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The Polish–Belarusian Border Crisis and the (Lack of) European Union Response

Abstract: This article addresses the migration crisis on the Polish–Belarusian border. The authors believe that the actions of the Polish authorities violated the requirements set by human rights standards, including the obligations arising from Poland’s membership of the EU and the Council of Europe. This is confirmed not only by legal doctrine and the reports of non-governmental organisations, present on the ground despite all the restrictions, but also by interim-measure orders issued by the ECtHR against the Polish government. In the first part of the text, the authors summarise the situation, recalling the most important events that took place on the Polish–Belarusian border. The second part discusses the most important obligations of the EU arising both from the treaties creating it and also from the secondary legislation adopted on their basis. The juxtaposition of the EU’s actual response and the obligations written on paper may lead to the conclusion that the EU’s actions are insufficient under EU law. Relying on the texts of legal acts and other available information, the authors argue that the EU’s actions, in a certain amount of compromise with political interests, even detract from its credibility as an organisation that also aims to protect human rights externally.

Keywords: Council of Europe, ECtHR, European Union, interim measures, migration, NGOs, push-backs, refugees

Introduction

The crisis on the Polish–Belarusian border has been growing since August 2021. Alexander Lukashenko and his supporters have decided to use migrants transported from Middle Eastern countries to destabilise the situation on the border and have attempted to create a new European migration route. According to scholars, this crisis could be interpreted as an element of the hybrid war in which humans are used as a tool of hybrid warfare against the EU and its principles and values.¹ The Polish authorities' practice of consistent use of push-back, justified by the need to protect the Polish border and the external border of the EU, has led to a humanitarian crisis. The actions of the Polish authorities were in fact accepted by the EU institutions. At the same time, the authorities' actions could not be effectively scrutinised either by the media or by non-governmental organisations due to the introduction of a state of emergency. This situation raised a question of whether the protection of the European Union's external borders should be a matter for one Member State alone, or whether the European Union should be more active not only with respect to security, but also to human rights protection at the border, especially taking into account the EU's obligations in the field of human rights protection and their asylum policy. Based on the available information, as well as legal analysis and observation of the actions of EU institutions, we argue that the Polish–Belarusian border crisis has undermined the credibility of the European Union's ability to defend European values when strictly political interests are at stake.

1. Origins of the crisis and the response by Polish authorities

1.1. The Polish–Belarusian border and previous migration problems

The border between Poland and Belarus stretches for 418 km. It is largely a forested, marshy wetland. To the north, the Polish–Belarusian border changes into the Polish–Lithuanian border and to the south into the Polish–Ukrainian border. The border with Belarus is also an external border of the European Union.

For many years migrants coming from former USSR countries (but also from the Middle East) have been trying to cross the Polish–Belarusian border. Most often their destination was Germany, and Poland was just a transit country. Beginning with the migration crisis in 2015, Poland has regularly followed the practice of refusing applications for international protection. This happened especially at the border crossing points in Brest and Terespol. Polish practices have been criticised by international and non-governmental organisations (including the Helsinki Foundation for Human

1 O. Filipec, Multilevel Analysis of the 2021 Poland–Belarus Border Crisis in the Context of Hybrid Threats, 'Central European Journal of Politics' 2022, vol. 8, no. 1, pp. 1–18.

Rights and Human Rights Watch),² and have also been considered a violation of human rights by the European Court of Human Rights (in *M.K. and others v. Poland*).³

It appears that a political decision to provoke a crisis on the border, to start the hybrid warfare and thus make the European Union more submissive towards Belarus, was taken in the summer of 2021. Lukashenko started bringing migrants from Middle Eastern countries to Minsk and then forcing them to cross the border with neighbouring countries. Many of them were deceived by the mirage of easy access to Germany and thus accepted leaving their own country. At first these actions concerned forcing them across the border with Lithuania and Latvia; then the border with Poland began to be crossed. The Belarusian authorities, as well as people helping the migrants, realised that the border was insufficiently guarded; in many places it is a so-called ‘green border’ and can be crossed without major obstacles.

1.2. Crisis in Usnarz Górny and the state of emergency

The first sign of the crisis came when a group of migrants was detained in August 2021 by the Polish authorities near Usnarz Górny, without the possibility of applying for international protection. NGOs from Poland and lawyers appeared there to try to get themselves admitted to the migrants. However, the authorities consistently refused to admit anyone to the group, arguing about whether the migrants were on the Polish or the Belarusian side of the border. For several days, the migrants de facto lived in a nomadic camp near the border, without access to water, food or medical assistance. In their joint declaration of 23 August 2021, the presidents of Poland, Latvia, Lithuania and Estonia stated that ‘[t]his is not a migrant crisis but a politically orchestrated hybrid operation by Alyaksandr Lukashenka’s regime to divert attention from the regime’s growing human and civil rights abuses’⁴. At the same time, the presidents declared that they were not going to change their policies towards Belarus, and called on the EU and NATO for support.

2 M. Górczyńska, M. Szczepanik, *A Road to Nowhere: The Account of a Monitoring Visit at the Brześć–Terespól Border Crossing between Poland and Belarus*, Helsinki Foundation for Human Rights 2016, <https://www.hfhr.pl/wp-content/uploads/2016/11/A-road-to-nowhere.-The-account-of-a-monitoring-visit-at-the-Brze%C5%9B%C4%87-Terespol-border-crossing-point-FINAL.pdf>; Human Rights Watch, *Poland: Asylum Seekers Blocked at Border, Ensure Procedure Access; Halt Summary Returns*, <https://www.hrw.org/news/2017/03/01/poland-asylum-seekers-blocked-border> (20.12.2022).

3 Judgment of the ECtHR of 14 December 2020 on the case of *M.K. and others v. Poland*, applications nos. 40503/17, 42902/17 and 43643/17.

4 Joint Statement of the Presidents of Estonia, Latvia, Lithuania and Poland on Belarus, 23.08.2021, <http://www.president.pl/news/joint-statement-of-the-presidents-of-estonia-latvia-lithuania-and-poland-on-belarus,37214> (20.02.2023).

Due to the growing crisis, the Polish authorities decided to introduce a state of emergency, a measure justified by the hybrid actions of the Belarusian state.⁵ According to Minister of the Interior and Administration Mariusz Kamiński, the crisis is a result of clearly political reasons and revenge for the approach towards Belarus by Poland, Latvia and Lithuania. Therefore, there was a need for the introduction of special and extraordinary measures.⁶

Article 231 of the Constitution of the Republic of Poland provides that a state of emergency may be imposed by the president by means of a decree, which is then approved by the Sejm (the lower house of Parliament) within 48 hours of the decree being issued. A security threat from Belarus and Russia, including in the context of the upcoming Zapad military manoeuvres, was cited as the main motive for the imposition of the state of emergency. In fact, however, the state of emergency introduced significant restrictions on freedom of movement in 183 border towns and in a 3-kilometre strip of land next to the border. It aimed primarily at preventing journalists and civil society organisations from carrying out their work. There was a ban on any ‘outsiders’ staying in the area covered by the state of emergency and on photographing and documenting border sites and facilities, and there were restrictions on access to public information concerning ‘activities carried out in the area covered by the state of emergency in connection with the protection of the state border and the prevention and counteraction of illegal migration.’ In brief, no one had the authority to observe the practices carried out in relation to migrants. After the Zapad manoeuvres, the state of emergency was extended and lasted until 30 November 2021.⁷

In addition, the government started its operations to better protect the border physically. First, a makeshift razor-wire fence on the border was built. In addition, a new law was passed on building protection of the state border, which provided for the construction of a special wall on the EU external border (which is not only the Belarusian–Polish, but also the Ukrainian–Polish and the Russian–Polish border) and special terms for public procurement.⁸ The estimated cost of this wall is PLN 1.615 billion (around EUR 350 million). The decision to build a wall has been exten-

5 Decree of the President of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency in part of the Podlaskie voivodeship and part of the Lubelskie voivodeship (Journal of Laws 2021, item 1612).

6 Statement by Mariusz Kamiński, Polish Minister of the Interior and Administration, of 2 September 2021; Usnarz Górny to czubek góry lodowej. Nie pozwolimy na to [Usnarz Górny is just the tip of the iceberg. We will not allow this], ‘Rzeczpospolita’ 02.09.2021, <https://www.rp.pl/polityka/art18878991-mariusz-kaminski-usnarz-gorny-to-czubek-gory-lodowej-nie- pozwolimy-na-to> (16.02.2023).

7 Decree of the President of the Republic of Poland of 1 October 2021 (Journal of Laws 2021, item 1788).

8 Act on Building the Protection of the State Border of 29 October 2021 (Journal of Laws 2021, item 1992).

sively used for government propaganda about the additional need to protect the EU external border and the EU itself.

Moreover, the practice of push-back has been ‘legalised’ with the ordinance of the Minister of the Interior of 20 August 2021.⁹ It was clear that such an ordinance is contrary to human rights standards. Nevertheless, the creation of the legal norm by the Minister of the Interior gave power to the Border Guard to disobey those standards. Later on, the practice of push-backs was written into legislative status. In October 2021, amendments to the law on foreigners were adopted, providing for direct legislative authorisation for the practice of push-backs.¹⁰ Specifically, the local governor of the Border Guard obtained powers to make a note on a foreigner crossing the border and issue a decision ordering them to leave the territory of Poland. Such a decision was the subject of an appeal to the head of the Border Guard. However, making an appeal did not stop enforcement of the procedure of de facto push-back. Moreover, the decision included a prohibition on entering the Schengen area for a period of between six months and three years. The law also provided for the penalisation of any acts aimed at destroying elements of border protection, such as fences, entanglements, dams or barriers. Even if a foreigner submitted a motion for international protection, according to the new provisions such a motion was left without any review unless the foreigner came directly from the country of repression with a threat to his or her life and health and presented reliable reasons for illegal crossing of the border.

These measures were the subject of criticism from the ombudsman and from civil society.¹¹ Nevertheless, they were adopted. Moreover, these provisions were used by the government of Poland to refuse to obey the European Court of Human Rights’ interim measures (see below). The political subordination of the Constitutional Court made any attempt to carry out a judicial review of the provisions futile.¹²

1.3. Abusive human rights practices during the state of emergency

The state of emergency as well as a general perception of the hybrid war threat has created a kind of *carte blanche* for the Polish authorities to abuse human rights.¹³ After building a makeshift fence on the border, the authorities made various attempts

9 Ordinance of the Minister of the Interior amending the ordinance on temporary suspension or restricting the border movement at certain border crossings of 20 August 2021 (Journal of Laws 2021, item 1536).

10 Act on Amending the Act on Foreigners and other Acts of 14 October 2021 (Journal of Laws 2021, item 1918).

11 See for example the comprehensive opinion of 3 October 2021 by the ombudsman submitted to the Polish Senate, https://bip.brpo.gov.pl/sites/default/files/2021-10/Opinia_RPO_cudzoziemcy_3.10.2021.pdf (16.02.2023).

12 On the rule-of-law crisis and the political subordination of the Polish Constitutional Court, see W. Sadurski, *Poland’s Constitutional Breakdown*, Oxford 2019.

13 G. Baranowska, *Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021*, ‘Polish Yearbook of International Law’ 2023, vol. 41, pp. 193–211. See also W. Klaus (ed.), *Poza prawem*.

to catch people who crossed the border illegally. If they were caught, the authorities did not allow applications for international protection to be lodged, but instead carried out a push-back procedure, which in essence meant taking people outside the Polish border to the Belarusian side. The procedure was also applied to women and children.¹⁴

NGOs and journalists were excluded from any activity in the 3-kilometre border area. This meant that migrants who crossed the border and remained in this area did not have any possibility of assistance. If they were apprehended, the authorities could use a push-back procedure without any restrictions, without registering people or providing support. The Border Guard was supported in this by the Polish army, the military police and the police. Moreover, no persons other than residents were allowed into the zone. Even the organisation providing medical assistance – ‘Medics on the Border’ – was not allowed in.

On the other hand, in the case of areas outside the 3-kilometre zone, social organisations could already act. However, in this case there was a kind of race against time. If a given group of migrants was previously tracked down by social organisations, there was a chance that those persons would be included in the procedure for verification of their status and directed to centres for foreigners or to hospitals, rather than subjected to the push-back procedure. If these persons were detained by the authorities, they generally had no chance to stay in Poland and the push-back procedure was applied immediately.

At least ten people – victims of this situation – were identified and buried in a cemetery established by the Muslim Tatar community. This prolonged crisis, and especially the awareness that more people were dying in the Polish forests, prompted a reaction from Polish civil society, artists and representatives of various churches. It was termed by Marian Turski a ‘moral catastrophe.’¹⁵ However, it did not result in a change of attitude by the Polish authorities.

One should underline here the special position of the Office of the Polish Ombudsman. Under Polish law, the ombudsman should have access to any place in the territory of Poland where violations of human rights may happen. This also includes such restricted zones as those provided in the state of emergency. Starting from the first days of the crisis situation, the ombudsman officers, under the direction of the ombudsman himself (Marcin Wiącek) or the deputy ombudsman (Hanna

Prawna ocena działań państwa polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej, Warsaw 2022.

14 See information contained in the report of the Granica group operating in the vicinity of the area covered by the state of emergency, Grupa Granica, Kryzys humanitarny na pograniczu polsko-białoruskim, 01.12.2021, <https://www.grupagranica.pl/files/Raport-GG-Kryzys-humanitarny-napograniczu-polsko-bialoruskim.pdf> (20.22.2022).

15 M. Turski, Unde malum? Skąd bierze się zło?, lecture at Warsaw University, 16.11.2021.

Machińska), were present and monitored the situation, provided support to NGOs and verified conditions in migrant and refugee centres.

1.4. The response of the ECtHR and other international organisations

The situation at the border has been a subject of interest for many international organisations. On 25 August 2021, the European Court of Human Rights (ECtHR) issued an interim measure concerning the situation at both the Polish–Belarusian and the Lithuanian–Belarusian borders.¹⁶ The cases concerned migrants from Afghanistan and Iraq who were stuck between the borders of the two countries and could not submit their application for international protection. The response of the ECtHR to the dramatic situation concerning the nomadic camp in Usnarz Górny was that it requested that the Polish and Latvian authorities provide all the applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter.

This measure was extended on 27 September 2021 to allow lawyers to make necessary contact with applicants. Moreover, the ECtHR requested this group not be pushed back to Belarus.¹⁷ At the same time, the ECtHR communicated the case to the government of Poland and requested written observations. This second stage of this case was a result of the introduction of the state of emergency, which prevented any significant contact with migrants in Usnarz Górny, as this place was included in the restricted 3-kilometre strip of land. It should be underlined that the Polish government in practice ignored the interim measures issued by the ECtHR; this was the reason for their extension. At the same time, the ECtHR lifted the interim measure regarding Lithuania, due to the assurance from the government that migrants on the territory of Lithuania and their applications for asylum were the subject of review.¹⁸

One should mention here the strong reaction to the crisis by Dunja Mijatović, the Council of Europe's Commissioner for Human Rights. The Commissioner not only reacted with official statements,¹⁹ but also decided to visit the border personally. However, the authorities did not allow her to enter the zone. After her four-day visit, she acknowledged the effort by civil society and local governments to bring assistance to the victims of the crisis, but in a strong statement said that '[i]nternational organisations and civil society actors providing humanitarian and legal assistance

16 Interim measures in the case of R.A. and others v. Poland, application no. 42120/21, and H.M.M. and others v. Latvia, application no. 42165/21.

17 Press release of the Registry of the European Court of Human Rights of 28 September 2021, ECHR 283 (2021).

18 Press release of the Registry of the European Court of Human Rights of 29 September 2021, ECHR 285 (2021).

19 See the statement of the CoE Commissioner for Human Rights of 25 August 2021 concerning the situation in Usnarz Górny, <https://www.coe.int/en/web/commissioner/-/poland-should-take-immediate-action-to-protect-the-human-rights-of-people-stranded-at-its-border-with-belarus> (22.12.2022).

should be given immediate and unimpeded access to all areas along the border and to all people in need of help. Journalists should be allowed to report from all areas along the border, freely and safely.²⁰

The situation at the border was also the subject of attention from the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization of Migration (IOM). The UNHCR appealed for the crisis concerning the group of migrants in Usnarz Górny to be stopped, and for proper asylum procedures in accordance with their submissions to be started.²¹ When the crisis escalated, the UNHCR and the IOM called for the necessity of providing humanitarian assistance and the obligation for compliance with international procedures concerning requests for asylum status.²² Second, they visited the makeshift camp on the Belarusian side of the border and requested provision of access to food, water and medical assistance.²³

1.5. New legislation on the protection of borders

At the beginning of November 2021, Lukashenko decided to make a final attempt to push a group of migrants across the Polish border; a massive group of migrants was forced to move towards the border and to try to cross it. The Belarusian authorities did not hide their intention to destabilise the border. This unprecedented act of the instrumentalisation of migrants to achieve political goals triggered a strong reaction from the Polish authorities – 15,000 Polish troops were sent to protect the state border. The official border crossing in Kuźnice was closed, and Polish troops used tear gas and water in order to prevent the border crossing. One may suspect that Lukashenko wanted to provoke – to push Polish troops towards using guns and to escalate the conflict even more. This did not happen. The Polish authorities used all possible political means to react to this unprecedented situation. On 17 November,

20 Commissioner for Human Rights, Commissioner Calls for Immediate Access of International and National Human Rights Actors and Media to Poland's Border with Belarus to End Human Suffering and Violations of Human Rights, 19.11.2021, <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu> (22.12.2022).

21 Notes from Poland, UN Refugee Agency Calls on Poland to Admit Asylum Seekers on Border with Belarus, 24.08.2021, <https://notesfrompoland.com/2021/08/24/un-refugee-agency-calls-on-poland-to-admit-asylum-seekers-on-border-with-belarus/> (22.12.2022).

22 UNHCR, UNHCR and IOM Call for Immediate De-Escalation at the Belarus-Poland Border, 09.11.2021, <https://www.unhcr.org/news/press/2021/11/618a63674/unhcr-iom-call-immediate-de-escalation-belarus-poland-border.html> (20.12.2022).

23 UNHCR, IOM, UNHCR Provide Emergency Aid to Asylum-Seekers and Migrants at the Belarus-Poland Border, Call to Ensure Well-Being of People and Prevent Loss of Life, 12.11.2021, <https://www.unhcr.org/news/press/2021/11/618e20c34/iom-unhcr-provide-emergency-aid-asylum-seekers-migrants-belarus-poland.html> (22.12.2022).

the Polish Sejm adopted a special resolution on the protection of Polish borders.²⁴ It stated that ‘[t]he regime of Alexander Lukashenko has attacked Poland using the thousands of migrants it brought to Poland as an assault on the borders of the Republic of Poland. For many years our country has not faced such a great threat to its own border security and integrity.’ Therefore, the Sejm expressed solidarity ‘with the Polish government, together with all institutions of the Polish state and people involved in the defence of Poland and Poles’.

This action by Belarus also resulted in the European Union and certain Member States taking action. Lukashenko’s talks with the leaders of Germany and France (as well as the involvement of Vladimir Putin in discussions) led to a halting of further actions, clearing of the migrant camp and the return of a large group of migrants to their countries of origin (e.g. Iraq).²⁵

The above actions did not result in a change of policy by the Polish authorities as regards humanitarian assistance for migrants crossing border; on the contrary. The state of emergency formally ended on 30 November 2021. However, on 17 November 2021, the parliament passed amendments to the law on border protection.²⁶ This act essentially repeated the solutions provided for in the decree on the state of emergency and effectively prolonged the restrictions on movement and freedom of expression in the 3-kilometre strip of land along the state border. It is claimed that this act is not in accordance with the Constitution,²⁷ but due to the political dependency of the Polish Constitutional Court, there is no institution to make a proper judicial review. On 1 December 2021, five MEPs tried to enter Białowieża, a town located in the restricted zone.²⁸ However, they were stopped by the police and prevented from doing so.

24 Resolution of the Sejm of 17 November 2021, ‘Monitor Polski’ 2021, no. 1129, <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WMP20210001129/O/M20211129.pdf> (16.02.2023).

25 A. Higgins, Belarus Clears Migrant Camp, Easing Border Standoff with Poland, ‘New York Times’ 18.11.2021, <https://www.nytimes.com/2021/11/18/world/europe/belarus-poland-migrant-camp.html>; J. Arraf, S. Khaleel, Limping and Penniless, Iraqis Deported From Belarus Face Bleak Futures, ‘New York Times’ 22.11.2021, <https://www.nytimes.com/2021/11/22/world/middleeast/belarus-iraqi-migrant-deportations.html> (20.12.2022).

26 Act on Amendment of the State Border Protection Act and Other Acts of 17 November 2021 (Journal of Laws 2021, item 2121).

27 See for example the opinion of the Polish Ombudsman on the Law on Protection of Borders, as approved by the Sejm, of 22.11.2021, <https://bip.brpo.gov.pl/index.php/pl/content/rpo-senat-ustawa-granica-panstwowa-uwagi> (16.02.2023).

28 The delegation of MEPs was headed by Janina Ochojska and included Łukasz Kohut, Fabienne Keller, Katalin Cseh and Róża Thun, <https://www.polsatnews.pl/wiadomosc/2021-12-01/janina-ochojska-zatrzymana-przez-policje/> (20.12.2022).

1.6. Russian aggression towards Ukraine and its consequence for the situation at the Polish–Belarusian border

Russian aggression towards Ukraine beginning on 24 February 2022 has changed the political perspective as regards the situation at the Polish–Belarusian border. The massive migration of Ukrainian refugees and almost open access to the territory of Poland via the border with Ukraine has changed the public and political perception of the crisis situation. Nevertheless, the Polish authorities did not change their attitude of keeping the Polish–Belarusian border almost totally closed. One could see a completely different approach towards migrants depending on where they came from – a division into ‘good’ migrants and refugees (coming from Ukraine) and those not accepted by authorities (especially non-White people forced to leave Asian or African regions in crisis, coming via Belarus).²⁹

Until the end of June 2022, the state of exceptionality was binding in the 3-kilometre strip of land. It was abolished on 1 July 2022. On the basis of Article 8 of the Law on Protection of State Border, the regional governor of the Podlaskie voivodeship introduced a restriction that did not allow the presence of individuals in the 200-metre strip of land next to the border.³⁰ This change was motivated by the progress in building the wall between Poland and Belarus. However, the presence of the wall did not stop practices of crossing the border. Moreover, it contributed to new problems, due to the physical injuries suffered as a result of crossing the border, as well as continued use of push-back procedures.

Importantly, as a result of the strategic litigation of cases by Polish NGOs (mostly the Association of Legal Intervention and the Helsinki Foundation for Human Rights) and the ombudsman, Polish courts have started to evaluate different procedures concerning the push-back of migrants crossing the border. In a judgment of 28 March 2022, the District Court in Hajnówka found that the arrest and deportation to the forest of three migrants of Afghan origin by the Border Guard was illegal and unjustified.³¹ This decision opens the way for compensation by the state treasury for illegal deprivation of liberty. In a judgment of 15 September 2022 on a motion by the

29 W. Klaus and M. Szulecka have analysed the applicability of the concept of ‘departheid’ to Polish policies concerning refugees and migrants; W. Klaus, M. Szulecka, *Departing or Being Deported? Poland’s Approach towards Humanitarian Migrants*, ‘Journal of Refugee Studies’ 2022, p. feac063, <https://doi.org/10.1093/jrs/feac063> (16.02.2023).

30 Ordinance No. 3/2022 of the Podlaskie Voivodeship Regional Governor of 15 June 2022 on the prohibition to stay in the area of 200 m from the borderline of the Polish State, ‘Official Journal of Podlaskie Voivodeship’ 2022, no. 2772.

31 Decision of the District Court in Bielsk Podlaski, VII Sub-District Criminal Division in Hajnówka, of 28 March 2022, VII Kp 203/21, https://interwencjaprawna.pl/wp-content/uploads/2021/01/postanowienie-ws.-zatrzymania_VII_Kp_203_21.-zanonimizowane.pdf; see also J. Klimowicz, Sąd: Push-back nielegalny. Pierwszy wyrok w sprawie wywozek migrantów na granicę z Białorusią, ‘Gazeta Wyborcza’ 29.03.2022, <https://bialystok.wyborcza.pl/bialystok/7,35241,28278358,sad-push-backi-sa-nielegalne-pierwszy-wyrok-w-sprawie-wywozek.html> (20.12.2022).

Polish ombudsman, the Regional Administrative Court in Białystok found that push-backs are contrary to the Constitution and human rights standards.³² The Court referred extensively to guarantees of the 1951 Geneva Convention, the EU Charter of Fundamental Rights (CFR), the principle of non-refoulement and the prohibition on the collective expulsion of foreigners stemming from Protocol No. 4 to the European Convention on Human Rights. There have been more cases decided by regional administrative courts in Białystok³³ and Warsaw³⁴ along similar lines, confirming serious violations of basic human rights standards by the Border Guard in different contexts of push-back procedures and their implementation. However, those judgments are not yet final. Second, they have not stopped the Border Guard from carrying out the same practices. Violations of human rights at the Polish–Belarusian border have resulted in litigation before the ECtHR, which has communicated a few cases concerning push-back procedures to the Polish government. The Polish authorities ignored interim measures aiming to stop this wrongful practice.³⁵ One can expect judgments in these cases in 2023.³⁶

Another aspect of the problem was the targeting of civil society activists and some individuals for their activities at or comments on the border. For example, an activist of the Club of Catholic Intelligentsia (Klub Inteligencji Katolickiej) was the subject of investigation about whether they contributed to illegal human trafficking. The case was ultimately dropped by the Prosecutor's Office, but it raised concern among NGOs.³⁷ A famous actress, Barbara Kurdej-Szatan, was accused of violating the dignity of Border Guard officers for her comments criticising the approach to migrants and refugees. This case was upheld by the District Court in Pruszków on 6

32 Judgment of the Regional Administrative Court in Białystok of 15 September 2022, II SA/Bk 492/22, https://bip.brpo.gov.pl/sites/default/files/2022-10/uzasadnienie_wsa_bia%C5%82ystok_pushback_15.09.2022.pdf (16.02.2023).

33 See *ibidem* and other judgments of the Regional Administrative Court in Białystok of 15 September 2022, II SA/Bk 493/22 and II SA/Bk 494/22, as well as of 27 October 2022, II SA/Bk 558/22.

34 See judgments of the Regional Administrative Court in Warsaw of 26 April 2022, IV Sa/WA 420/22; of 27 April 2022, IV Sa/WA 471/22; of 20 May 2022, IV SA/Wa 615/22; of 27 May 2022, IV SA/Wa 772/22; and of 5 October 2022, IV SA/Wa 1031/22.

35 According to the press release issued by the Registry of the ECtHR (ECHR 372 (2021), 06.12.2021), interim measures have been issued with respect to the following cases: R.A. and others v. Poland (no. 42120/21), I.A. and others v. Poland (no. 53181/21), A.H.A. and N.A.A.H. v. Poland (no. 53566/21), A.R. and O.S. v. Poland (no. 53808/21), J.D. and D.M. v. Poland (no. 54016/21), D.A.M. and others v. Poland (no. 54275/21) and A.A. v. Poland (no. 54849/21).

36 See summary of litigation of Polish–Belarusian border cases prepared by the Helsinki Foundation for Human Rights, <https://hfhr.pl/upload/2022/12/informacja-wyroki-ws-push-back-grudzien-2022.pdf> (20.12.2022).

37 B. Rumieńczyk, Szok i niedowierzenie! Wolontariusze KIK nie przemycali ludzi [Shock and Disbelief. KIK volunteers did not participate in human trafficking], 'OKO.Press' 07.09.2022, <https://oko.press/szok-i-niedowierzenie-wolontariusze-kik-nie-przemycali-ludzi> (20.12.2022).

December 2022.³⁸ Another case is pending before the court against Władysław Frasyniuk, a well-known anti-communist dissident (and now a prominent participant in public life), for his comments concerning the behaviour of soldiers at the Polish–Belarusian border. The first court partially discontinued the proceedings partially, but Frasyniuk was found guilty of insulting Polish soldiers; there have been appeals against the judgment.³⁹ Another case concerns Piotr Maślak, a journalist of Radio TOK FM, who is also accused of defaming and insulting Border Guard officers.⁴⁰

Even if those cases end up ultimately being dropped or incurring small penalties, they could be regarded as a kind of SLAPP (strategic lawsuits against public participation) litigation – their purpose is to chill any dissent regarding the practices of the Polish authorities, but also to make it more difficult for NGOs and activists to engage in that kind of activity. It should be noted that in all these cases, the litigation is supported by high-level politicians of the ruling party. Moreover, the accused persons are presented in the politically subordinated media in a polarised way, and thus become victims of massive hate speech by regular citizens sympathising with government policies. As a result, a deep and engaged discourse on Border Guard practices is discouraged.

2. The response of the European Union

2.1. First reactions

The actions of the Polish authorities taken in reaction to what is officially called a ‘hybrid attack’ have been generally accepted by EU institutions. The EU’s actions and discussion did not focus at all on the reaction of EU Member State authorities and their regularity from a human rights perspective, but rather focused on the issue of hybrid warfare by Belarus.⁴¹ We believe this approach is one-sided and short-

38 W. Czuchnowski, Sąd: Kurdej-Szatan nie znieważyla Straży Granicznej, ‘Gazeta Wyborcza’ 06.12.2022, <https://wyborcza.pl/7,75398,29229732,sad-kurdej-szatan-nie-zniewazyla-strazy-granicznej.html> (20.12.2022).

39 Władysław Frasyniuk miał znieważyc żołnierzy. Sąd warunkowo umorzył sprawę [Władysław Frasyniuk was alleged to have insulted soldiers. The Court has conditionally redeemed the case], ‘TVN24’ 04.08.2022, <https://tvn24.pl/polska/wroclaw-sad-umorzyl-proces-wladyslawa-frasyniuka-o-zniewazenie-zolnierzy-jest-zapowiedz-apelacji-6057396> (20.12.2022).

40 W. Czuchnowski, Kryzys na granicy polsko-białoruskiej. Dziennikarz uraził 200 funkcjonariuszy Straży Granicznej wpisem o ‘naszywkach SS’, ‘Gazeta Wyborcza’ 26.11.2022, <https://wyborcza.pl/7,75398,29185828,kryzys-na-granicy-polsko-bialoruskiej-dziennikarz-urazil-200.html> (20.12.2022).

41 Due to limitations of size in our article, we do not analyse the reaction of the authorities of other Member States which were also attacked similarly by Belarus. For more information regarding media, see Relief Web, People Repeatedly Repelled at Lithuania and Latvia Borders Face Increased Suffering, <https://reliefweb.int/report/lithuania/people-repeatedly-repelled-lithuania-and-latvia-borders-face-increased-suffering> (15.12.2022).

sighted. We would like to emphasise that security issues are obviously very important, but this does not, however, exempt the European Union and its Member States from the obligation to take action in accordance with the standards by which both a Member State (Poland) and the European Union are bound.⁴²

It should be briefly mentioned that after the situation escalated dramatically in September 2021, the president of the European Commission said that ‘[t]he Belarusian authorities must understand that pressuring the European Union in this way through a cynical instrumentalisation of migrants will not help them succeed in their purposes.’⁴³ The EU Member States have opted for a ‘gradual approach’, trying to pile pressure on Belarusian president Lukashenko and the regime in Minsk using the system of EU sanctions.⁴⁴ On 15 November 2021, the Council amended its sanctions regime in view of the situation at the EU’s border with Belarus, so as to be able to respond to the instrumentalisation of human beings carried out by the Belarus regime for political purposes. The sanctions regime was amended by way of a Council decision, which broadens the listing criteria on which specific designations can be based.⁴⁵ To reflect these changes, two regulations were amended.⁴⁶ In November 2021, the Council adopted a partial suspension of the EU–Belarus Visa Facilitation Agreement for officials linked to the Belarus regime,⁴⁷ while in early December 2021, the Council decided to impose restrictive measures on an additional 17 individuals and 11 entities who had helped incite and organise illegal border crossings through Belarus to the EU.⁴⁸

42 A legal analysis of the Polish government’s actions has been comprehensively carried out, including, (in:) W. Klaus (ed.), *Poza prawem*, *op. cit.*

43 Cf. Statement by President von der Leyen on the situation at the border between Poland and Belarus, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5867, 08.11.2021 (03.02.2023).

44 Cf. point 21 of the Conclusions of the European Council meeting (21 and 22 October 2021), EUCO 17/21 CO EUR 15 CONCL 5: ‘The EU will continue countering the ongoing hybrid attack launched by the Belarusian regime, including by adopting further restrictive measures against persons and legal entities, in line with its gradual approach, as a matter of urgency’, <https://www.consilium.europa.eu/media/52622/20211022-euco-conclusions-en.pdf> (03.02.2023).

45 Council Decision (CFSP) 2021/1989 of 15 November 2021 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (O.J. L 405, 16.11.2021, p. 8); Council Decision (CFSP) 2021/1990 of 15 November 2021 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (O.J. L 405, 16.11.2021, p. 10).

46 Council Regulation (EU) 2021/1986 of 15 November 2021 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (O.J. L 405, 16.11.2021, p. 3); Council Regulation (EU) 2021/1985 of 15 November 2021 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (O.J. L 405, 16.11.2021, p. 1).

47 Council Decision (EU) 2021/1940 of 9 November 2021 on the partial suspension of the application of the Agreement between the European Union and the Republic of Belarus on the facilitation of the issuance of visas (O.J. L 396, 10.11.2021, p. 58).

48 Council implementing Regulation (EU) 2021/2124 of 2 December 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus

The deep worries over the crisis unfolding at the Polish–Belarusian border were also expressed during a plenary debate with EU foreign policy chief Josep Borrell on 10 November 2021.⁴⁹ Vice President Borrell repeated that the European Union was engaging in wide-ranging diplomatic efforts together with the countries of origin in order to find solutions and prevent more trafficked migrants from arriving in this way. At the same time, he stressed that Belarusian authorities must provide humanitarian assistance to the people trapped in the Belarusian border area, including providing access for humanitarian organisations to the region and allowing for humanitarian corridors. During the debate, several MEPs were alarmed about the deteriorating humanitarian situation at the Polish–Belarusian border and urged the Polish authorities to end the ongoing aggressive push-backs of migrants into Belarus.⁵⁰

Moreover, in December 2021, the European Commission presented a proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum, coupled with a proposal amending the Schengen Borders Code, to define the instrumentalisation of migrants.⁵¹ The proposal was initiated following the increasing role of state actors in the facilitation of irregular migration, using certain migratory flows as a tool for political purposes. However, up to now, this act has not yet been adopted, which only shows that good ideas are not finalised effectively.

With the situation escalating in the wrong direction, critics argue that the EU’s method – limited sanctions and political statements – has proved ineffective.⁵²

(O.J. L 430I , 02.12.2021, p. 1); Council implementing Decision (CFSP) 2021/2125 of 2 December 2021 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (O.J. L 403I, 02.12.2021, p. 16).

49 Cf. European Parliament press release, Poland–Belarus border: MEPs alarmed by humanitarian and political crisis, <https://www.europarl.europa.eu/news/en/press-room/20211110IPR17001/Poland-Belarus-border-meps-alarmed-by-humanitarian-and-political-crisis> (03.02.2023).

50 Push-back practices indisputably constitute violations of the principle of non-refoulement. They have already been outlawed by the ECtHR in its Hirsi decision in 2012 for cases on the high seas. In that decision, the Court also declared push-backs at sea a violation of the prohibition of collective expulsions as laid down in Article 4 Protocol No. 4 ECHR. Cf. Judgment of the ECtHR of 23 February 2012 on the case of Hirsi Jamaa and others v. Italy, application no. 27765/09. Also see J. Bast, F. von Harbou, J. Wessels, *Human Rights Challenges to European Migration Policy*, Baden-Baden 2022, p. 47.

51 Proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890, not yet adopted.

52 Cf. Y. Miadzvetskaya, *Designing Sanctions: Lessons from EU Restrictive Measures against Belarus*, GMF Policy Paper June 2022, <https://www.gmfus.org/sites/default/files/2022-06/Designing%20Sanctions%20Lessons%20from%20EU%20Restrictive%20Measures%20against%20Belarus.pdf> (03.02.2023).

2.2. The EU's and Members States' general responsibility for protecting fundamental rights in the Area of Freedom, Security and Justice

In recent years, the migration policy of the EU has focused on strict border controls and cooperation with third states in managing migration flows. The EU's objectives in this field are to safeguard freedom of movement within the EU by, inter alia, ensuring the effective monitoring of people who cross the EU's external borders.⁵³ This is to contribute to the achievement of the overall goal, which is the creation of the Area of Freedom, Security and Justice (AFSJ).⁵⁴ These competences belong to the so-called shared competences,⁵⁵ which means that the treaty provisions oblige not only Member States but also the EU to act in this area. What is important is that both Member States and the EU are obliged to act in full respect of fundamental rights and in a manner that safeguards the free movement of persons within the Union.⁵⁶ Although states have the right to decide whether to grant non-EU nationals access to their territory, they must obey the law and uphold individuals' fundamental rights. Border surveillance operations must respect international and European human rights standards.⁵⁷ The basic provision of the Treaty on the European Union (TEU), Article 2, read together with Article 6, should be the real basis for all actions of the Member States and the EU itself. EU primary law also enshrines directly the right to asylum and the right to international protection, and provides for the prohibition of collective expulsion and the principle of non-refoulement.⁵⁸

Nonetheless, national human rights institutions, international bodies and civil society organisations regularly report cases of push-backs or collective expulsions at the EU's borders, including the Polish–Belarusian border.⁵⁹ According to these reports, push-backs often involve excessive use of force and degrading and inhuman

53 Article 3 para 2 Treaty on the European Union (TEU) and Article 77 Treaty on the Functioning of the European Union (TFEU).

54 Cf. Article 3 para 2 TEU and Article 67 TFEU. For obvious reasons, there is no room in this study to go over the details of EU law in this area. In this regard, it is possible to refer to the basic literature, e.g. S. Peers, *EU Justice and Home Affairs Law: EU Immigration and Asylum Law*, Oxford 2016.

55 Cf. Article 2 and Article 4 TFEU.

56 Cf. Article 2 TEU and Article 6 TFEU.

57 Cf. A. Grzelak, M. Wróblewski, *Ochrona praw podstawowych w ramach przestrzeni wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej*, (in:) J. Barcz (ed.), *Współpraca sądowa w sprawach cywilnych, karnych i współpraca policyjna. System Prawa Unii Europejskiej*, Tom 8, Warsaw 2020, pp. 705–858.

58 Article 78 TFEU and Articles 18 and 19 CFR.

59 See the report of Grupa Granica, *op. cit.*, or Amnesty International, *Polska: Okrucieństwo zamiast współczucia na granicy z Białorusią*, <https://amnesty.org.pl/wp-content/uploads/2022/04/Raport-Amnesty-International-POLSKA-OKRUCIENSTWO-ZAMIAST-WSPOLCZUCIA-NA-GRANICY-Z-BIALORUSIA.pdf> (18.11.2022).

treatment of migrants.⁶⁰ Furthermore, the European Border and Coast Guard Agency (Frontex) has been accused of failing to safeguard people against human rights violations. The unprecedented migration flows of 2015 put management of the EU's external borders to the test; the uncontrolled arrivals of migrants and asylum seekers in the EU raised concerns relating to security threats, eventually leading to the temporary reintroduction of internal borders between several Member States.⁶¹

The European Council has gradually been shifting focus to prioritise strengthening the EU's external borders and preventing irregular migrants from reaching EU territory. To this end, the aim has been to stop illegal migration on all routes and extend the EU's partnerships with third countries, including Turkey.⁶² Frontex has been reinforced and provided with stronger means and powers to contribute to this goal.⁶³ The practice clearly does not always keep up with the obligations stipulated in legal acts. Still, acts of secondary EU law in this field clearly give priority to the standards resulting from the principles of the protection of fundamental rights. For example, the Schengen Borders Code states that it respects fundamental rights and observes the principles recognised in particular by the CFR.⁶⁴ It should be applied in accordance with the Member States' obligations as regards international protection and the non-refoulement principle.⁶⁵ When applying this regulation, which determines, inter alia, rules for crossing the EU's external borders, Member States shall act not only in full compliance with relevant EU law, including the CFR, but also relevant international law, including the Geneva Convention.⁶⁶ Compared to the former Schengen Borders Code, the provision on states' obligations to protect fundamental rights has

60 Cf. the report of 2020 by Refugee Rights Europe and the End Pushbacks Partnership, *Pushbacks and Rights Violations at Europe's Borders: The State of Play in 2020*, <https://refugee-rights.eu/wp-content/uploads/2020/11/pushbacks-and-rights-violations-at-europes-borders.pdf> (16.02.2023). Also see the Fundamental Rights Agency, *Fundamental Rights Issues at Land Borders* <https://fra.europa.eu/en/publication/2020/migration-fundamental-rights-issues-land-borders> (18.11.2022).

61 For accurate information, see https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en (18.11.2022).

62 On 18 March 2016, the European Council and Turkey reached an agreement aimed at stopping the flow of irregular migration via Turkey to Europe. According to the EU-Turkey Statement, all new irregular migrants and asylum seekers arriving from Turkey to the Greek islands and whose applications for asylum have been declared inadmissible should be returned to Turkey.

63 V. Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights*, September 2020, EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 EN September 2020 -PE 603.512.

64 Regulation (EU) 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) (O.J. L 77, 23.03.2016, p. 1 as amended).

65 Article 4 of the Schengen Borders Code. See also Articles 18 and 19 of the CFR.

66 The Convention Relating to the Status of Refugees of 1951.

clearly been strengthened,⁶⁷ which is the result of the problems that appeared in the EU during the migration crisis in 2013–2015. Another example, the Frontex Regulation, also clearly states that Frontex shall guarantee the protection of fundamental rights in the performance of its tasks.⁶⁸

Member States and the EU are also bound by the standard of fundamental rights protection when acting in the field of migratory law. To give only some examples, as regards third-country nationals who are staying illegally on the territory of a Member State, the Return Directive sets out the standards and procedures governing their return, in accordance with fundamental rights as general principles of EU law.⁶⁹ The Asylum Procedures Directive sets out rules on common procedures for granting and withdrawing international protection, while the Qualification Directive lays down the common standards for the identification of non-EU citizens or stateless persons genuinely in need of international protection in the EU and ensures that they can use a minimum level of benefits and rights in all EU Member States.⁷⁰ The obligations of the Member States also result, to a large extent, from the case law of the ECtHR, which is part of the analyses carried out by the Court of Justice of the European Union (CJEU) when interpreting the provisions of the CFR, in accordance with Article 52 para 3 CFR. To give an example: the CJEU indicates that when a state decides to return a foreign national to a country where there are substantial grounds for believing that he or she will be exposed to a real risk of ill-treatment, contrary to Article 3 of the European Convention on Human Rights (ECHR)⁷¹, the right to an effective remedy provided for in Article 13 ECHR requires that a remedy enabling suspension of enforcement of the measure authorising removal should, *ipso jure*, be available to that foreign national.⁷² Incorrect execution of these obligations, including

67 Recital 20 of the preamble of 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) (O.J. L 105, 13.04.2006, p. 1).

68 Article 80 of the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624 (O.J. L 295, 14.11.2019, p. 1) (Frontex Regulation).

69 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (O.J. L 348, 24.12.2008, p. 98).

70 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (O.J. L 180, 29.06.2013, p. 60); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (O.J. L 337, 20.12.2011, p. 9).

71 The Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

72 See, *inter alia*, the judgment of the ECtHR on the case of Gebremedhin [Gaberamadhien] v. France, application no. 25389/05, § 67; on Hirsi Jamaa..., *op. cit.*, § 200; and the judgment of the

non-compliance with the standards resulting from the CFR and indirectly also from the jurisprudence of the ECtHR, must be met with a significant reaction from the EU institutions, in particular the European Commission, whose role is to guard the treaties. Any action that does not meet these requirements exposes Member States to liability for breach of EU law. The argument, sometimes raised in discussion, that the issue of ensuring internal security should belong to the exclusive competence of the Member States⁷³ and that in principle in this respect they are unlimited in their activities and the EU institutions cannot intervene, is inaccurate. Quite recently the CJEU clearly stated that:

although it is for the Member States to adopt appropriate measures to ensure law and order on their territory [...], it does not follow that such measures fall entirely outside the scope of EU law [...] the derogation provided for in Article 72 TFEU must be interpreted strictly. It follows that Article 72 TFEU cannot be read in such a way as to confer on Member States a power to depart from the provisions of EU law based on no more than reliance on the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.⁷⁴

When analysing existing problems, one should mention another problem: Member States are still reluctant to show solidarity by sharing responsibility for asylum seekers.⁷⁵ The principle of solidarity in the context of the AFSJ is expressed in Article 80 TFEU; however, this notion is not defined anywhere.⁷⁶ This is quite natural, because solidarity activities can take various forms, such as sharing out relevant tasks and pooling resources at EU level, compensating frontline Member States financially and through other contributions.⁷⁷ The continued failure to reform the EU asylum system, as well as the implementation of temporary solidarity measures based on ad

CJEU of 17 December 2015 on the case of *Abdoulaye Amadou Tall v. Centre public d'action sociale de Huy*, application no. C-239/14, ECLI:EU:C:2015:824.

73 Article 72 TFEU.

74 Judgment of 30 June 2022 on the case of *M.A. v. Valstybės sienos apsaugos tarnyba*, C-72/22 PPU, ECLI:EU:C:2022:505, § 70–71. See also to that effect the judgment of 17 December 2020 on the case of *Commission v. Hungary* (Reception of applicants for international protection), C808/18, EU:C:2020:1029, § 214.

75 E. Küçük, *The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?* *European Law Journal* 2016, no. 22, p. 463.

76 D. Thym, E. (L.) Tsourdi, *Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions*, *Maastricht Journal of European and Comparative Law* 2017, no. 24, pp. 611–612.

77 For different views on Article 80 TFEU, see European Parliamentary Research Service, *Solidarity in EU Asylum Policy*, PE 649.344, March 2020, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649344/EPRS_BRI\(2020\)649344_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649344/EPRS_BRI(2020)649344_EN.pdf) (16.02.2023) or R. Dowd, J. McAdam, *International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How?* *International and Comparative Law Quarterly* 2017, vol. 66, no. 4, pp. 863–892.

hoc solutions, has exposed a crisis that actually shows no signs of being resolved. On the occasion of the crisis in 2015, some Member States, including Poland, clearly showed that they did not intend to support countries particularly exposed to the migration crisis. Apart from the judgment of the CJEU in cases related to relocation and the non-fulfilment of obligations resulting from Council decisions, no further significant actions sanctioning such an approach of those Member States were taken.⁷⁸ This only shows the weakness of the concept of the principle of solidarity in the face of real problems and the approach of some Member States focused solely on the national and not the community interest.

2.3. The New Pact on Migration and Asylum

As early as April 2016, the European Parliament pointed out in a resolution that any attempt by Member States to push back migrants who have not been given the opportunity to present asylum claims runs contrary to Union and international law, and that the Commission should take appropriate action against any Member State that attempts such push-backs.⁷⁹ In September 2018, the Parliament invited the Council of the EU to determine whether there was a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU, including violation of the fundamental rights of migrants, asylum seekers and refugees, owing to the reported push-backs at Hungary's border with Serbia, and to address appropriate recommendations to Hungary in this regard. Annexed to the resolution was a proposal for a Council decision under Article 7 TEU. In September 2022, the Parliament adopted a resolution regretting the lack of decisive EU action, in particular the inability of the Council to make meaningful progress in the ongoing Article 7(1) TEU procedure.⁸⁰

In July 2020, the European Commission recognised the need for an institutional response to ensure that EU states uphold fundamental rights while guarding borders. In September 2020, it published a new pact on migration and asylum,⁸¹ claiming that 'all necessary guarantees will be put in place to ensure that every person would have an individual assessment and essential guarantees remain in full, with full respect for the principle of non-refoulement and fundamental rights'. The pact includes a legisla-

78 Judgment of 2 April 2020 on the joined cases of *Commission v. Czech Republic, Hungary and Poland*, C-715/17, C-718/17 and C-719/17 (respectively), ECLI:EU:C:2020:257. For more, see M. Zdanowicz, *Poland's Stance on the Refugee and Migration Crisis in the European Union*, 'Białostockie Studia Prawnicze' 2021, no. 1, pp. 85–103.

79 European Parliament Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, https://www.europarl.europa.eu/doceo/document/TA-8-2016-0102_EN.html (20.11.2022).

80 European Parliament Resolution, *Existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*, 2018/0902R(NLE), 15.09.2022.

81 Communication from the Commission on a New Pact on Migration and Asylum, COM(2020) 609 final.

tive proposal intended to address potential breaches of fundamental rights at the EU's external borders.⁸²

The monitoring of fundamental rights at EU external borders should be systematically and regularly carried out for a range of border management activities. As an element of the EU Pact on Migration and Asylum, the European Commission proposed a screening regulation on 23 September 2020.⁸³ This proposal includes an obligation for Member States to establish an independent monitoring mechanism.⁸⁴ However, rules are not enough to ensure compliance. The Commission, as guardian of the Treaties, should enforce Member States' compliance with EU obligations, especially regarding fundamental rights. This should be done by focusing not only on incorrect transposition of EU law, but also on violations occurring during the implementation of the legislation on the ground.

Since the pact was presented in September 2020, negotiations have remained largely deadlocked, and progress has still not been reached on most of the issues, such as the establishment of a fair system for EU states to share responsibility for new arrivals at EU borders. If the EU is to have a fair and effective asylum system, the priority for EU institutions and Member States must be to address the worrying backsliding in asylum policies or access to safe pathways to Europe. Serious violations of the right to asylum make it critical to establish an independent border-monitoring mechanism to investigate allegations of fundamental rights violations at borders, and the Commission's inclusion of this proposal within the pact is greatly welcome. The question is whether the proposed mechanism is effective.⁸⁵

After several weeks of inaction and focusing solely on political statements, on 1 December 2021 the Commission presented a set of temporary asylum and return measures to assist Lithuania, Latvia and Poland in addressing the emergency situation at the EU's external border with Belarus.⁸⁶ In accordance with the project assumptions, the measures would 'allow these Member States to set up swift and orderly processes to manage the situation, in full respect of fundamental rights and international obligations, including the principle of non-refoulement'. To adopt them,

82 For more on the pact, see A. Doliwa-Klepacka, *The New Pact on Migration and Asylum as a Response to Current Migration Challenges: Selected Issues*, 'Białostockie Studia Prawnicze' 2021, no. 1, pp. 9–21.

83 Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612 final.

84 Fundamental Rights Agency (FRA) prepared the general guidance in the light of Article 7(2) of the proposed screening regulation, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-monitor-fundamental-rights-eu-external-borders_en.pdf (18.11.2022).

85 International Rescue Committee, *Policy Brief: The New Pact on Migration and Asylum: One Year on, a Fair and Humane Asylum System is Needed More Than Ever*, 23.09.2021, <https://eu.rescue.org/article/new-pact-migration-and-asylum-one-year-fair-and-humane-asylum-system-needed-more-ever> (18.11.2022).

86 Press release IP/21/6447.

however, a Council decision and consultation with the European Parliament was necessary.⁸⁷ Among the proposals are those relating to the procedure (the possibility of extending the asylum application registration procedure), but also to material reception conditions. The Commission also announced support for EU agencies, including the European Asylum Support Office and Frontex.⁸⁸ However, a question arises about whether these measures are actually needed – should countries such as Poland, even without the initiative of the Committee in this regard, provide decent conditions for admitting people applying for international protection? What if a Member State continues to use procedures that are not in line with international standards, contrary to existing rules? After all, Lithuania and Latvia are already benefiting from appropriate support, while the Polish authorities have consistently stated that they do not need any assistance.⁸⁹ However, no actions are taken to coerce the authorities of the Member State to apply the law. The EU institutions turn a blind eye to the actions of the Polish authorities, the lack of transparency, the difficult flow of information and the lack of clear procedures.

2.4. The role of Frontex

The issue of the possibility of supporting the actions of the Member States and also their control over Frontex should also be mentioned. In recent years, Frontex has been criticised, or even accused of acting contrary to the principles of the protection of fundamental rights.⁹⁰ According to some reports, Frontex's oversight mechanisms have failed to safeguard people against serious human rights violations at the EU's external borders.⁹¹ An analysis of the actions of Frontex may show a pattern of failure to

87 Article 78(3) TFEU.

88 Proposal for a Council on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM(2021) 752 final.

89 For example, upon request by Lithuania, from the start of this crisis the EU deployed assistance immediately. Operational support by the European Asylum Support Office has been provided to Latvia and Lithuania with the handling of asylum applications, reception management and interpretation; COM(2021) 752 final, p. 3.

90 For an example of criticism by an NGO, see Amnesty International, Greece: Violence, Lies, and Pushbacks – Refugees and Migrants Still Denied Safety and Asylum at Europe's Borders, <https://www.amnesty.org/en/documents/eur25/4307/2021/en/> p. 41. For an example of criticism by organs of international organisations, see CoE Parliamentary Assembly, Resolution 1932 (2013) Final version: Frontex: Human Rights Responsibilities, <http://assembly.coe.int/nw/xml/Xref/Xref-XML2HTML-en.asp?fileid=19719&lang=en> (18.11.2022).

91 In October 2020, investigative journalism collective Bellingcat accused Frontex of being involved in push-backs; see <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>. In November 2020, the Frontex Management Board held an extraordinary meeting to investigate the incidents at the Greek–Turkish Aegean Sea border, following which the then Frontex executive director reported to the then European Parliament president that there had been ‘no evidence of a direct or indirect participation of Frontex staff or officers deployed by Member States’; <https://www.tinekestrik.eu/sites/default/>

credibly investigate or take steps to mitigate abuses against migrants at EU external borders, even in the face of clear evidence of rights violations.⁹² In December 2019, Frontex gained new responsibilities and tools to more effectively support EU Member States in managing their external borders to provide a high level of security for all their citizens.⁹³

However, it seems that Frontex's rapid growth into an executive agency of the EU, with increased powers, funding and legal responsibilities, makes it all the more urgent for it to put in place effective tools to safeguard fundamental rights. There are not only several legal proceedings pending against Frontex, but instruments of legal protection are also used. In November 2020, the European ombudsman opened an inquiry on their own initiative to assess the Frontex complaint mechanism and the role and independence of the fundamental rights officer (FRO) in this process.⁹⁴ The conclusions pointed to a number of shortcomings, including a lack of transparency and cooperation between the FRO and the Member States' national authorities. In March 2021, the ombudsman opened another inquiry; in this report, the ombudsman invited Frontex to be more transparent, including by publishing summaries of its operational plans and publishing its reply to each negative opinion of the FRO about a planned activity.⁹⁵ On 5 October 2022, the ombudsman opened a third inquiry into concerns that the agency does not carry out prior human rights risk and impact assessments before providing assistance to non-EU countries to develop surveillance capabilities.⁹⁶ Moreover, in December 2020, European Anti-Fraud Office (OLAF) opened an investigation into Frontex. Even though the final report has not been publicly released, the German magazine *Der Spiegel* published the report in its entirety on 13 October 2022.⁹⁷ The investigation involved alleged migrant pushbacks.⁹⁸

files/2020-11/Letter%20to%20EP_Frontex%20maritime%20operations%20at%20EU%20external%20bord...pdf (18.11.2022).

92 Human Rights Watch, *Frontex Failing to Protect People at EU Borders*, <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders> (8.11.2022).

93 For more about the Frontex Regulation, see B. Schotel, *EU Operational Powers and Legal Protection: A Legal Theory Perspective on the Operational Powers of the European Border and Coast Guard*, <https://ssrn.com/abstract=3587298> (18.11.2022).

94 <https://www.ombudsman.europa.eu/en/decision/en/143108> (18.11.2022).

95 <https://www.ombudsman.europa.eu/fr/decision/en/151369> (18.11.2022).

96 <https://www.ombudsman.europa.eu/en/opening-summary/en/161487> (18.11.2022).

97 G. Christides, S. Lüdke, *Why Der Spiegel Is Publishing the EU Investigative Report on Pushbacks*, 'Der Spiegel' 13.10.2022, <https://www.spiegel.de/international/europe/why-der-spiegel-is-publishing-the-eu-investigative-report-on-pushbacks-a-5218398a-5c1e-414e-a477-b26515353fce> (18.11.2022).

98 In the statement of Frontex Executive Management following publication of the OLAF report of 14 October 2022, we read that the practices described happened in the past; <https://frontex.europa.eu/media-centre/news/news-release/statement-of-frontex-executive-management-following-publication-of-olaf-report-amARYy> (18.11.2022).

Three legal actions have already been brought before the CJEU against Frontex. In May 2021, for the first time ever, two applicants brought an action against Frontex on the grounds that the agency had ‘failed to act’ in accordance with Article 265 TFEU.⁹⁹ The first plea was about ‘serious or persisting violations of fundamental rights and international protection obligations in the Aegean Sea Region’, which resulted in a ‘policy of systematic and widespread attack directed against civilian populations seeking asylum in the EU’. The second was about the agency’s failure to fulfil its positive obligations under the CFR or take any action to prevent fundamental rights violations in the context of its operation. The third involved the applicants’ claim of having been directly and individually affected by Frontex operations, which resulted in ‘unlawful refoulement, collective expulsion, and prevention of access to asylum’; in April 2022, the Court dismissed the action as inadmissible. In September 2021, an action for damages was brought against Frontex on behalf of a Syrian family pushed out of Greece in 2016 on a flight operated by Frontex and Greece.¹⁰⁰ The action was sustained by eight pleas in law that included, among others, alleged violations of several articles of the EU CFR, alleged violations of the Frontex Regulation, and the fact that Frontex failed to take measures to mitigate the risks of violations to fundamental rights. The case is still pending. Finally, in March 2022, a new action was brought before the CJEU.¹⁰¹ The applicant claimed that Frontex owed him compensation for the damages he suffered during and following his collective expulsion from Greece on 28–29 April 2020 in the Aegean Sea.

However, the problem of evaluating Frontex’s activities in the case of the Polish–Belarusian border is different from the cases concerning the situation in the Aegean Sea. A year ago, the question was asked where Frontex actually is.¹⁰² This question is intended to reverse the situation a little and to lead to a reflection on what the role of Frontex and, more broadly, the EU institutions, should be towards the states whose authorities act in a way that threatens fundamental rights when protecting the EU’s external borders. The Frontex Regulation contains provisions that allow one to assume that Frontex should be more active in this area, however. As stated in its preamble, in a spirit of shared responsibility, the role of the agency should be to regularly monitor the management of external borders.¹⁰³ The agency should ensure proper and effective monitoring not only through situational awareness and risk analysis, but also through the presence of experts from its own staff in Member States. The executive director identifies measures to be taken and recommends them to the Mem-

99 Order of the General Court of 7 April 2022 on the case of S.S. and S.T. v. European Border and Coast Guard Agency, T-282/21 EU:T:2022:235.

100 Pending case of W.S. and other v. Frontex, T-600/21.

101 Pending case of Hamoudi v. Frontex, T-136/22.

102 A. Bodnar, A. Grzelak, In Poland, Where is Frontex? ‘Politico.eu’ 04.11.2021, <https://www.politico.eu/article/poland-frontex-belarus-border-migration-crisis/> (18.11.2022).

103 Recital 42 of the preamble of the Frontex Regulation.

ber State concerned. It is also his or her task to set a time limit within which those measures should be taken and closely monitor their timely implementation. It is particularly important to say that where there is a specific and disproportionate challenge at the external borders, the agency should organise and coordinate rapid border interventions, either on its own initiative and with the agreement of the Member State concerned or at the request of that Member State.¹⁰⁴ The most important solution, where Frontex should be involved without the request of the Member State concerned, is described in Article 42 of the Regulation. In a case where external border control is rendered ineffective to such an extent that it risks jeopardising the functioning of the Schengen area, either because a Member State does not take the necessary measures in line with a vulnerability assessment or because a Member State facing specific and disproportionate challenges at the external borders has not requested sufficient support from the Agency or is not implementing such support, a unified, rapid and effective response should be delivered at Union level. It is the Commission that should propose to the Council a decision that identifies the measures to be implemented by the agency and requires the Member State concerned to cooperate with the agency in the implementation of those measures. The implementing power to adopt such a decision should be conferred on the Council because of the potentially politically sensitive nature of the measures to be decided, which are likely to touch on national executive and enforcement powers. If a Member State does not comply with that Council decision within 30 days and does not cooperate with the agency in the implementation of the measures contained in that decision, the Commission should be able to trigger the specific procedure to address exceptional circumstances putting the overall functioning of the area without internal border control at risk.

All this means that it is not as if Frontex is currently unable to act even if Member States have not asked to participate. Decisions in this regard should be made in a transparent manner, based on information gathered from various sources, including from the fundamental rights officer of the agency. The Fundamental Rights Office assists Frontex in the implementation of its Fundamental Rights Strategy and its action plan.¹⁰⁵ It prepares reports to the Management Board and the Consultative Forum for Fundamental Rights. In addition, the office is responsible for handling

104 Recital 49 of the preamble of the Frontex Regulation.

105 In February 2021, the agency adopted a new fundamental rights strategy, which insists that border checks and border surveillance must always be conducted in a way that respects fundamental rights, with particular attention to vulnerable categories such as children. The FRO, who is fully independent in the performance of their duties, follows up and reports on the implementation of the strategy; https://frontex.europa.eu/assets/Key_Documents/Fundamental_Rights_Strategy/Fundamental_Rights_Strategy.pdf (18.11.2022).

complaints related to fundamental rights issues. It all seems a little too bureaucratic, and not adhering to the realities of the situation at the border.¹⁰⁶

2.5. Protection of human rights defenders

Finally, it is worth mentioning a new EU initiative that should be of future relevance in the context of the matters covered in this text. The problem of taking action by human rights defenders is a broad issue that requires a separate discussion; however, it is impossible not to notice the latest EU initiative. Manifestly unfounded or abusive court proceedings against public participation (commonly also referred to as strategic lawsuits against public participation or SLAPPs) are a recent but increasingly prevalent phenomenon in the European Union.¹⁰⁷ The European Commission states that such actions are a particularly harmful form of harassment and intimidation used against those involved in protecting the public interest. The ultimate goal of SLAPPs is to achieve a chilling effect, silence the defendants and deter them from pursuing their work.

The proposal presented by the Commission in April 2022 aims to protect targets of SLAPPs and prevent the phenomenon from further expanding in the EU. The initial analysis clearly shows that it should have a great impact on the legislation of Member States if accepted. Currently, none of the Member States has specific safeguards against such proceedings and only a few are currently considering the introduction of specific safeguards. This is another example of how, on the one hand, the Commission is taking steps to promote and protect human rights, but on the other, in situations such as the reported events on the Polish–Belarusian border, actual actions fall short of what is needed.

106 EU Commissioner for Home Affairs Ylva Johansson raised the issue and importance of transparency at the border during a meeting with the Polish Interior Minister. The Commissioner also pushed for direct EU involvement at the border, saying: ‘I think it could be a good idea to invite Frontex to be part at the Polish–Belarusian border to also visibly show that this is an European protection of the border and also because we have expertise in Frontex’; <https://ecre.org/eu-eastern-borders-poland-ignores-commission-pressure-for-frontex-deployment-eastern-states-move-to-legalise-pushbacks-belarus-suspends-return-agreement/>. Meanwhile, Frontex executive director Fabrice Leggeri was ‘impressed’ with Polish security measures and thanked Poland for its cooperation with his agency when visiting the border; <https://frontex.europa.eu/media-centre/news/news-release/frontex-executive-director-visits-poland-s-border-with-belarus-LAS4dG> (18.11.2022).

107 Proposal for a directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (‘Strategic lawsuits against public participation’) – Explanatory memorandum, COM(2022) 177 final.

Conclusions

Poland is a subject of interest in the European Union due to its rule-of-law problems. However, the example of the Polish–Belarusian situation, including some laws and policies of the Polish state, indicates that the rule-of-law crisis has an impact on human rights practices. Adopted laws cannot be the subject of judicial review, due to the political subordination of the Constitutional Court. Violations of human rights during the state of exceptionality may go unpunished, due to the general problems with the accountability of state officials. Moreover, the government uses different instruments of pressure and propaganda in order to disguise its abuses or to limit the level of public criticism. Even judgments of common and administrative courts do not contribute to changing the operation of state authorities. Taking this into account, the role of external actors, such as the European Union, is of great importance in stopping human rights abuses or at least in empowering civil society actors performing watchdog and legal-aid activities.

The situation at the border is not the exclusive problem of Poland, Lithuania or Latvia, but of the entire European Union – just like the migration problems of Italy, Spain and Greece were not only a problem for those countries.¹⁰⁸ The Commission and the other EU institutions must work to strengthen the principle of solidarity and to execute it effectively. The European Union institutions cannot uncritically believe the statements of the authorities of the Member States which are struggling with the migration problem. The inability of the civil society to act and the inability to publicly present the information obtained by the ombudsman's office should induce the Commission to take a closer look at all data and information provided by the authorities of a Member State.

The Commission's proposals and the Council's reactions should be assessed as insufficient – they generally regulate issues that are already at the disposal of the Member States. Allowing the possibility of a derogation from the general principles will in theory not change the situation in the case of a state that does not already comply at all with its provisions. Therefore, it is hard to expect that it will comply with any requirements, especially those defined quite generally. In a study devoted to human rights challenges to European migration policy, one of the recommendations was that Member States must refrain from any push-back measures, as such practices violate the ECHR and also the CFR. This should be fostered by new EU legislation specifying the conditions for the respect of human rights, such as the principle of non-refoulement, during border control measures conducted by Member States.¹⁰⁹

108 For more on the experiences of the EU Member States with migration, see E. Kuzelewska, A. Pietkowska, *The EU Member States' Diverging Experiences and Policies on Refugees and the New Pact on Migration and Asylum*, 'Białostockie Studia Prawnicze' 2021, no. 1, pp. 23–36.

109 J. Bast, F. von Harbou, J. Wessels, *Human Rights Challenges*, *op. cit.*, p. 57.

Unfortunately, the situation in Poland is not unique. Information on similar actions taking place at the borders of other countries appears regularly. Is it not the case that the European Commission and other EU institutions continue to turn a blind eye to the staggering violations of EU law, and even continue to finance police and border operations in some of these countries? The measures taken by EU Member States must be proportionate and the EU should control them. Proportionality means balancing two interests: the interest of the European Union in security and the interest of the individual in the preservation of his or her human rights. EU institutions must not lose sight of the core values on which the EU is built when there is a security threat. Hybrid war must never be allowed to destroy the democratic way of life in society, but it is necessary to find other solutions that will help prevent security threats and which at the same time will not be associated with the acceptance of disrespect for the basic value of human dignity.

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