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Were the Lithuanian and Polish Responses to the Refugee Influx Legal or Illegal?

Abstract: Since the summer of 2021, the Baltic Sea states of Latvia, Lithuania and Poland have been facing an influx of refugees from the territory of Belarus. This migration is fully controlled by the Belarusian authorities. Refugees, coming mainly from Middle Eastern countries, are forced to cross the border with neighbouring EU countries. The aim of this article is therefore to present the legal responses of the Lithuanian and Polish authorities to this influx, to compare the solutions adopted and to critically analyse them. Both states decided to use constitutional measures in the form of states of emergency introduced on a part of their territory, and adopted a number of solutions in laws and regulations. Therefore, the article critically analyses the legal basis for the introduction of a state of emergency in both states. It also analyses the solutions adopted at the statutory level, which enable border services to use push-back. The legal regulations introduced are also compared with international and European Union law binding on both Lithuania and Poland. Therefore examples of violations of international law in the field of refugees' rights to seek international protection are indicated.

Keywords: human rights, migration, refugees, state of emergency

Introduction

Since June 2021, arrivals of asylum seekers and irregular migrants from Belarus have reached unprecedented levels, with Belarus being accused of 'the instrumental-

ization of migrants for political purposes'. Thousands of people have been reportedly stranded in the forests between the Baltic Sea States of the borders and the Belarusian border, without access to humanitarian aid or assistance. Recent developments, at the beginning of November, further escalated the political crisis between the EU (and its Member States) and Belarus, at the expense of people's lives and safety.¹ The governments of Latvia, Lithuania and Poland describe this situation as a 'hybrid war'² waged by the Belarusian regime in retaliation for sanctions imposed by the European Union.³ This is an unprecedented situation, since it has never before happened that a single country has taken on de facto migrant smuggling on such a large scale. The main instruments of retaliation are people from Afghanistan, Iraq, Somalia, Syria, Tajikistan, Congo and Cameroon, among others, who have been promised access to the European Union.⁴ After arriving in Belarus, they were forced to cross the borders of Latvia, Lithuania and Poland. According to information provided by the Polish Border Guard, in 2021 attempts were made to cross the Polish–Belarusian border 39.7 thousand times⁵ (whereas in 2020, 246 people were detained on this border for illegally crossing, and in 2019 there were 218 cases).⁶ On the other hand, in 2021 the Lithuanian–Belarusian border was illegally crossed 4,200 times (in 2018–2020 only 211 people were detained in total), while over 8,000 attempts were thwarted.⁷

In response to the actions of the Belarusian authorities, the Baltic Sea states have taken a number of legal and physical measures aimed at protecting their own borders, which are sections of the EU's external border. These include the declaration

1 Danish Refugee Council, Human Dignity Lost at the EU's Borders: Protecting Rights at Borders, December 2021, https://pro.drc.ngo/media/o22gi4ft/prab-iii-report-july-to-november-2021_final.pdf (11.01.2023).

2 The pushing of migrants and asylum seekers into the European Union by Belarus does not fall within the classical understanding of 'hybrid war' as a combination of an attack by regular and irregular troops. A. Graban, W jaki sposób pojęcie 'wojny hybrydowej' wykorzystywane jest przeciwko osobom uchodźczym?, <https://obmf.pl/publikacje/BBnG.AGraban.pdf> (11.08.2022).

3 On 23 May 2021, Belarusian authorities hijacked a Ryanair flight from Athens to Vilnius, forced it to land in Minsk and arrested Belarusian journalist Raman Pratasevich. In response to the incident, the EU European Council decided to extend sanctions against Belarus and to close EU airspace and airports to Belarusian airlines.

4 Straży Graniczne, Konferencja prasowa na temat wydarzeń na granicy polsko-białoruskiej, <https://strazgraniczna.pl/pl/aktualnosci/9433,Konferencja-prasowa-na-temat-wydarzen-na-granicy-polsko-bialoruskiej.html> (15.10.2021); J. Juškaitė-Vizbarienė, G. Daugėlaitė, Migrantų krizė: ar išlaikėme egzaminą?, 'Žurnalas Teismai' 2021, no. 43, p. 12ff.

5 Information provided by the Border Guard on Twitter, 01.01.2022 at 8:13 am. https://twitter.com/Straz_Graniczna/status/1477176087612428289?s=20&t=Fs68uw6cFcADfC71356wCw (10.01.2022).

6 Based on Border Guard data available at <https://strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> (02.01.2022).

7 Information from State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania, 2021.

of a state of emergency or a state of national emergency, restricting the freedom of the press or prohibiting NGOs from entering the border area, as well as introducing amendments to the laws regarding the possibility of entering these countries and applying for international protection. Considering all these factors, this paper aims at comparing the reactions of the Lithuanian and Polish governments to the problem of forced migration from Belarus, as well as assessing the legitimacy of the actions taken and their compliance with international and EU law.

1. The legal response to the migration crisis on the constitutional level

Lithuania declared a state of national emergency throughout the country due to a massive influx of foreigners⁸ (an extreme situation)⁹ on 2 July 2021 as a result of irregular migration. Later, on 9 November 2021, the Seimas¹⁰ declared a state of emergency in order to facilitate the legislative process, to speed up relevant procedures, coordinate actions and mobilize capacity, as well as to unlock the Government Reserve Fund and facilitate cooperation with municipalities and other relevant authorities.¹¹ The Lithuanian Parliament declared a state of emergency along the border stretch and five kilometres inland, as well as in the migrant accommodation facilities in Kybartai, Medininkai, Pabrade, Rukla and Vilnius.¹² This is the first time Lithuania has resorted to this instrument. The Seimas stated that the states hostile towards Lithuania are waging hybrid aggression against it, during which flows of third-country nationals illegally crossing the state border of Lithuania are organized, in violation of international law and commitments, to destabilize the situation in the country and cause damage to the state of Lithuania, as well as the fact that on 23 May 2021, a civil aircraft with passengers on board was unlawfully seized in Belarus and other unlawful actions were carried out. There was a concern that this hybrid aggression could be further developed and become the basis for threats of a new nature in the context of ZAPAD, a large-scale military exercise.¹³ This situation underlined the com-

8 Government of the Republic of Lithuania Resolution No. 517 of 2 July 2021, 'On the Declaration of State-level Emergency and Appointment of the Head of State-level Emergency Operations'.

9 See A. Vaičaitis, *Specialieji teisiniai režimai Lietuvos teisinėje sistemoje*, 'Teisė' 2020, vol. 117, pp. 79–98.

10 According to the explanation by its constitutional court, Lithuania is a democratic parliamentary republic with elements of a semi-presidential republic. This means the parliament, the Seimas, is the most powerful institution and the government is selected by the parliament. The Seimas is elected by two different systems: 70 seats are elected by proportional representation and the remaining 71 are elected in separate constituencies.

11 Seimas of the Republic of Lithuania, Declaration of the State Emergency 2021 November 9, No. XIV-617.

12 *Ibidem*.

13 ZAPAD are Russian–Belarusian strategic exercises held every four years on the territory of Belarus. In 2021, they provided a summary of the modernization of the Russian army and a showcase

mitment by the Republic of Lithuania to protect the external border of the EU and NATO against irregular migration flows, of which only a minor part consists of bona fide refugees, which may become a cover for persons linked to terrorist and criminal groups who seek to enter the EU and NATO member countries. Considering that, the irregular international migration organized by the regimes hostile towards Lithuania and the resulting emergency in the country pose a threat to constitutional order and public peace.¹⁴

Under Article 144 of the Constitution of the Republic of Lithuania, ‘When a threat arises to the constitutional system or social peace in the State, the Seimas may declare a state of emergency throughout the territory of the State or in any part thereof. The period of the state of emergency shall not exceed six months.’¹⁵ This is critical in controlling the crisis of irregular migration caused by the events on the Belarus–Poland border, as this threat is also real on the Lithuanian border. Besides, the visible links with the incitement of unrest in the accommodation sites of irregular migrants¹⁶ and in border territories pose a serious threat to society. These measures are expected to prevent potential threats arising from the influx of migrants. Earlier to the Lithuanian decision, based on the President of the Republic of Poland’s decree issued on 2 September 2021,¹⁷ a state of emergency was introduced in parts of the Podlaskie and Lubelskie voivodeships in Poland, the areas which directly border the Republic of Belarus. As indicated in the explanatory memorandum to the draft decree, the reason for this state of affairs was:

the exceptional character and extraordinary scale of migration pressure on the Polish–Belarusian border, which is based on the deliberate and planned actions of Belarusian services aimed at destabilization of the situation on the border with Poland and other European Union Member States, i.e. Lithuania and Latvia. These actions take the form of a ‘hybrid war’ waged by the Belarusian regime in retaliation for the sanctions imposed by the European Union [...]. The Belarusian authorities [...] are taking coordinated steps to move migrants to the area adjacent

of Russia’s military strength.

14 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.21892> (18.11.2022).

15 Article 144 states further that ‘In cases of urgency, between sessions of the Seimas, the President of the Republic shall have the right to adopt a decision on the state of emergency and convene an extraordinary session of the Seimas for the consideration of this issue. The Seimas shall approve or overrule the decision of the President of the Republic. The state of emergency shall be regulated by law.’ See also K. Prokop, *Funkcje Prezydenta Republiki Litewskiej w świetle Konstytucji z 1992 r.*, ‘Białostockie Studia Prawnicze’ 2016, no. 20/B, p. 276.

16 www.vrm.lt; www.pasienis.lt; <https://www.lrt.lt/en/news-in-english/19/1577237/merciful-belarus-uses-migrants-to-accuse-lithuania-and-poland-of-using-methods-close-to-fascism> (10.03.2022).

17 Decree of the President of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency on the territory of a part of the Podlaskie voivodeship and a part of the Lubelskie voivodeship (Journal of Laws 2021, item 1612). The state of emergency was imposed for a period of 30 days, after which it was extended with the approval of the Sejm for another 60 days.

to the border with EU Member States. [...] In view of the unprecedented nature of the actions carried out by Belarus on the state border, it is necessary to ensure the full effectiveness of actions taken by the Border Guard, as well as the Polish Army.¹⁸

The explanatory memorandum also emphasized that Latvia had already declared a state of emergency in the border areas, which has been in place since 11 August 2021.

In Poland, a state of emergency was also introduced for the first time since 1989, and for the first time under the Constitution of 1997,¹⁹ which is currently in force. Under Article 228 CRP, in situations of particular danger, if the ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster. And in accordance with Article 230 CRP, the president may, on request of the Council of Ministers, introduce, for a definite period of time, a state of emergency in a part of or upon the whole territory of the state in the case of threats to the constitutional order of the state, to the security of its citizens or to public order. Both Polish and Lithuanian constitutional provisions contain vague expressions such as 'constitutional order', 'public order' and 'social peace'. A state of emergency may only be declared if both general (Article 228, paragraph 1 CRP) and specific conditions defined for this state of emergency (Article 230, paragraph 1 CRP) are met.²⁰ It follows from the nature of the items enumerated in Article 230 CRP (the constitutional order of the state, security of citizens or public order) that in fact martial law is usually introduced for an internal threat, not an external one.²¹ A state of emergency is caused by an internal threat to normal living conditions in a state for reasons which are, as a rule, of an intrastate nature.²² The question may be posed here as to the validity of the choice to introduce the state of emergency in Poland, since it is grounded in internal factors, and yet the state of emergency declared was a response to the intended and planned actions of the Belarusian services, as indicated in the justification of the request for a state of emergency.

18 Proposal by the President of the Council of Ministers on the introduction of a state of emergency on the territory of a part of the Podlaskie voivodeship and a part of the Lubelskie voivodeship, RM-060-218-21, p. 4.

19 The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, No. 78, item 483 as amended (hereafter CRP).

20 K. Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej*, Białystok 2005, p. 18.

21 *Ibidem*, p. 74; K. Działocha, *Rozdział XXI, Stany nadzwyczajne artykuł 230*, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 4, Warsaw 2005, p. 1; A. Kustra, *Stany nadzwyczajne*, (in:) Z. Witkowski (ed.), *Prawo konstytucyjne*, Toruń 2013 Wydanie XIV, p. 703; K. Prokop, *Stany nadzwyczajne*, (in:) S. Bożyk (ed.), *Prawo konstytucyjne*, Białystok 2020, p. 447. Garlicki presents a different opinion, stating that there is no stipulation that the state of emergency must relate to the actions of 'internal actors'; L. Garlicki, *Polskie prawo konstytucyjne. Zarys Wykładu*, Warsaw 2018, p. 464.

22 K. Działocha, *Rozdział XXI...*, *op. cit.*

Both countries' provisions contain vague conditions, i.e. the terms 'threat', 'specific threat' and a threat to 'public order' or 'public peace'. In the literature a special threat is described as a serious and imminent threat to the fundamental interests of society and the normal functioning of public institutions.²³ On the principle of exceptionality, the premise of a special threat must be fulfilled together with the premise of the insufficiency of 'ordinary constitutional measures'. Ordinary constitutional measures are all the possible actions available to state authorities that can be used in a 'normal' situation, hence when a state of emergency has not been declared. This includes enacting laws, taking decisions in individual cases or even taking de facto actions within the limits of their power.²⁴ If, despite the existing special threat, ordinary constitutional measures appear to be sufficient, resorting to the provisions on states of emergency is not necessary or is even prohibited.²⁵

On the other hand, a threat to the security of citizens or public order/public peace is an action against order and social peace, which affects the general public and takes an intensified form, connected with endangering the lives of citizens, the loss of substantial property or significant disruption of the functioning of state institutions.²⁶ In the case in question, the threat consisted of an uncontrolled influx of foreigners across the Lithuanian–Belarusian and Polish–Belarusian borders, outside border crossing points controlled by Belarusian authorities. The justification for the Polish regulation on the introduction of the state of emergency read that 'actions of a foreign state [...] strike against the sense of security of persons living in the border area' and that the 'real intentions of the arrival [of the foreigners] cannot be established'. These are the only factors identified which pose a threat to the security of citizens, which in no way correspond to what the doctrine considers as a threat to security. Moreover, by the end of 2021, no example of a threat posed to the local community in Poland or Lithuania by refugees who have crossed the border has been made public.

Crossing the state border in violation of the relevant regulations may constitute a crime in both Polish and Lithuanian law. The offence is outlined in Article 264(2) of the Polish Penal Code, Chapter XXXII, Offences against Public Order, whereas in the Lithuanian Criminal Code it is in Article 291, Chapter XLII, Crimes and Misdemeanours against Government Order. The generic classification of offences against public/governmental order is highly debatable, as it includes offences with different individual objects of protection, which are difficult to 'assign' to other chapters of the Polish Penal Code, as the legislation indicated in the draft Polish Penal Code. And the

23 K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 250; S. Steinborn, *Komentarz do art. 230 (in:) M. Safjan, L. Bosek (eds.), Konstytucja RP. Tom II. Komentarz do art. 87–243*, Warsaw 2016, p. 1610.

24 *Ibidem*.

25 K. Wojtyczek, *Granice...*, *op. cit.*, p. 20.

26 P. Radziejewicz, (in:) P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wyd. II, 2021, Lexonline.

term ‘public policy’ itself is not precise.²⁷ Nevertheless, it is possible to point to the predominant common features, which are the public nature of the act and the threat to supra-individual goods, public safety, order and peace in particular.²⁸ The generic objects of protection of both articles are order (in so far as the lawful crossing of state borders is precisely for the purpose of controlling this process and its taking place in accordance with the rules laid down by law) and public security (in so far as the illegal crossing of a border may involve a threat to this security). On the other hand, the individual object of protection of both articles is the inviolability of a state border and state sovereignty, which is manifested precisely by the control of its own borders.²⁹

An analysis of the justification for the Polish regulation on the introduction of a state of emergency clearly shows that the factor which impedes the effective exercise of the statutory powers of the Border Guard and the Polish Army (‘operational activities related to the protection of the state border’) is not the action of a neighbouring state, but the actions taken by ‘persons lawfully staying in the area of the Polish–Belarusian border’.³⁰ As can be seen from this reasoning, the authorities are disturbed by the lawful presence of their own citizens exercising their right to freedom of residence. Furthermore, the statement that ‘even actions undertaken for objectively justified humanitarian reasons, aimed solely at assisting people in need, may [...] result in and lead to a reduction in the effectiveness of extremely difficult operational activities’ sounds bizarre.³¹

The introduction of the state of emergency in Lithuania was expected to prevent potential threats arising from the influx of migrants. Under the Law on the State Border and the Guard Thereof – the border zone up to five kilometres in width from Lithuania’s external border and, additionally, a five kilometre-wide territory from the border zone into the depth of the country. Movement within five kilometres of the Lithuania–Belarus border (i.e. the border zone) was banned unless authorized by the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania. The ban did not apply to, and no authorization was required for, those who reside and possess immovable property in this border zone, but they were required to carry with them an identity document and a residence declaration certificate or real-estate ownership documents. Those who reside in the zone under the state of

27 M. Bojarski, *Przestępstwa przeciwko porządkowi publicznemu*, (in:) L. Gardocki (ed.) *System Prawa Karnego*. Tom 8. *Przestępstwa przeciwko państwu i dobrom zbiorowym*, Warsaw 2018, p. 827.

28 A. Marek, *Prawo karne*, Wyd. III, Warsaw 2001, pp. 672–673, A. Marek, *Kodeks karny*. Komentarz, wyd. V, LEX 2010.

29 A. Michalska-Warias, *Komentarz do art. 264* (in:) M. Królikowski, R. Zawłocki (eds.) *Kodeks karny*. Część szczególna. Tom II. *Komentarz do artykułów 222–316*, Legalis.

30 Explanatory memorandum to the Decree of the President of the Republic of Poland of 2 September 2021, *op. cit.*, print 1512, p. 7.

31 *Ibidem*, p. 4.

emergency did not need authorization, but they could be checked by officers. The state of emergency applied in the border zone, plus a five kilometre-wide territory bordering the border zone; it did not cover the entire territory of the municipality.³² The state of emergency was also applicable in migrant accommodation centres in Medininkai, Kybartai, Vilnius, Pabradė, Rukla and a 200-metre area around the buildings.

Under the state of emergency in Lithuania, the movement of vehicles in the border area without border guards' permission was restricted, and entry into the area was banned except for local residents as well as those having real estate there. The authorities had the right to check vehicles and people and their belongings, as well as to seize illegally possessed weapons, ammunition, explosives and other hazardous materials, and detain offenders. Gatherings were also banned in the areas under the state of emergency. The measure included restricting the right of irregular migrants accommodated in Lithuania to communicate in writing or by telephone, etc., except to contact the country's authorities.

During the emergency situation in Lithuania, the following emergency measures were applied: use of the monetary funds of the state reserve; strengthened state border security; a ban on the movement of unauthorized vehicles on the territory of the border stretch (except for special purpose vehicles and vehicles engaged in international carriage of goods); an entry ban on the territory of the border stretch (not applicable to residents and owners of real estate on the territory); a prohibition on changing a place of permanent residence during the emergency period; a prohibition on assembly; and inspection of vehicles, persons and their luggage.

Under the Polish regulation which introduced a state of emergency, meetings, mass events and cultural, artistic and entertainment activities were also prohibited in the respective areas. In addition, bans on staying in designated places at specified times and on carrying firearms, ammunition and explosives were imposed. The obligation to carry an identity document was also introduced. Preventive censorship was imposed in both countries too. In Poland the recording by technical means of the appearance or other characteristics of certain places, objects or areas located within the area covered by the state of emergency was banned. Since the introduction of the extraordinary situation in Lithuania, there was a *de jure* possibility to apply for permission to enter the border zone for both journalists and NGO representatives, but there were attempts by the border guards to obstruct journalists' work. When the state of emergency came into force in Lithuania in November 2021, journalists were banned from coming closer than one kilometre to the Lithuanian–Belarusian border. In response to disapproval of the new regulation, the restriction was amended, allowing for journalists to work up to 100 metres from the border. The situation remained

32 The border municipalities were Šalčininkai, Druskininkai, Ignalina, Lazdijai, Švenčionys, Varėna and Vilnius district municipalities.

more difficult for the NGO workers and volunteers providing humanitarian aid, as they can be denied access to enter the five-kilometre zone.

Thus, together with the prohibition on staying, journalists in the area covered by a state of emergency were also excluded, which is considered an excessive restriction disproportionate to the degree of the threat.³³ In addition, the use of an instrument through which the public can keep an eye on the authorities' moves is excluded, as access to public information on activities carried out in the area under the state of emergency in connection with the surveillance of the state border and the prevention and combating of illegal migration was limited. As a consequence, by this regulation, first and foremost, citizens' right to watch the activities of state authorities is excluded, and in principle, only bodies of public authority and local government know what is happening in the area covered by the state of emergency – the public does not have access to this information. It only has access to the information that the authorities are willing to share.³⁴ Unlike Lithuania,³⁵ Poland has not asked the European Border and Coast Guard Agency (Frontex) for help and support, claiming that it is in constant contact with the agency and exchanges information with it. It is clear from the tone of the statement given by the Polish Minister of the Interior and Administration that he does not believe in its effective assistance,³⁶ which is another example of the concealment of the real activities near the Lithuanian–Belarusian and Polish–Belarusian borders. Moreover, the regulation on limiting freedoms and rights in connection with the imposition of a state of emergency includes most of the above prohibitions and also introduces a 24-hour ban on staying in the area covered by the state of emergency.³⁷ This ban does not apply to people who live, work or study in the area or to those who wish to participate in religious rites or to cross the state border legally.

Drawing upon the above, it should be emphasized that no changes have been introduced to the statutory competences of the Border Guard, the Polish Army or the

33 The Ombudsman has also raised doubts concerning the ban on journalists in the state of emergency zone, in addition to media claims, <https://bip.brpo.gov.pl/pl/content/stan-wyjatkowy-rpo-ma-watpliwosci-ws-ograczen-pracy-dziennikarzy-oraz-dostepu-do> (02.02.2022).

34 A. Gutauskas, VU teisės profesorius: migracija Baltarusijos pasienyje nėra nei teisėta, nei neteisėta, Vilniaus universitetas 2022, <https://naujienos.vu.lt/vu-teises-profesorius-migracija-baltarusijos-pasienyje-nera-nei-teiseta-nei-neteiseta/> (18.08.2022).

35 Lithuania asked for assistance from Frontex, which launched a joint operation, Flexible Operational Activities 2021, in Lithuania on 01.07.2021 and then reformatted this action as JO Rapid Border Intervention Lithuania 2021, which lasted from 15.07.2021 until 30.11.2021. After 30.11.2021, the operation remained as JO Flexible Operational Activities 2021 until 26.01.2022.

36 Kamiński o stanie wyjątkowym: Funkcjonariusze na granicy potrzebują swobody działania, <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8236797,mariusz-kaminski-mswia-stan-wyjatkowo.html> (25.11.2022).

37 Regulation of the Council of Ministers of 2 September 2021 on limiting the freedoms and rights in connection with the imposition of a state of emergency (Journal of Laws 2021, item 1613).

police. These services operate on the basis of their existing powers and duties. Thus, since the ordinary constitutional measures and the hitherto binding regulations specifying the competencies of the services proved sufficient, it clearly shows that the introduction of the state of emergency in Poland on the grounds of the insufficiency of 'ordinary constitutional measures', which was assessed negatively, was aimed at limiting the transparency of the authorities' actions in implementing the policy of deterring refugees from Polish territory.³⁸

The Polish legislature went even further in restricting public access to border areas. Namely, some amendments were made to the Act on State Border Protection by introducing Articles 12a–12d, which contain provisions empowering the minister in charge of internal affairs (after consulting the Chief Commandant of the Border Guard) to impose a temporary ban on staying in a particular area in the zone which is adjacent to the state border constituting an external EU border. The imposition of such a ban may be justified by a threat to human life, human health or property resulting from crossing the state border in violation of the law or from attempts to do so, or a justified risk of committing other prohibited acts. The purpose of the ban is to guarantee the protection of the state border and its inviolability, security and public order in the border area, as well as to ensure the safety of officers and employees of state services protecting the border and also to comply with international obligations. On 14 January 2022, the emergency state introduced in November 2021 expired.³⁹ Thus, the Polish minister obtained a *de facto* power to impose a state of emergency in the border area by means of a regulation. This solution violates the Constitution

38 Grupa Granica, Kryzys na pograniczu polsko-białoruskim, p.15, <https://grupagranica.pl/files/Raport-GG-Kryzys-humanitarny-napograniczu-polsko-bialoruskim.pdf>; Poland violates European Law, <https://interwencjaprawna.pl/wp-content/uploads/2021/01/Letter-to-the-EC-on-push-back-in-Lithuania-Latvia-and-Poland.pdf>; M. Chodołowski, Europosłowie niewpuszczeni do strefy, choć dopełnili formalności: 'Co chcą w tej strefie ukryć zarówno służby, jak i rząd?' 'Gazeta Wyborcza', Białystok, <https://bialystok.wyborcza.pl/bialystok/7,35241,27934512,europoslowie-sytuacja-przy-granicy-polsko-bialoruskiej-pokazuje.html?disableRedirects=true>; J. Klimowicz, J. Latała, Dziennikarka jechała za konwojem z uchodźcami. Zatrzymała ją policja i ukarała za brak trójkąta ostrzegawczego, 'Gazeta Wyborcza', Białystok, <https://bialystok.wyborcza.pl/bialystok/7,35241,27622457,dziennikarka-jechala-za-konwojem-z-uchodzcamizatrzymala-ja.html> (25.11.2022). For more, see M. Zdanowicz, Poland's Stance on the Refugee and Migration Crisis in the European Union, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, p. 93ff.; N. Hajiyeva, The Current Dynamics of International Migration in Europe: Problems and Perspectives, 'Eastern European Journal of Transnational Relations' 2018, vol. 2, no. 2, p. 38ff.; W. Klaus, Between Closing Borders to Refugees and Welcoming Ukrainian Workers: Polish Migration Law at the Crossroads, (in:) E. Goździak, I. Main, B. Suter (eds.), Europe and the Refugee Response: A Crisis of Values?, Routledge 2020, pp. 74–90; J. C. Hathaway, The Emerging Politics of Non-Entrée, 'Refugees' 1992, no. 9, pp. 40–41; T. Gammeltoft-Hansen, N. F. Tan, The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy, 'Journal on Migration and Human Security' 2017, vol. 5, no. 7, p. 30.

39 The previously declared extreme situation remained in place after the state of emergency ended.

of the Republic of Poland, as not only does it not fulfil the prerequisites for the introduction of one of the states of emergency, but it also provides for the possibility of limiting the rights of individuals on the basis of a regulation. The Constitution of the Republic of Poland in Article 31(3), however, indicates that limitations to constitutional freedoms and rights may only be imposed by statute.⁴⁰

2. The legal response to the migration crisis on the statutory level

Reacting to more intensified flows of irregular migration from Belarus, the head of emergency state operations, the Minister of the Interior, adopted a decision on 2 August 2021 instructing all institutions ensuring the protection of the state border of the Republic of Lithuania to additionally take all necessary statutory measures to protect the state border and measures not creating preconditions for illegal entry into the territory of Lithuania.⁴¹ According to this decision, persons shall not be admitted to the territory of the country and shall be diverted to the nearest border crossing point or diplomatic mission of the Republic of Lithuania. Persons who do not take into account the legitimate claims or instructions of officials must, where appropriate and in particular, be subject to deterrence.⁴² In cases where persons intend to cross the border in illegal places or who have already entered the border area illegally, where they do not comply with the legitimate instructions or requirements of officials not to enter or to leave the territory, the latter may take, if necessary and in a proportionate manner, all legal, special and other measures permitted by the laws of the Republic of Lithuania. Technical means may record irregular border crossings and gather evidence (including video records) which could, if necessary, confirm the scale of the mass influx of foreigners and the illegal acts of specific persons.

40 For more, see M. Górski, *Legalność wprowadzenia stanu wyjątkowego i ograniczeń praw obywatelskich nim nałożonych, w tym dotyczących przemieszczania się*, (in:) W. Klaus (ed.), *Poza prawem. Prawna ocena działań państwa polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej*, Warsaw 2022, p. 21.

41 Minister of the Interior of the Republic of Lithuania Head of the State Emergency Operations Decision on the management and strengthening of the State Border Guard due to the mass influx of foreigners in border areas at the state border of the Republic of Lithuania with the Republic of Belarus, No. 10V-20, <https://www.e-tar.lt/portal/lt/legalAct/02e9f860f42411eb9f09e7df20500045> (30.11.2022).

42 See also A. Lindberg, L. M. Borrelli, *All Quiet on the 'Eastern Front'? Controlling Transit Migration in Latvia and Lithuania*, 'Journal of Ethnic and Migration Studies' 2019, vol. 47, p. 318; L. Jakulevičienė, L. Biekša Pabėgiliai jūrų, tarptautinių sutarčių ir žmogaus teisių teisės sandūroje, (in:) J. Žilinskas, L. Jakulevičienė, R. Valutytė, D. Gailiūtė-Janušonė (eds.), *XXI amžiaus iššūkiai tarptautinei teisei: Liber amicorum Sauliui Katuokai*, Vilnius 2020, p. 346, DOI: 10.13165/LA.2020.06.10 2020.

A few months later (in October 2021), similar amendments were made to the Polish Act on Aliens.⁴³ Paragraph 9a was added to Article 303(1), on the basis of which proceedings to oblige a foreigner to return are not initiated if the foreigner is apprehended immediately after crossing the external border in violation of the law. Moreover, according to the introduced Article 303b, the commanding officer of the Border Guard post competent for the place where the border was crossed is obliged to draw up a report on the border crossing and to issue an order on crossing the border in violation of the law. This order may be appealed to the Commander-in-Chief of the Border Guard, but it does not suspend the execution of the order. The order includes the information that the foreigner is to be deported from the territory of the Republic of Poland and that s/he has been banned from re-entering the territory of the Republic of Poland and other Schengen states for a period from six months to three years.

The regulations introduced in Lithuanian and Polish law are, first of all, contrary to the principle of *non-refoulement* and violate Article 9(1) of Directive 2013/32, assuming that persons applying for international protection should be allowed to stay in an EU Member State for the purpose of the pending procedure.⁴⁴ Furthermore, the lack of suspensory effect of the remedy effectively deprives a person of the right to an effective remedy within the meaning of Article 13 European Convention on Human Rights and Article 47 Charter of Fundamental Rights of the European Union, guaranteeing the right to an effective remedy and access to an impartial tribunal.⁴⁵ It is also problematic to concentrate appellate competences by entrusting them to the Commander-in-Chief of the Border Guard and not to a central authority – the Head of the Office for Foreigners.⁴⁶ This is another step towards securitization of the policy towards foreigners, where more and more formal matters are transferred to the Border Guard, which is a uniformed, command-based unit of a police nature, instead of to civilian administrative authorities.⁴⁷

43 Act of 14 October 2021 on Amendments to the Polish Act on Aliens and other Acts (Journal of Laws 2021, item 1918).

44 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 180/60).

45 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of 4 November 1950 (hereafter ECHR); Charter of Fundamental Rights of the European Union (O.J. C 326).

46 Opinia Ośrodka Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych do projektu ustawy o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (druk sejmowy 1507), p. 10, available at <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?documentId=1266D8882D503653C125875800430324> (23.10.2021).

47 J. Huysmans, The European Union and the Securitisation of Migration, 'Journal of Common Market Studies' 2000, vol. 38, no. 5, pp. 757–758, M. A. H. van der Woude, J. P. van der Leun, J.-A. A. Nijland, Crimmigration in the Netherlands, 'Law and Social Inquiry' 2014, vol. 39, p. 574.

The Lithuanian Seimas amended the Law on the Legal Status of Aliens by stipulating that under certain circumstances applications for asylum may be lodged by aliens only in designated locations.⁴⁸ The Seimas agreed that aliens could submit asylum applications only at border crossing points or transit zones for the State Border Guard Service, at the Migration Department if the alien entered Lithuania legally, or at embassies or consular authorities of the Republic of Lithuania abroad. Moreover, the Lithuanian Parliament adopted legal amendments which gave additional powers to military personnel in border areas during the emergency situation. The decision to divert irregular migrants to official border crossing points and diplomatic representations and not to allow them illegal entry from Belarus into the territory of Lithuania also triggered tighter control from Belarus's side over the border with Lithuania. But stronger control over the border was carried out in such a way that, in a number of cases, third-country nationals were not allowed to move from the border line inland to Belarus, even though in some cases they had passports and expressed the wish to return to Minsk and to their countries of origin.

The Polish legislature also introduced amendments to the Act on granting protection to foreigners within the territory of the Republic of Poland. Paragraph 1a has been added to Article 33, which reads:

The Head of the Office may leave unprocessed an application for granting international protection, which was submitted by a foreigner who was apprehended immediately after crossing the external border in violation of the law, under the provisions of Regulation No. 2016/399,⁴⁹ unless the foreigner has come directly from a territory where his life or freedom was threatened by the danger of persecution or the risk of serious harm, and has presented credible reasons for his illegal entry into the territory of the Republic of Poland and has applied for international protection immediately after crossing the border.

The aforementioned provision of Lithuanian and Polish law discriminatorily differentiates between procedures for submitting applications for international protection. The applications of persons who cross the green border remain unprocessed,

48 Republic of Lithuania Law on the Legal Status of Aliens No. IX-2206 67. In this context, amendments to the Law on the Legal Status of Aliens were also adopted, introducing important changes to the asylum system which are likely to have a significant impact on its overall functioning. During summer 2021, the Parliament of the Republic of Lithuania amended the Aliens Law twice. The first package of amendments was approved on 13 July 2021 with the adoption of Law No. XIV-506, 'On the Law of the Republic of Lithuania Amending Articles 5, 71, 76, 77, 79, 113, 131, 136, 138, 139, 140 of the Law on the Legal Status of Aliens No. IX-2206 and Supplement of the Law with Chapter IX' ('Amendments to the Aliens Law of 13 July 2021') 5. The law was amended for the second time on 10 August 2021 with the adoption of Law No. XIV-515 'On the Law of the Republic of Lithuania on the Legal Status of Aliens No. IX-2206 Amendment to Article 67 6 ('Amendments to the Aliens Law of 10 August 2021').

49 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, SBC) (O.J. L 77).

whereas applications which are submitted at border crossings will be examined.⁵⁰ Furthermore, this provision is contrary to international law and established case law. The application of any person who has manifested a wish to submit an application for international protection should be considered as having been validly lodged at the time when that wish is manifested.⁵¹ This results in its acceptance and the initiation of a subsequent procedure, leading to an individual decision resolving the case. As Wierzbicki observes, a refusal to initiate proceedings constitutes a refusal to fulfil obligations undertaken by the state/party to the Geneva Convention⁵² and thus a breach of the elementary principle of international law *pacta sunt servanda*.⁵³ Moreover, there is again a violation of Article 3 ECHR, as well as a violation of Article 13 in conjunction with Article 3 ECHR and Article 4 of Protocol No. 4 to the ECHR, as underlined by the European Court of Human Rights in the judgment *M. K. and others v. Poland*.⁵⁴ Moreover, it conflicts with Directive 2013/32 as it does not meet the standards of protection set out therein. Directive 2013/32 provides for a simplified procedure and an accelerated procedure, but under no circumstances does it allow the application to be left unprocessed.⁵⁵

In addition to the legal response, both countries have also taken measures to physically secure the border with Belarus. On 10 August 2021, the Lithuanian Parliament adopted a separate law for the installation of a physical barrier.⁵⁶ The purpose of this law is to create the necessary legal, financial and organizational conditions for

50 This differentiation is only theoretical, as the practice of the border guards, e.g. in Terespol since 2015, does not at all guarantee (although it should) the acceptance of applications for international protection. At this border crossing point (although at others as well), foreigners are denied the right to submit an application for international protection on a large scale. A. Chrzanowska, P. Mickiewicz, K. Ślubik, J. Subko, A. Trylińska, *At the Border: Report on Monitoring of Access to the Procedure for Granting International Protection at Border Crossings in Terespol, Medyka, and Warsaw-Okęcie Airport*, Warsaw 2016, Association for Legal Intervention, Analyses, Reports, Evaluations No. 2/2016, p. 94, <http://interwencjaprawna.pl/en/files/at-the-border.pdf> (9.10.2022); A. Górny, *Skala napływu w latach 1992–2016 i wielkość zbiorowości cudzoziemców starających się o ochronę w Polsce i nią objętych*, (in:) A. Górny (ed.), *Uchodźcy w Polsce Sytuacja prawna, skala napływu i integracja w społeczeństwie polskim oraz rekomendacje*, Kraków/Warsaw 2017, p.38; M. Perkowska, *Polish Response to Irregular Migration in Recent Years*, 'Revista Española de Investigación Criminológica' 2020, vol. 18, no. 2, pp. 16–17.

51 *Opinia Ośrodka Badań...*, *op. cit.*, pp. 7–8.

52 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations.

53 B. Wierzbicki, *Uchodźcy w prawie międzynarodowym*, Warsaw 1993, p. 91.

54 The judgment of the European Court of Human Rights case of *M. K. and others v. Poland* (applications nos. 40503/17, 42902/17 and 43643/17).

55 *Opinia Ośrodka Badań...*, *op. cit.*, p. 6; M. Półtorak, *Czy można odmówić przyjęcia wniosku o ochronę międzynarodową i kiedy uznaje się go za złożony?*, (in:) W. Klaus (ed.), *Poza prawem*, *op. cit.*, p. 6; G. Baranowska, *Czy państwo może ograniczyć możliwość rozpatrywania wniosków azylowych (ocena przepisów ustawy wywózkowej)*, (in:) W. Klaus (ed.), *Poza prawem*, *op. cit.*, p. 8.

56 <https://www.e-tar.lt/portal/en/legalAct/afe4d3e0faa111eb9f09e7df20500045> (18.11.2022).

the rapid installation of a physical barrier, to create an effective mechanism for decision-making and organization of the necessary work: the modernization of Lithuanian border infrastructure with Belarus in order to create additional barriers (the installation of fences), as well as the installation and updating of video surveillance systems (on 9 July 2021, the military started installing a concertina barbed wire fence). A fence to cover the entire border with Belarus is to be built in the near future. On the grounds of Article 10 of the Polish Law on the Protection of the State Border, which authorizes the Border Guard to construct border security devices, 112 km of entanglements in the form of a spiral (concertina barbed wire) fence laid on the ground were set up on this section of the border by the end of September. In addition, 123 km of fence in the form of posts and vertically overlapping entanglements made of spiral fence were set up in the border road strip. Also, on 4 November 2021, the Polish Act on the Construction of State Border Security came into force, on the basis of which contractors were selected at a rapid pace to build a 186 km-long wall. This border security will be 5.5 metres high: the steel poles are 5 metres, topped with a coil of wire so that it is impossible to get to the other side. Electronic border management methods, such as motion sensors along the entire border and cameras, will also be used.⁵⁷

Final remarks

The policy of Poland and Lithuania towards foreigners forced by Belarusian authorities to cross the external EU border, which is based on hastily adopted legal solutions, consists primarily in application of push-back.⁵⁸ Unlike the Polish law, the Lithuanian law assumes escorting of foreigners to a border crossing point, but in practice they are not allowed to enter the territory of Belarus further than the border crossing point and they are then forced to return to the EU in an illegal manner. The amended Polish regulations do not specify where the departure from the territory of the Republic of Poland should take place; however, according to the law, it can only be done at a border crossing point. In practice, persons are turned back not only at border crossing points where border traffic has been suspended or restricted, but also outside border crossing points (in forests, swamps, etc.). Such conduct by states is

57 Straż Graniczna podpisała umowy dotyczące budowy zapory na granicy polsko-białoruskiej – Ministerstwo Spraw Wewnętrznych i Administracji – Portal Gov.pl, www.gov.pl (02.02.2022).

58 According to the European Centre for Constitutional and Human Rights, 'push-backs are a set of state measures by which refugees and migrants are forced back over a border – generally immediately after they crossed it – without consideration of their individual circumstances and without any possibility to apply for asylum or to put forward arguments against the measures taken. Push-backs violate – among other laws – the prohibition of collective expulsions stipulated in the European Convention on Human Rights.' European Centre for Constitutional and Human Rights, <https://www.ecchr.eu/en/glossary/push-back/> (12.03.2022).

inhuman and contrary to international and European law, as demonstrated earlier: first, no application for international protection may be left unprocessed and applicants must be allowed to remain in the EU Member State. Even if a foreigner does not apply for international protection and has crossed the border illegally, an appropriate return procedure must be initiated. The practice carried out by both countries is criticized by NGOs and also by international and European⁵⁹ institutions such as Frontex.⁶⁰ Such action constitutes collective expulsion prohibited by Article 4 of Protocol 4 to the ECHR, i.e. ‘any action by the authorities that compels aliens as a group to leave the country unless it is the result of a rational and objective consideration of the individual and specific situation of each person in that group.’⁶¹ This was also confirmed by the European Court of Human Rights in its judgment in the case *M. K. and others v. Poland* in relation to Poland’s policy. It can even be considered a form of ‘legal violence’ towards migrants’ unauthorized border crossing associated with interdiction, apprehension, detention and deportation.⁶²

Such actions can be compared to de Swaan’s theory of the ‘bureaucratization of barbarism’, which assumes, among other things, that the barbarity is compartmentalized:

This compartmentalization refers at once to the categorization of a target population, the physical isolation of the sites of destruction, the institutional identification of the authorized agents, the censoring of all information and opinion on the subject, the social demarcation of brutalization from other forms of interaction.⁶³

In the case of both countries, regulations primarily lead to the strong isolation of foreigners. Imposition of a state of emergency and restriction of access by ‘ordinary people’, NGOs, lawyers, etc., and above all the media to the border area has led to the physical isolation of foreigners crossing the border with Belarus and the introduction of censorship. The practice of the uniformed services makes contact with foreigners crossing the border very difficult and sometimes impossible, even for the lawyers who represent them. Also, the media actually have no way to observe and inform the public about the current situation. Practically the only information available is offi-

59 Third-party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights case *R. A. and others v. Poland* (no. 42120/21), CommDH (2022) 3.

60 Frontex says Lithuania should scrap push-back policy, as it violates migrants’ rights, <https://www.lrt.lt/en/news-in-english/19/1572019/frontex-says-lithuania-should-scrap-pushback-policy-as-it-violates-migrants-rights> (12.03.2022).

61 M. A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warsaw 2021, p. 1097.

62 M. Tazzioli, N. De Genova, *Kidnapping Migrants as a Tactic of Border Enforcement*, ‘Society and Space’ 2020, vol. 38, issue 5, p. 5.

63 A. de Swaan, *Dyscivilization, Mass Extermination and the State*, ‘Theory, Culture & Society’ 2001, vol. 18, pp. 268–269.

cial information from government authorities, from the population and from a few NGOs and lawyers.

Another theory, 'departheid', assumes an exercise in spatial engineering based on the identification, separation, and differential treatment of illegalized migrants. Departheid's formal goal to maintain a national territory vacated of illegalized migrants is to be achieved by the deployment of legal, psychological, and physical violence. [...] Departheid has both a concrete materiality – in the form of laws, fortified borders, detention centers, deportation flights, and a spirit in the form of prevailing cultural and societal moods that inform and promote the dehumanization of illegalized migrants.⁶⁴

Such a policy is implemented in the Belarusian borderland by means of the aforementioned laws that are contrary to international and EU law. It is claimed that Lithuania's policy toward detained migrants dehumanizes them.⁶⁵ In the case of Poland, the policy to maintain a national territory vacated of unwanted migrants has been implemented for several years. Christian economic migrants from across Poland's eastern border who are needed by the Polish economy are welcome. On the other hand, irregular migrants are subjected to xenophobic policies that are a part of the departheid trend.⁶⁶

In conclusion, the legal provisions adopted by Lithuania and Poland legalizing push-backs must be considered contrary to European and international law (especially Directive 2013/32/EU on common procedures for granting and withdrawing international protection and the Schengen Borders Code), in particular by failing to ensure the suspensive effect of the decision in the event of a complaint. The envisaged push-back procedure *de facto* excludes the possibility of lodging an appeal against the decision of the border guards. The practice implemented can be considered as collective expulsions, as the authorities do not investigate each case individually. This violates the principle of *non-refoulement*, a fundamental principle of international law.

64 B. Kalir, Departheid: The Draconian Governance of Illegalized Migrants in Western States, 'Conflict and Society: Advances in Research' 2019, no. 5, p. 20.

65 Politicians in Lithuania are 'dehumanising' migrants, experts say, <https://www.lrt.lt/en/news-in-english/19/1433962/politicians-in-lithuania-are-dehumanising-migrants-experts-say>; Migrants entering Lithuania via Belarus are neither legal nor illegal – judge, <https://www.lrt.lt/en/news-in-english/19/1594088/migrants-entering-lithuania-via-belarus-are-neither-legal-nor-illegal-judge> (12.03.2022).

66 See W. Klaus, Security First: New Right-Wing Government in Poland and Its Policy Towards Immigrants and Refugees, 'Surveillance & Society' 2017, vol. 15, nos. 3/4, pp. 523–528; W. Klaus, Between Closing..., *op. cit.*, p. 77ff.

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