is prohibited or undesirable. The deported foreigner can be barred from entering Belarus for a period from six months to five years. An expelled foreigner may be banned from entering Belarus for a period from six months to ten years. In the case of deportation or expulsion to a foreign country in accordance with an international agreement on readmission of a foreigner, the appropriate mark should be inserted in his or her document in the case of his or her travelling abroad. The form of the mark and the procedure for its placement are determined by the Council of Ministers of the Republic of Belarus.

Proving liability for a crime under Article 371² of the CCRB is difficult, because crossing the border with Poland, Latvia, Lithuania, or Ukraine is punishable under Article 371 par. 2 of the CCRB, while crossing the border with Russia is punishable under Article 371 par. 2 of the CCRB. The border between Belarus and Russia, as mentioned earlier, is unprotected and transparent, and has no checkpoints.⁶⁵

The nature of this crime is formal and is considered to be completed with the performance of the conduct indicated in the provision, so the liability of the pepe-

63 *Ibidem*, p. 808.

64 Закон Республики Беларусь 4 января 2010 г. № 105-3 'О правовом положении иностранных граждан и лиц без гражданства в Республике Беларусь', https://www.legislationline.org/download/id/7190/file/Belarus_Legal_Status_of_Foreign_Citizens_Stateless_Persons_2010_am2017_ru.pdf (04.10.2022) [Zakon Respubliki Belarus' 4 yanvarya 2010 g. № 105-Z 'O pravovom polozhenii inostrannykh grazhdan i lits bez grazhdanstva v Respublike Belarus', https://www.legislationline.org/download/id/7190/file/Belarus_Legal_Status_of_Foreign_Citizens_Stateless_Persons_2010_am2017_ru.pdf (accessed 04.10.2022)].

65 Р.Г. Лиштван, Организация пртиводействия незаконной миграции в Республике Беларусь, https://elib.institutemvd.by/bitstream/MVD_NAM/628/1/Lishtvan.pdf (04.10.2022) [R.G. Lishtvan, Organizatsiya prtivodeystviya nezakonnoy migratsii v Respublike Belarus', https://elib.institutemvd.by/bitstream/MVD_NAM/628/1/Lishtvan.pdf (accessed 04.10.2022)].

trator does not require the occurrence of any consequences.⁶⁶ The perpetrator of the crime under Article 371² of the CCRB is a sane individual who has reached the age of 16 and is a foreigner or a stateless person. Intentional fault is a necessary criterion for a person to be considered a perpetrator of this crime.

Conclusions

The analyses carried out lead to the conclusion that the first hypothesis, that assumes that ‘the regulation of the crime of illegal crossing of the national border and the crimes directly associated with it under the 1999 Criminal Code of the Republic of Belarus is of casuistic and restrictive nature’, was partly confirmed. In the course of the analysis, it was found that the method of regulation, i.e. the scope of criminalization, is in line with the policy of creating a detailed criminal law. This is evidenced by the three crimes in the Criminal Code that concern illegal border crossing and that cover six behaviours comprising many actions. However, the assumptions about the severity of the stipulated penalties were not confirmed. The following penalties were introduced for the commission of the analysed crimes: fine, detention, restriction of liberty, and imprisonment. The last penalty is present in every provision. Depending on the act, the duration of imprisonment may be up to one year, two years, up to five years, or up to seven years. Thus its severity is not grossly excessive. Stricter liability is provided in particular for the commission of these crimes by a person previously convicted of illegal border crossing, by organized structures, and by public officials, as well as for posing a threat to the life or health of migrants.

The second hypothesis, which assumes that ‘due to legal facilitations of migration within the Commonwealth of Independent States, the provisions of the 1999 Criminal Code hardly guarantee the protection of the country’s national border’, was confirmed. In the course of the analysis, it was determined that this is due to the lack of checks at the border between Russia and other countries of the Commonwealth of Independent States (including Belarus) and thus the ease of obtaining the right to enter Belarus. Therefore it can be concluded that Belarusian law provides the best protection against illegal border crossing from member states of the European Union: Poland, Lithuania, and Latvia.

There is no doubt that criminalization of the crime of illegal crossing of the national border and the crimes directly associated with it in the Criminal Code of the Republic of Belarus of 1999 is necessary. Against the backdrop of the aforementioned events which took place in the autumn and winter of 2021, a conclusion arises regarding the need to properly apply the provisions discussed herein and not to use them to achieve political objectives.

66 В.А. Круглов, Е.И. Климова, Комментарий..., *op. cit.*, с. 809 [V.A. Kruglov, Y.I. Klimova, Kommentariy..., *op. cit.*, p. 809].

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